THE

LAW-DICTIONARY.

VOL. II.

THE

LAW-DICTIONARY:

EXPLAINING THE

RISE, PROGRESS, AND PRESENT STATE,

OF THE

ENGLISH LAW,

IN THEORY AND PRACTICE;

DEFINING AND INTERPRETING

THE TERMS OR WORDS OF ART;

AND COMPRISING COPIOUS INFORMATION,

HISTORICAL, POLITICAL, AND COMMERCIAL,

ON THE SUBJECTS OF OUR

LAW, TRADE, AND GOVERNMENT.

ORIGINALLY COMPILED

By *GILES JACOB*;

AND continued by Him, and other Editors, through TEN EDITIONS:

NOW GREATLY ENLARGED AND IMPROVED,

BY MANY MATERIAL CORRECTIONS AND ADDITIONS,

FROM the lateſt STATUTES, REPORTS, and other ACCURATE PUBLICATIONS;

By T. E. TOMLINS,

OF THE INNER TEMPLE, BARRISTER AT LAW.

IN TWO VOLUMES.

VOL. II.

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A

Modern Law Dictionary;

CONTAINING

The PRESENT STATE of the LAW in THEORY and PRACTICE;

With a DEFINITION of its TERMS; and the

HISTORY of its RISE and PROGRESS.

JACK, A kind of defensive coat-armour formerly worn by horsemen in war, not made of solid iron, but of many plates fastened together; which some persons by tenure were bound to find upon any invasion. *Walsingham.* It was called *lorica*, because at first it was made with leather. *Cowel.*

JACTITATION OF MARRIAGE, Is one of the first and principal matrimonial causes in the Ecclesiastical Courts; as, when one of the parties *boasts* or gives out that he or she is married to the other, whereby a common reputation of their marriage may ensue. On this ground the party injured may libel the other; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head: which is the only remedy those courts can give for this injury. 3 *Comm* 93.

JACTIVUS, *Lat.*] He that loseth by default; *Formul. Solen.* 159.

JAMAICA, An *American* Island taken from the *Spaniards*, in the year 1655. See this Dict. tit. *Navigation-Acts.*

JAMBEAUX, Leg-armour; from *jambe*, *tibia*. *Blount.*

JAMPNUM, Furze or gorse, and gorsy ground; a word used in *fines* of lands, &c. when law proceedings were in Latin, and which seems to be taken from the Fr. *jaune*, *i. e.* yellow; because the blossoms of furze or gorse are of that colour. *Cro. Car.* 179.

JANNUM, or JAUN, Heath, whins, or furze. *Placita*, 23 *H.* 3. No man can cut down furze, or whins in the *forest* without licence. *Manwood, cap.* 25. *num* 3.

JACQUES, Small money. *Staundford's P. C. c.* 30.

JAR, *Span. Jarro*, *i. e.* an earthen pot.] An earthen pot or vessel of oil, containing twenty gallons.

JARROCK, A kind of cork, or other ingredient, prohibited to be used in dying cloth. *Stat.* 1 *R.* 3. *c.* 8.

JAUN, Fr. *Jaune*, *i. e.* yellow colour.] Furze or gorse, in law-latin called *jampnum*, and anciently *jaunum*. *Pl. Assi.* 22 *H.* 3. *Cowell.*

IBERNAGIUM, *hibernagium*, *ybernagium*.] Season for sowing winter-corn. *Cart. Antiq.* MSS.

ICENI, The ancient name for the people of *Suffolk*, *Norfolk*, *Cambridgeshire*, and *Huntingdonshire*. *Law Lat. Dict.*

ICH DIEN, From the German.] The motto belonging to the arms of the *Prince of Wales*, signifying *I serve*: It was formerly the motto of *John*, king of *Bohemia*, slain in the battle of *Cressy*, by *Edward* the *Black Prince*; and taken up by him to shew his subjection to his father King *Edward* III.

ICONA, *Icona*.] A figure or representation of a thing. *Mat. Paris.* 1461. *Hoveden* 670.

ICTUS ORBUS, A maim, bruise, or swelling; any hurt without cutting the skin and shedding of blood, which was called *plaga*: it is mentioned in *Bracton*, *lib.* 2. *tract.* 2. *cap.* 5 & 24; and in the laws of *Henry* 1. *c.* 34.

IDENTITATE NOMINIS, An ancient, and now obsolete, writ that lay for one taken and arrested in any personal action, and committed to prison for another man of the same name; which writ was in nature of a commission to enquire, whether he were the same person against whom the action was brought; and if not, then to discharge him. *Reg. Orig.* 194: *F. N. B.* 267.

By *Stat.* 37 *E.* 3. *c.* 2, this writ is given for wrongfully seising lands or goods of a person outlawed, for want of a good declaration of his surname; and officers shall take security, to answer the value of what is seized, if the party cannot discharge it, on pain of double damages. And this writ shall be maintainable by executors, &c. by Stat. 9 *H.* 6. *c.* 4. Vide 3 *Com. Dig*: 14 *Vin. Abr.* title *Identitate Nominis.*

Where one person is by mistake arrested for another, the person so arrested, may maintain an action for false imprisonment, against the officer to recover damages, though he sue this writ, for immediate relief, from the imprisonment. See title *Arrest*. *False imprisonment.*

IDENTITY OF PERSON. Where a person convicted of, or outlawed for a criminal offence, being asked what he hath to alledge why execution should not be awarded against him, pleads diversity of person, a jury

shall

ſhall be impannelled to try this *collateral iſſue*, viz. the *identity of the perſon*. See 4 *Comm.* 396: and this Dictionary, title *Execution and Reprieve*.

IDEOTS. See *Idiots*.

IDES, *Idus*.] With the antient *Romans* were eight days in every month, ſo called; being the eight days immediately after the *Nones*. In the months of *March*, *May*, *July*, and *October*, theſe eight days begin at the eighth day of the month, and continue to the fifteenth day: in other months they begin at the ſixth day, and laſt to the thirteenth. But it is obſervable, that only the laſt day is called *Ides*, the firſt of theſe days is the eighth *Ides*, the ſecond day the ſeventh, the third the ſixth, *i. e.* the eighth, ſeventh, or ſixth day before the *Ides*, and ſo it is of the reſt of the days; wherefore when we ſpeak of the *Ides* of any month in general, it is to be taken for the fifteenth or thirteenth of the month mentioned. See title *Calends*.

IDIOTS AND LUNATICKS.

The Law relating to perſons labouring under the infirmities of idiocy and lunacy, being in many reſpects the ſame, and in all caſes depending on ſimilar reaſoning, is here reduced to one head; under which we may conſider:

I. *The Diſtinction between Idiots and Lunaticks; and the Effects of that Diſtinction.*
II. *How they are to be found ſuch.*
III. *Of the Care of Lunaticks; of appointing Committees or Curators; and of their Power and Duty*
IV. *The Effect of Idiocy or Lunacy, on the civil Acts of Perſons under thoſe Infirmities.*
V. *Of their Effect in criminal Caſes.*

I. An Idiot, [derived originally from the *Greek* Ἰδιώτης, a private individual,] or *Natural Fool*, is one that hath had no underſtanding from his nativity, and therefore is by law preſumed never likely to attain any. For which reaſon the cuſtody of him and his lands were formerly veſted in the lord of the fee. *Flet. l.* 1, *c.* 11. § 10. And therefore ſtill, by ſpecial cuſtom in ſome manors, the lord ſhall have the ordering of idiot and lunatic copyholders. *Dy.* 302: *Hutt.* 17: *Noy*, 27. But by reaſon of the manifold abuſes of this power by ſubjects, it was at laſt provided by common conſent, that it ſhould be given to the king as the general conſervator of his people; in order to prevent the Idiot from waſting his eſtate, and reducing himſelf and his heirs to poverty and diſtreſs. *F. N. B.* 232. This fiſcal prerogative of the king is declared in parliament by *Stat.* 17 *E.* 2. *c.* 9; which directs, in affirmance of the common law, that the king ſhall have ward of the lands of *Natural Fools*, taking the profits without waſte or deſtruction, and ſhall find them neceſſaries; and after the death of ſuch Idiots, he ſhall render the eſtate to the heirs; in order to prevent ſuch Idiots from aliening their lands, and their heirs from being diſinherited. 4 *Rep.* 126.

Lord *Coke*, in 4 *Co. Beverley*'s caſe, ſays, that this prerogative was by the common law, and that the ſtatute *de prærogativâ Regis*, 17 *Ed.* 2. *c.* 9, above mentioned is only declarative thereof. 2 *Inſt.* 14: 4 *Co.* 126.

A man is not an Idiot if he hath any glimmering of reaſon, ſo that he can tell his parents, his age, or the like common matters. *F. N. B.* 233. But a man who is born deaf, dumb, and blind, is looked upon by the law as in the ſame ſtate with an Idiot; he being ſuppoſed incapable of any underſtanding, as wanting all thoſe ſenſes which furniſh the human mind with ideas. *Co. Litt.* 42: *Fleta*, *l.* 6. *c.* 40.

A Lunatick, or *Non Compos Mentis*, Is one who hath had underſtanding, but by diſeaſe, grief, or other accident hath loſt the uſe of his reaſon. *A Lunatick* is, indeed, properly one that hath lucid intervals, ſometimes enjoying his ſenſes, and ſometimes not; and that frequently depending upon the change of the moon. But under the general name of *non compos mentis*, and which is the moſt legal term, are comprized not only Lunaticks, but perſons under phrenzies, or who loſe their intellects by diſeaſe; thoſe that *grow* deaf, dumb, and blind, not being *born* ſo, or ſuch in ſhort as are judged by the Court of Chancery incapable of conducting their affairs. See *Poſt.* II. To theſe alſo, as well as Lunaticks, the king is guardian, but to a very different purpoſe. For the law always imagines, that theſe accidental misfortunes may be removed; and therefore only conſtitutes the Crown a truſtee for the unfortunate perſons, to protect their property, and to account to them for all profits received if they recover, or after their deceaſe to their repreſentatives. And therefore it is declared by *Stat.* 17 *E.* 2. *c.* 10, that the king ſhall provide for the cuſtody and ſuſtentation of Lunaticks, and preſerve their lands and the profits of them for their own uſe when they come to their right mind: and the king ſhall take nothing to his own uſe; and if the parties die in that ſtate, the reſidue ſhall be diſtributed for their ſouls by the advice of the Ordinary; and of courſe, by the ſubſequent amendments of the law of adminiſtration, ſhall now go to their executors or adminiſtrators. 1 *Comm.* 304.

The diſtinction, eſtabliſhed by this ſtatute, between the king's intereſt in the lands of an *Idiot* and thoſe of a *Lunatick*, is laid down and admitted in all the books which ſpeak of this matter; and on this foundation it hath been reſolved, that the king may grant the cuſtody of an *Idiot* and his lands to a perſon, his heirs and executors, and that he had the ſame intereſt in ſuch a one as he had in his *ward* by the common law. *Bro. Idiot*, 4, 5: *Dyer*, 25: *Moor*, 4. *pl.* 12: 1 *And.* 23: 4 *Co.* 127: *Co. Litt.* 247.

The more general deſcription of a perſon, who, from his want of reaſon and underſtanding, comes within the protection of the law, is that of *Non compos mentis*. *Co. Lit.* 246: 4 *Co.* 124: *Skin.* 177.

There are, ſays *Coke*, four kinds of men who may be ſaid to be *non compos*: 1. An Idiot who is *non compos* from his nativity. 2. One made ſuch by ſickneſs. 3. Lunatick, *qui aliquando gaudet lucidis intervallis*; who is *non compos* only for the time that he wants underſtanding. 4. One that is drunk; which laſt is ſo far from coming within the *protection* of the law, that his drunkenneſs is an aggravation of whatever he does amiſs. *Co. Lit.* 247: 4 *Co.* 124: See 1 *Hale Hiſt. P. C.* 30—37: 3 *P. Wms.* 130: and this Dictionary, title *Drunkenneſs*.

1. An Idiot is a fool or madman from his nativity, and one who never has any lucid intervals; therefore the king has the protection of him and his eſtate, during his life, without rendering any account; becauſe it cannot be preſumed that he will be ever capable of taking care of himſelf

himself or his affairs: and such a one is described a person that cannot number twenty, tell the days of the week, does not know his father or mother, his own age, *&c.* But these are mentioned as instances only; for idiot, or not, being a question of fact, must be tried by jury, or inspection. *Dyer*, 25: *Moor* 4. *pl.* 11: *Bro. Idiots*: *F. N. B* 233.

But though an Idiot must be so *à nativitate*, yet, if by inquisition it be found, that *A.* is an Idiot not having any lucid intervals *per spatium octo annorum*, this is a sufficient finding; for the inquisition having found the party an Idiot, the adding *spatium octo annorum* is surplusage, and shall be rejected. 3 *Mod.* 43, 44: 2 *Show.* 171: *Skin.* 5. 177. *S. C. Prodgers* and Lady *Frazier*.

2. One made such by sickness, which Lord *Hale* calls *Dementia accidentalis vel adventitia*, and which he again distinguishes into a total and a partial insanity, from its being more or less violent, is such a madness as excuseth in criminal cases; and though the party also in every thing else be entitled to the same protection with an Idiot; and though his disorder seems permanent and fixed, yet as he had once reason and understanding, and as the law sees no impossibility but what he may be restored to them again, it makes the king only a trustee for the benefit of such a one, without giving him any profit or interest in his estate. 1 *Hale's Hist. P. C.* 30.

3. A Lunatick; this is also *Dementia accidentalis vel adventitia*, and though such a one hath intervals of reason, yet during his phrenzy he is entitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent. 4 *Co.* 125: *Co. Lit.* 247: 1 *Hale's Hist. P. C.* 31.

4. One made mad by drunkenness, which is called *Dementia effectata*; and though, as has been said, such a person be not entitled to the protection of the law, yet if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth phrenzy, this puts him in the same condition with any other phrenzy, and equally excuseth him; also if by one or more such practices an habitual or fixed phrenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man in the same condition, as if the same was contracted involuntarily at first. *Plowd.* 19. *a.*: *Co. Lit.* 247: 1 *Hale's Hist. P. C.* 23.

But though this subject of madness may be branched into several kinds and degrees, yet it appears that the prevailing distinction in law is between *Idiocy* and *Lunacy*; the first a fatuity *à nativitate, vel dementia naturalis*: the other accidental or adventitious madness, which, whether permanent and fixed, or with lucid intervals, goes under the general name of lunacy. 4 *Co.* 125. *a.*

II. Every person of the age of discretion is in law presumed to be of sound mind and memory, unless the contrary appear; and this rule holds as well in civil as criminal cases. 1 *Hale's Hist. P. C.* 33.

By the old common law there is a writ *de idiotâ inquirendo*, to enquire whether a man be an Idiot or not; which must be tried by a jury of twelve men; and if they find him *purus idiota*, the profits of his lands, and the custody of his person may be granted by the king to some subject who has interest enough to obtain them. *F. N. B.* 232. This branch of the royal revenue hath been long considered as a hardship upon private families: and so long ago as 8 *Jac.* I, it was under the consideration of Parliament, to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it; it being then proposed to share the same fate with the feodal tenures which have been since abolished. 4 *Inst.* 203: *Com. Journ.* 610. Yet few instances can be given of the oppressive exertion of it, since it seldom happens that a jury finds a man an Idiot, *à nativitate*, but only *non compos mentis* from some particular time; which has an operation very different in point of law. 1 *Comm.* 304.

The method of proving a person *non compos* is very similar to that of proving him an Idiot. The Lord Chancellor, to whom, by special authority from the king, the custody of Idiots and Lunaticks is entrusted, upon petition or information grants a commission in nature of the writ *de idiota inquirendo*, to enquire into the party's state of mind; and if he be found *non compos*, the chancellor usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his Committee. See *Post.* III.

The *Stat.* 2 *E.* 6. *c.* 8. § 6, also provides, that "if any be or shall be untruely found lunatic, &c. that every person or persons grieved or to be grieved by any such office or inquisition, shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices founden." It has been doubted, however, whether the party aggrieved by the inquisition must not apply to Chancery, notwithstanding this provision of the statute. *Ley.* 26, 27. Certain it is, that he must apply in order to suspend the grant of the custody of the person, which regularly is immediate upon the return of the inquest; though according to *Stat.* 18 *H.* 6. *c.* 6, the custody of the land ought not to be granted till a month after; in order that the parties affected by it may have time to traverse it: *ex parte Roberts*, 3 *Atk.* 5. For the doctrine of traversing an inquisition, see the cases referred to in *ex parte Roberts*, 3 *Atk.* 7, 311.* The *Stat.* 2 *E.* 6, gives the right of traverse to all persons aggrieved by the inquisition; yet the heir may not traverse it, but is bound upon the traverse by the Lunatick, or his alienee, who may traverse it: *Ex parte Roberts*, 3 *Atk.* 308: 1 *Ch. Ca.* 113.

If by inquisition a person be found a *Lunatick*, and the custody granted to *J. S.*, and the party thus found bring a *scire facias* to set aside the inquisition, the Committee of the Lunatick cannot plead nor join issue in such *scire facias*; for he can have no interest in the estate of the Lunatick, being only in the nature of a bailiff to the king, and therefore his duty is to inform the king's attorney-general of the nature of the affair, who is the proper person to contest the matter in behalf of the king. 2 *Sid.* 124.

The rules of judging upon the point of insanity, being the same at law and in equity, the Court of Chancery cannot assume any kind of discretion upon the subject; and therefore the return of an inquest, stating that *W. B.* was, at the time of taking the inquisition, from the weakness of his mind, incapable of governing himself and his lands and tenements, was held illegal and void; and many adjudged cases being cited to the same effect, Lord *Hardwicke* congratulated himself, that, upon search of precedents, the Court had not gone further, in departing

 from

from the legal definition of a Lunatick, than in allowing returns of *non compos mentis*, or *insanæ mentis*, or, since the proceedings had been in English, of *unsound mind*, which amounts to the same thing. And in Lord *Donegal*'s case upon the same principle, a commission of lunacy was refused, though it was admitted that the weakness of Lord *Donegal*'s understanding was extreme. See 3 *P. Wms.* 130: 2 *Atk.* 327: 3 *Atk.* 168: 2 *Vez.* 407.

But though a court of equity, in judging upon the point of insanity, is governed by the rules of law, yet, if a man, by age or disease, is reduced to a state of debility of mind, which, though short of lunacy, renders him unequal to the management of his affairs, the court will, in respect of his infirmities, if the demand in question be but small, appoint a guardian to answer for him, or to do such other acts as his interest, or the rights of others, may require. 3 *P. Wms.* 111. *n.* B. As to the general rules of determining what shall be considered a lucid interval, where previous lunacy has been proved or admitted; See *Attorney-General* v. *Parnther*, 3 *Bro. C. R.*

If a man be found by a jury an Idiot, *à nativitate*, he may come in person into the Chancery before the Chancellor, or be brought there by his friends, to be inspected and examined whether idiot or not; and if upon such view and enquiry it appears he is not so, the verdict of the jury, and all the proceedings thereon, are utterly void and instantly of no effect. 9 *Rep.* 30, 1: 4 *Co.* 126.

In case of the Lunatick's recovery, he must petition the Chancellor to supersede the commission; upon the hearing of which, the Lunatick must attend in person, that he may be inspected by the Chancellor: it is also usual for the physician to attend, and to make an affidavit that the Lunatick is perfectly recovered. *Fonblanque Treat. Eq. c.* 2. § 3. *in not.*

As to the authority of the court, to enforce the production of persons suspected to be Idiots or Lunaticks, it seems clearly established, that upon the commission being sued out, the person having the Lunatick, must, when required, produce him. 1 *P. Wms.* 701: 2 *P. Wms.* 638. And though it was formerly doubted, it now seems to be settled, that a commission may be sued out against a Lunatick resident abroad, and may be executed where his mansion house was; *ex parte Southcote*, *Amb.* 109.

III. As the King, being *parens patriæ*, hath the protection of all his subjects, so is he in a more peculiar manner to take care of all those who, by reason of their imbecillity and want of understanding, are incapable of taking care of themselves; this, in some books, is called a prerogative in the crown, and in others a *regium munus*, or duty which the King owes to his subjects in return for their subjection and allegiance to him. *Staund. Prærog. cap.* 9. *fol.* 33: 2 *Inst.* 14: 4 *Co.* 126. *a. Dyer*, 25.

On the first attack of lunacy, or other occasional insanity, while there may be hopes of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations; who by law may beat or use such other methods as are necessary for their cure. 2 *Ro. Ab.* 546. And the Legislature, to prevent all abuses incident to such private custody, hath thought to proper to interpose its authority, by *Stat.* 14 *Geo.* 3. *c.* 49, continued by 19 *Geo.* 3. *c.* 15, and made perpetual by *Stat.* 26 *Geo.* 3. *c.* 91, for regulating private mad-houses. By these acts, no person shall confine more than one Lunatick in a house kept for the reception of Lunaticks, without an annual licence from commissioners appointed by the College of Physicians, or the justices in sessions, under a penalty of 500*l.*: and if the keeper of a licensed house receive any person as lunatick without a certificate from a physician, surgeon, or apothecary, that he is a fit person to be received as a Lunatick, he shall forfeit 100*l.* No person to keep two houses; commissioners to visit houses once a year, or when required by Chancellor, or either chief justice, or when they think fit, and examine persons confined.

But when the disorder is grown permanent, and the circumstances of the party will bear such additional expence, it is proper to apply to the royal authority, as delegated to the Chancellor, to warrant a lasting confinement. 1 *Comm.* 305.

In the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting, unless under proper controul; and in particular they ought not to be suffered to go loose, to the terror of the King's subjects. It was the doctrine of our ancient law, that persons deprived of their reason might be confined till they recovered their senses, without waiting for the forms of a commission, or other special authority from the Crown: and now by the vagrant acts a method is directed to be pursued for imprisoning, chaining, and sending them to their proper houses. 4 *Comm.* 25: see *Stat.* 17 *Geo.* 2. *c.* 5. § 20, 21; and this Dictionary, titles *Poor*; *Vagrants*.

Although the statutes respecting Idiots and Lunaticks, *Stat.* 17 *E.* 3. *cc.* 9, 10, refer only to the lands of the Idiot or Lunatick, yet it seems that the prerogative extends to the custody of his person, goods, and chattels. *Beverley's case*, 4 *Co.* 126: *F. N. B.* 232. As to the manner in which this branch of the prerogative is vested in the Chancellor; before the Court of Wards was erected, the jurisdiction, both as to Idiots and Lunaticks, was in Chancery, and therefore all such commissions were taken out and returned in Chancery; and after the Court of Wards was abolished by act of parliament, it reverted back to the Court of Chancery, and the sign manual is a standing warrant to the Lord Chancellor to grant the custody of Lunaticks, and is a beneficial one in case of idiocy, because the King could not only grant the custody of Idiots, but also the rents and profits of their lands. 2 *Atk.* 553. And the power of the Chancellor extends to making grants from time to time of the Idiot's and Lunatick's estates. 3 *Atk.* 635. And as this power is derived under the sign manual, in virtue of the prerogative of the crown, the Chancellor, who is usually invested with it, is responsible to the crown alone for the right exercise of it; and therefore an appeal will not lie to the House of Lords, from an order made in lunacy, but must be made to the King in Council. 3 *P. Wms.* 107: *Rochfort* v. *Ely*, (*E*) *Bro. P. C.* Though the King may, by *scire facias*, or by information, avoid all acts done during the incapacity, yet his right to the mesne profits shall have relation only to the time of the office. 8 *Rep.* 170, *a.* The doubt, whether the King could grant the custody of an Idiot to one and his executors, proceeded on the possibility of the executorship devolving on an infant, who, being held incapable of managing his own estate, could scarcely be thought a proper person to be intrusted with the charge

charge of the perſon and lands of another. The Court of King's Bench, however, did, upon an iſſue directed, adjudge the grant to be good, holding it to be a truſt coupled with an intereſt, of which an infant is capable. 3 *Mod.* 43: *Skin.* 177: ſee 1 *Vern.* 9.

Though in ſtrictneſs the guardianſhip of the King may be ſaid to be determined by the death of the Lunatick, yet it has been held, that the Chancellor may make an order in a Lunatick's affairs, after the death of the Lunatick. *Amb.* 706: ſee alſo 3 *Bro. C. R.* 238.

The cuſtody of Lunaticks being a branch of the prerogative, the appointment of the Committees muſt neceſſarily be in the diſcretion of the perſon to whom that branch of the prerogative is intruſted; but in the exerciſe of this diſcretion, certain rules have been regarded, as beſt calculated to protect the perſon and intereſts of the unfortunate Lunatick.

To prevent ſiniſter practices, the next heir is ſeldom permitted to be the Committee of the perſon of a Lunatick, becauſe it is his intereſt that the party ſhould die; but it hath been ſaid there lies not the ſame objection againſt his next of kin, provided he be not his heir; for it is his intereſt to preſerve the Lunatick's life, in order to increaſe the perſonal eſtate, by ſavings (out of the rents and profits of the real) which he or his family may hereafter be entitled to enjoy. 2 *P. Wms.* 638. The heir is generally made the manager or Committee of the eſtate, it being clearly his intereſt, by good management, to keep it in condition; accountable however to the Court of Chancery, and to the *non compos* himſelf if he recovers, or otherwiſe to his adminiſtrators. 1 *Comm.* 305.

This diſtinction was, however, very ſeverely reprobated by Lord Chancellor *Macclesfield*, in Juſtice *Dormer*'s caſe, 2 *P. Wms.* 264, as founded in barbarous times, before the nation was civilized; but it may be obſerved in defence of it, that it gives the cuſtody of the perſon to thoſe who, in point of nearneſs of blood, have equal pretenſions to the charge, without the ſame temptation, in point of intereſt, to abuſe it. Lord Chancellor *Finch*, in Lady *Mary Cope*'s caſe, 2 *Ch. Ca.* 239, appears indeed to have ſtrained the rule beyond its original extent, in deciding that a half-ſiſter ſhould not be Committee of the perſon of the Lunatick, becauſe concerned to outlive her. A reaſon which, in fact, does not apply; for the perſonal eſtate may increaſe, and probably will, by good management, during the life of the Lunatick; thus, the longer the Lunatick lives, it will be the better for the next of kin. 2 *P. Wms.* 638, 544.

Though no Committee ſhould get any thing by his appointment, yet the allowance for the ſupport of a Lunatick ſhould be liberal and honourable; and, if neceſſary, the court will allow the yearly value of the Lunatick's eſtate. See 2 *Ch.C.* 239: *Amb.* 78: 2 *P. Wms.* 262: 3 *P. Wms.* 110.

So ſtrictly does the court conſider the committeeſhip a mere authority without any intereſt, that where the cuſtody of the Lunatick's eſtate was granted to huſband and wife, the wife being next of kin to the Lunatick, Lord *Talbot* held, that the huſband's right was determined by the death of the wife, the grant being joint. *Forreſter* 143. It muſt not, however, be inferred from this caſe, that the huſband was neceſſarily joined in the grant. Lord *Parker* having held (*ex parte* Kingſmill, *Mich. T.* 1720,) that the cuſtody of a Lunatick may be granted to a feme covert, though not *ſui juris*; and, indeed, the court will ſeldom grant the cuſtody to two, and in its choice is influenced by the ſex of the parties applying, as well as by other circumſtances. Therefore, where two perſons equally a-kin to a feme Lunatick, the one a man, the other a woman, applied for the cuſtody, the woman was preferred as being of the ſame ſex, and better knowing how to take care of her. 2 *P. Wms.* 635.

With reſpect to the powers with which the Committee of a Lunatick is intruſted, they are neceſſarily reſtrained by the object of the truſt; and as a diſcretionary power might, in ſome inſtances, endanger that object, the Committee cannot make leaſes, nor incumber the Lunatick's eſtate, without ſpecial order of the court, though the profits be not ſufficient to maintain the Lunatick; therefore, where the Lunatick when ſane had mortgaged his eſtate for 50*l.*, and the Committee had afterwards taken up more upon it, the court refuſed to allow the mortgage to ſtand, as a ſecurity for more than the 50*l.*, or to charge the heir of the Lunatick with the improvements made by the Committee. 1 *Vern.* 262.

The court, however, will allow the Committee of a real eſtate of a Lunatick to exerciſe the ſame power over it, in regard to cutting timber for repairs, as any diſcreet perſon who was the abſolute owner of it might do. 2 *Atk.* 407. Though it has been ſtated as a rule never departed from, not to vary or change the property of a Lunatick, ſo as to effect any alteration as to the ſucceſſion to it; it has been decreed, that incumbrances paid off in the life-time of the Lunatick, out of ſavings of the eſtate, ſhould be aſſigned to attend the inheritance, and not in truſt for the next of kin; the ruling principle in the management of a Lunatick's eſtate, being conſidered to be the doing of that which is moſt beneficial to the Lunatick. And it is upon this principle, that the court will order part of the Lunatick's perſonal eſtate to be laid out in repairs, or even upon improvements of his real eſtate, if the intereſt of the Lunatick requires it, and the next of kin cannot ſhew good cauſe againſt it. See *Amb.* 81. 706: 2 *Atk.* 414.

IV. An *Idiot*, or perſon *non compos*, may inherit; becauſe the law, in compaſſion to their natural infirmities, preſumes them capable of property. *Co. Lit.* 2, 8.

It was formerly adjudged, that the iſſue of an Idiot was legitimate, and conſequently that his marriage was valid. A ſtrange determination! ſince conſent is abſolutely requiſite to matrimony, and neither Idiots nor Lunaticks are capable of conſenting to any thing; and therefore the civil law judged more ſenſibly when it made ſuch deprivations of reaſon a previous impediment; though not a cauſe of divorce if they happened after marriage. And modern reſolutions have adhered to the reaſon of the civil law, by determining that the marriage of a Lunatick, not being in a lucid interval, was abſolutely void. But as it might be difficult to prove the exact ſtate of the party's mind at the actual celebration of the nuptials, the *Stat.* 15 *Geo* 2. *c.* 30, has therefore provided that the marriage of Lunaticks and perſons under phrenzies, (if found Lunaticks under a commiſſion, or committed to the care of truſtees by any act of parliament,) before they are declared of ſound mind by the Lord Chancellor, or majority of ſuch truſtees, ſhall be totally void. 1 *Comm.* 438.

If an *Idiot* or *Lunatick* marry, and die, his wife ſhall be endowed; for this works no forfeiture at all, and the King has only the cuſtody of the inheritance in one caſe, and the power of providing for him and his family in the other; but in both caſes the freehold and inheritance is in the *Idiot* or *Lunatick*; and therefore if lands deſcend to an *Idiot* or *Lunatick* after marriage, and the King, on office found, takes thoſe lands into his cuſtody, or grants them over to another, as *Committee*, in the uſual manner; yet this ſeems no reaſon why the huſband ſhould not be *tenant* by the *curteſy*, or the *wife endowed*; ſince their title does not begin to any purpoſe till the death of the huſband or wife, when the King's title is *at an end*. *Co. Lit.* 31. *a.*: 4 *Co.* 124, 125. Yet ſee *Plow.* 263. *b.* 1 *Vern.* 10.

A *Lunatick* ſhall be *tenant* by the *curteſy*, and ſhall have dower; ſo though a woman, being a *Lunatick*, kill her huſband, or any other, yet ſhe ſhall be endowed, becauſe this cannot be *felony* in her, who was deprived of her underſtanding by the act of God. *Perk.* 365.

If a perſon *non compos* be diſſeiſed, and a deſcent caſt, this, it is ſaid, takes away his entry, but not the entry of the heir; for regularly the *non compos* in this caſe cannot alledge the diſability in himſelf, becauſe he cannot be ſuppoſed conſcious of it, nor is he allowed ever, at any time, to alledge it; for when he is once *non compos*, there is no certain time when he can be adjudged to recover that diſability, unleſs where he is legally *committed*, and then the acts during his *lunacy* will be ſet aſide and diſcharged, and afterwards the *commiſſion* ſuperſeded; for in no other way can the *non compos* be legally reſtored to his right, and to his capacity of acting. *Lit.* § 405: *Co. Lit.* 247.

A perſon *non compos*, being lord of a copyhold manor, may make grants of copyhold eſtates, for ſuch eſtates do not take their perfection from any power or intereſt in the lord, but from the cuſtom of the manor, by which they have been demiſed and demiſable time out of mind. 4 *Co.* 23. *b*: *Co. Copyholder*, 79, 107.

Idiots and *Lunaticks* are, both by the civil law and likewiſe by the common law, incapable of being executors or adminiſtrators; for theſe diſabilities render them not only incapable of executing the truſt repoſed in them, but alſo by their *infanity*, and want of underſtanding, they are incapable of determining whether they will take upon them the execution of the truſt or not. *Godolph. Orph. Leg.* 86.

Therefore it hath been agreed, that if an executor become *non compos*, that the ſpiritual court may (on account of this natural diſability) commit adminiſtration to another. 1 *Salk.* 36.

An Idiot can have no executor; for, being *non compos à nativitate*, he could at no time make a will; but a Lunatick may have an executor, for lunacy is not a revocation of a will made when *compos*. 4 *Co.* 61. *b.* But equity will not entertain a ſuit to perpetuate the teſtimony of witneſſes to ſuch a will in the life-time of the Lunatick. 1 *Vern.* 105. In ſupporting the validity of the will, notwithſtanding the ſubſequent lunacy, the rule of the common law is conformable to the civil law, which provides that "*neque teſtatum rectè factum, neque ullum aliud negotium rectè geſtum, poſtea furor interveniens perimit.*" *Inſt.* *l.* 2. *t.* 12. § 1.

Diſtinction muſt be made between acts done by *Idiots* and Lunaticks *in pais*, and in a court of record. As to thoſe ſolemnly acknowledged in a court of record, as Fines and Recoveries, and the uſes declared on them, they are good, and can neither be avoided by themſelves nor their repreſentatives; for it is to be preſumed, that had they been under theſe diſabilities, the judges would not have admitted them to make theſe acknowledgments. 4 *Co.* 124: 2 *And.* 145: *Co. Lit.* 247.

Therefore, if a perſon *non compos* acknowledges a *fine*, it ſhall ſtand againſt him and his heirs, for though the judges ought not to admit of a fine from a madman under that diſability, yet when it is once received, it ſhall never be reverſed, becauſe the record and judgment of the court being the higheſt evidence that can be, the law preſumes the conuzor at that time capable of contracting; and therefore the credit of it is not to be conteſted, nor the record avoided by any averment againſt the truth of it, though an office find him an Idiot *à nativitate*. 4 *Co.* 124: 2 *Inſt.* 483: *Bro.* tit. *Fines*. 75: *Co. Lit.* 247: 2 *And.* 193: 4 *Co* 124.

The rule of law in theſe caſes is *fieri non debet, ſed factum valet*; and *Mansfield*'s caſe, 12 *Co.* 123. furniſhes a ſtriking inſtance of the extreme anxiety of courts of law to protect the authority of their records; for though in that caſe a fine was levied by a man obviouſly an Idiot, and by a moſt groſs contrivance, and though Lord *Dyer* obſerved, that the judge who had taken it, ought never to take another, yet he allowed it to prevail. As by the common law a fine might be avoided on account of fraud, or even on account of infancy, by inſpection during the infancy; (*Bracton* 436. *b*; 437. *a*: *Co Litt.* 380 *b*;) it ſeems remarkable, that idiocy or lunacy ſhould not have been held entitled to the ſame effect; but *Mansfield*'s caſe abundantly proves that the groſſeſt imbecillity of mind was not at law, a ground of annulling the record. But, in equity, a remainder-man has been relieved againſt a fine levied by an Idiot, even againſt a purchaſer. *Toth.* 42: ſee alſo 2 *Vern.* 678. The Court of Chancery, however, in the caſe of fraud, does not abſolutely ſet aſide or vacate the fine; but, conſidering thoſe who have taken it under ſuch circumſtances as truſtees, decrees a reconveyance of the eſtate to the perſons prejudiced by the fraud; and though this does not diſtinctly appear to be the practice, in the caſe of fines levied by Idiots or Lunaticks, yet, from the argument in *Day* v. *Hungat*, 1 *Rolle's Rep.* 115, ſuch may be inferred to be the rule of proceeding. See this Dict. tit. *Fines of Lands*.

If an *Idiot* or *Lunatick* enter into a *recognizance*, or *acknowledge* a *ſtatute*, neither they themſelves, nor their heirs nor executors can avoid them; for theſe are ſecurities of a higher nature than ſpecialties and obligations, which yet they themſelves cannot avoid, and being *matters of record*, and equivalent to *judgments* of the ſuperior courts, neither they themſelves, their heirs nor executors, can avoid them. 4 *Co.* 124. *a*: 10 *Co.* 42. *b.*: 2 *Inſt.* 483: *Bro. Fait. Inrol.* 14.

As to acts *in pais*; Idiots and perſons of nonſane memory, are not totally diſabled either to convey or purchaſe, but *ſub modo* only; for their conveyances and purchaſes are voidable, but not actually void. The King, indeed, on behalf of an Idiot, may avoid his grants, or other acts. 1 *Inſt.* 247. But it hath been ſaid, that a

non compos himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity, in order to avoid such grant; for that no man shall be allowed to stultify himself, or plead his own disability. The maxim, however, that a man shall not stultify himself has been handed down as law from very loose authorities, which *Fitzherbert* does not scruple to reject as contrary to reason; and later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it. *F. N. B.* 202: *Litt.* § 405: *Cro. Eliz.* 398: 4 *Rep.* 123: *Jenk.* 40: *Comb.* 469: 3 *Mod.* 310, 311: 1 *Eq. Ab.* 279: See *Fonblanque's Treat. Eq.* c. 2. § 1, and *Stra.* 1104: 2 *Vent.* 198. there cited.

Though the principles upon which Courts of Equity in general relieve, appear to entitle a Lunatick to a remedy in such cases, there does not appear a single case in which the plea of *non compos* by the Lunatick himself before inquisition has been allowed; on the contrary, in *Toth.* 130, it is said, that Chancery will not retain a bill to examine the point of lunacy. But after the Lunatick is so found by inquisition, his Committee may avoid his acts from the time he is found to have been *non compos*. See 2 *Vern.* 412, 678; 1 *Eq. Ab.* 279. Courts of Equity were formerly so anxious to adhere to the rule of law, that the Lunatick was not allowed to be a party to a suit, to be relieved against an act done during his lunacy; 1 *C. C.* 112; though he might be party to a suit, to enforce performance of an agreement entered into prior to his lunacy. 1 *C. C.* 153.

And clearly the next heir or other person interested may, after the death of the *Idiot* or *non compos*, take advantage of his incapacity, and avoid his grant. *Perk.* § 21. So too, if he purchases under this disability, and does not afterwards upon his recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option. 1 *Inst.* 2.

The Guardians or Committees of a Lunatick also are powered by *stat.* 11 *Geo.* 3. *c.* 20, to renew in his right, under the directions of the Court of Chancery, any lease for lives or years, and apply the profits of such renewals for the benefit of such Lunatick, his heirs or executors. See 2 *Comm.* 291.

By statute 4 *Geo.* 2. *c.* 10, Lunaticks being trustees or mortgagees, are empowered by themselves, or by their Committees, to convey the estates of which they are seized in trust or mortgage: but it is doubtful whether the words of the act include all Lunaticks, as well such as are at large, as those of whom custody has been granted under the great seal. *Amb.* 80.

If *Parceners* of *nonsane memory* make *partition*, unless it be equal, it shall only bind the parties themselves, but not their issue: and the reason it binds the parties themselves is the same that all other contracts bind them, *viz.* because no man is admitted to stultify himself: and the reason their issue may avoid such partition is the same likewise, for which they may avoid all other contracts made by such ancestors during their *insanity*, *viz.* because they may be admitted to shew the incapacity of their ancestors, and so avoid all acts done by them during that time. *Co. Lit.* 166. *a.*

Courts of equity will not only sustain contracts completed by the Lunatick while sane; but, under certain circumstances, will enforce performance of such as were entered into before, but were not complete at the time of the lunacy; for the change of the condition of a person entering into an agreement, by becoming lunatick, will not alter the rights of the parties, which will be the same as before, provided they can come at the remedy: as, if the legal estate be vested in trustees, a court of equity ought to decree a performance; but, if the legal estate be vested in the Lunatick himself, that may prevent the remedy in equity, and leave it at law. 1 *Ves.* 82.

As to the effect of a defendant becoming insane after an arrest at law, it seems to be now settled, that such circumstance is not a reason for discharging him out of custody, on filing common bail. 2 *Term Rep.* 390. Nor will a court of law interpose, though the party be insane at the time of arrest. 4 *Term Rep.* 121.

It seems that, even at law, the *contracts* of *Idiots* and *Lunaticks*, after office found, and the party legally committed, are void, and it must be at the peril of him who deals with such a one; and that if afterwards the commission of lunacy be superseded or discharged, the *non compos* shall be restored to his legal right: but this, it seems, must be at the suit and application of his *Committee*. 4 *Co.* 125.

When an *Idiot* doth sue or defend he shall not appear by guardian, prochein amy, or attorney, but he must be ever in proper person. *Co. Lit.* 135. *b.*: *F. N. B.* 27. The statute of *Westm.* 2. *cap.* 15, extends not to an *Idiot*. 2 *Inst.* 390.

But otherwise of him who becomes *non compos mentis*; for he shall appear by guardian, if within age, or by attorney if of full age. 4 *Co.* 124. *b.*: *Palm.* 520. & *vid.* 2 *Saund.* 335.

If a trespass be committed in the lands of a Lunatick who is legally committed, the *Committee* cannot bring an action of trespass; but this must be brought in the name of the Lunatick. 2 *Sid.* 125.

If a *Lunatick* be sued, he must have a Committee assigned to him to defend the suit. 1 *Vern.* 106.

V. One case of a deficiency in will, which excuses from the guilt of crimes, arises from a defective, or vitiated understanding; viz. in an *Idiot* or *Lunatick*. For the rule of law as to the latter, which may be easily adapted also to the former, is, *furiosus furore solum punitur*. In criminal cases, therefore, Idiots and Lunaticks are not chargeable for their own acts, if committed under these incapacities; no, not even for treason itself. 3 *Inst.* 6. Also if a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned; if after pleading, he shall not be tried; if after trial, he shall not receive judgment; if after judgment, execution shall be stayed. See this Dictionary, title *Execution and Reprieve*.

It seems to have been anciently holden, (in respect of that high regard which the law has for the safety of the King's person,) that a *madman* might be punished as a traitor for killing, or offering to kill, the King; but this is now contradicted by better and later opinions. *Fitz. Coron.* 351: *Regist.* 309: 4 *Co.* 124. *b*: 1 *Roll. Rep.* 324. In the reign of *Henry* VIII. a statute was made, 33 *H.* 8. *c.* 20, that if one *compos mentis* should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death as if he were of perfect memory; but this was repealed by *stat.* 1 & 2 *P.* & *M.* *c.* 10: see 3 *Inst.* 6. But if there be any doubt whether

whether the party be *compos* or not, this ſhall be tried by a jury; and if he be ſo found, a total idiocy or abſolute inſanity excuſes from the guilt, and of courſe from the puniſhment, of any criminal action committed under ſuch deprivation of the ſenſes: but if a Lunatick hath lucid intervals of underſtanding, he ſhall anſwer for what he does in thoſe intervals, as if he had no deficiency. 1 *Hal. P. C.* 31.

It is laid down as a general rule, that *Idiots* and *Lunaticks* being, by reaſon of their natural diſabilities, incapable of judging between good and evil, are puniſhable by no *criminal* proſecution whatſoever. 1 *Hawk. P. C.* 2.

And therefore a perſon who loſes his memory by ſickneſs, infirmity, or accident, and kills himſelf, is no *felo de ſe.* 3 *Inſt.* 54.

So if a man give himſelf a mortal ſtroke while he is *non compos*, and recovers his underſtanding, and then dies, he is not *felo de ſe*; for though the death complete the homicide, the act muſt be that which makes the offence. But it is not every melancholy or hypochondriacal diſtemper that denominates a man *non compos*, for there are few who commit this offence, but are under ſuch infirmities; but it muſt be ſuch an alienation of mind that renders them to be madmen, or frantic, or deſtitute of the uſe of reaſon. 1 *Hal. P. C.* 412.

And as a perſon *non compos* cannot be a *felo de ſe* by killing himſelf; ſo neither can he be guilty of *homicide* in killing another, nor of *petit treaſon.* 1 *Hawk. P. C.* 2.

The great difficulty in theſe caſes is, to determine where a perſon ſhall be ſaid to be ſo far deprived of his ſenſe and memory, as not to have any of his actions imputed to him; or where, notwithſtanding ſome defects of this kind, he ſtill appears to have ſo much reaſon and underſtanding as will make him accountable for his actions, which Lord *Hale* diſtinguiſhes between, and calls by the name of *total* and *partial inſanity*; and though it be difficult to define the indiviſible line that divides *perfect* and *partial inſanity*, yet, ſays he, it muſt reſt upon circumſtances, duly to be weighed and conſidered both by the judge and jury; leſt on the one ſide there be a kind of inhumanity towards the defects of human nature, or, on the other ſide, too great an indulgence given to great crimes; and the beſt meaſure he can think of is this: ſuch a perſon, as labouring under melancholy diſtempers, hath yet *ordinarily* as great underſtanding as a *child of fourteen years* commonly hath, is ſuch a perſon as may be guilty of treaſon or felony. 1 *Hale Hiſt. P. C.* 30.

He who incites a madman to do a murder, or other crime, is a principal offender, and as much puniſhable as if he had done it himſelf. *Keilw.* 53: *Dalt. cap.* 95: 1 *Hawk. P. C*: ſee titles *Acceſſary*: *Murder.*

And here we muſt obſerve a difference the law makes between civil ſuits that are terminated *in compenſationem damni illatæ*, and criminal ſuits or proſecutions, that are *ad pœnam & in vindictam criminis commiſſi*; and therefore it is clearly agreed, that if one who wants diſcretion commits a treſpaſs againſt the perſon or poſſeſſion of another, he ſhall be compelled in a *civil* action to give ſatiſfaction for the damage. 2 *Roll. Abr.* 547: *Hob.* 134: *Co. Lit.* 247: 1 *Hawk. P. C.* 2: 1 *Hal. Hiſt.* 15, 16, 38.

As to *Idiocy*, *Lunacy*, or *Madneſs*, (the latter of which is defined by *Hale* to be a *total alienation of the mind*,) which excuſes in *capital* caſes, it is not neceſſary that it was found by inquiſition that the party was a *Madman*, *Idiot*, or *Lunatick*, previous to the commitment of the fact; for if he was *actually mad* at the time of the fact committed, this ſhall excuſe; and this regularly is to be tried by an inqueſt of office to be returned by the ſheriff of the county wherein the court ſits for the trial of the offence; and if it be found that he was *actually mad*, he ſhall be diſcharged without any other trial; but if they find that the party only feigns himſelf mad, and he refuſes to anſwer or plead, he ſhall be dealt with as one who ſtands mute. 26 *Aſſ. pl.* 27: *Bro. Cor.* 101: 1 *And.* 107, 154: *Sav.* 50, 57: 1 *Hawk. P. C.* 2: 1 *Hal. Hiſt. P. C.* 35.

Theſe defects whether permanent or temporary muſt be unequivocal and plain; not an idle frantic humour or unaccountable mode of action, but an abſolute diſpoſſeſſion of the free and natural agency of the human mind. 8 *S. T.* 322: 1 *Hal. P. C. c.* 4: 1 *Hawk. P. C. c.* 1. § 1. *in n.*

If a man in a *frenzy* happy by ſome overſight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial that he is *mad*, the judge in diſcretion may diſcharge the jury of him, and remit him to gaol to be tried after the recovery of his underſtanding, eſpecially in caſe any doubt appear upon the evidence touching the guilt of the fact, and this *in favorem vitæ*; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his *inſanity* at the time of the fact committed, then, upon the ſame favour of life and liberty, it is fit it ſhould be proceeded in the trial, in order to his acquittal and enlargement. 1 *Hal. Hiſt. P. C.* 33, 36.

So if a perſon during his *inſanity* commits a *capital* offence, and recovers his underſtanding, and being indicted and arraigned for the ſame, pleads Not guilty, he ought to be acquitted; for, by reaſon of his *incapacity*, he cannot act *felleo animo.* 1 *Hal. Hiſt. P. C.* 36.

IDIOTA INQUIRENDO. See the preceding title *Idiots and Lunaticks.*

IDLENESS, See titles *Poor*; *Vagrants.*

IDONEUM SE FACERE; IDONEARE SE, To purge himſelf by oath of a crime of which he is accuſed. *Leg. Hen.* 1. *cap.* 15.; where the word *idoneus* is taken for *innocens.* But He is ſaid in our law to be *idoneus homo*, who hath theſe three things, *honeſty*, *knowledge*, and *ability*; and if an officer, &c. be not *idoneus* he may be diſcharged. 8 *Rep.* 41. See titles *Conſtable*, *Preſentation.*

IDUMANUS FLUVIUS, *Black-Water* in *Eſſex.*

JEJUNIUM, *Purgatio per jejunium*, is mentioned *in Leg. Canuti, cap.* 7. *apud Brompton.* See title *Ordeal.*

JEMAN, Sometimes uſed for *yeoman.* *Cowel.*

JEOFAILS, *j'ai failli*; *ego lapſus ſum*; I have failed.] An overſight in pleadings, or other law proceedings. See this dictionary, title, *Amendment.*

JERSEY, GUERNSEY, SARK, AND ALDERNEY. Theſe iſlands and their appendages were parcel of the duchy of *Normandy*, and were united to the crown of *England* by the firſt princes of the *Norman* line. They are governed by their own laws, which are, for the moſt part, the ducal cuſtoms of *Normandy*, being collected in an ancient book of very great authority,

entitled

entitled *Le Grand Coustumier*. The king's writ or process from the courts at *Westminster* is there of no force, but his commission is. They are not bound by common acts of our parliament, unless particularly named. 4 *Inst.* 286. All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the king and council in the last resort. 1 *Comm.* 106. See further this Dictionary, titles *Navigation Acts*, *Plantations*.

JESSE, A large brass *candlestick*, with many *sconces*, hanging down in the middle of a church or choir; which invention was first called *Jesse*, from the similitude of the branches to those of the *Arbor Jesse*. This useful ornament of churches was first brought over into this kingdom by *Hugh de Flory*, abbot of St. *Austin*'s in *Canterbury*, about the year 1100. *Chron. Will. Thorn.*

JETSAM, JETZON, and JOTSON, from the French *jetter*, *ejicere*.] Any thing thrown out of a ship, being in the danger of wreck, and by the waves driven to the shore. See this Dictionary, titles *Flotsam*; *Wreck*.

JESUITS. The society of *Jesuits* was instituted by *Ignatius Loyola*, a *Biscayan* gentleman. It has been termed most political and best regulated of all the monastic orders, and from which mankind have derived more advantages, and received greater hurt, than from any other of the many religious fraternities. *Robertss. Hist. Emp. Char.* V. 2 *V.* 134, 135, *&c.*

By the statutes against papists, persons born in the king's dominions and *ordained* by the pretended jurisdiction of *Rome*, remaining in *England*, or coming from beyond sea into his kingdom, and not submitting to some bishop or justice of peace within three days, and taking the oaths, are guilty of *high treason*; and receivers, aiders, and habourers of them are guilty of felony. Persons knowing priests, *Jesuits*, &c. and not discovering them to a justice of peace, shall be fined and imprisoned. See title *Papists*.

JEWELS. See *Jocalia*; and also titles *Carrier*; *Navigation Acts*; *Baron and Feme*.

JEWS, *Judæi*.] In former times the *Jews* and all their goods were at the disposal of the chief lord where they lived; who had an absolute property in them; and they might not remove to another lord without his leave: and we read that king *Henry* III, sold the *Jews* for a certain term of years to earl *Richard* his brother. They were distinguished from the *Christians* in their lives, and at their deaths; for they wore a badge on their outward garments, in the shape of a table, and were fined if they went abroad without such badges; and they were never buried within the walls of any city, but without the same, and anciently not permitted to burial in the country. *Matt. Paris*, 521, 606, *&c.*

There were particular judges and laws by which their causes and contracts were decided here, and there was a court of justice assigned for the *Jews*. 4 *Inst.* 254. A *Jew* may be witness by our laws, being sworn on the Old Testament. According to our ancient books, *Jews*, Hereticks, *&c.* are adjudged out of the statutes allowing benefit of clergy. But this doctrine is now exploded. See title *Clergy, Benefit of*.

The statute 53 *Hen.* 3, was called *provisiones de Judaismo*; and by the statute 18 *Ed.* 1, the king had a fifteenth granted him *pro expulsione Judæorum*. In the 16th year of *Edward* I, all the *Jews* in *England* were imprisoned; but they redeemed themselves for a vast sum of money: notwithstanding which, *anno* 19 of that king, he banished them all. *Stow's Surv. b.* 3. *p.* 54. And they remained in banishment 364 years; till at the time of the grand rebellion they were again allowed in the kingdom.

A plaintiff had leave given him by the court to alter the *Venue* from *London* to *Middlesex*, because all the sittings in *London* were on a *Saturday*, and his witness was a *Jew*, and would not appear that day. 2 *Mod.* 271.

A *Jew* brought an action, and the defendant pleaded that the plaintiff was a *Jew*, and that all *Jews* are perpetual enemies of the king and our religion. But, by the court, a *Jew* may recover as well as a villain, and the plea is but in disability so long as the king shall prohibit them to trade; and judgment for the plaintiff. *L. P. R.* 4. cites *Mich.* 36 *Car.* 2. *B. R.*

A *Jew* was ordered to swear his answer upon the *Pentateuch*, and that the plaintiff's clerk should be present to see him sworn. 1 *Vern.* 263.

The *Jews*, it has been said, are here by an implied licence, but on a proclamation of banishment, they are in the same situation as alien enemies on a determination of letters of safe conduct. *Arg.* 2 *Show.* 371. See further, as to the privileges and incapacities of *Jews*, this Dictionary, title *Alien*.

In the beginning of this century an instance occurred, where a *Jew* of immense riches, turned out of doors his only daughter who had embraced Christianity; and on her application for relief, it was held he could not be compelled to afford her any. Lord *Raym.* 699. But, to prevent such inhumanity in future, the statute 1 *Anne*, *c.* 30, ordains, that if *Jewish* parents refuse to allow their protestant children a fitting maintenance suitable to the fortune of the parent, the Lord Chancellor on complaint may make such order therein as he shall see proper. See 1 *P. Wms.* 524: 2 *Eq. Ab.* 513. *c.* 2.

IFUNGIA, The finest white bread, formerly called cocket bread. *Blount.*

IGNIS JUDICIUM, Purgation by fire, or the old judicial fiery trial. *Blount.* See *Ordeal*.

IGNORAMUS, We are ignorant.] The words formerly written on a bill of indictment by the *Grand Jury* impanelled on the inquisition of criminal causes, when they rejected the evidence as too weak or defective to make good the presentment against a person so as to put him on the trial; the effect whereof was, that all farther inquiry and proceedings against that party on that bill, (for the words now used are, *not a true bill*, or *not found*,) for the fault wherewith he is charged, is thereby stopped, and he is delivered without further answer. 3 *Inst.* 30. See this Dictionary, title *Indictment*.

IGNORANCE, *Ignorantia*.] Want of knowledge of the law, shall not excuse any man from the penalty of it. Every person is bound at his peril to take notice what the law of the realm is; and *Ignorance* of it though it be invincible, where a man affirms that he hath done all that in him lies to know the law, will not excuse him. *Doct. & Stud.* 1. 46: *Plowd.* 343.

And an infant of the age of discretion shall be punished for crimes, though he be *ignorant* of the law; but infants of tender age, have *Ignorance by nature* to excuse them; so persons *non compos* have *Ignorance* by the hand of God. *Stud. Comp.* 83, 84.

Though *Ignorance* of the *law* excuseth not, *Ignorance* of the *fact* doth: as if a person buy a horse or other thing in open market, of one that had no property therein, and not knowing but he had right; in that case he hath good title, and the Ignorance shall excuse him. *Doct. & Stud.* 309. But if the party bought the horse out of the market, or knew the seller had no right, the buying in open market, would not have excused. *Ibid.*: 5 *Rep.* 83. Also where a man is to enter into land or seize goods, *&c.* he must see that what he does be rightly done, or his *Ignorance* shall be no excuse. *Wood's Inst.* 608.

Ignorance of fact is a defect of will, when a man intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act; as if a man intending to kill a thief or housebreaker in his own house, by mistake, kills one of his own family. This is no criminal action. *Cro. Car.* 538. But if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is murder, as it proceeds from a criminal Ignorance of the law. 4 *Comm.* 27.

IKENILD-STREET, One of the four famous ways that the *Romans* made in *England*, called *Stratum Icenorum*, because it took its beginning among the *Iceni*, which were the people that inhabited *Norfolk, Suffolk*, and *Cambridgeshire*. *Cam. Brit.*: *Leg. Edw. Conf. c.* 12. See title *Watling-Street*.

ILET, By contraction *ight*, corruptly *eight*; a little island. *Blount*.

ILLEVIABLE, A debt or duty that cannot or ought not to be levied; as *nihil* set upon a debt is a mark for *illeviable*.

ILLITERATE. If an *illiterate* man be to seal a deed, he is not bound to do it, if none be present to read it, if required; and reading a deed falsely will make it void. 2 *Rep.* 3. 11. See *post*. A man may plead *non est factum* to a deed read false; as where a release of an annuity was read to an illiterate person, as a release of the arrears only, *&c.* agreed to be released. *Moor*, 148. If there is a time limited for a person to seal a writing, in such case *illiteracy* shall be no excuse, because he might provide a skilful man to instruct him; but when he is obliged to seal it upon request, *&c.* there he shall have convenient time to be instructed. 2 *Nels. Abr.* 946.

If a man for great age cannot see to read, and seals an obligation upon false reading, he shall avoid it. 11 *Rep.* 28. Resolved, though he was lettered; for now he has all his intelligence by hearing. Also *vide* 9 *H.* 6. 59. *b*: 10 *H.* 6. 6. 10: 2 *Rep.* 9: *Skin.* 159: 47 *E.* 3. 3. *b*, 17: 44 *Ed.* 3. 23: 44 *Ass.* 30: 3 *Ed.* 3. 31. *b.* 38. *a*: 11 *Rep.* 27. *b*: *Piggot's* case. See title *Deed*.

ILLUMINARE, To *illuminate*, to draw in gold and colours the initial letters and the occasional pictures in manuscript books.—See *Brompton, sub anno* 1076. Those persons who particularly practised this art, were called *illuminatores*, whence our *limners*.

IMAGES, How to be defaced, *stat.* 3 & 4 *Ed.* 6. *c.* 10. See title *Papist*.

IMAGINING (or *compassing, &c.*) the king's death, is high treason, 25 *Ed.* 3. *c.* 2. A *Queen regnant* is within the words of the act. 1 *Hal. P. C.* 101. The terms *compassing* and *imagining* are synonymous. And there must be sufficient proof of an *overt* act to convict. See this Dictionary, title *Treason*.

IMBARGO, *Span. Navium detentio.*] A stop, stay, or arrest upon ships or merchandize, by public authority. See statute 18 *Car.* 2. *c.* 5. This arrest of shipping is commonly of the ships of foreigners in time of war and difference with States to whom they are belonging: but, by an ancient statute, foreign merchants in this kingdom are to have forty days' notice to sell their effects and depart, on any difference with a foreign nation. 27 *Ed.* 3. *c.* 17. See title *Merchant*. This term has also a more extensive signification, for ships are frequently detained to serve a prince in an expedition; and for this end have their lading taken out without any regard to the colours they bear, or the government to whose subjects they belong. The legality of such a measure has been doubted by some, but it is certainly conformable to the law of nations, for a prince in distress to make use of whatever vessels he finds in his ports that may contribute to the success of his enterprize *Parke on Insurance, c.* 4. *p.* 78. The king may grant *Imbargoes* on ships, or employ the ships of his subjects, in time of danger, for the service and defence of the nation; but a warrant to stay a single ship, on a private account, is no legal *Imbargo*. *Moor*. 892: *Carth*. 297 Prohibiting commerce in the time of war, or of plague, pestilence, *&c.* is a kind of *Imbargo on shipping*.

Imbargoes laid on shipping in the ports of *Great Britain*, by royal proclamation, *in time of war*, are strictly legal, and are equally binding as an act of parliament; because such proclamation is founded on a prior law, namely, that the king may prohibit any of his subjects from leaving the realm. But in times of peace the power of the king to lay such restraints is doubtful; and therefore where a proclamation issued in the year 1766, to prevent the exportation of corn against the words of a statute, (22 *C.* 2. *c.* 13,) then in force, although the measure was absolutely necessary to prevent a dearth, it was thought prudent to procure an act of the legislature, (*stat.* 7 *Geo.* 3. *c.* 7,) to indemnify all who advised or acted under that proclamation. See *Parke on Ins.* 79: 1 *Comm.* 270: 4 *Mod.* 177, 9. And further this Dictionary, title *Insurance*.

IMBASING of *Money*. Mixing the species with an *allay* below the standard of sterling; which the king by his prerogative may do, and yet keep it up to the same value as before: *Inhansing* of it, is when it is raised to a higher rate, by proclamation. 1 *Hale's Hist. P. C.* 192. See title *Coin*.

IMBEZZLE, To steal, pilfer, or purloin; or where a person entrusted with goods, wastes and diminishes them. The word *imbezzle* is mentioned in several statutes, particularly relating to workers of wool, *&c.* *Stat.* 7 *Jac.* 1. *c.* 7: 1 *Ann. stat.* 2. *c.* 18. See title *Manufacturers*.

If any servant *imbezzles*, purloins, or makes away his master's goods, to 40 *s.* value, it is made felony without benefit of clergy, by *stat.* 12 *Ann. c.* 7. See titles *Felony*; *Robbery*; *Servant*; *Apprentice*.

Imbezzling the king's armour or stores is felony without clergy, by 31 *El. c.* 4. As to *naval* stores, the benefit of clergy is taken away by 22 *Car.* 2. *c.* 5. Other inferior imbezzlements and misdemeanors, that fall under this denomination, are punished, by *stat.* 1 *Geo.* 1. *stat.* 2. *c.* 25, with fine and imprisonment.

Imbezzling

Imbezzling the public money. If committed by high officers, is usually punished by impeachment in parliament. At common law the offender is subject to a discretionary fine and imprisonment. 4 *Comm.* 121, 2.

Imbezzling or vacating records, is a *felonious offence* against *public justice*, by *statute* 8 *Hen.* 6. *c.* 12. See titles *Records*; *Felony*; *Fine*; *Deeds*.

IMBRACERY. See *Embracery*.

IMBROCUS, A brook, a gut, a water-passage. *Somner of Ports and Forts*, *p.* 43.

IMBROIDERY. See *Embroidery*.

IMMUNITIES. King *Henry* III, by charter granted to the citizens of *London*, a general *Immunity* from all tolls, &c except customs and prisage of wine. *Cit. lib.* 91. See titles *King*; *Prerogative*; *London*.

IMPALARE, To put in a pound. *Ll. Hen.* I. *c.* 9.

IMPANEL, *Impanellare vel impanulare Juratis*] Signifies the writing and entering into a parchment schedule, by the sheriff, the names of a jury.

IMPARLANCE, *Interlocutio, vel licentia interloquendi*, from the Fr. *parler*, to speak.] In the *common law*, is taken for a petition, in court, of a day to consider or advise what answer the defendant shall make to the action of the plaintiff; being a continuance of the cause till another day, or a longer time given by the court.

Imparlance is said to be when the court gives the party leave to answer at another time, without the assent of the other party. *Com. Dig.* title *Pleader*, *D.* 1. But the more common signification of Imparlance is, time to plead, 2 *Show.* 310: 2 *Mod.* 62. And it is either *general* without saving to the defendant any exception, which is always to another term, *Mod.* 28; or *special*, which is sometimes to another day in the same term, 6 *Mod.* 8. The *general Imparlance* is of course where the defendant is not bound to plead the same term; but a *special Imparlance* is not allowed, without leave of the court. *R. E.* 5 *Ann.* A special Imparlance is with a saving of all exceptions to the writ or count, which may be granted by the prothonotary; or they may be still more special with a saving of all exceptions whatsoever, which are granted at the discretion of the court, and are called *general special* Imparlances. 12 *Mod.* 529.

A *general Imparlance* is set down and entered in general terms, without any special clause, thus; *And now at this day, to wit, on* Thursday *next after the* Octave *of St.* Hilary, *in the same term, until which day the aforesaid* C. D. *the defendant had licence to* imparle *to the bill aforesaid, and then to answer*, &c.

Special Imparlance, is where the party desires a farther day to answer, adding also these words; *Saving all advantages, as well to the jurisdiction of the court, as to the writ and declaration*, &c. *Kitch.* 200. This *Imparlance* is had on the declaration of the plaintiff; and special *Imparlance* is of use where the defendant is to plead some matters which cannot be pleaded after a general *Imparlance*. 5 *Rep.* 75.

Imparlance is generally to the next term; and if the plaintiff amend his declaration after delivered or filed, the defendant may *imparl* to the next term, if the plaintiff do not pay costs; but if he pay costs, which are accepted, the defendant cannot *imparl*. Also if the plaintiff declares against the defendant, but doth not proceed in three terms after, the defendant may *imparl* to the next term. 2 *Lill. Abr.* 35.

If the writ be returnable on the last day of term, the defendant is of course entitled to an Imparlance, but must plead in four days of the next term, provided a rule be given either in a town or country cause.

On a declaration delivered of *Hilary*, there may be an Imparlance to *Trinity* term, if the defendant has not pleaded before; for it is the course of the court to give Imparlance or declaration till the day of pleading. If a writ be returnable in one term, and the declaration is not delivered *before* the essoign-day of the *second* term, the defendant is not obliged to plead in the *same* term, but is entitled to an Imparlance. *Impey, K. B.*

As to causes of Imparlance. The not delivering a declaration in time is sometimes the cause of *Imparlance* of course: and where the defendant's case requires a special plea, and the matter which is to be pleaded is difficult, the court will, upon motion, grant the defendant an *Imparlance*, and longer time to put in his plea, than otherwise by the rules of the court he ought to have: if the plaintiff keeps any deed or other thing from the defendant, whereby he is to make his defence, *Imparlance* may be granted till the plaintiff delivers it to him, or brings it into court, and a convenient time after to plead. *Hil.* 22 *Car.* 1. *B. R.*

An *Imparlance* being prayed on a defendant's appearing to answer an information, it was said, *Imparlance* was formerly from *day* to *day*, but now from one *term to another*, in criminal proceedings; and it was ruled that the defendant should have the same time to *imparl* that the process would have taken up, if he had stood out till the attachment or *capias*; for when he comes in upon that, he must plead *instanter*. 1 *Salk.* 367: *Mod. Cases*, 243. And if process had been continued, he might have been brought in the same term upon an attachment; and then there could be no *Imparlance*, but he ought to plead *instanter*. 2 *Nels. Abr.* 947.

There are many cases wherein *Imparlances* are not allowed; no *Imparlance* is granted in an *homine replegiando*; or in an assise, unless on good cause shewn: nor shall there be an *Imparlance* in an action of special *clausum fregit*; though it is allowed in general actions of trespass. *Hil.* 9 *W.* 3: 3 *Salk.* 186. Where an attorney, or other privileged person of the court, sues another, the defendant cannot *imparl*, but must plead presently: if the plaintiff sues out a special original, wherein the cause of action is expressed, and the defendant is taken on a special *capias*, he shall not have an *Imparlance*, but shall plead as soon as the rules are out. 2 *Lil.* 35, 36. See title *Practice*.

Of Pleadings afterwards. A plea to the jurisdiction may not be pleaded after general *Imparlance*. *Raym.* 34. Dilatory pleas also cannot be pleaded after a general Imparlance, which is an acknowledgment of the propriety of the action. 3 *Comm.* 301: *Tidd's Pract.* After *Imparlance*, the defendant cannot plead in *abatement*; if he doth, and the plaintiff tenders an issue, whereupon the defendant demurs, and the plaintiff joins in demurrer, such plea is not peremptory; because the plaintiff ought not to have joined in demurrer, but to have moved the court, that the defendant might be compelled to plead in chief. *Allen* 65. Though a defendant may not plead in abatement after a general *Imparlance*; yet, if it appear by the record that the plaintiff hath brought his action before he had any cause, the court *ex officio* will

abate the writ. 2 *Lev.* 197. See this Dictionary, titles *Abatement*; *Practice*.

The defendant cannot have *oyer* of a deed in a common case, after *Imparlance*: and a tender after *Imparlance* is naught. 2 *Lev.* 190: *Lutw.* 238. If it appears upon the record, that an *Imparlance* was due, and denied, it is error; but then such error must appear on the record. 3 *Salk.* 168. It has been held, that if the defendant doth not appear on a *dies datus*, the plaintiff shall not have judgment by default, as he may on *Imparlance*, because the *dies datus* is not so strong against him as an *Imparlance*; and therefore the plaintiff must take process against the defendant for not appearing at the time. *Moor* 79: 2 *Nelf.* 947.

After a general special Imparlance, the defendant may not only plead in abatement of the writ, bill, or count, but also privilege. 1 *Lev.* 54: 12 *Mod.* 529: 5 *Mod.* 335. But it seems that such plea must be intitled of the term the declaration is filed. *Impey, K. B.*

It is ordered that a special Imparlance shall not be allowed the defendant, without the leave of the court first obtained. *R. E.* 5 *Ann.*

If the writ be returnable *before the last return of any term*, and the declaration not filed, and notice given four days exclusive before the end of such term, the defendant is entitled to an Imparlance. *R. Trin.* 22 *Geo.* 3.

Where a defendant is arrested by process out of *B. R.* in which the cause of action is specially expressed; or a copy of process is delivered, and the plaintiff hath declared; the defendant shall not have liberty of *imparlance*, without leave first granted, but shall plead within the time allowed a defendant prosecuted by original writ. *R. Hil.* 2 *Geo.* 2. And upon all processes, returnable the first or second return of any term, the declaration shall be delivered with notice to plead in eight days after delivery, where the defendant lives above twenty miles from *London*, &c. without any *Imparlance*; and, on default of pleading, the plaintiff may sign judgment. *R. Trin.* 5 & 6 *Geo.* 2. See further on this subject, and as to obtaining time to plead, this Dictionary, titles *Pleading*; *Practice*.

IMPARSONEE, A parson *Imparsonee*, *Persona impersonata*, is he that is inducted, and in possession of a benefice. *Dyer*, *fol.* 40. *num.* 72, says a Dean and Chapter are parsons *Imparsonees* of a benefice appropriate unto them. *Cowel.*

IMPEACHMENT, from Lat. *impetere*.] The accusation and prosecution of a person for treason, or other crimes and misdemeanors. Any member of the House of Commons may not only impeach any one of their own body, but also any Lord of parliament, &c. And thereupon *articles* are exhibited on behalf of the Commons, and managers appointed to make good their charge and accusation; which being done in the proper judicature, sentence is passed, &c. And it is observed, that the same evidence is required in an *Impeachment* in parliament, as in the ordinary courts of justice; but not in bills of attainder. See index to *State Trials*, *vol.* 6. tit. *Evidence*.

An Impeachment before the Lords by the Commons of *Great Britain*, in parliament, is a prosecution of known and established law, and hath been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction, by the most solemn grand inquest of the whole kingdom. 1 *Hal. P. C.* 150. A commoner cannot however be impeached before the Lords for any capital offence, but only for high misdemeanors: *Rot Parl.* 4 *Ed.* 3. *n.* 2 & 6: 2 *Brad. Hist.* 190: *Selden Judic. in Parl. ch.* 1.

A peer may be impeached for any crime. The articles of Impeachment are a kind of bills of indictment, found by the House of Commons, and afterwards tried by the Lords; who are in cases of misdemeanors considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the ancient *Germans*; who in their great councils sometimes tried capital accusations relating to the public: "*Licet apud concilium accusare quoque* "*et discrimen capitis intendere.*" *Tac. de mor. Germ.* 12.

By statute 12 & 13 *W.* 3. *c.* 2, it is enacted, that no pardon under the Great Seal shall be *pleadable* to an *Impeachment* by the Commons in parliament. But the king may pardon after conviction on an Impeachment. 4 *Comm.* 400, and see *ib.* 259—261; and this Dictionary, title *Pardon*.

On the Impeachment of *Warren Hastings* for malconduct as Governor-general of *India*, the trial of which lasted, by adjournment, for seven years, from 1787 to 1794, it was solemnly determined that an Impeachment is not abated, or put an end to, by the prorogation or dissolution of parliament. And a statute was passed to prevent prorogation or dissolution from having the effect of putting a stop to the previous proceedings in the House of Commons.

IMPEACHMENT OF WASTE, *Impetitio vasti*, from Fr. *empeschement*, i. e. *impedimentum*.] Signifies a restraint from committing of waste upon lands or tenements; or a demand of recompence for waste done by a tenant who hath but a particular estate in the land granted. He that hath a lease to hold *without Impeachment of Waste*, hath by that such an interest given him in the land, &c. that he may make waste without being *impeached* for it; that is, without being questioned, or any demand of recompence for the *waste* done. 11 *Rep.* 82. *b.* See title *Waste*.

IMPECHIARE, Fr. *empecher*; Lat. *impetere*.] To impeach, to accuse and prosecute, for felony, or treason. *Spelman* and *Somner* say, that it is derived from the Lat. *impetere*, which is to accuse, or *in jus vocare*; from whence *impetitio* signifies *an accusation*, viz. *fine impetitione vasti*, is without impeaching or accusing him of waste. See *Impeachment*.

IMPEDIATUS, *Expeditatus*; *impediati canes*, Dogs *lawed* and disabled from doing mischief in the forests, and purlieus of them. *Cowel.* See *Expeditate*.

IMPEDIENS, A defendant, or deforciant. *Cowel.*

IMPEDIMENTS IN LAW. Persons under *Impediments* are those within age, under coverture, *non compos mentis*, in prison, beyond sea, &c. who, by a saving in several laws, have time to claim and prosecute their rights, after the *Impediments* removed, in case of fines levied, &c. See title *Limitation of Actions*.

IMPERIALE, A sort of very fine cloth. *Cowel.*

IMPESCATUS, Impeached, or accused. *Pat.* 18 *E.* 1.

IMPETITIO, See ante, *Impeachment*.

IMPETRATION, *Impetratio*.] An obtaining any thing by request and prayer: and in our statutes it is a pre-obtaining of church benefices in *England* from the court

court of *Rome*, which belonged to the gift and disposition of the king, and other lay-patrons of this realm; the penalty whereof was the same with that inflicted on *provisors*. See *statutes* 25 *E.* 3. *st.* 6: 38 *E.* 3. *st.* 2. *c.* 1.

IMPIERMENT, Impairing or prejudicing, "to "the *Impierment* and diminution of their good names." *Stat.* 23 *Hen.* 8. *c.* 9.

IMPLEAD, from Fr. *Plaider*.] To sue or prosecute by course of law.

IMPLEMENTS, from Lat. *impleo*, to fill up.] Things necessary in any trade or mystery, without which the work cannot be performed; also the furniture of an house, as all houshold goods, *Implements*, &c. And *Implements* of *houshold* are tables, presses, cupboards, bedsteads, wainscot, and the like. In this sense, we find this word often in gifts and conveyances of moveables. *Terms de Ley.*

IMPLICATION, A necessary inference of something not directly declared; between parties in deeds, agreements, *&c.* arising from what is admitted or expressed. When the law giveth any thing to a man, it giveth, *implicitly* (or rather *impliedly*) whatsoever is necessary for the enjoying the same.

It is a general rule, that where an estate is to be raised by Implication, *it must be a necessary and inevitable Implication*, and such as that the words can have no other construction whatsoever. *Talb.* 3.

An Implication cannot be intended by deed, unless there are *apt* words; but otherwise in a will. *Brownl.* 153.

An implied intent must not, without clear expression, alter the equitable general law. 1 *Chan. Caf.* 297.

An estate by Implication was never thought of in a deed, nor in a will but in case of necessity. 4 *Mod.* 156.

No Implication shall be allowed against an express estate *limited by express words.* 1 *Salk.* 226.

An express estate for life cannot be enlarged by Implication, but by express words it may. 2 *Vern.* 449.

The want of words in some cases may be helped by *Implication*; and so one word or thing, or one estate given, shall be implied by another. There is an *Implication* in wills and devises of lands, whereby estates are gained; as if a husband devises the goods in his house to his wife, and that after her decease his son shall have them, and his house; though the house be not devised to the wife by express words, yet it has been held, that she hath an estate for life in it by *Implication*, because no other person could then have it, the son and heir being excluded, who was to have nothing till after her decease. 1 *Ventr.* 223.

Estates for life, and estates tail, may be raised by *Implication* in wills: a testator had *three* sons, the eldest son dying, leaving his wife with child, to whom the father devised an annuity, *in ventre sa mere*, and if his middle son died before he had any issue of his body, remainder over, *&c.* And it was resolved, that such son had an estate-tail by *Implication*. *Moor* 127. It is said a fee-simple estate shall not arise by *Implication* in a will; though there is a perpetual charge imposed by the devisor on the devisee, *&c.* *Bridgm.* 103. Also it hath been adjudged, that where a particular estate is devised by will expresly, a contrary intent shall not be *implied* by any subsequent clause. See title *Will.*

Implication is either *necessary* or *possible*, and wherever an estate is raised by that means in a will, it must be by a *necessary Implication*; for the devisee must *necessarily* have the thing devised, and no other person can have it. 1 *Salk.* 236: 2 *Nelf. Abr.* 494.

No *Implication* shall be allowed against an *express estate*, limited by *express words*, to drown the same. *Salk.* 266. There are *conditions* and *covenants*, *implied* by law, in deeds and grants: and *Implication* will sometimes help law proceedings, and supply defects. See titles *Intendment*; *Use*; *Deed*; *Covenant*; *Estate*; *Limitation*, &c.

IMPORTATION, *Importatio*.] The bringing goods and merchandize into this kingdom from other nations. See this Dictionary, title *Navigation Acts*.

IMPOSSIBILITY. A thing which is *impossible* in law, is all one with a thing *impossible* in nature: and if any thing in a bond or deed is *impossible* to be done, such deed, *&c.* is void. Yet where the condition of a bond becomes *impossible* by the act of God, in such case, it is held the obligor ought to do all in his power towards a performance: as when a man is bound to enfeoff the obligee and his heirs, and the obligee dies, the obligor must enfeoff his heir. 2 *Co. Rep.* 74. See titles *Bond*; *Condition*; *Deed.*

IMPOST, from Lat. *impono*.] The tax received by the prince, for such merchandizes as are *brought into any haven* within his dominions, from foreign nations. It may in some sort be distinguished from *customs*, because *customs* are rather that profit the prince maketh of wares *shipped* out; yet they are frequently confounded. *Cowel.* See this Dictionary, title *Customs on Merchandize.*

IMPOSTORS, *Religious*. Those who falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. They are punishable by the Temporal Courts with fine, imprisonment, and infamous corporal punishment. 1 *Hawk. P. C. c.* 5.

IMPOTENCY, Is a canonical disability to avoid marriage in the Spiritual Court. The marriage is not void *ab initio*, but voidable only by sentence of separation, but to be actually made during the life of the parties. See title *Marriage.*

IMPOTENCY, *Property by reason of.* A qualified property may subsist with relation to animals *feræ naturæ*, *ratione impotentiæ*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or conies or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones, till such time as they can fly or run away, and then my property expires. *Carta de forestâ*; (9 *Hen.* 3. *c.* 13;) but till then it is in some cases trespass, and in others felony, for a stranger to take them away. 7 *Rep.* 17: *Lamb. Eiren.* 274: 2 *Comm.* 394. See title *Game.*

IMPRESSING SEAMEN. The power of impressing men for the sea service by the king's commission, has been a matter of some dispute, and submitted to with great reluctance; though it hath *very clearly* and learnedly been shewn by Sir *Michael Foster*, that the practice of impressing, and granting powers to the Admiralty for that purpose, is of very ancient date, and hath been *uniformly continued*, by a regular series of precedents, to the present time: whence he concludes it to be part of the common law. The difficulty arises from hence, that no statute has expresly declared this power to be in the crown, though *many* of them very strongly imply it. The statute 2 *Ric.* 2. *c.* 4, speaks of mariners being arrested

arrested and retained for the king's service, as of a thing well known, and practised without dispute; and provides a remedy against their running away. By *statute* 2 & 3 *Ph. & M. c.* 16, if any waterman, who uses the river *Thames*, shall hide himself during the execution of any commission of pressing for the king's service, he is liable to heavy penalties. By *statute* 5 *Eliz. c.* 5, no fisherman shall be taken by the queen's commission to serve as a mariner; but the commission shall be first brought to two justices of the peace, inhabiting near the sea coast where the mariners are to be taken, to the intent, that the justices may choose out, and return such a number of able-bodied men as in the commission are contained, to serve her majesty. And, by others, (7 & 8 *W.* 3. *c.* 21: 2 *Ann. c.* 6: 4 & 5 *Ann. c.* 19: 13 *Geo.* 2. *c.* 17, *&c.*) especial protections are allowed to seamen in particular circumstances, to prevent them from being impressed. All which do most evidently imply a power of impressing to reside somewhere; and, if any where, it must from the spirit of our constitution, as well as from the frequent mention of the king's commission, reside in the crown alone. 1 *Comm.* 419: *Comb.* 245: *Fost.* 154.

The legality of pressing is so fully established, that it will not now admit of a doubt in any court of justice. In the case of *The King* v. *Tubbs*, Lord *Mansfield* said, "The power of pressing is founded upon immemorial usage allowed for ages. If not, it can have no ground to stand upon; nor can it be vindicated or justified by any reason but the safety of the State. The practice is deduced from that trite maxim of the constitutional law of *England*, That private mischief had better be submitted to, than public detriment and inconvenience should ensue. Though it be a legal power, it may, like many others, be abused in the exercise of it." *Cowp.* 517. In that case the defendant was brought up by *habeas corpus*, upon the ground that he was entitled to an exemption; but the court held, that the exemption was not made out, and he was remanded to the ship from whence he had been brought. 1 *Comm.* 420. *n.* See also 5 *Term Rep.* 276; and further this Dictionary, titles *Mariners*; *Seamen*; *Murder*.

IMPREST MONEY, from *In*, and Fr. *prest*, *paratus*.] Money paid on inlisting soldiers.

IMPRETIABILIS, Invaluable; in which sense it is often mentioned in *Mat. Paris*.

IMPRIMERY, *Fr.* A print, or impression; the art of printing, and a printing-house, are called *Imprimary*, in some statutes.

IMPRISII, Those who side with, or take the part of another, either in his defence, or otherwise. *Mat. Par.* 127.

IMPRISONMENT, *imprisonamentum.*] The restraint of a man's liberty under the custody of another; and extends not only to a gaol, but to a house, stocks, or where a man is held in the street, *&c.* for in all these cases the party so restrained is said to be a prisoner, so long as he hath not his liberty freely to go about his business, as at other times. *Co. Lit.* 253.

None shall be imprisoned *but by the lawful judgment of his peers, or by the law of the land. Magna Charta, c.* 2: *stat* 25 *Ed.* 3. *stat.* 5. *c.* 4. All Imprisonment must be according to law, or the custom of *England*; or by process and course of law. 2 *Inst.* 46, 50, 282. And no person is to be imprisoned, but as the law directs, either by command and order of a court of record, or by lawful warrant, or the king's writ; by which one may be lawfully detained to answer the law. 2 *Inst.* 46: 3 *Inst.* 209.

At common law, a man could not be imprisoned in any case, unless he were guilty of some force or violence; for which his body was subject to Imprisonment, as one of the highest executions of the law; but Imprisonment is inflicted by statute in many cases. 3 *Rep.* 11. Whenever the common law, or any statute, gives power to imprison, there it is lawful and justifiable; but he who doth it in pursuance of a statute, must be sure exactly to follow the statute in the order and manner of doing thereof. *Dyer* 204: 13 *E.* 1. See further on this subject, and connected therewith, this Dictionary, titles *Arrest*; *Bail*; *Capias*; *Commitment*; *Constable*; *False Imprisonment*; *Habeas Corpus*.

IMPROPRIATION. See title *Appropriation*.

IMPROVEMENT. See *Approvement*.

IMPRUIARE, To improve land.

IMPRUIAMENTUM, The improving of lands. *Cartular. Abbat. Glaston. MS. pag.* 50. Or rather the *improvement* itself, when made.

IN AUTER DROIT, In another's right; as where executors or administrators sue for a debt or duty, *&c.* in right of the testator or intestate.

INBLAURA, Profit or product of ground. *Cowell.*

IMBORH AND OUTBORH, *Saxon* See *Camden's Britan. in Ottadinis*, where he says, speaking of *Edelingham*, the barony of *Patrick* earl of *Dunbare*, which also was *Inborow* and *Outborow* between *England* and *Scotland*, as we read in the books of *Inquisitions*, that is, (as he believes,) he was to allow, and to observe in this part the ingress and egress of those who travelled to and fro between both realms; for *Englishmen* in ancient time called in their language an *entry* and *forecourt* or gatehouse, inborow. *Cowel.*

INCASTELLARE, To reduce a thing to serve instead of a castle; and it is often applied to churches.—*Qui post mortem patris ecclesiam* incastellatam *retinebat. Gervas. Dorob. anno* 1144.

IN CASU CONSIMILI. See *Casu consimili*.

IN CASU PROVISO. See *Casu proviso*.

INCAUSTUM, or ENCAUSTUM, Ink. *Fleta, lib.* 2. *c.* 27. *par.* 5.

INCENDIARIES. Burning of houses maliciously, to extort sums of money from those whom the malefactors should spare, was made treason the first year of king *H.* VI. 1 *Hale's Hist. P.C.* 270. The like offences of firing houses and sending letters demanding money of persons, *&c.* is made felony, by *Stat.* 9 *Geo.* 1. *c.* 22. See titles *Arson*; *Black Act*; *Burning*.

INCEPTION. The same person is patron and incumbent, and he devises the next avoidance; it was objected, that by his death the church is void, and then the presentation is a *chose en action*, and not grantable, and the devise takes not effect till after the death of devisor, and therefore void; but held a good devise, because it has *Inception* in his life. *Rol. Rep.* 214: 3 *Bulst.* 42.

Lease to *A.* for life, remainder to the right heir of *A.*; this is a good remainder to vest upon the death of *A.* for the Inception in his life. *Rol. Rep.* 215: 7 *H* 4.

Institution gives Inception to a lay-fee, so that if a caveat be entered after to prevent induction, a prohibition

hibition shall be granted. 2 *Roll.* 294. *Prohibition* (M), *pl.* 14.

INCERTAINTY. See title *Certainty.*

INCEST. In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, Incest and wilful adultery were made capital crimes. But at the Restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme, of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the Spiritual Court, according to the rules of the Canon law. 4 *Comm.* 64. See title *Lewdness.*

INCHANTMENT. See title *Conjuration.*

INCHANTER, *incantator.*] He who by *charms* conjures the devil; and they were antiently called *carmina*, by reason in those days their *charms* were in *verse*. 3 *Inst.* 44.

INCHANTRESS, *incantatrix.*] A woman who uses charms and incantations. See *Conjuration.*

INCHARTARE, To give, or grant and assure any thing by an instrument in writing. *Matt. Paris.*

INCH OF CANDLE, Is the manner of selling goods by merchants; which is done thus: First, Notice is to be given upon the *Exchange*, or other public place, of the time of sale; and, in the mean time, the goods to be sold or divided into lots, printed papers of which, and the conditions of sale, are also forthwith published; and when the goods are exposed to sale, a small piece of wax-candle, about an inch long, is burning, and the last bidder when the candle goes out, is entitled to the lot or parcel so exposed. If any difference happens in adjusting to whom a lot belongs, where several bid together, the lot is to be put up again; and the last bidder is bound to stand to the bargain, and take the lot, whether good or bad. In these cases, the goods are set up at such a price; and none shall bid less than a certain sum, more than another hath before, &c. *Merch. Dict.* See title *Auction.*

INCIDENT, *incidens.*] A thing necessarily depending upon, appertaining to, or following another that is more worthy or principal. A court-baron is inseparably incident to a manor; and a court of piepowder to a fair: these are so inherent to their principals, that by the grant of one, the other is granted; and they cannot be extinct by release, or saved by exception, but in special cases. *Kitch.* 36: *Co. Lit.* 151.

Rent is incident to a reversion; timber trees are incident to the freehold, and also deeds and charters, and a way to lands; fealty is incident to tenures; distress to rent and amercements, &c. *Co. Lit.* 151. Tenant for life or years hath, incident to his estate, estovers of wood. *Co. Lit.* 41. And there are certain Incidents to estates-tail; as to be dispunishable of waste, to suffer a recovery, &c. *Co. Lit.* 224. 10 *Rep.* 38, 39. Incidents are needful to the well-being of that to which they are incident; and the law is tender of them. *Hob.* 39, 40.

If a man, either by grant or prescription, has a right to a wreck thrown on another's land, of consequence he has a right to a way over the same land to take it; and the very possession of the wreck is in him before seisure. 6 *Mod.* 149. See 14 *Vin. Abr.* title *Incidents.*

INCLAUDARE, To fetter a horse. *Monasticon*, 2 *tom.* *p.* 598.

INCLAUSA, A home-close, or inclosure near the house. *Paroch. Antiquit. pag.* 31.

INCLOSURES, Throwing down Inclosures is an offence punishable by our antient laws and statutes. *stat.* 13 *Ed* 1. *stat.* 1. *c.* 46. But if the lord of a manor inclose part of the waste or common, and doth not leave sufficient for the commoners, they may break down such Inclosure, or have writ of assize. *Stat.* 3 & 4 *Ed.* 6. *c.* 3. Large wastes or commons in the *West-Riding* of the county of *York*, with the consent of the lords of manors, &c. may be inclosed, a sixth part whereof shall be for the benefit of poor clergymen, whose livings are under 40*l.* a-year, to be settled in trustees, who may grant leases for twenty-one years, &c. *Stat.* 12 *Ann.* *c.* 4.

Destroying them in the night, to be made good by the neighbouring towns, *stats.* 13 *Ed.* 1. *stat.* 1. *c.* 46; 3 & 4 *Ed.* 6. *c.* 3. Throwing down Inclosures in the night, to be punished with treble damages, *stats.* 3 & 4 *Ed.* 6. *c.* 3. *s.* 4: 22 & 23 *Car.* 2. *c.* 7. Taking away gates, pales, posts, stiles or hedge wood, or destroying them, how punished, &c. See *stats.* 43 *Eliz.* *c.* 7. 15 *Car.* 2. *c.* 2: 9 *Geo.* 3 *c.* 29. See titles *Common*; *Wastes.*

INCOMPATIBILITY, *incompatibilitas beneficiorum.*] Is when benefices cannot stand one with another, if they be with cure, and of such a value in the King's books. *Whitlock's Read.* *p.* 4. See title *Advowson.*

INCONTINENCY. See titles *Adultery*; *Fornication*; *Lewdness*; *Rape*, &c.

INCOPOLITUS, A proctor, or vicar, *Leg. Hen.* 1.

INCORPORATION, power of. See title *Corporation.*

INCORPOREAL HEREDITAMENTS. See title *Hereditaments.*

INCREMENTUM, Increase or improvement: to which was opposed *decrementum* or abatement. *Paroch. Antiq.* 164. It is used in charters for a parcel of ground inclosed out of a common, or improved.

INCROACHMENT, Fr. *accrochment*, a grasping.] An unlawful gaining upon the right or possession of another man. As where a man sets his hedge or wall too far into the ground of his neighbour, that lies next to him, he is said to make Incroachment upon him: and a rent is said to be incroached, when the lord by distress or otherwise compels his tenant to pay more than he owes; and so of services, &c. 9 *Rep.* 33. And sometimes this word is applied to power; for the *Spencers*, father and son, it is said, incroached unto them *royal power* and authority, *anno* 1 *Ed.* 3. And the admirals and their deputies are said in *statute* 15 *R.* 2. *c.* 3, to have incroached to themselves divers jurisdictions, &c.

INCUMBENT, from Lat. *incumbo*, to mind diligently.] A clerk resident on his benefice with cure; and is so called, because he does or ought to bend all his study to the discharge of the cure of the church to which he belongs. *Co. Lit.* 119. Where an Incumbent is put out without due process, he shall be at large to sue for his remedy at what time he pleaseth, &c. *Statute* 4 *Hen.* 4. *c.* 22. See titles *Advowson*; *Church.*

INCUMBRANCE. See titles *Mortgage*; *Purchase*; and 14 *Vin. Abr.* tit. *Incumbrance.*

INCURRAMENTUM, The incurring or being subject to a penalty, fine or amercement: so *incurri alieni* is to be liable to another's legal censure or punishment. *Westm.* *c.* 37.

INDEBI-

INDEBITATUS ASSUMPSIT. See title *Assumpsit*.

INDECIMABLE, *Indecimabilis*.] That is not *tithable*, or by law ought not to pay tithe. 2 *Inst*. 490.

INDEFEASIBLE, or INDEFEISIBLE, That cannot be defeated or made void: as a good and *indefeasible estate*, &c.

INDEFEASIBLE RIGHT TO THE THRONE. See title *King*.

INDEFENSUS, One that is impleaded, and refuseth to make answer. *Mich*. 50 *H*. 3. *Rot*. 4.

INDEMNITY, On the *appropriation* of a church to any college, &c. when the archdeacon loses for ever his induction-money, the recompence he receives yearly out of the church so appropriate, as 12 *d*. or 2 *s*. more or less, as a pension agreed at the time of the appropriating, is called *Indemnity*. *MS. in Bibl. Cotton*. *p*. 84. Acts of Indemnity are passed every session of parliament for the relief of those who have neglected to take the necessary oaths, &c. required to qualify them for their respective offices.

INDENTURE, *indentura*,] Is a writing containing some contract, agreement, or conveyance between two or more persons, being indented in the top answerable to another part, which hath the same contents. *Co. Lit*. 229. A deed of bargain and sale of freehold lands, &c. must be by Indenture, inrolled, &c. *Stat*. 27 *Hen*. 8. *c*. 16. Words in Indentures, though of one party only, are binding to both parties. *Cro. Eliz*. 202, 657. See this Dict. titles *Conveyance*; *Deed*.

INDIA-COMPANY. See *East India Company*.

INDIA GOODS. See this Dict. titles *East India Company*; *Navigation Acts*.

INDICAVIT. A writ of prohibition that lies for a *Patron* of a *church*, whose clerk is sued in the Spiritual Court by another clerk for *tithes*, which amount to a fourth part of the profits of the advowson; when the suit belongs to the King's courts, by the *Statutes*, *Westm*. 2. *c*. 5: 13 *E*. 1. *st*. 4. The patron of the defendant is allowed this writ, as he is like to be prejudiced in his church and advowson, if the plaintiff recovers in the Spiritual Court. *Reg. Orig*. 35: *Old. Nat. Br*. 31.

This writ may be also purchased by the parson sued; and is directed as well unto the judge of the court, as unto the party plaintiff, that they do not proceed, &c. But it is not to be had before the defendant is libelled against in the Spiritual Court, the copy of which libel ought to be produced in Chancery, before the *Indicavit* is granted: and this writ must be brought before judgment given in the Spiritual Court; for after judgment there, the *Indicavit* is void. *New Nat. Br*. 66, 101: see *Stat*. 34 *E*. 1. *st*. 1. The writ of *Indicavit* doth not lie of a less part of the tithes, &c. than a fourth part of the church; if they are not so much, this being surmised by the other party, a *consultation* shall be had. *Ibid*. The patron of the clerk, who is prohibited by the *Indicavit*, may have his writ of *right* of the *advowson of dismes*, &c. The Ecclesiastical Court may hold plea of tithes not amounting to the fourth of the church. *Stat. Circumsp. Agatis*, 13 *Ed*. 1. *st*. 4. See further titles *Prohibition*; *Tithes*.

INDICO, or INDIGO. See title *Navigation Acts*.

INDICTED, *Indictatus*.] When any one is accused by bill preferred to jurors at the king's suit, for some offence, either criminal or penal, he is said to be indicted thereof. *Cowel*.

INDICTIO, The same with Indictment. *Nonnunquam enim fiunt accusationes de foresta*, & *indictiones vulgariter sic appellatæ*. Du Fresne.

INDICTION, *Indictio*; *ab indicendo*.] The space of fifteen years, by which computation charters and public writings were dated at *Rome*; likewise antiently in *England*, which we find not only in the charters of King *Edgar*, but of King *Hen*. III. And by this account of time, which began at the dismission of the *Nicene* Council, every year still increased one till it came to *fifteen*; and then returned again, making *first*, *second Indiction*, &c. *dat. apud* Chippenham, 18 *die* Aprilis, indictione nonâ, *anno Dom*. 1266.

INDICTMENT.

INDICTAMENTUM, from the Fr. *enditer*, i. e. *indicare*, to shew.] A bill or declaration of complaint drawn up in form of law, exhibited for some offence criminal or penal, and preferred to a grand jury; upon whose oath it is found to be true, before a judge, or others, having power to punish or certify the offence. *Terms de Ley*.

I. *Of the Nature of an Indictment; how found, presented, and prosecuted.*
II. *Of the Locality of an Indictment.*
III. *Of Certainty, and the other Requisites in an Indictment; and of Errors, and Amendments thereof.*
IV. *For what Offences Indictment will lie.*

I. LAMBARD says, An Indictment is an accusation, at the suit of the King, by the oaths of twelve men of the same county wherein the offence was committed, returned to inquire of all offences in general in the county, determinable by the court into which they are returned, and their finding a bill brought before them to be true: but when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed *Indictment*, it is called *A Presentment*; and when it is found by jurors returned to inquire of that particular offence only, which is indicted, it is properly called *An Inquisition*. *Lamb. lib*. 4 *cap*. 5.

By *Poulton*, an *Indictment* is an inquisition taken and made *by twelve men*, at the *least*, thereunto sworn, whereby they find and present, that such a *person*, of such a *place*, in such a *county*, and of such a *degree*, hath committed such a *treason*, *felony*, *trespass*, or other offence, against the peace of the King, his crown and dignity. *Pult*. 169. An *Indictment*, according to Lord Chief Justice *Hale*, is only a plain, brief, and certain narrative of an offence, committed by any person, and of those necessary circumstances, that concur, to ascertain the fact and its nature. 2 *Hale's Hist. P.C*. 168, 169.

An Indictment seems to be thus shortly well defined: "A written accusation, of one or more persons, of a crime or a misdemeanor, preferred to, and presented on oath by, a grand jury." 4 *Comm*. 302.

A bill of *Indictment* is said to be an accusation, for this reason; because the jury that inquire of the offence doth not receive it, until the party that offers the bill, appearing, subscribes his name, and offers his oath for the truth of it. *Staundf. P.C. lib*. 2. *cap*. 23.

To this end the sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, "to inquire, present, do, and execute

execute all those things which on the part of our lord the king shall then and there be commanded them." As many as appear upon this pannel are sworn of the Grand Jury to the amount of twelve at least, and not more than twenty-three; that twelve may be a majority. See title *Jury*. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge on the bench. They then withdraw from court to sit and receive Indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor: and they are only to hear evidence on behalf of the prosecution: for the finding an Indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths whether there be sufficient cause to call upon the party to answer it.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill, *ignoramus, i.e.* 'we know no nothing of it;' intimating, that though the facts might possibly be true, the truth did not appear to them: but now, they assert in English, more absolutely, *not a true bill*; or (which is the better way) *not found*; and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then indorse upon it, *a true bill*; antiently, *billa vera*. The Indictment is then said to be found, and the party stands indicted. But to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives of the Subject, that no man can be convicted at the suit of the king for any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards by the whole petit jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree. 2 *Hal. P. C.* 161. And the Indictment when so found, is publicly delivered into court.

Although a bill of *Indictment* may be preferred to a grand jury upon oath, they are not bound to find the bill, if they find cause to the contrary; and though a bill of *Indictment* be brought unto them without oath made, they may find the bill if they see cause; but it is not usual to prefer a bill unto them before oath be first made in court, that the evidence they are to give unto the grand inquest to prove the bill is true. 2 *Lill. Abr.* 44. The grand jury are to find *the whole* in a bill, or reject it, and *not find specially for part*, &c. 2 *Hawk. P. C. c.* 25. § 2. This rule relates only to cases where the grand jury take upon themselves to find part of the *same Indictment* to be true, and part false; and do not either affirm or deny the facts submitted to their inquiry. But where there are two distinct counts, *viz.* one for a riot, and the other for an assault, and the grand jury find a true bill as to the assault, and indorse *ignoramus* as to the riot, this finding leaves the Indictment as to the count found, just as if there had been originally only that one count. *Cowp.* 325.

Any one under prosecution for a crime, before he is indicted, may except against or challenge any of the persons returned on the grand jury; as being outlawed, returned at the instance of the prosecutor, or not returned by the proper officer, *&c.* 2 *Hawk. c.* 25. § 16. No *Indictment* shall be made but by inquest of lawful men returned by sheriffs, *&c.* And if a person not returned by the sheriff on a grand jury, procures his name to be read among those of others who were actually returned, whereupon he is sworn of the jury, he may be indicted for it and fined, and the *Indictment* found by such a jury shall be void. *Stat:* 11 *Hen.* 4. *c.* 9: 12 *Rep.* 98: 3 *Inst.* 33.

Sheriffs had formerly power to take *Indictments*; which they did by roll indented, one part whereof remained with the *indictors*. 13 *Ed.* 1: 1 *Ed.* 3. Justices of peace have no power relating to *Indictments* for crimes, but what is given them by act of parliament: And it is said justices of peace in sessions cannot, on an *Indictment*, try and determine the offence in one and the same sessions in which the offenders are indicted. *Hill.* 11 *Car.*: *Cro. Car.* 430, 448. And Indictments before justices of peace, *&c.* may be removed into the court of *B. R.* by *certiorari*. But an Indictment removed by *certiorari* into *B. R.* may be sent back again into the county or place whence removed, if there be cause to do it. See title *Certiorari*.

An Indictment is the king's suit; for which reason the party who prosecutes, is a good witness to prove it: And no damages can be given to the party grieved upon an Indictment, or other criminal prosecution, *unless particularly grounded on some statute*; but the court of *B. R.* by the king's privy seal may give to the prosecutor a third part of the fine assessed for any offence; and the fine to the king may be mitigated, in regard to the defendant's making satisfaction to a prosecutor for costs of prosecution, and damages sustained by the injury received. 2 *Hawk. c.* 25. § 3.

No man may be put upon his trial for a capital offence, except on an appeal or Indictment, or something equivalent thereto. *H. P. C.* 210. All Indictments ought to be brought for offences committed against the common law, or against some statute; and not for every slight misdemeanor. 2 *Lill.* 44. Where a statute appoints a penalty to be recovered by bill, plaint, or information, it cannot be by Indictment, but as directed to be recovered: An Indictment will not lie where only another remedy is provided by statute. *Cro Jac.* 643: 3 *Salk.* 187.

Husband and wife may commit a trespass, felony, *&c.* and be indicted together; so for keeping a bawdy-house, though the house be the husband's. *Hob.* 65: 1 *Salk.* 382. See title *Baron and Feme*.

If an offence wholly arises from any joint act that is criminal of several defendants, they may be all charged in one *Indictment*, jointly and severally, or jointly only; and some of the defendants may be convicted, and others acquitted; for the law looks on the charge as several against each, though the words of it purport a joint charge against all: In other cases, the offences of several persons must be laid several, *because the offence of one cannot be the offence of another*; *and every man ought to answer severally for his own crime.* And three offences may be joined in an *Indictment*, and the party convicted of one offence, though he is found Not guilty of the others. On penal statutes, several things shall not be joined in the *Indictment*, *&c.* except it be in respect of some one thing, to which all of them have relation. 2 *Hawk. P. C. c.* 25. § 89: 1 *Hal. P. C.* 561, 610.

Several defendants cannot be joined in one Indictment for perjury; for perjury is a separate act in each; and one may be desirous to have a *certiorari*, and the other not;

not; and the jury on the trial of all, may apply evidence to all, that is but evidence against one. *Stra.* 921. So also in *the King* v. *Clendon & al.* where two were joined in the same Indictment for an assault, the court held they were distinct offences. *Stra.* 870: *Lord Raym.* 1572. But in another case, on an information against two for the same libel, it was held good; and the case of *the King* v. *Clendon* held not to be law. *Burr.* 980.

A person indicted of felony, &c. may plead generally misnomer, or wrongful addition; a former acquittal or conviction; a pardon, or other special plea; or the general issue; or may plead any plea in abatement of the *Indictment*, &c. 2 *Hawk. P. C. c.* 25. § 150. One indicted for felony may have counsel assigned him to speak for him in matter of *law only*. See titles *Trial*; *Treason*; *Abatement*, &c.

After a person is indicted for felony, the sheriff is commanded to attach his body by a *capias*; and on return of a *non est inventus*, a second *capias* shall be granted, and the sheriff is to seize the offender's chattels, &c. And if on that writ a *non est inventus* is returned, an *exigent* shall be awarded, and the chattels be forfeited, &c. *stat.* 25 *Ed.* 3. *st.* 5. *c.* 2.

If an innocent person be indicted of felony, and will not suffer himself to be arrested by the officer who has a warrant for it, he may be killed by the officer, if he cannot otherwise be taken; for there is a charge against him upon record, to which at his peril he is bound to answer. *Fitz. Coron.* 179, 261. See title *Arrest*.

A person may be indicted twice at the same time, where he hath committed two felonies, and if he hath his clergy for one, he may be hanged for the other. And if there is an Indictment and inquisition against one for the same offence, one found by the coroner's inquest, and another by the grand jury, he may be tried on both at the same time: But if he be tried and acquitted upon the one, it may be pleaded in bar on trial for the other. *Kel.* 30, 108: 1 *Salk.* 382.

When a person is convicted upon an *Indictment* for trespass or misdemeanor, he is to appear in court, on judgment pronounced; and the court having set a fine upon him, will commit him in execution, &c. 2 *Lil. Abr.* 41.

II. The Grand Jury are sworn to inquire only for the body of the county; and therefore they cannot regularly inquire of a fact done out of the county for which they are sworn, unless particularly enabled by statute. At common law, therefore, where a man was wounded in one county and died in another, the offender was indictable in neither, because no complete act of felony was done in either county; but by *stat.* 2 & 3 *E.* 6. *c.* 24, the offender is now indictable in the county where the party died; and by *stat.* 2 *Geo.* 2. *c.* 21, if the stroke or poisoning be in *England*, and the death upon the sea or out of *England*, or *vice versâ*, the offenders and their accessories may be indicted in the county where either the death, poisoning, or stroke shall happen. So in some other cases: as particularly, where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct, in pursuance of *stats.* 26 *Hen.* 8. *c.* 13: 33 *Hen.* 8. *c.* 23: 35 *Hen.* 8. *c.* 2: 5 & 6 *E.* 6. *c.* 11. Counterfeiters, washers, or minishers of the current coin, together with all manner of felons and their accessories, may by *stat.* 26 *Hen.* 8. *c.* 6, (confirmed and explained by *stat.* 34 & 35 *H.* 8. *c.* 26. § 75, 76,) be indicted and tried for those offences, if committed in any part of *Wales*, before the justices of gaol delivery, and of the peace, in the next adjoining county of *England*, where the king's writ runneth; that is, at present in the county of *Hereford* or *Salop*; and not, as it should seem, in the county of *Chester* or *Monmouth*: the one being a county palatine where the king's writ did not run, and the other a part of *Wales* in the time of *Henry* VIII. *Str.* 533: 8 *Mod.* 134: See *Hardr.* 66. Murders also, whether committed in *England* or in foreign parts, may by virtue of *stat.* 33 *Hen.* 8. *c.* 23, be inquired of and tried by the king's special commission in any shire or place in the kingdom. By *stat.* 10 & 11 *W.* 3. *c.* 25, all robberies and other capital crimes, committed in *Newfoundland*, may be inquired of and tried in any county of *England*. Offences against the black act, 9 *Geo.* 1. *c.* 22, may be inquired of and tried in any county of *England*, at the option of the prosecutor. So felonies in destroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may, by *stats.* 8 *Geo.* 2. *c.* 20: 13 *Geo.* 3. *c.* 84, be inquired of and tried in any adjacent county. By *stat.* 26 *Geo.* 2. *c.* 19, plundering or stealing from any vessel in distress or wrecked, or breaking any ship contrary to 12 *Ann. st.* 2. *c.* 18, may be prosecuted either in the county where the fact is committed, or in any county next adjoining; and, if committed in *Wales*, then in the next adjoining *English* county: by which is understood to be meant such *English* county as, by *stat.* 26 *Hen.* 8. *c.* 6, above-mentioned, had before a concurrent jurisdiction with the great sessions on felonies committed in *Wales*. Felonies committed out of the realm, in burning or destroying the king's ships, magazines, or stores, may, by *stat.* 12 *Geo.* 3. *c.* 24, be inquired of and tried in any county of *England*, or in the place where the offence is committed. By *stat.* 13 *Geo.* 3. *c.* 63, misdemeanors committed in *India* may be tried upon information or Indictment in the court of King's Bench in *England*; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court.

But, in general, all offences must be inquired into as well as tried in the county where the fact is committed. Yet, if larceny be committed in one county, and the goods carried into another, the offender may be indicted in either; for the offence is complete in both. 1 *Hal. P. C.* 507. Or, he may be indicted in *England*, for larceny in *Scotland*, and carrying the goods with him into *England*, or *vice versâ*, or for receiving in one part of the united kingdoms goods that have been stolen in another, *stat.* 13 *Geo.* 3. *c.* 31. But, for robbery, burglary, and the like, an offender can only be indicted where the fact was actually committed: for, though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore *larceny* in the second county, yet it is not a *robbery* or *burglary* in that jurisdiction. And if a person be indicted in one county for larceny of goods originally taken in another, and be thereof convicted or stands mute, he shall not be admitted to his clergy; provided the original taking be attended with such circumstances as would have ousted him of his clergy by virtue of any statute made previous to the year 1691. *Stats.* 25 *Hen.* 8. *c.* 3: 3 *W.* & *M.* *c.* 9.

If no town or place be named where the fact was done, the *Indictment* shall be void; though a mistake of the place

place in laying the offence is of no signification on the evidence, if the fact is proved at some other place in the same county. *H. P. C.* 264. See *stat.* 1 *Hen.* 5. *cap.* 5.

If, upon not guilty pleaded, to an *Indictment*, it shall appear that the offence was done in a *county* different from *that* in which the *Indictment* was found,* the defendant shall be acquitted. *H. P. C.* 203: *Kel.* 15.

If there be an accessory in one county, to a felony committed in another, the accessory may be indicted and tried in the same county wherein he was accessory. *Stat.* 2 & 3 *Ed.* 6. *c.* 24.

An *Indictment* being found in the proper county, may (in some cases) be heard and determined in any other county, by special commission. 3 *Inst.* 27.

In the two last rebellions, statutes passed empowering the crown to try the traitors in any county.

III. INDICTMENTS must have a precise and sufficient certainty. By *stat.* 1 *Hen.* 5. *c.* 5, all Indictments must set forth the christian name, surname, and addition of the state and degree, mystery, town, or place, and county of the offender; and all this to identify his *person*. The *time* and *place* are also to be ascertained, by naming the day and township in which the fact was committed; though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the Indictment, and the *place* to be within the jurisdiction of the court; unless where the place is laid, not merely as a *venue*, but as part of the description of the fact. 2 *Hawk. P. C. c.* 25. But sometimes the time may be material, where there is any limitation in point of time assigned for the prosecution of offenders, as by *stat.* 7 *W.* 3. *c.* 3; which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned, (except an assassination designed or attempted on the person of the king,) unless the bill of Indictment be found within three years after the offence committed. *Fost.* 249. And, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given.

The offence itself must also be set forth with clearness and certainty; and, in some crimes, particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, *treasonably, and against his allegiance*; antiently, *proditoriè et contra ligeantiæ suæ debitum*; else the Indictment is void. In Indictments for murder, it is necessary to say, that the party indicted, *murdered*, not *killed* or *slew*, the other, which was expressed in *Latin* by the word *murdravit*. In all Indictments for felonies, the adverb *feloniously* [*felonicè*] must be used; and for burglaries also, *burglariter*, or in *English*, *burglariously*, and all these to ascertain the intent. In rapes, the word *rapuit* or *ravished* is necessary, and must not be expressed by any periphrasis, in order to render the crime certain. So in larcenies also, the words *felonicè cepit et asportavit* [*feloniously took and carried away*] are necessary to every Indictment; for these only can express the very offence.

Also in Indictments for murder, the length and breadth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature; but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb, or the like, is absolutely cut off, there such description is impossible. 5 *Rep.* 122.

Lastly, In Indictments the *value* of the thing, which is the subject or instrument of the offence, must sometimes be expressed. In Indictments for larcenies this is necessary, that it may appear whether it be grand or petit larceny, and whether entitled or not to the benefit of clergy. In homicide, of all sorts, it is necessary, as the weapon with which it is committed is forfeited to the king as a deodand. See 4 *Comm. c.* 23.

Indictments ought to be more certain than common pleadings in law, because they are more penal, and to be answered with more precision. *Hil.* 23 *Car. B. R.* They must be precise and certain in every point, and charge some offence in particular, and not a person as an offender in general, or set down goods, &c. stolen, without expressing what goods; and it ought to be laid positively, not by way of recital, &c. or be supplied by implication. *Cro. Jac.* 19: 2 *Hawk. P. C. c.* 25.

If an Indictment be generally of offences at several times, without laying any one of them on a certain day, as if it be laid between such a day and such a day, it hath been adjudged, that the Indictment is void: but a mistake in not laying an offence on the very same day, on which it is afterwards proved upon the trial, is not material upon evidence. 2 *Hawk. c.* 25. § 82. And it is said, the crown is not bound to set forth the very day, when treason, &c. was committed: evidence may be given of a treasonable conspiracy, &c. at any time before or after the time alleged in the Indictment, where it is laid on such a day, and divers other days, as well before as after; because the time is only a circumstance, and of form some day must be alleged, but it is not material. 1 *Salk.* 168.

When an Indictment is drawn upon a statute, it ought to pursue the words of it, if a private act; but it is otherwise on a general statute: it is best not to recite a public statute; *the recital is not necessary*, for the judges are bound *ex officio* to take notice of all public statutes, and mis-recitals are fatal; so that it is the surest way only to conclude generally "against the form of the "statute." 4 *Rep.* 48. Though there be no necessity to recite a public statute in an *Indictment*, yet if the prosecutor take upon him to do it, and *materially* vary from the *substantial part* of the purview of the statute, and conclude *contra formam statut' prædict'* he vitiates the *Indictment*. *Plowd.* 79, 83: *Cro. Eliz.* 236. But many mis-recitals may be saved by a general conclusion *contra formam statuti*, without adding *prædict'*, &c. And mistakes may be helped by the constant course of precedents upon such statutes. 2 *Hawk. c.* 25. § 101. An *Indictment* is to bring the fact making an offence, within all the material words of the statute, or the words, *contra formam statuti*, will not make it good. 2 *Hawk. c.* 25. § 115. If a word of *substance* be omitted in the *Indictment*, the whole *Indictment* is bad; but it is otherwise where a word of *form* is omitted, or there is an omission of a synonymous word, where the sense is the same, &c. Judgment shall not be given by statute, upon an *Indictment* which doth not conclude *contra formam statuti*: and judgment by sta-

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tute shall never be given out an *Indictment* at common law, as every *Indictment* which doth not thus conclude shall be taken to be. But where persons are indicted on the statute of *stabbing*, and the evidence is not sufficient to bring them within the statute, they may be found guilty of *general manslaughter* at common law, and the words *contra formam statut'* be rejected as useless: in other cases the same has been also adjudged; though formerly it was held, that an *Indictment* grounded on a statute, which would not maintain it, could not in any case be maintained as an *Indictment* at common law. 2 *Hawk. P. C. c.* 25. § 4.

The omission of *vi & armis & contra pacem*, is helped by *stat.* 4 & 5 *Ann. c.* 16. False *Latin*, antiently, did not hurt an *Indictment*, if by any intendment it could be made good; but if any word was not *Latin*, or allowed by law as a word of art; or if it had been insensible in a material point, the Indictment was insufficient. 5 *Rep.* 121: 2 *Cro.* 108: 3 *Cro.* 465. An Indictment should not be set aside for a false concord between the substantive and the adjective, *&c.* the expressions being significant to make the sense appear. 5 *Co. Rep.* 121.

But an Indictment against two or more, laying the fact in the singular number, as if against one, hath been held insufficient for the incertainty. 2 *Hawk. c.* 25. A misnomer of the defendant's surname, will not abate the Indictment, as it will in case of the name of baptism; and if there be a mistake in spelling, if it sounds like the true name, it is good. 1 *Hen.* 5. A person may be indicted for felony against an unknown person; and when the name of one killed is unknown, or goods are stolen from a person that cannot be known, it is sufficient to say in the Indictment that *one unknown was killed by the person indicted*, or that *he stole the goods of one unknown. Wood's Inst.* 624. But though an Indictment may be good for stealing the goods *cujusdam ignoti*, of a person unknown, yet a property must be proved in somebody at the trial; otherwise it shall be presumed to be in the prisoner by his pleading not guilty. *Mod. Cas. in L. & E.* 249. Where a person injured is known, his name ought to be put into the Indictment. 2 *Hawk. c.* 25.

Indictments may be amended the same term wherein brought into court, and not after. But criminal prosecutions are not within the benefit of the *statutes of amendments*; so that no amendment can be made to an *indictment*, &c. but such only as is allowed by the common law. 2 *Lil.* 45. The body of a bill of *Indictment* removed into *B. R.* may not be be amended, except from *London*, where the tenor only of a record is removed; though the caption of an *Indictment* from any place may, on motion, be amended by the clerk of the assizes, *&c.* so as to make it agree with the original record. *Captions* of *Indictments* ought to set forth the court in which, and the jurors by whom, and also the time and place at which, the *Indictment* was found; and that the jurors were of the county, city, *&c.* Also they must shew that the *Indictment* was taken before such a court as had jurisdiction over the offence indicted. 2 *Hawk. P. C. c.* 25. While the jury who found a bill of *Indictment* is before the court, it may be amended by their consent in matter of form, the name, or addition of the party, *&c. Keb.* 37. Clerks of the assize and of the peace, *&c.* drawing defective bills of *Indictment*, shall draw new bills without fee, and take but 2 *s.* for drawing any *Indictment* against a felon, *&c.* on pain of forfeiting 5 *l. Stat.* 10 & 11 *W.* 3. *cap.* 23.

If one material part of an *Indictment* is repugnant to or inconsistent with another, the whole is void; but where the sense is plain, the court will dispense with a *small* impropriety in the expression. 2 *Hawk. P. C. c.* 25.

Many objections to *Indictments* are over-ruled. 5 *Rep.* 120. Where an *Indictment* is void for insufficiency, or if the trial is in a wrong county, another *Indictment* may be drawn for the same offence, whereby the insufficiency may be cured: and the *Indictment* may be laid in another county, (it is said,) though judgment be given. See 4 *Rep.* 45. *a. Sed qu.* If the judgment should not be reversed for error, before the party be arraigned, upon a second Indictment? By the common law, the court may quash any *Indictment* for such insufficiency as will make the judgment thereon erroneous: but the court may refuse to quash an *Indictment* preferred for the public good, though it be not a good *Indictment*, and put the party to traverse, or plead to it. *Mich.* 22 *Car. B. R.* Also the court will grant time for the king's counsel to maintain an *Indictment*, if they desire it.

Judges are not bound *ex debito justitiæ* to quash an *Indictment*; but may oblige the defendant either to plead or demur to it; and where *Indictments* are not good, the parties indicted may avoid them by pleading. 2 *Lil.* 42: 2 *Hawk.* 258. The court doth not usually quash *Indictments* for forgery, perjury, and nuisances, notwithstanding the *Indictments* are faulty; and it is against the course of the court to quash an *Indictment* for extortion. 2 *Lil.* 411: 5 *Mod.* 31.

If an *Indictment* be good in part, though the other part of it is bad, the court will not quash it; for if an offence sufficient to maintain the *Indictment* be well laid, it is good enough, although other facts are ill laid. *Latch.* 173: *Poph.* 208: 1 *Salk.* 384. One that is convicted upon an erroneous *Indictment*, cannot after the conviction move to have the *Indictment* quashed; but must bring his writ of error to reverse the judgment given against him upon the *Indictment*. 2 *Lil.* 43.

If the party indicted is outlawed upon the *Indictment*, the court will not quash the *Indictment*, though erroneous; but will force the party outlawed to bring his writ of error to reverse the outlawry. *Mich.* 24 *Car. B. R.*

The *stat.* 7 *W.* 3. *cap.* 3. ordains, That no *Indictment* for treason, *&c.* or any process thereon, shall be quashed, on motion of the prisoner, or his counsel, for mis-writing, false *Latin*, &c. unless exception be made before evidence given in court; nor shall any such defects, *&c.* after conviction, be caused to arrest judgment; though any judgment given upon such *Indictment* may be reversed on a writ of error, *&c.*

Counts in an *Indictment* cannot be struck out as they may in an information; for the court cannot strike out that which the grand jury have found. *Hardr.* 203.

IV. All capital crimes whatsoever, and also all kinds of inferior crimes of a public nature, as misprisions and all other contempts, all disturbances of the peace, all oppressions, and all other misdemeanors whatsoever, of a public evil example *against the common law*, may be indicted; but no injuries of a private nature, unless

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they some way concern the king. And where an offence is made punishable by statute, the true rule seems to be, that if the offence was punishable before the statute prescribed a particular method of punishing it, then such particular remedy is cumulative, and does not take away the former remedy; but where the statute only enacts, That the doing an act not punishable before shall for the future be punishable in a certain particular manner, there it is necessary to pursue such particular method, and not the common law method of Indictment. 2 *Burr*. 799, 805, 854: *Cowp*. 524, 650. And it hath been adjudged, that if a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorises a proceeding by way of Indictment. 2 *Hawk. P. C. c*. 25. § 4, and *note*. See *ante* III.

Indictments are for the benefit of the Commonwealth and the public good; and to be preferred for *criminal* not *civil* matters; they may be of high treason, petit treason, felony, trespass, and in all sorts of pleas of the crown; but not of injuries of a *private* nature, which do not concern the king, and the public. *Co. Lit*. 126, 303: 4 *Rep*. 44. An Indictment lies against one for assaulting and stopping another on the highway, being a breach of the peace. *Hil*. 22 *Car*. It lies for cheating a person at play, with false dice, or any other cheating: but it is not indictable for one man to make a fool of another, in the case of cheats getting money, &c. though action may be brought. 2 *Lill*. 44: 1 *Salk*. 479. Except in the cases specified in the act of 30 *Geo*. 2. *c*. 24, commonly called the statute of *False Pretences*. See title *Cheat*.

Indictment will not lie for a private nusance, wherein action on the case only lies; and where a person is indicted for trespass, which is not indictable at law, but for which action should be had; or if a man be indicted for scandalous words, as calling another rogue, &c. such *Indictments* are not good; *for private injuries are to be redressed by private actions*. 2 *Lill. Abr*. 42. But where a person is beaten, he may proceed for this trespass by *Indictment*, or information, as well as action. *Pasch*. 24 *Car. B. R*.

Where, in an action on the case, a defendant justifies for words, as calling the plaintiff *thief*, &c. if on the trial it be found for the defendant, *Indictment* may be brought forthwith to try the plaintiff for the felony. 2 *Lill*. 44. If a civil action of trover be brought for goods taken, after recovery the party may be *indicted* for trespass or felony, for the same taking: but if the first prosecution had been criminal, as an *Indictment* for trespass, &c and the crime appears to be felony; there you cannot have verdict or judgment on the Indictment for trespass till the felony is tried, it being the inferior offence. *Mod. Cas*. 77.

It is said that trover lies not for goods stolen, until the offender is convicted, &c. on *Indictment* of felony. 1 *Hale's Hist. P. C*. 546. A parson may be indicted for preaching against the government of the church, the civil and ecclesiastical government being so incorporated together, that one cannot subsist without the other; and both center in the king; wherefore to speak against the church, is within the statute 13 *Car*. 2. *Sid*. 69: 2 *Nels. Abr*. 959. And a parson was indicted for pronouncing absolution to persons condemned for treason, at the place of execution, without shewing any repentance. 5 *Mod*. 363. Also a parson hath been indicted, and fined, &c. for drinking healths to the memory of traitors. 3 *Mod. Rep*. 52.

It is not an indictable offence to impede the public intercourse by delivering hand-bills in the streets. 1 *Bur*. 516. Nor to throw down skins into a public way, which accidentally occasions a personal injury. *Stra*. 190. Nor to kill a hare. *Stra*. 679. Nor can one be indicted for an offence made penal by statute, without it directs to whom the penalty is payable. *Stra*. 828. Nor for acting unqualified as a justice of peace. *Cro. Jac*. 643. Nor for entering a yard, erecting a shed, unthatching a house, or by numbers keeping another out of possession, if unattended with violence or riot, &c. 3 *Burr*. 1698, 1706, 1727, 1731. Nor for selling short measure. 1 *Wils*. 301: 3 *Burr*. 1697. Nor for excluding commoners by enclosing. *Cro. Eliz*. 90. Nor for an attempt to defraud, if neither by false tokens or conspiracy. *Stra*. 793, 866: 6 *Mod*. 105. Nor for secreting another. 2 *Ld. Raym*. 1368. Nor for bringing a bastard child into a parish. *Stra*. 644: 3 *Burr*. 1645: 2 *Vez*. 450; but see this Dictionary, titles *Churchwardens*; *Bastard*.

See further on the subject of Indictments at length. 2 *Hawk. P. C. c*. 25.

INDICTOR, He that indicteth another man for any offence; as *indictee* is the party that is indicted.

INDISTANTER, Without delay. *Mat. Westm. Anno* 1244.

INDIVISUM, What two persons hold in common without partition; as where it is said he holds *pro indiviso*, &c. *Kitch*. 241.

INDOLIS, A studious young man, or a youth. *Mon. Angl*. 3 *tom. p*. 120.

INDOMIT, Boisterous and ungovernable. *Law Fr. Dictionary*.

INDORSEMENT, *Indorsamentum*.] Any thing written on the back side of a deed; thus, receipts for consideration-money, and the sealing and delivery, &c. on the back of deeds, are called *Indorsements*. *West Symb. par*. 2. *s*. 157. On sealing of a bond any thing may be *indorsed* or subscribed upon the back thereof, as part of the condition, and the *Indorsement* and that shall stand together. *Moor*, 679. See titles *Bond*; *Condition*. There is also an *Indorsement* of *bills* or *notes*, of what part thereof is paid, and when, &c. And in another sense it is a writing a man's name only on the back of *bills of exchange*, &c. See title *Bills of Exchange*.

INDOWMENT. See *Endowment*.

INDUCEMENT, What is alleged as a motive or incitement to a thing; the term is used specially in several cases, *viz*. *Inducement* to actions, to a traverse in pleadings, a fact or offence committed, &c. *Inducements* to actions need not have so much certainty as in other cases: a general *indebitatus* is not sufficient, where it is the ground of the action; but where it is but the *Inducement* to the action, as in consideration of forbearing a debt till such a day, (for that the parties are agreed upon the debt,) this being but a collateral promise, is good without shewing how due. *Cro. Jac*. 548: 2 *Mod*. 70.

A man ought to induce his traverse when he denies the title of another, because he should not deny it till he shew some colourable title in himself; for if the title traversed be found naught, and no colour of right ap-

pears for him who traversed, there can be no judgment given: but an *Inducement* cannot be traversed, because that would be a traverse after a traverse, and quitting a man's own pretence of title, and falling upon another. *Cro.* 265, 266: 3 *Salk.* 357. An *Inducement* to a traverse must be such matter as is good and justifiable in *law. Cro. Eliz.* 829. There is an *Inducement* to a justification, when what is alleged against it is not the substance of the plea, &c. *Cro. Jac.* 138: *Moor* 847: 2 *Nels. Abr.* 986. See title *Pleading*.

INDUCTION, *Inductio.* i. e. a leading into.] The giving a Parson possession of his church: after the bishop hath granted institution, he issues out his mandate to the archdeacon to induct the clerk, who thereupon either does it personally, or usually commissions some neighbouring clergyman for that purpose; which is compared to livery and seisin, as it is a putting the minister in actual possession of the church, and of the glebe lands, which are the temporalities of it. This *Induction* is done in the following manner: one of the clergymen commissioned takes the parson to be inducted by the hand, lays it on the key of the church, and pronounces these words; *By virtue of this commission, I induct you into the real and actual possession of the rectory of*, &c. *with all its appurtenances*. Then he opens the church door, and puts the parson into possession thereof, who commonly tolls a bell, &c. and thereby shews and gives notice to the people that he hath taken corporal possession of the said church: if the key of the church door cannot be had, the clerk to be inducted may lay his hand on the ring of the door, the latch of the church-gate, on the church-wall, &c. and either of these are sufficient: also *Induction* may be made by delivery of a clod, or turf of the glebe, &c. Ordinarily the bishop is to direct his mandate to the archdeacon, as being the person who ought to induct or give possession unto the clerks instituted to any churches within his archdeaconry: but it is said, the bishop may direct his mandate to any other clergyman to make *Induction*. See *stat.* 38 *Ed.* 3. *st.* 2. *cap.* 3. And by prescription, others as well as archdeacons may make *Inductions*. *Pars. Counsel.* 8. See 1 *Comm.* 391.

An *Induction* made by the patron of the church, is void; but bishops and archdeacons may induct a clerk to the benefices of which they are patrons, by *prescription*, &c. 11 *H.* 4. 7. The dean and chapter of cathedral churches are to induct prebends; though it hath been held, if the bishop doth induct a prebend, it may be good *at the common law*. 11 *Hen.* 4. 7: 11 *Hen.* 6. In some places a prebend shall be in possession, without any *Induction*: as at *Westminster*, where the king makes collation by his letters patent. If the king grants one of his free chapels, the grantee shall be put in possession by the sheriff of the county, and not by the bishop.

But no *Induction* is necessary to a *donative*, where the patron by donation in writing puts the clerk into possession, without presentation, &c. 11 *Hen.* 4. 7. If the authority of the person who made the mandate for *Induction*, determines by death or removal, before the clerk is inducted, the *Induction* afterwards will be void; as where, before it is executed, a new bishop is consecrated, &c. But if the archbishop, during the vacancy of a see, as guardian of the spiritualities, issue a mandate to induct a clerk to a church, it is good though not executed before there is a new bishop. 2 *Lev.* 299: 1 *Ventr.* 309.

Induction is a temporal act; and if the archdeacon refuse to induct a parson, or to grant a commission to others to do it, action on the case lies against him, on which damages shall be recovered; he may likewise be compelled, by sentence in the Ecclesiastical Court, to induct the clerk, and shall answer the contempt. 12 *Rep.* 128.

It is *Induction* which makes the parson complete incumbent, and fixes the freehold in him; and a church is full by *Induction*, which cannot be avoided but by *quare impedit* at common law. 4 *Rep.* 79: *Plowd.* 529: *Hob.* 15. A bishop sued in the court of audience, to repeal an institution, after *Induction* had, and a *prohibition* was granted; *because an institution is not examinable in the Spiritual Court after* Induction, but then a *quare impedit* lies. *Moor* 860. It is *not* the *admission* and but the *Induction* to a *second benefice*, which makes the *first void*, in case of *pluralities*, &c. *Moor* 12. See this Dictionary, title *Advowson* II; *Parson*.

INDULGENCES, According to the doctrine of the *Romish* church, all the good works of the Saints, over and above those which were necessary towards their own justification, together with the infinite merits of *Jesus Christ*, are deposited in one inexhaustible treasury. The keys of this were committed to St. *Peter*, and to his successors the Popes, who may open it at pleasure, and by transferring a portion of this superabundant merit to any particular person, *for a sum of money*, may convey to him either the pardon of his own sins, or a release for any one in whom he is interested, from the pains of purgatory. Such Indulgences were first invented in the eleventh century by *Urban* II. *Robertson's Char.* V. ii. 79. See the *stat.* 25 *Hen.* 8. *c.* 21. *sec.* 27.; and this Dictionary, titles *Rome*; *Papists*.

IN ESSE, *In being.*] The learned make this distinction between things *in esse* and *in posse*; as a thing that is not, but may be, they say is *in posse*, or *in potentiâ*; but what is apparent and visible, they allege is *in esse*, *viz.* that it has a real being, whereas the other is casual, and but a possibility. A child, before he is born, is a thing *in posse*; after he is born, and for many legal purposes after he is conceived, he is said to be *in esse*, or actual being. See titles *Posthumous Children*; *Limitation*; *Estates*; *Wills*, &c.

INEWARDUS, *Inwardus.*] A guard, a watchman, one set to keep watch and ward. *Lib. Domesday. Chenth. Heref.*

INFALISTATUS, This word occurs only in *Ralph de Hengham, Summa parva, cap.* 3, recapitulating the several punishments for felony. Mr. *Selden*, in his notes on that author, says, "It appears that several "customs of places made in those days capital punish- "ments several. But what is *Infalistatus*? In regard of "its being a custom used in a port-town, I suppose it was "made out of the *Fr.* word *falize*, which is *fine sand by* "*the water side*, or *a bank of the sea*. In this sand "or bank it seems their execution at *Dover* was." The elaborate *Du Fresne* condemns this derivation and this sense of the word, but yet gives no better. Therefore (till we have more authority) we may conclude that *infalistatus* did imply some capital punishment inflicted

flicted on the sands or sea-shore: perhaps *infalistatio* was exposing the malefactor to be laid bound upon the sands, till the next full tide carried him away; of which custom, there is some dark tradition. The penalty took its name from the *Norman falese, falesia*, which signified not only the sands, but rather the rocks and cliffs adjoining or impending on the sea-shore. *Cowel.* See the like use of *falesia* in *Mon. Angl. tom.* 2. *p.* 165. *b.*

INFAMY, Which extends to forgery, perjury, gross cheats, &c. disables a man to be a witness, or juror; but a pardon of crimes restores a person's credit to make him a good evidence. 2 *Hawk. P. C. c.* 46. *s.* 19. Judgment of the pillory induces *Infamy* by the common law; but, by the civil and canon law, if the cause for which the person was convicted was not infamous, it infers no *Infamy*. 3 *Lev.* 426. See titles *Evidence*; *Witness*.

INFANGTHEF, INFANGENETHEOF, from Sax. *Fang* or *Fangen*, i. e. *capere*, and *Theof*, *Fur*.] A privilege or liberty granted unto lords of certain manors, to judge any thief taken *within* their fee. *Bract. lib.* 3. *c.* 35. In some antient charters, it appears that the thief should be taken in the lordship, and with the goods stolen, otherwise the lord had not jurisdiction to try him in his court; though by the laws of king *Edward the Confessor*, he was not restrained to his own people or tenants, but might try any man who was thus taken in his manor: it is true afterwards, the word *infangthef* signified *Latro captus in terra alicujus seisitus de aliquo Latrocinio de suis propriis hominibus*. See *stat.* 1 & 2 *P. & M. c.* 15. The franchises of *infangthef* and *outfangthef*, to be heard and determined in court-barons, are antiquated, and long since gone. 2 *Inst.* 31. The word is sometimes preceded by an *H*.

INFANT, *Infans*.] A person under twenty-one years of age; whose acts are in many cases either *void*, or *voidable*. *Co. Lit. lib.* 1. *cap.* 21: *lib.* 2. *cap.* 28.

I. *The several Ages distinguished by Law for various Purposes.*
II. *Who are subject to, or free from, the Incapacities of Minors; and how far the Law regards Infants* in ventre sa mere.
III. *Of the* Trial *of Infancy.*
IV. *Of what* Offices, Trusts, *and* Functions *an Infant is capable.*
V. *What an Infant may do for his own Advantage; how far his Acts are* good, void, *or* voidable, &c. *Of Contracts for Necessaries, Judicial Acts, and Acts in Pais.*

I. Though a person is stiled in law an Infant, till attaining the age of twenty-one years, which is termed his full age, yet there are many actions which he may do before that age, and for which various times or ages are appointed. Thus, a Male at *twelve* years old may take the oath of allegiance; at *fourteen* he is at years of discretion, and therefore may disagree or consent to marriage; may choose his guardian; and if his discretion be actually proved, may make his testament of his personal estate; at *seventeen* may be an executor; and at *twenty-one* is at his own disposal, and may alien his lands, goods, and chattels. A Female also, at *seven* years of age may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage, and if proved to have sufficient discretion, may bequeath her personal estate; at *fourteen* is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty one* may dispose of herself and her lands: so that full age, in male or female, is twenty-one years; which age is completed on the day preceding the anniversary of a person's birth. *Salk.* 44. 625: *Ld. Raym.* 480, 1096: 1 *Bro. P. C.* 468. (8vo. edit.) *Toner* v. *Sansam*. If, therefore, one is born on the 1st of *January*, he is of age to do any legal act on the morning of the last day of *December*, though he may not have lived twenty-one years by near forty-eight hours; the reason is, that in law there is no fraction of a day, and if the birth were on the first second of one day, and the act on the last second of the other, then twenty-one years would be complete; and in law it is the same, whether a thing is done upon one moment of the day or another: and hence probably originated the distinction of a year *and a day*, &c. by which is meant a year complete in common acceptation.

From the observations made on the daily actions of *Infants*, as to their arriving at discretion, the laws and customs of every country have fixed upon particular periods, on which they are presumed capable of acting [illegible] reason and discretion; in our law the full age of [illegible] or woman is twenty-one years. 3 *New Abr.* 118.

Therefore, if one under the age of twenty one years makes his will, and thereby devises his *lands*, and after attains the age of twenty-one years, and dies, without making a new publication thereof, *this devise is void*. *Dyer* 143: *Raym.* 84: 1 *Sid.* 162.

Though a person under the age of twenty-one cannot directly dispose of his lands, yet as one under that age may (pursuant to the statute of 12 *Car.* 2. *cap.* 24,) dispose of the custody of his *infant* child, it is said, such disposition draws after it the land, &c. as incident to the custody. *Vaugh.* 178.

The reason why an *Infant male* at *fourteen*, and *female* at *twelve*, may dispose of their personal estate at those ages is, that the common law has appointed no time, being a matter cognizable in the Spiritual Court, which herein proceeds according to the civil law; by which law, *Infants* at those ages are presumed to have sufficient discretion to make such disposition; therefore their testaments in these cases are not to be set aside, or controlled in Chancery, or the temporal courts. 2 *Mod.* 315: 2 *Jones* 210: *Comb.* 50: 1 *Vern.* 469: *Preced. Chan.* 316.

Though the age of consent to a marriage in an *Infant male* is *fourteen*, and in a *female twelve*; yet they may marry before, and if they agree thereto when they attain these ages, the marriage is good; but they cannot disagree before then; and if one of them be above the age of consent, and the other under such age, the party so above the age may as well disagree as the other; for both must be bound, or neither. *Co. Lit.* 33, 78, 79. 2 *Inst.* 434: 3 *Inst.* 88, 89: 6 *Co.* 22: 7 *Co.* 43: 1 *Rol. Abr.* 340, 341.

But though the party above age may as well disagree as the other, yet it is said that the party cannot do it *before* the other arrives at the proper age: also it is said to have been adjudged, that if a man marries a woman that is within the age of *twelve* years, and after the woman at *eleven* years of age disagrees to the marriage, and after the husband takes another wife, and hath

hath issue by her, that this is a bastard; *for the first marriage continues notwithstanding the disagreement of the woman*; for she cannot disagree within the age of *twelve* years, and so her disagreement is void. *Co. Lit.* 79: 1 *Rol. Abr.* 341.

If a man marries a woman who is *within* the age of *twelve* years, and after the feme covert *within* the age of consent disagrees to the marriage, and *after* the age of *twelve* years marries another, the first marriage is absolutely dissolved, so that *he may take another wife*; for though the disagreement within the age of consent was not sufficient, yet her taking another husband, after the age of consent, *affirms the disagreement*, and so the marriage avoided *ab initio*. 1 *Rol. Abr.* 341.

See the case of Mr. *Fitzgerrard*, Lord *Decius*, and Mr. *Villers*, 3 *New Abr.* 119, 120. See also, 1 *Inst.* 33: 1 *Rol. Abr.* 340: *Dyer* 369: *Moor* 575: 1 *Rol. Abr.* 341: 1 *Inst.* 79: 7 *Co. Keen's case*: 6 *Co. Ambrosia George's case*: 7 *H.* 6. 11: 6 *Co.* 22.

At common law an Infant at *fourteen* was *out* of *ward* of guardian in socage, to *choose* a *guardian*; and at *fifteen* to have had *aid pur fair Fitz Chevalier*. *Co. Lit.* 98. *b*: *Hob.* 225.

The authority of a guardian in socage, ceases at the age of fourteen, at which age the *Infant* may call his guardian to an account, and may choose a new guardian. *Lit sect.* 103; *Co. Lit.* 75: 2 *Inst.* 135.

One *within* the age of *twenty-one* years may do *homage*, but not fealty; because, in doing of fealty he ought to be sworn, which an *Infant* cannot be. *Co. Lit.* 65. *b*: 2 *Inst.* 11.

An *Infant* at the age of *seventeen*, may be a *procurator* as well as *executor*; and in this both the civil and common law agree. 5 *Co.* 29. *b*: *Off. Ex.* 307: 1 *Hal. Hist. P. C.* 17.

Infancy is a good cause of refusal of a clerk; also by the statutes 13 *Eliz. cap.* 12, and 13 & 14 *Car.* 2. *c.* 4, none is to be admitted a deacon, unless he be twenty-three *at least*, nor a priest, unless he be twenty-four. *Gibs. Cod.* 168: 3 *Mod.* 67.

By the custom of *gavelkind*, an *Infant* at the age of *fifteen* is reckoned *at full age to sell his lands*; and this seems to have been taken from the civil law, which reckons *fourteen* the *ætas pubertatis*; for they reckoned that though the *Infant* had ended his years of *guardianship* at *fourteen*, yet he might not have completed his account with his guardian till the age of *fifteen*, and that was esteemed to be the age when he was completely out of guardianship; therefore at this age he was allowed to sell the lands descended to him: but in this the customs of *England* differ from the *civil law*; for the *civil law* does not allow of this disposition till the age of twenty-five; therefore this must have been allowed by the old *Saxon* law, because they thought that much time was lost, if the *Infant* could only use his own estate without being able to dispose of it in a way of traffick, or in marriage, till twenty-five; therefore they allowed the *Infant* to sell (but under great limitations and restrictions, that he might not be defrauded); and by this means they thought there was sufficient provision made for the necessity of commerce. *Lamb.* 624, 625. See title *Gavelkind*.

Also by *custom* in some places, an *Infant* seised of lands in socage may, at the age of *fifteen years*, make a *lease for years*, which shall bind him after he comes of age; for the *custom* makes *fifteen* his full age to that purpose. *Co. Lit.* 45. *b*.

Also, by the *custom* of *London*, an *Infant* unmarried, and above the age of fourteen, if under twenty-one, may *bind himself apprentice* to a freeman of *London*, by indenture with proper covenants; which *covenants*, by the custom of *London*, shall be as binding as if he were of full age. *Moor* 134: 2 *Bulst.* 192: 2 *Rol. Rep.* 305: *Palm.* 361: 1 *Mod.* 271. See *stats.* 5 *Eliz. c.* 4: 43 *Eliz. c.* 2: and this Dictionary, title *Apprentice*.

In *Criminal Cases*, the law of *England* does in some cases privilege an Infant under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like; and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences; for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which Infants when full-grown, are at least as liable as others to commit,) for these an Infant above the age of fourteen is equally liable to suffer, as a person of the full age of twenty-one. 1 *Hal. P. C.* 20, 21, 22.

With regard to capital crimes, the law is still more minute and circumspect, distinguishing with greater nicety the several degrees of age and discretion. By the antient *Saxon* law the age of twelve years was established for the age of possible discretion, when first the understanding might open. *L. L. Athelstan, Wilk.* 65. From thence till the offender was fourteen, it was *ætas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but, under twelve, it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent of any capital crime which he in fact committed. But by the law as it now stands, and has stood at least ever since the time of *Edward* III, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet ætatem.*" Under seven years of age indeed an infant cannot be guilty of felony; *Mir. c.* 4. § 16: 1 *Hal. P. C.* 27: *Plowd.* 19: for then, by presumption in law, he cannot have discretion; and, in fact, a felonious discretion is almost an impossibility in nature, and no averment shall be received against that presumption; but at eight years old he may be guilty of felony. *Dalt. Just. c.* 147. Also, under fourteen, though an Infant shall be *primâ facie* adjudged to be *doli incapax*; yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged, because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed; which hiding manifested a consciousness of guilt, and a discretion to discern

discern between good and evil. 1 *Hal. P. C.* 26, 7. And there was once an instance, where a boy of eight years old was tried at *Abingdon* for firing two barns: and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. *Emlyn on* 1 *Hal. P. C.* 25. Thus also, at the assizes for *Bury*, in the year 1748, one *William York*, a boy of ten years old was convicted on his own confession of murdering his bed-fellow; there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the Judges, that he was a proper subject of capital punishment. *Foster*, 72. But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction. 4 *Comm.* 22, 24.

Lord *Hale* lays down the following further cautions on this subject:

If the party be above twelve, though under fourteen, and appears to be *doli capax, and could discern between good and evil at the time of the offence committed*, he may be convicted, and undergo judgment and execution of death, though he hath not attained the age of fourteen; but herein, according to the nature of the offence and circumstances of the case, the Judge may, or may not, in discretion reprieve him, before or after judgment, in order to obtain the king's pardon. If an Infant be above *seven*, and under *twelve* years, and commit a capital offence, *primâ facie* he is to be judged not guilty, and to be found so; because he is supposed not of discretion to judge between good and evil: yet if it appear, by *strong and pregnant evidence and circumstances*, that he had discretion to judge between good and evil, judgment of death may be given against him; for *malitia supplet ætatem*; but herein the circumstances must be inquired of by the jury, and the Infant is not to be convict upon his confession: also herein, my Lord *Hale* says, that it is prudent after conviction to respite judgment, or at least execution; but that if he be convicted the Judge cannot discharge, but only reprieve him from judgment, and leave him in custody till the king's pleasure be known. 1 *Hal. Hist. P. C.* 26, 27.

II. The privilege or incapacity of Infancy does not extend to the King; for the political rules of government have thought it necessary, that he who is to govern the whole kingdom should never be considered as a minor, incapable of governing himself and his affairs. *Co. Lit.* 43: *Dyer* 209. *b.*

Therefore if the King within age make any lease or grant, he is bound presently, and cannot avoid them, either during his minority, or when he comes of full age. *Plowd.* 213. *a*: 5 *Co.* 27: 7 *Co.* 12. So, if the king aliens land which he had by descent from his mother, he shall not defeat it, by reason that he was within age at the time of the alienation; for his body politic, which is annexed to his body natural, takes away the imbecility of the natural body, and draws it, and all the effects thereof, to itself; *quia magis dignum trahit ad se minus dignum.* See *Plowd.* 213, 14.

So if the King consent to an act of parliament during his minority, yet he cannot after avoid this act; because the king, *as king*, cannot be a minor; for as king he is a body politic. *Co. Litt.* 43: 1 *Roll. Abr.* 728.

Also the acts of a mayor, and commonalty, shall not be avoided, by reason of the nonage of the mayor. *Cro. Car.* 557: 5 *Co.* 27.

Although a duke, earl, or the like, be but a minor, or not above ten years of age, in the custody and in the family of another nobleman, who may and doth retain chaplains, yet he may qualify chaplains to hold two benefices with cure, as if he was of full age. 4 *Co.* 119.

An Infant in gavelkind shall have his age, and all other privileges of the Infant at common law; because though he hath the privilege of alienation at fifteen, yet that doth not take from him any privilege he had before at common law. 1 *Rol. Abr.* 144.

A bastard being impleaded shall have his age: *for the dilatory plea must be determined before the pleas in chief can come on*; so that the plea of infancy will stay the suit before it can be inquired, whether he is or is not a bastard. *Co. Litt.* 244. *b.*

An Infant *in ventre sa mere*, or in the mother's womb, is supposed in law, to be born for many purposes. It is capable of having a legacy, or, a surrender of a copyhold estate made to it. (See *Post* this division.) It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. *Stat.* 10 & 11 *W.* 3. *c.* 16: 1 *Comm.* 130. See this Dictionary, title *Posthumous Children.*

A child *in ventre sa mere* may be appointed executor; also if there are two or more at a birth, they shall be joint executors, or joint legatees of the thing bequeathed. *Godolph. Orph. Leg.* 102.

If there be bastard *eigne* and *mulier puisne*, and the bastard enters, and dies seised, his issue shall inherit the lands, and exclude the *mulier* for ever; but in this case if the bastard had died leaving issue *in ventre sa mere*, and the *mulier* had entered, and then a son is born, yet he cannot enter upon the *mulier*: herein our law differs from the civil law: for our law requires an immediate descent, which cannot be before the person is *in esse*; also by our law the freehold cannot be in abeyance. *Co. Litt.* 244.

A devise of lands to an Infant *in ventre sa mere* is good, and the freehold shall not be in abeyance, but shall descend to the heir at law in the mean time. Though formerly it was doubted. *Vide* 11 *Hen.* 6. 13: *Bro. Devise* 32: *Moor* 177, 637: 2 *Bulst.* 273: *Cro. Eliz.* 423: 1 *Lev.* 135: 1 *Sid.* 153: *Raym.* 163: 1 *Keb.* 85: 1 *Salk.* 231: 2 *Mod.* 9.

However all the books agree, that a devise to an Infant *when he shall be born*, or *when God shall give him birth*, is good, *as an executory devise*, and that the freehold shall descend to the heir at law in the mean time. 1 *Sid.* 153: 1 *Lev.* 135: *Raym.* 163. *S. C. Snow* v. *Cutler*. It may be devised to *trustees*.

So it is clear, that if land be devised for life, the remainder to a posthumous child, that this is a good contingent remainder; because there is a person in being to take the particular estate; and if the contingent remainder vests during the continuance of the particular estate,

estate, or *eo instante* that it determines, it is sufficient. *Moor*. 637: 3 *Lev*. 408: 4 *Mod*. 359: 1 *Salk*. 227: *Carth*. 309. See this Dictionary, titles *Remainder*; *Estate*; *Posthumous Child*; *Executory Devise*.

Also it seems agreed, that a man may surrender copyhold lands immediately to the use of an Infant *in ventre sa mere*; for a surrender is a thing executory, and nothing vests before admittance; and therefore, if there be a person to take at the time of the admittance, it is sufficient, and not like a grant at common law, which putting the estate out of the grantor must be void, if there be nobody to take. 1 *Roll. Rep*. 109, 138: 2 *Bulst*. 273: *Co. Copyh*. 9; and see *Moor* 637.

If an usurpation be had on one *in ventre sa mere*; at the next turn after his birth, he shall be relieved on the statute of *Westm*. 2. *cap*. 5: *Hob*. 240.

An Infant *in ventre sa mere* may have a distributive share of intestate property even with the half blood. 1 *Ves* 81. It is capable of taking a devise of land. See *ante* and 2 *Atk*. 117: 1 *Freem*. 244, 293. It takes, under a marriage settlement, a provision made for children living at the death of the father. 1 *Ves*. 85. And it has lately been decided, that marriage, and the birth of a posthumous child, amount to a revocation of a will executed previous to the marriage. 5 *Term. Rep*. 49. It takes land by descent, though, in that case, the presumptive heir may enter and receive the profits for his own use till the birth of the child, which seems to be the only interest it loses by its situation. 3 *Wils*. 526. See this Dictionary, titles *Descent*; *Posthumous Children*.

III. INFANCY is to be tried by inspection of the court, or by jury: and herein it is laid down as a rule in some books, that wheresoever it is alleged upon the pleading, that the party was and yet is under age, there it shall be tried by inspection; but where the Infant is of full age at the time of the plea, there it shall be tried *per pais*. 1 *Lev*. 142: 1 *Sid*. 321: 1 *Keb*. 796: *Cro. Jac*. 59, 581.

But as to judicial acts, or acts done by an Infant in a court of record, and which he is allowed to avoid, the trial thereof must be by inspection; therefore if an Infant levies a fine, he must reverse it by writ of error: and this must be brought during his minority, that the court may by inspection determine the age of the Infant. *Co. Lit*. 380: *Moor* 76: 2 *Rol. Abr*. 15: 2 *Inst*. 483: 2 *Bulst*. 320: 12 *Co*. 122.

If an Infant brings a writ of error to reverse a fine for his nonage, and, after inspection and proof of infancy by witnesses, dies before the fine is reversed, his heir may reverse it; because the court having recorded the nonage of the cognizor, ought to vacate his contract when he appeared to be under a disability at the time he entered into it. *Co. Lit*. 380: *Moor*. 884.

An Infant acknowledged a fine, and the cognizees omitting to have the fine ingrossed till he came of age, in order to prevent the infant from bringing a writ of error; yet the court upon view of the conuzance produced by the Infant, and upon his prayer to be inspected and his age examined, *recorded his nonage, to give him the benefit of his writ of error*, which he must otherwise lose, his nonage determining before the next term. *Moor* 189; & *vide Cro. Jac*. 230, 1.

So if an Infant suffer a common recovery by appearing in person, this must be reversed during his minority by inspection of the Judges. But it is said, that if an Infant suffers a recovery, in which he appears by attorney, he may reverse it after his full age, as it may be discovered whether he was within age when the recovery was suffered; because it may be tried *per pais* whether the warrant of attorney was made by him when he was an Infant. 1 *Sid*. 321; 1 *Lev*. 142.

It is said, that in all cases where the party pleads that he was within age at *B*. and alleges a place, that there the trial may be well enough where it is alleged; where no place is alleged, there, in personal actions, where the writ is brought; and in real actions where the right of the land depends upon infancy, there the trial is to be where the land lies, and if not, where the action is brought. *Skin*. 10, 11: *Cro. Eliz*. 818. *S. P*.

In case of a suit to reverse a fine for nonage of the cognizor, or to set aside a statute or recognizance entered into by an Infant; here, and in other cases of the like sort, a writ shall issue to the sheriff, commanding him that he constrain the said party to appear, that it may be ascertained by the view of his body by the king's justices, whether he be of full age or not; *per aspectum corporis sui constare poterit justiciariis nostris prædictus A sit plenæ ætatis necne*." 9 *Rep*. 31. This question of nonage was formerly, according to *Glanvil*, (*l*. 13. *c*. 15,) tried by a jury of eight men; though now it is tried by inspection. If however the court has, upon inspection, any doubt of the age of the party, (as may frequently be the case,) it may proceed to take proofs of the fact, by witnesses, church books, &c.; and particularly, may examine the Infant himself upon an oath of *voire dire* (*veritatem dicere*), that is, to make true answer to such questions as the court shall demand of him, or the court may examine his mother, his godfather, or the like. 2 *Roll. Abr*. 573.

IV. AN INFANT it seems, is capable of such offices as do not concern the administration of justice, but only require skill and diligence; and there he may either exercise them himself when of the age of discretion, or they may be exercised by deputy; such as the offices of park-keeper, forester, gaoler, &c. *Plowd*. 379, 381: 9 *Co*. 48, 97: See title *Offices*.

But it is said, that an Infant is not capable of the stewardship of a manor, or of the stewardship of the courts of a bishop; because by intendment of law he hath not sufficient knowledge, experience, and judgment to use the office, and also because he cannot make a deputy. *Co. Lit*. 3. *b*: 1 *Rol. Abr*. 731: 2 *Rol. Abr*. 153: *March* 41, 43: *Cro. Eliz*. 636: *Cro. Car*. 556.

An Infant cannot be an attorney, bailiff, factor, or receiver. *F. N. B*. 118: 1 *Rol. Abr*. 117: *Co. Lit*. 172: *Cro. Eliz*. 637. An *Infant* cannot exercise an office in a corporation. *Hardw*. 8, 9.

An Infant cannot be a common informer; for *stat*. 18 *Eliz*. *c*. 5, directs that such shall sue in proper person, or by attorney, which an Infant cannot do. *Bull. N. P*. 196.

As to Infants being witnesses, there seems to be no fixed time in which children are excluded from giving evidence; but it will depend in a great measure on the sense and understanding of the child, as it shall appear on examination in court. See *Bull. N. P*. 293. And, where they are admitted, concurrent testimony seems peculiarly desirable. 4 *Comm*. 214.

If an Infant, being master of a ship at *St. Christopher's* beyond sea, by contract with another, undertakes to carry certain goods from *St. Christopher's* to *England*, and there to deliver them; but does not afterwards deliver them according to agreement, but wastes and consumes them, he may be sued for the goods in the court of Admiralty, though he be an Infant; for this suit is but in nature of a detinue, or trover and conversion at the common law. 1 *Rol. Abr.* 530.

If an Infant keeps a common inn, an action on the case upon the custom of inns will not lie against him. 1 *Rol. Abr.* 2. cited *Carth.* 161.

So if an Infant draws a bill of exchange, yet he shall not be liable on the custom of merchants, but he may plead infancy in the same manner that he may to any other contract of his. *Carth.* 160. Or he may in this, as in all cases, give it in evidence on the general issue, but the fairest way is to plead it. *Bull. N. P.* 152. An Infant cannot be a juror. *Hob.* 325.

An Infant, or one under the age of twenty-one years, cannot be elected a member of the House of Commons; nor can any lord of parliament sit there until he be of the full age of twenty-one years. 2 *Inst.* 47. See title *Parliament*. As to Infant trustees, see *Post* V.

If an Infant be lord of a manor, he may grant copyholds, notwithstanding his nonage; for these estates do not take their perfection from the interest or ability of the lord to grant, but from the custom of the manor by which they have been demised, and are demisable time out of mind. 4 *Co.* 23. *b*: *Co. Copyholder* 79, 107: *Noy* 41: 8 *Co.* 65.

An Infant may present to a church; and here it is said, that this must be done by himself, of whatsoever age he be, and cannot be done by his guardian, for the guardian can make no advantage thereof, consequently has nothing therein whereby he can give an account, therefore the Infant himself shall present. *Co. Lit.* 17. *b.* 89. *a*: 29 *Ed.* 3. 5: 3 *Inst.* 156.

V. Infants have various privileges, and various disabilities; but their very disabilities are privileges, in order to secure them from hurting themselves, by their own improvident acts. An Infant cannot be sued but under the protection, and joining the name of his guardian; for he is to defend him against all attacks as well by law as otherwise; but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. *Co. Litt.* 135. This *prochein amy* may be any person who will undertake the Infant's cause; and it frequently happens, that an infant, by his *prochein amy*, institutes a suit against a fraudulent guardian.

With regard to estates and civil property, an Infant hath many privileges, which will be better understood on farther investigation: but this may be said in general, that an Infant shall lose nothing by non claim or neglect of demanding his right; nor shall any other *laches* or negligence be imputed to an Infant, except in some very particular cases; *viz.* in case of a fine where the time begins in the life of the ancestor; or of an appeal of death of his ancestor, where he brings not his appeal within a year and a day, *&c.* 1 *Inst.* 246, 380: *Wood's Inst.* 13. Laches shall prejudice an *Infant*, if he presents not to a church in six months. *Lit.* 402. It is generally true, that an Infant can neither alien his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract that will bind him. But still to all these rules there are some exceptions; part have been mentioned (see *Ante* I.) in reckoning up the different capacities which they assume at different ages; and there are others, a few of which when mentioned will serve as a general specimen of the whole. And, first, it is true, that Infants cannot alien their estates; but Infant trustees, or mortgagees, are enabled to convey, under the direction of the Court of Chancery or Exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint. *Stats.* 7 *Ann. c.* 19: 4 *Geo.* 3. *c.* 16. An Infant also may purchase lands, but his purchase is incomplete, for, when he comes to age, he may either agree or disagree to it, as he thinks prudent and proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement. *Co. Litt.* 2. It is farther generally true, that an Infant under twenty-one can make no deed but what is afterwards voidable; yet in some cases he may bind himself apprentice by deed indented, or indentures for seven years; and he may by deed or will appoint a guardian to his children, if he has any. See *stats.* 5 *Eliz. c.* 4: 43 *Eliz. c.* 2: *Cro. Car.* 179: *stat.* 12 *Car.* 2. *c.* 24: and this Dictionary, titles *Apprentice*; *Guardian*. See also, *stat.* 4 *Geo.* 1. *c.* 11. § 5; as to Infants contracting to serve in the plantations.

To enter more particularly into the subject.—An Infant is capable of inheriting, for the law presumes him capable of property; also an Infant may purchase, because it is intended for his benefit, and the freehold is in him till he disagree thereto; because an agreement is presumed, it being for his benefit, and because the freehold cannot be in the grantor contrary to his own act, nor can be in abeyance, for then a stranger would not know against whom to demand his right; and if at his full age the Infant agrees to the purchase, he cannot afterwards avoid it; but if he dies during his minority, his heirs may avoid it; for they shall not be bound by the contracts of a person who wanted capacity to contract. *Co. Lit.* 2, 8: 2 *Inst.* 203.

If an Infant take a lease for years rendering rent; if he enter upon the land he shall be charged with an action during his minority, because the purchase is intended for his benefit; but he may waive the term, and not enter, and if more rent be reserved upon the lease than the land is worth, he may avoid it. 2 *Bulst.* 69. If an Infant make a lease for years with remainder over, rendering rent, and, at full age, accepts the rent of the tenant for years, this shall be an assent to him in remainder, so that he shall not oust him after. *Plowd.* 546.

As to *Contracts for necessaries*, made by Infants, it is to be observed that, (strictly speaking,) all contracts made by Infants, are either void or voidable; because a contract is the act of the understanding, which during their state of infancy they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, *as to allow them to contract for their benefit and advantage*, with power, in most cases, *to recede from and vacate it, when it may prove prejudicial to them*; but in this contract for necessaries they are absolutely bound, and this likewise is in benignity to Infants, for if they

 were

were not allowed to bind themselves for necessaries nobody would trust them, in which case they would be in worse circumstances than persons of full age. 10 *H.* 6. 14: 18 *Ed.* 4. 2: 1 *Rol. Abr.* 729.

Therefore it is clearly agreed, that an Infant may bind himself to pay for his necessary meat, drink, apparel, physick, and such other necessaries, and likewise for his good teaching and instruction, whereby he may profit himself afterwards. *Co. Lit.* 172. *a.* &c. This binding means by *parol:* in fact, for *necessaries*, if there is not an actual promise the law implies a promise, but the Infant will not be bound by any bond, note, or bill, which he gives, though for necessaries, therefore a tradesman's best security will be the actual or implied promise. With respect to *schooling*, &c. it must be in cases where the credit was given, *bona fide*, to the Infant. But where an Infant is *sub potestate parentis*, and living in the house with his parents, he shall not then be liable even for necessaries. 2 *Black. Rep.* 1325.

It must appear that the things were actually *necessary*, and *of reasonable prices*, and *suitable to the Infant's degree and estate*, which regularly must be left to the jury; but if the jury find that the things were necessaries, and of reasonable price, it shall be presumed they had evidence for what they thus find; and they need not find particularly what the necessaries were, nor of what price each thing was; also if the plaintiff declares for other things, as well as necessaries, or alleges too high a price for those things that are necessary, the jury may consider of those things that were really necessaries, and of their intrinsick value, and proportion their damages accordingly. *Cro. Jac.* 360: 2 *Rol. Rep.* 144: *Poph.* 151: *Palm.* 361: *Goulf.* 168: *Godb.* 219: 1 *Leon.* 114.

If an Infant promises another, that if he will find him meat, drink and washing, and pay for his schooling, that he will pay 7 *l.* yearly, an action upon the case lies upon this promise; *for learning is as necessary as other things*, and though it is not mentioned what learning this was, yet *it shall be intended what was fit for him*, till it be shewn to the contrary on the other part; and though he to whom the promise was made does not instruct him, but pays another for it, the promise of re-payment thereof is good; if it appears that the learning, meat, drink, and washing could not be afforded for a less sum than 7 *l.* 1 *Rol. Abr.* 729: *Palm.* 528: 1 *Jon.* 182.

Assumpsit, for labour and medicines in curing the defendant of a distemper, &c. who pleaded infancy; the plaintiff replied, it was for necessaries generally; and upon a demurrer to this replication it was objected, that the plaintiff had not assigned in certain how, or in what manner, the medicines were necessary: but it was adjudged, that the replication in this general form was good. *Carth.* 110.

If an Infant be a mercer, and hath a shop in a town, and *there buys and sells*, and contracts to pay a certain sum to *J. S.* for wares sold to him by *J. S.* to resell, yet he is not chargeable upon this contract, for this trading is not immediately necessary *ad victum & vestitum*; and if this were allowed, Infants might be infinitely prejudiced, and buy and sell, and live by the loss. 1 *Rol. Abr.* 729: *Cro. Jac.* 494: 2 *Rol. Rep.* 45.

And as the contract of an Infant for wares, for the necessary carrying on his trade, whereby he subsists, shall not bind him; *so neither shall he be liable for money which he borrows to lay out for necessaries*; therefore the lender must, at his peril, lay it out for him, or see that it is laid out in necessaries. 5 *Mod.* 368: 1 *Salk.* 386-7.

In debt upon a single bill, the defendant pleaded that he was within age; the plaintiff replied, that it was for necessaries, *viz.* 10 *l.* for clothes, and 15 *l.* money lent for and towards his necessary support at the university; the defendant rejoined, *that the money was lent him to spend at pleasure*; *absque hoc*, that it was lent him for necessaries; and issue hereupon was found for the plaintiff, who had judgment in *C. B.*, but was reversed in *B. R.* on a writ of error; for the issue only being, whether this money was lent the Infant for necessaries, not whether it was laid out in necessaries, it cannot bind the Infant whichever way it is found; for it might have been borrowed for necessaries, and laid out in a tavern; and the law will not intrust the Infant with the application and laying of it out. 1 *Salk.* 386. See *Contra* as to a single bill given for necessaries; 1 *Lev.* 86: 1 *Keb.* 382, 416, 423. *S. C*: *Co. Lit.* 172. *S. P*: *Sed qu?* See *post.*

So if one *lends money* to an Infant, who actually lays it out in necessaries, yet this will not bind the Infant, nor subject him to an action; *for it is upon the lending that the contract must arise*, and after that time there could be no contract raised to bind the Infant, because after that he might waste the money, and the Infant's applying it afterwards for necessaries will not, by matter *ex post facto*, entitle the plaintiff to an action. 1 *Salk.* 279.

Although an Infant shall be liable for his necessaries, yet if he enters into an obligation with a penalty for payment thereof, this shall not bind him; for the entering into a penalty can be of no advantage to the Infant. *Cro. Eliz.* 290: *Moor* 679. *pl.* 929: *Co. Lit.* 172: 1 *Rol. Abr.* 729. But a bond or single bill for the exact amount of necessaries furnished will be valid. *Esp. N. P.* 164.

It is also said, that an Infant cannot either by parol-contract, or a deed, bind himself, even for necessaries, *in a sum certain*, and that should an Infant promise to give an unreasonable price for necessaries, that would not bind him; and that therefore it may be said that the contract of an Infant for necessaries, as a contract, does not bind him any more than his bond would; but only since an Infant must live as well as a man, the law gives a *reasonable price* to those who furnish him with necessaries. *Cases in Law and Equity* 85. And in a case where a warrant of attorney was given by an Infant and another, and judgment entered up thereon, the court on motion ordered the name of the Infant to be struck out, and set aside the judgment as against him. 2 *Black. Rep.* 1133.

If an Infant becomes indebted for necessaries, and the party takes a bond from the Infant, this shall not drown the simple contract, because the bond has no force. *Cro. Eliz.* 920.

But it is agreed, that an action on an account stated will not lie against an Infant, though it be for necessaries; *for he not having discretion, is not to be liable to false accounts*. *Co. Lit.* 172: *Lamb.* 169: *Noy* 87: 1 *Term Rep.* 40.

If an Infant comes to a stranger, who instructs him in learning, and boards him, there is an *implied contract in law*, that the party should be paid as much as his board and schooling are worth; but if the Infant at the time of his going thither was under the age of discretion, or if he

he were placed there upon a ſpecial agreement with ſome of the child's friends, the party that boards him has no remedy againſt the Infant, but muſt reſort to them with whom he agreed for the Infant's board, *&c. Allen* 94.

Neceſſaries for an Infant's wife are neceſſaries for him; but if provided only in order for the marriage, he is not chargeable, though ſhe uſe them after. *Stra.* 168. An Infant ſhall be liable for the nurſing his child. *Eſp. N. P.* 161.

Debts contracted during infancy, form however a good conſideration to ſupport a promiſe made to pay them when a perſon is of full age. 2 *Lev.* 144: 2 *Leon.* 215. And where the defendant pleads infancy, and the plaintiff replies that the defendant confirmed the promiſe or contract when he was of age, the plaintiff need only prove the promiſe, and the defendant muſt diſcharge himſelf by proof of the infancy. 1 *Term Rep.* 648.

Though a promiſe by an Infant will not bind him unleſs for neceſſaries, yet he ſhall take advantage of any promiſe made to him, though the conſideration were his promiſe when an Infant. And an Infant plaintiff has been allowed to recover on mutual promiſes of marriage. *Stra.* 937.

As to *Judicial Acts*, and acts done by an Infant in a court of record, they regularly bind the Infant and his repreſentatives, with the following ſavings and exceptions; as if an Infant levies a Fine, though the Judges ought not to admit the acknowledgment of one under that diſability, yet having once recorded his agreement as the judgment of the court, it ſhall for ever bind him and hi repreſentatives, unleſs he reverſes it by writ of error, *which muſt be brought by him during his minority*, that the court by inſpection may determine his age. *Co. Lit.* 380: *Moor* 76: 2 *Rol. Abr.* 15: 2 *Inſt.* 483: 2 *Bulſ.* 320: 12 *Co.* 122: *Yelv.* 115: 3 *Mod.* 229.

So if an Infant levies a Fine, he is enabled by law to declare the uſes thereof, and if he reverſeth not the fine during his nonage, the declaration of uſes will ſtand good for ever; for though *that* be a matter *in pais*, and all ſuch acts an Infant may avoid at any time after his full age, if he do not conſent, yet being made in purſuance of the fine levied, which fine muſt ſtand good for ever, (unleſs reverſed in the manner as has been mentioned,) ſo will the declaration of uſes too. 2 *Co.* 58. *a*: 10 *Co.* 42: *Moor* 22: *Dal.* 47: 2 *Leon.* 159: *Goulſ.* 13: 1 *Jones* 390: *Winch.* 103.

If there be tenant for life, the remainder to an Infant in fee, and they two join in a fine, the Infant may bring a writ of error, and reverſe the fine as to himſelf; but it ſhall ſtand good as to the tenant for life; for the diſability of the Infant ſhall not render the contract of the tenant for life, who was of full age, ineffectual. 1 *Leon.* 115, 317: 2 *Sid.* 55: 2 *Jones* 182.

If an Infant brings a writ of error to reverſe a fine for his nonage, and his non-age, after inſpection, is recorded by the court, but before the fine reverſed he levies another fine to another, the ſecond fine ſhall hinder him from reverſing the firſt; becauſe the ſecond having entirely barred him of any right to the land, muſt alſo deprive him of all remedies which would reſtore him to the land. 1 *Rol. Abr.* 788. See *Moor* 74; and further this Dictionary, title *Fine of Lands*.

As to *Recoveries* ſuffered by Infants, when theſe were improved into a common way of conveyance, it was thought reaſonable that thoſe whom the law had judged incapable to act for their own intereſt, ſhould not be bound by the judgment given in recoveries, though it was the ſolemn act of the court; for where the defendant gives way to the judgment, it is as much his voluntary act and conveyance, as if he had transferred the land by livery, or any other act *in pais*; therefore if an Infant ſuffers a recovery, he may reverſe it, as he may a fine, *by writ of error, during his minority*: and this was formerly taken to be law, as well where the Infant appeared by guardian, as by his attorney, or in perſon: but now the diſtinction turns upon this point, that if an Infant ſuffers a recovery in perſon, it is erroneous, and he may reverſe it by writ of error; but even in this caſe the writ of error muſt be brought during his minority, that his infancy may be tried by the inſpection of the court; *for at his full age it becomes obligatory and unavoidable*: but in caſes of neceſſity the court has admitted the Infant to appear by guardian, and to ſuffer a recovery, or come in as a vouchee; but this, too, is ſeldom allowed by the court, unleſs upon emergencies, when it tends to the improvement of the Infant's affairs, or when lands of equal value have been ſettled on him, and when he has had the king's privy ſeal for that purpoſe; and thoſe recoveries have been allowed and ſupported by the Judges, and the Infant could not ſet them aſide; beſides, if ſuch recoveries be to the prejudice of the Infant, he has his remedy for it againſt his guardian, and may reimburſe himſelf out of his pocket to whom the law had committed the care of him. 1 *Rol. Abr* 731, 742: *Co. Lit*: 381. *b*: 2 *Rol. Abr.* 395: 10 *Co.* 43 *a*: *Cro. El.* 471: *Hob.* 196-7: *Cro. Car.* 307: 2 *Bulſ.* 235. 1 *Sid.* 321-2: 1 *Lev.* 142: 2 *Saund.* 94: 1 *Vern.* 461: 2 *Salk.* 567. See further this Dictionary, title *Recovery*.

Partition, by writ *de partione faciendâ*, binds Infants, becauſe by judgment in a court of juſtice, to which no partiality can be imputed. *Co. Lit.* 171. *b*.

If an Infant acknowledge a recognizance or ſtatute, it is *only voidable*; and the Infant at his peril muſt avoid them by *auditâ querelâ*, as he muſt a Fine or Recovery by writ of error, *during his minority*; for ſuch conveyances or other acts of record become obligatory and unavoidable, if they be not ſet aſide before the Infant comes of age; the reaſon is, becauſe theſe contracts being entered into under the inſpection of the Judge, (who is ſuppoſed to do right) the Infant cannot againſt them aver his diſability, but muſt reverſe them by a judgment of a ſuperior court, who, by inſpection has the ſame means to determine whether the inferior juriſdiction has done right, that firſt received the contract. *Moor pl.* 206: 2 *Inſt.* 483, 673: *Co. Lit.* 380: *Keilw.* 10: *Reg.* 149: 10 *Co.* 43. *a*.

If an Infant bargain and ſell his land by deed indented and inrolled, yet he may plead nonage; for notwithſtanding the ſtatute 27 *Hen.* 8. *cap.* 16, makes the inrolment in a court of record neceſſary to complete the conveyance; yet the bargainee claims by the *deed* as at *common law*, which was, and therefore is, ſtill defeaſible by non-age. 2 *Inſt.* 673.

An *Infant* confeſſed judgment in an action of debt brought againſt him; and it was held, *audita querela* did not

not lie upon this judgment, though it would on a statute or recognisance; but the party ought to bring a writ of error in the Exchequer Chamber, by virtue of the statute 27 *Eliz.*: *Moor* 460. See 3 *Salk.* 196: 1 *Inst.* 233, 380: *Moor* 189. Where an *Infant* may levy a fine, he may declare the uses of it also by deed: and the *Infant's* declaration of uses shall be good and binding to the *Infant* and his heirs, so long as the fine continues unreversed. *Hob.* 224: 2 *Leon.* 193: 2 *Rep.* 58: 10 *Rep.* 42. It was formerly held that an *Infant* appearing by guardian, could not suffer a Common Recovery, 10 *Rep.* 42; though it hath since been allowed in many cases, and by all the Judges, that an *Infant* may suffer a common recovery by guardian, and he shall not avoid it; for by intendment he shall have recompence in value; and if it is not for the good of the *Infant*, he may have recompence over against his guardian. 2 *Danv. Abr.* 772. A common recovery may be had against an *Infant*, being examined *solely & secretly*; and he may suffer a recovery by guardian in open court. *Hob.* 169: 2 *Bulst.* 255: 2 *Nels. Abr.* 994. and see *Sid.* 321: 2 *Nels.* 995: and this Dictionary, title *Recovery*.

An Infant is to prosecute a suit by his guardian or best friend, though the term used is *prochein amy*; i. e. next friend; but he cannot defend by such next friend, but must defend only by guardian, because the law supposes, that where he demands or sues for any thing, it is for his benefit. The power for Infants to sue by *prochein amy*, was first introduced by the statute *West.* 2.

If an Infant be joined with others, in suing in the right of another, the action may be brought by attorney, for they all make but one person in law. 3 *Cro.* 377.

But in all cases where an Infant is defendant, though it be in another's right, and though joined with others, he must defend by guardian. 2 *Cro.* 289: 1 *Lev.* 294.

In all actions real, personal, or mixed against an Infant, if he appears by attorney, it is error. 8 *Co. b*: 9 *Co.* 30. *b*.

If an attorney undertakes to appear for an Infant, and enters it *per attornatum*, it may be amended and made *per guardianum*. *Str.* 114, 445.

The plaintiff's attorney should apply to the defendant to name a guardian; and if he does not, in six days, the plaintiff may apply to the court who will oblige him to do it. 2 *Wils.* 50.

If an Infant appear and plead by attorney, and the plaintiff finds it out, he may in vacation-time apply to a Judge for a summons (or in term to the court), for a rule to shew cause "why common bail filed should not be struck out, and the plea be set aside, and that the defendant may be obliged to appear by a guardian;" and if no one is named within six days, the plaintiff may name one for him, which will be ordered of course. *Vid. Str.* 1076.

The Infant plaintiff, who sues by *prochein amy* is not liable to costs, because he cannot, while under age, disavow the suit; but the *prochein amy* is liable. *Str.* 548. *James* v. *Hatfield*, *Barnes* 128. And if it appears to the court that he is not of sufficient ability to pay the costs, the court will order another who is. But an Infant defendant (although he names a guardian,) is liable to costs if the verdict be against him. *Dyer* 104: 1 *Bulst.* 209: *Str.* 708.

If an *Infant* appearing by guardian comes of age pending the suit, he may then plead by attorney. *Moor* 665.

If baron and feme, where the feme is an *Infant*, appear by attorney, it is error. 5 *Mod.* 209. When the defendant in an action is an *Infant*, the plaintiff shall have six years to bring his action in, after the defendant comes of age: and if the plaintiff be an *Infant*, he hath six years likewise after his age, to sue by the statute of limitations. *Lutw.* 243. See title *Limitation of Actions*.

As to Acts *in pais*, Infants are regularly allowed to rescind and break through all contracts *in pais* made during minority, except only for *schooling and necessaries*, be they never so much to their advantage; and the reason hereof is, the indulgence the law has thought fit to give Infants, who are supposed to want judgment and discretion in their contracts and transactions with others, and the care it takes of them in preventing their being imposed upon, or over-reached by persons of more years and experience. 39 *Ed.* 3. 20. *b*: 1 *Rol. Abr.* 729: *Co. Lit.* 172, 381.

And for the better security and protection of Infants herein, the law has made some of their contracts absolutely void; *i. e.* all such in which there is no apparent benefit, or semblance of benefit, to the Infant; but as to those from which the Infant may receive benefit, and which were entered into with more solemnity, they are only voidable; that is, the law allows them, when they come of age, and are capable of considering over again what they have done, either to ratify and affirm such contracts, or to break through and avoid them. *Cro. Car.* 502: 1 *Jones* 405: 3 *Mod.* 310.

Hence an Infant may purchase, because it is intended for his benefit, and at his full age he may either agree or disagree to the same. *Co. Lit.* 2, 8: 2 *Vern* 203.

Also the feoffment of an Infant is not void, but only voidable, not only because he is allowed to contract for his benefit, but because there ought to be some act of notoriety to restore the possession to him, equal to that which transferred it from him. *Co. Lit.* 380: *Dyer* 104: 2 *Rol. Abr.* 572: 4 *Co.* 125 *a*.

Therefore if an Infant make a feoffment and livery in person, he shall have no assise, *&c.* but must avoid it by entry; for it is to be presumed in favour of such solemnity, that the assembly of the county then present would have prevented it, if they had perceived his non-age, and therefore the feoffment shall continue till defeated by entry, which is an act of equal notoriety. 8 *Co.* 42.

But if the Infant had made a letter of attorney to deliver seisin, he might have an assise, *&c.* because the letter of attorney, (like all other acts or agreements made by an Infant to his prejudice,) must be void; therefore whoever claims under it, or by virtue of its authority, must be a wrong-doer. 2 *Rol. Abr.* 2: *Noy* 130: *Palm.* 237.

Also as to the acts of Infants being void, or voidable, there is a diversity between an actual delivery of the thing contracted for, and a bare agreement to deliver it only; that the first is voidable, but the last absolutely void; as if an Infant deliver a horse, or a sum of money, with his own hands, this is only voidable, and to be recovered back in an action of account. *Perk.* § 12, 19: 1 *Rol. Abr.* 730: 2 *Rol. Rep.* 408: *Latch.* 10: *Rol.* 736: 3 *Rep.* 13: *Hob.* 96.

But

But if an Infant agrees to give a horse, and does not deliver the horse with his hand, and the donee take the horse by force of the gift, the Infant shall have an action of trespass; for the grant was merely void. *Perk.* § 12, 19: 1 *Mod.* 137.

In trespass, wherefore with force and arms the defendant made an assault, and cut off all the hair of the plaintiff, the defendant as to all the trespass, except cutting the hair, pleads not guilty, and as to that, pleads that the plaintiff was of the age sixteen years, and for a certain sum of money gave licence to the defendant to cut off two ounces of hair; upon demurrer to this plea the court held, that the contract was absolutely void, and consequently the tonsure unlawful, and gave judgment accordingly for the plaintiff. 3 *Keb.* 369.

And as an Infant is not bound by his contract to deliver a thing; so if one deliver goods to an Infant upon a contract, &c. knowing him to be an Infant, he shall not be chargeable in trover and conversion, or any other action for them; for the Infant is not capable of any contract, but for necessaries; therefore such delivery is a gift to the Infant: but if an Infant without any contract wilfully takes away the goods of another, trover lies against him; also it is said, that if he take the goods under pretence that he is of full age, trover lies; because it is a wilful and fraudulent trespass. 1 *Sid.* 129: 1 *Lev.* 169: 1 *Keb.* 905, 913

Also it seems, that if an Infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if, by combination with his guardian, &c. he make any contract or agreement with an intent afterwards to elude it, by reason of his privilge of infancy, that a court of equity will decree it good against him according to the circumstances of the fraud; but in what cases in particular a court of equity will thus exert itself is not easy to determine. See 1 *Vern.* 132: 2 *Vern.* 224, 5.

All gifts, grants, &c. of an Infant, which do not take effect by delivery of his hand, are void; and if made to take effect by delivery of his own hand, are voidable by himself, and his heirs, and those which shall have his estate. And privies in blood (as the heir-general or special) may avoid a conveyance made by their ancestor during his infancy. But privies in estate, such as the donor of an estate-tail where the tenant in tail dies without issue; or privies in law, as the lord by escheat where there is no heir, shall not avoid a conveyance made by an Infant.

If a man within age, seised in right of his wife, makes a feoffment and dies, his heir cannot enter and avoid it, because no right descends to him; for the baron, if he had lived, could have entered only in right of his wife. And no person shall take advantage of the infancy of his ancestor, but he who hath a right descending to him from that ancestor; though the heir may take the benefit of a condition, notwithstanding no right descended to him from his ancestor. 8 *Rep.* 42, 3, 4. and see 3 *Rep.* 35.

If husband and wife are both within age, and they by indenture join in a feoffment, and the husband dies, the wife may enter and avoid the deed, or have a *dum fuit infra ætatem.* 1 *Inst.* 337. Though if there be two joint-tenants within age, and one of them makes a feoffment in fee of the moiety during his infancy, and dies, the survivor cannot enter; but the heir of the feoffor may enter into the moiety, &c. 8 *Rep.* 43. If an *Infant* exchanges lands with another, and the other enters, the Infant may have assise. 18 *Ed.* 4. 2. And where an Infant leases for years, he may affirm the lease, or bring trespass against the lessee for the occupation. 18 *Ed.* 4: *Bro. Trespass* 338.

A lease made by an Infant reserving rent is voidable; but if there be no rendering rent, it is absolutely void. *Latch* 199. But if an Infant make a lease paying rent, and after his coming of age he accepts the rent, the voidable lease is made good; and an Infant's lease in ejectment is good, 2 *Lil. Abr.* 55: 3 *Salk.* 196; though in such case he must give a security for the costs. 1 *Wils.* *part* 1. *p.* 130. An Infant cannot surrender a future interest, by taking a new lease; his surrender by deed, and by acceptance of a second lease, are void, except there be an increase of the term, or a decrease of the rent; for where no benefit comes to him, his acts are merely void. *Cro. Car* 502.

All acts of necessity bind Infants; as presentations to benefices, admittances, and grants of copyhold estates, and assenting to legacies, &c 3 *Salk.* 190. So dower is demandable of an Infant heir. *Bull. N. P.* 117. So an Infant is compellable to pay a copyhold fine. *Burr* 1717. Conditions annexed to lands, whether the estate come by grant or descent, bind Infants: and where the estate of an Infant is upon condition to be performed by the Infant, if the condition is broken during the minority, the land is lost for ever. 1 *Inst.* 233, 380. Though a statute is not extendible against an Infant, yet Chancery will give relief against Infants. 1 *Lev* 198.

An Infant is much favoured by law; therefore it gives him many privileges above others: if an Infant make default in a real action, he shall not lose his land as another man shall do; one who is an Infant shall not be amerced, nor find pledges like one of full age; and if he be bail, he may be discharged by *audita querela,* &c. 1 *Inst.* 272: 8 *Rep.* 61 On his default at the *grand cape,* the Infant by writ of error may reverse the judgment given against himself; unless it be in case of a judgment in dower. *Dyer* 104: *Jenk. Cent.* 47, 319. But an Infant may be disseised of his lands, and a warranty that descendeth upon an Infant, may bar him of his entry; so a remitter upon him; *contra* of a descent: and if an Infant hath franchises or liberties, and do abuse, or disuse them, he shall forfeit them as a man of full age may. 1 *Inst.* 3, 133: 1 *And.* 311: *Bro.* 48.

A person gave a note, a few days after he was of age, for things had during his infancy; on extraordinary circumstances, equity set it aside: though it is true, if an Infant takes up goods, or borrows money, and, after he comes to age, give his note or promise for the money, that is good at law: but to prevent the ruin of Infants, it may be convenient to give relief. *Barn C.* 4. 6. If an Infant delivers money with his own hand, it is *voidable,* and to be recovered by action of account. The Infant sells goods to another; he may make the sale void, or have debt, &c. for the money. *Hob.* 77: 18 *Ed.* 4. 2.

If a trespass be done to an Infant, and he submits to an award, it is said the award shall not be binding on him.

him. 2 *Danv.* 770. See title *Award.* An Infant is not bound by his consent not to bring a writ of error; for though the judgment binds him, yet it binds but as a judgment reversable. *Rep. Hardw.* 104. Agreements &c. made by an Infant, although he be within a day of his full age, shall not bind him. *Plowd.* 364. Where an Infant enters into bond, pretending to be of full age, though he may avoid it by pleading his infancy, yet he may be indicted for a cheat. *Wood's Inst.* 585.

See further as connected with this subject of Infancy, titles *Annuity*; *Age*; *Heir*; *Chancery*; *Rape*; *Trial*; *Will*, &c.

INFANCY OF CORPORATIONS. See title *Infant* II.

INFECTIONS, By casting garbage and dung into ditches, &c. how punished. See *stat.* 12 *R.* 2. *c.* 13; and this Dictionary, title *Nusance.*

INFEODATION of TITHES, The granting of tithes to mere laymen. See 2 *Comm.* 27, and this Dictionary, title *Tithes.*

INFERIOR COURTS. The Courts of Judicature of this kingdom are classed in a general division of superior and inferior. The courts at *Westminster* are the superior, and in general have (especially the court of King's Bench and Common Pleas) superintendance over the inferior.

Lords or their bailiffs not to arrest on foreign pleas, on pain of double damages. *Stat. West.* 1. 3 *Ed.* 1. *c.* 35. See title *Arrest.*

By *stat.* 19 *Geo.* 3. *c.* 70, (see this Dictionary, title *Arrest*,) where final judgment is obtained in any inferior courts of record, and the defendant cannot be found in their jurisdiction, the Superior Courts at *Westminster* may remove the record, and issue execution as in judgments in such superior court; and similar provisions are made by *stat.* 33 *Geo.* 3. *c.* 68, as to the courts of great sessions in *Wales*, and the courts for the counties-palatine of *Chester*, *Lancaster*, and *Durham.* See further this Dictionary, title *County Court*; *Courts*; *Abatement*, &c.

INFIDELS, *infideles.*] Heathens; who may not be witnesses by the laws of this kingdom, because they believe neither the Old or New Testament to be the word of God, on one of which oaths must be taken. 1 *Inst.* 6.

The evidence of a *Gentoo* has however been admitted, sanctioned according to the ceremonies of his own religion. See further this Dictionary, titles *Evidence*; *Witnesses.*

INFINITY OF ACTIONS. The lord of the soil may have a special action against him who shall dig soil in the king's *highway*: but one subject may not have his action against another for common nuisances; for if he might, then every man would have it, and so the actions would be infinite, &c. 2 *Co. Inst.* 56: 9 *Rep.* 113. See title *Action.*

INFIRMARY, *infirmarius.*] In monasteries there was an apartment allowed for infirm or sick persons: and he who had the care of the infirmary was called *infirmarius. Mat. Paris, anno* 1252.

There are now, to the honour of the nation, many hospitals, for the relief of diseased persons, in various parts of the kingdoms, called Infirmaries.

IN FORMA PAUPERIS, Suing actions in, see title *Costs.*

INFORMATION FOR THE KING.

Informatio pro Rege.] An accusation or complaint exhibited against a person for some criminal offence, either immediately against the King, or against a private person; which, from its enormity or dangerous tendency, the public good requires should be restrained and punished. It differs from an indictment principally in this, that an indictment is an accusation found by the oath of twelve men, whereas an Information is only the allegation of the officer who exhibits it. 3 *New Abr.* 164.

I. *Of the various kinds of Information generally; and the Antiquity of the Practice.*
II. *In what cases Information will lie.*
III. *Of filing and compounding Information.*
IV. *How to be laid; the Proceedings and Provisions by Statute Law.*

I. INFORMATIONS are of two sorts: first, those which are partly at the suit of the King, and partly at that of a Subject: and secondly, such as are only in the name of the King. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the King, and another to the use of the informer, and are a sort of *qui tam* actions, only carried on by a criminal instead of a civil process; upon which therefore it is sufficient in this place to observe, that by *stat.* 31 *Eliz. c.* 5, no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the King and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offence; nor on behalf of the Crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the King, can such prosecution be had after the expiration of two years from the commission of the offence. *Cro. Jac.* 366.

The Informations that are exhibited, in the name of the King alone, are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the Attorney General; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person, or common informer, and they are filed by the king's coroner and attorney in the court of king's bench, usually called the Master of the crown-office, who is for this purpose the standing officer of the public. The object of the King's own prosecutions, filed *ex officio* by his own Attorney General, are properly such enormous misdemesnors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal; which power thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the *English* constitution; wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of Informations, filed by the Master of the crown office upon the

complaint or relation of a private subject, are any gross and notorious misdemesnors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government, (for those are left to the care of the Attorney-General) but which, on account of their magnitude or pernicious example, deserve the most public animadversion. 2 *Hawk. P. C. c.* 26. And when an Information is filed, either thus, or by the Attorney-General *ex officio* it must be tried by a petit jury of the county where the offence arises: after which, if the defendant be found guilty, the court must be resorted to for his punishment. See *Post*, II. III.

This mode of prosecution, by Information (or suggestion) filed on record by the king's Attorney-General, or by his Coroner, or Master of the Crown-office in the court of King's Bench, seems to be as antient as the common law itself. 1 *Show.* 118. For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths, that there was a sufficient ground for instituting a criminal suit; so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemesnor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that Information to the Court of King's Bench by a suggestion on record, and to carry on the prosecution in his majesty's name. But these Informations (of every kind) are confined by the constitutional law to mere misdemesnors only: for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. And as to those offences in which Informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty's court of King's Bench, the Subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the *stat.* 3 *Hen.* 7. *c.* 1, had extended the jurisdiction of the court of Star-chamber, the members of which were the sole judges of the law, the fact, and the penalty, and when the *stat.* 11 *Hen.* 7. *c.* 3, had permitted Informations to be brought by any informer upon any penal statute, not extending to life or member, at the assizes, or before the justices of the peace, who were to hear and determine the same according to their own discretion; then it was, that the legal and orderly jurisdiction of the court of King's Bench fell into dis-use and oblivion; and *Empson* and *Dudley*, the wicked instruments of king *Hen.* VII. by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices, continually harassed the subject, and shamefully enriched the crown. 1 *And.* 157. The latter of these acts was soon indeed repealed by *stat.* 1 *Hen.* 8. *c.* 6; but the court of Star-chamber continued in high vigour, and daily increasing its authority, till finally abolished by *stat.* 16 *Car.* 1. *c.* 10.

Upon this dissolution the old common-law authority of the court of King's Bench, as the *Custos morum* of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice. 5 *Mod.* 464: *Styl. Rep.* 217, 245: *Styl. Pract. Reg.* title *Information*, *p.* 187 (edit. 1657): 2 *Sid.* 71: 1 *Sid.* 152. And it is observable that, in the same act of parliament which abolished the court of Star-chamber, a conviction by Information is expressly reckoned up, as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute. 16 *Car.* 1. *c.* 10. § 6. Sir *Matthew Hale*, who presided in this court soon after the time of such revival, is said to have been no friend to this mode of prosecution; most probably because the power of filing Informations without any control then resided in the breast of the Master; and, being filed in the name of the king, they subjected the prosecutor to no costs, though on trial they proved to be groundless. 5 *Mod.* 460: 1 *Saund.* 301: 1 *Sid.* 174. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of King *William*, to procure a declaration of their illegality by the judgment of the court of King's Bench; but sir *John Holt*, who then presided there, and all the Judges, were clearly of opinion that this proceeding was grounded on the common law, and could not then be impeached. 5 *Mod.* 459: *Comb.* 141: 7 *Mod.* 361: 1 *Show.* 106. In a few years afterwards a more temperate remedy was applied in parliament, by *stat.* 4 & 5 *W. & M. c.* 18, which enacts, that the clerk of the crown shall not file any Information without express direction from the court of King's Bench: and that every prosecutor, permitted to promote such Information, shall give security by a recognizance of twenty pounds (which now seems to be too small a sum) to prosecute the same with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the Judge, who tries the Information, shall certify there was reasonable cause for filing it; and, at all events, to pay costs, unless the Information shall be tried within a year after issue joined. But there is a proviso in this act, that it shall not extend to any other Informations than those which are exhibited by the Master of the Crown Office; and, consequently, Informations at the King's own suit, filed by his Attorney-General, are no way restrained thereby.

There is one species of Informations, still farther regulated by *stat.* 9 *Ann. c.* 20; *viz.* those in the nature of a writ of *Quo warranto*, which are a remedy given to the Crown against such as may have usurped or intruded into any office or franchise. The modern Information tends to the same purpose as the antient writ, being generally made use of to try the civil rights to such franchises; though it is commenced in the same manner as other Informations are, by leave of the court, or at the will of the Attorney-General; being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office; yet usually considered at present as merely a civil proceeding. See this Dictionary, title *Quo Warranto*; and 4 *Comm.* 308, 312.

An *Information* on behalf of the Crown filed in the Exchequer by the King's Attorney-General, is a method of suit for recovering money or other chattles, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the Crown. *Moor* 375. It differs from an Information filed in the court

court of King's Bench, in that *this* is instituted to redress a private wrong, by which the property of the crown is affected; *that* is calculated to punish some public wrong or heinous misdemesnor in the defendant. It is grounded on no writ under seal, but merely on the intimation of the King's officer the Attorney-General, who "gives the court to understand and be informed of" the matter in question: upon which the party is put to answer, and trial is had, as in suits between Subject and Subject. The most usual Informations are those of *intrusion* and *debt*. *Intrusion* for any trespass committed on the lands of the crown, as by entering thereon without title; holding over after a lease is determined; taking the profits; cutting down timber; or the like. *Cro. Jac.* 212; 1 *Leon.* 48: *Savil.* 49. *Debt* upon any contract for monies due to the King, or for any forfeiture due to the Crown upon the breach of a penal statute. This latter is most commonly used to recover forfeitures occasioned by transgressing those laws, which are enacted for the establishment and support of the Revenue; others, which regard mere matters of police and public convenience, being usually left to be inforced by common informers, in *qui-tam* Informations or actions. But, after the Attorney-General has informed upon the breach of a penal law, no other Information can be received. *Hardr.* 201.

There is also an Information *in rem*, when any goods are supposed to become the property of the Crown, and no man appears to claim them, or to dispute the title of the King. As antiently in the case of treasure-trove, wrecks, waifs, and estrays seized by the King's officer for his use. Upon such seizure an Information was usually filed in the King's Exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands: after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the Crown. And when in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, the same process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice. 3 *Comm.* 261, 2.

An Information is, in many respects, the same as what, for a common person, is called a declaration. It ought to be certain, that the party may perfectly know what he is to answer to, and the court what they are to give judgment on. *Plowd.* 329.

Informations *qui-tam* will not lie on any statute, which prohibits a thing, as being an immediate offence against the public good in general, under a certain penalty, unless the whole or part of such penalty be expresly given to him who will sue for it, because otherwise it goes to the king, and nothing can be demanded by the party. 2 *Hawk. P. C. c.* 26.

It has been said, that the King shall put no one to answer for a wrong done principally to another, without indictment or presentment; but this does not seem a principle adhered to; and of common right, Informations, or actions in the nature thereof, may be brought for offences against statutes, whether mentioned or not in such statutes, where other methods of proceeding are not particularly appointed. 2 *Hawk. P. C. c.* 26. § 1, 2. And wherever a matter concerns the public government, and no particular person is entitled to an action, there an Information will lie. 1 *Salk.* 374.

II. It is every day's practice, agreeable to numberless precedents, either in the name of the King's Attorney-General, or of the Master of the Crown-office, to exhibit Informations for batteries, cheats, seducing a young man or woman from their parents, in order to marry them against their consent, or for any other wicked purpose, spiriting away a child to the plantations, rescuing persons from legal arrests, perjuries, and subornations thereof, forgeries, conspiracies; (whether to accuse an innocent person, or to impoverish a certain set of lawful traders, *&c.* or to procure a verdict to be unlawfully given, by causing persons bribed for that purpose to be sworn on a *tales*;) and other such like crimes, done principally to a private person; as also for offences done principally to the King; as for libels, seditious words, riots, false news, extortions, nuisances; (as in not repairing highways, or obstructing them, or stopping a common river, *&c.*;) contempts, as in departing from the parliament without the King's license, disobeying his writs, uttering money without his authority, escaping from legal imprisonment on a prosecution for contempt, neglecting to keep watch and ward, abusing the King's commission to the oppression of the Subject, making a return to a *mandamus* of matters known to be false; and in general any other offences against the public good, or against the first and obvious principles of justice and common honesty, 2 *Hawk. P. C. c.* 26. § 1, and the several authorities there cited, and see *Finch L.* 240: *Show.* 109.

The Court will grant an Information for reproaching the office of magistracy, or defaming the character of magistrates. *Carth.* 14, 15: 1 *Wils.* 22. See 12 *Mod.* 514. For taking away a young woman from her guardian, although Chancery has committed the offender for a contempt. *Str.* 1162: *Andr.* 310: Or from her putative father. *Str.* 1162. For not examining evidence upon oath under a reference and rule of court. 1 *Wils.* 7. Or for demanding a shilling by a justice to discharge his warrant, and committing the party for not paying it. 1 *Wils.* 7. For convicting a person unheard, and sending him to the house of correction. *Hard.* 124: 8 *Mod.* 45. For seducing a man to marry a pauper, in order to exonerate the parish. 1 *Wils.* 41. For seducing a woman, habituated to drinking, to make her will. 2 *Burr.* 1099. For voluntary absenting by a Justice, from sessions. *Str.* 21. For refusing to put a statute in execution *Str.* 413. For bribing persons to vote at corporation elections. Ld. *Raym.* 1377. For publishing an obscene book. *Str.* 788. For blasphemy. *Str.* 834. For unduly discharging a debtor by Judges of an inferior court. *Hard.* 135. For refusing, by the captain, to let the coroner come on board a man of war lying within the body of the county. *Andr.* 231: *Stra.* 1097. For keeping great quantities of gunpowder. *Str.* 1167. For a Justice making order of removal, and not summoning the party. *And.* 238, 273. For impressing a captain as a common seaman maliciously. 1 *Black.* 19. For illegal impressing and confining a recruit. See *Str.* 404. For speaking treasonable words, although the offender has been previously punished; *viz.* in an academical way, by the Vice Chancellor. 1 *Black.* 37. For contriving the escape

escape of French prisoners. 1 *Black.* 286. For giving a ludicrous account of a marriage between an actress and a married man. 1 *Black.* 294. For contriving pretended conversations with a ghost, with intention to accuse another of having murdered the body of the disturbed spirit. 1 *Black.* 392, 401. For procuring a female apprentice to be assigned, though with her own consent, to another, for the purposes of prostitution. 1 *Black.* 439.

Information was granted against an attorney for examining persons on oath, upon an arbitration, without putting the same in writing. Against one for practising as an attorney, while he was under-sheriff. 1 *Wils.* 93.—Against a gaoler for suffering one taken upon an *excom. capiend.* to go at large. 12 *Mod.* 434. Against certain persons for that they, as enemies, &c. to the government, hired a boat during a war with *France*, in order to go thither, intending to aid and assist the King's enemies, though they did not actually go thither, but only intended it. [illegible] 8 *W.* 3. *B. R.* The *King* v. *Cooper* [illegible].—Against one for building of locks in the river *Thames* to the obstruction of navigation. 12 *Mod.* 615.

An Information was exhibited by the Attorney General for conspiring to destroy the King's revenue of the excise; that the defendants and others *ignot'*, &c. *illicite, factiose, & seditiose, consultaverunt & conspiraverunt ad destruend' & depauperand' firmarios excisæ prædict'*, &c. and many other facts were laid in the Information tending to destroying the excisemen, depauperating them, destroying the King's revenue of excise, pulling down the excise-house, raising a tumult amongst the poor people, &c. But the jury that were to try the issue were unwilling to find this matter, though expressly proved, fearing it might be construed no less than treason; and so would only find that such and such of the defendants *illicite, factiose, & seditiose se assemblaverunt, & illicite factiose & seditiose consultaverunt, & conspiraverunt ad depauperand' firmarios Dom' Regis excisæ prædict', prout prædict' attornat' gen' Dom' Regis, &c Et quoad totam aliam materiam in informatione contentam,* find them not guilty, and find *J. S.* not guilty of the whole. It was moved in arrest of judgment, that here is no offence found. The court unanimously concurred, that judgment ought to be given for the King, though as to the offence found there was some variety of opinion: *Twisden* held, that *vi et armis* was not necessary, and that they were found guilty of an unlawful assembly, and in that the Ld. Ch. Just. *Hyde* concurred; as also that the intention of defrauding and depriving the King of his said rent is implicitly found within the *modo et forma prout*, &c. for so shall the *machinantes*, be applied. *Twisden* and *Keeling* concurred, that for a conspiracy alone, without any prosecution, Information lay: and they all agreed, that the King's revenue being concerned did highly aggravate the offence; 26 *Ass.* 44. was cited to prove, that whatever concerns the King's revenue is public; and for this reason (2 *H.* 4. 7. *pl.* 26,) it is determined, that a monk by being farmer is made capable to sue. The Lord Ch. Just. cited old *Magna Charta*, where there is an article, to inquire of such as seek to diminish the King's revenue of wards and marriages, which shews it is a public treasure. Judgment was therefore given for the King. 1 *Lev.* 125: 1 *Sid.* 174: 1 *Keb.* 650, 665, 675, 682.

A Coroner having sworn the jury to inquire of the death of one supposed a *felo de se*, and finding the evidence very strong, took off some of the inquest; and though it was said, that this coroner was a weak silly man, yet *Holt* said there was no reason why an Information should not be against him. 12 *Mod.* 493.

An Information was granted against one for counterfeiting and pretending himself to be bewitched by a poor woman, who was thereupon indicted for witchcraft, and acquitted, and the whole discovered to be a cheat. 12 *Mod.* 556.

Information for a scandalous narrative licensed by the defendant, speaker of the House of Commons, being *Dangerfield's* narrative, reflecting on a nobleman, (the E. of *Peterborough*); the defendant pleaded, that he did it by order of the House of Commons, and demanded judgment if this court will take conusance of it. The Attorney General demurred, and afterwards the defendant pleaded the common plea, *quod non vult contendere cum Domino Rege*, and was fined 10,000 *l.* *Comb.* 18.

Leave was given to file an Information against the defendant, by whom the plaintiff's wife was inveigled away, and who procured merchants and tradesmen to sell goods to her, in order to saddle the husband with the debt, he agreeing with the sellers to deliver the goods back again. 12 *Mod.* 454. For words spoken of a deceased King, which advance pernicious doctrines and evil tenets, and have an influence on the present government, &c. an Information lies, on which the offender may be fined, and also corporally punished. 2 Ld. *Raym.* 879. If the marshal of *B. R.* misdemeans himself in his office, he who is prejudiced by it may prefer an Information against him in that court, where he shall be fined and ordered to make satisfaction. *Hil.* 23 *Car. B. R.* If a person exhibits his Information only for vexation, the defendant may bring Information against the informer, upon the *stat.* 18 *Eliz. c.* 5. 2 *Bulst.* 18.

The Court will not grant an Information against a *private* person for reading a *pretended* proclamation. *Black.* 2. Nor against a husband for endeavouring to *retake* his wife contrary to articles of separation. *Black.* 18. Nor against persons who assemble with a lawful design, notwithstanding some unlawful and irregular acts ensue. *Black.* 48. Nor against Justices acting improperly in their publick capacity, unless flagrant proof of corruption appears. *Str.* 1181: *Bur.* 785, 1162: *Black.* 432: *Douglas* 589. Nor against ministers for converting brief-money. *Str.* 1130: *Black.* 443. Nor for bribing electors. *Black.* 541. Nor for a perjured intrusion to a living, upon an affidavit that it was simoniacal. *Str.* 70: *Barnard. K. B.* 11. Nor for a libel, if it appears to be true. *Str.* 498: *Doug.* 284, 387. Nor for offences committed upon the high seas. *Str.* 918: 2 *Keble*, 190. Nor against a dissenter for refusing the office of sheriff. *Str.* 1193: 1 *Wils.* 18. Nor against an offender, although the penalty for the offence is vested in the Crown. *Str.* 1234. Nor for *words spoken of a* justice in his public character. *Str.* 1157. Nor for attempting subornation of perjury. *Hardw.* 24. Nor for sending a challenge, if the informant had previously imparted a challenge. *Bur.* 316, 402. Nor in favour of one cheat against another cheat. *Bur.* 548. Nor on a general charge of extortion. *Str.* 999. Nor for striking a magistrate in the execution of his office, if the magistrate strike first. *Hard.* 240. Nor for an offence against a private statute. *Bur.* 385. Nor if a civil suit is depending, upon the same subject. *Hardw.* 241. And in general the

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diſcretion of the court in granting Informations is guided by the merits of the perſon applying; by the time of the application; by the nature of the caſe; and by the conſequences which may poſſibly reſult from the granting it. *Per* Ld. *Mansfield, Black.* 542. *Vide* alſo *Com. Dig.* title *Information.*

III. It ſeems to be an eſtabliſhed practice, not to admit the filing of an Information, (except thoſe exhibited in the name of His Majeſty's Attorney-General,) without firſt making a rule on the perſons complained of, to ſhew cauſe to the contrary; which rule is never granted but upon motion made in open court, and grounded upon affidavit of ſome miſdemeſnor, which, if true, doth either for its enormity or dangerous tendency, or other ſuch like circumſtances ſeem proper for the moſt public proſecution; and if the perſon, on whom ſuch rule is made, having been perſonally ſerved with it, do not, at the day given him for that purpoſe, give the court good ſatisfaction by affidavit, that there is no reaſonable cauſe for the proſecution, the court generally grants the Information; and ſometimes, upon ſpecial circumſtances, will grant it againſt thoſe who cannot be perſonally ſerved with ſuch rule; as if they purpoſely abſent themſelves, *&c.* 2 *Hawk. P. C. c.* 26. But it ſeems that in ſuch caſe the proſecutor ſhould on affidavit of the fact of abſence, move the court for a rule that leaving the ſame at the laſt place of abode ſhould be deemed good ſervice. *J. M.*

If a defendant ſhew good cauſe to the contrary, as that he has been indicted for the ſame cauſe, and acquitted, or that the intent is to try a civil right, which has not been yet determined, or that the complaint is trifling, or vexatious, *&c*; or where the motion is for an Information in the nature of a *quo warranto*, if he can ſhew that his right hath been already determined on a *mandamus*, or that it hath been acquieſced in many years, or that it depends upon the right of his voters which hath not been tried, or that it doth not concern the public, but is wholly of a private nature, the court will not grant the Information without ſome particular circumſtances, the judgment whereof lies in diſcretion. 2 *Hawk. P. C. c.* 26.

The *compounding of Informations* upon penal ſtatutes is an offence, in *criminal* caſes, equivalent to maintenance or barretry in civil caſes; and is, beſides, an additional miſdemeſnor againſt public juſtice, by contributing to make the law odious to the people. At once, therefore, to diſcourage malicious informers, and to provide that offences, when once diſcovered, ſhall be duly proſecuted, it is enacted by *ſtat.* 18 *Eliz. c.* 5, that if any perſon informing under pretence of any penal law, make any compoſition without leave of the court, or take any money or promiſe from the defendant to excuſe him, (which demonſtrates his intent in commencing the proſecution to be merely to ſerve his own ends, and not for the public good,) he ſhall forfeit 10 *l.*, ſhall ſtand two hours on the pillory, and ſhall be for ever diſabled to ſue on any popular or penal ſtatute. 4 *Comm.* 136.

IV. Regularly, the ſame certainty that is required in an Indictment, is required in an Information; but it has been held, not to be neceſſary to repeat the words it gives the court here to underſtand, and be informed," in the beginning of every diſtinct clauſe, if the want of them may be ſupplied by a natural, and eaſy conſtruction. See tit. *Indictment.* 1 *Salk.* 375: *Raym.* 34: 2 *Hawk. P. C. c.* 26.

In an Information againſt *Roberts* the ferryman over the river *Merſey*, which parts *Angleſey* from *Caernarvonſhire* in *Wales*, it was moved in arreſt of judgment, that the Information was too general and uncertain, becauſe it did not allege that any particular perſon, or any certain number of cattle, were ferried over within the time laid in the Information; neither did it mention any particular perſon from whom the extorted rates were taken, which it ought to do, that the ſingle offence might certainly appear to the court; after great deliberation, the whole court was of that opinion; and *per Holt*, Chief Juſtice, in every ſuch Information a ſingle offence ought to be laid and aſcertained, becauſe every extortion from every particular perſon is a ſeparate and diſtinct offence; therefore they ought not to be accumulated under a general charge, as in this caſe, becauſe each offence requires a ſeparate and diſtinct puniſhment according to the quantity of the offence; and it is not poſſible for the court to proportion the fine or other puniſhment, unleſs it is ſingly and certainly laid. *Carth.* 226.

An Information upon a penal ſtatute muſt be ſued in one of the ſuperior courts, and cannot be brought in any inferior court, becauſe the King's Attorney cannot be there to acknowledge or deny, as he can in a ſuperior court. *Cro. Jac.* 538. All Informations on penal ſtatutes, brought by an informer, where a ſum certain is given to the proſecutor, muſt be brought in the proper county where the offence was committed; and within a year after the ſame: but a party grieved, who is not a common informer, is not obliged to bring his Information in the proper county, but may inform in what county he pleaſes. *Stat.* 31 *Eliz. c.* 5: *Cro Eliz.* 645.

Where an Information is given by ſtatute, to be proſecuted at the aſſizes, *&c.* the informer, on filing his Information, muſt make oath before a judge, that the offence laid in the *Information* was not committed in any other county than that mentioned in the Information; and that he believes the offence was committed within a year next before the filing of the Information. *Stat.* 21 *Jac.* 1. *c.* 4. And when an Information is ordered to be filed, upon an affidavit made, the court will not ſuffer the proſecutor to put any more or other matter into the Information than what only is in his affidavit. *Mich.* 9 *W.* 3. *B. R.*

It has been reſolved, that the *Stat.* 21 *Jac.* 1. *c.* 4, reſtrains the juriſdiction of *B. R.* in actions of debt by common *informers*, and that they cannot bring debt upon the ſtatute in that court, unleſs the cauſe of action ariſe in the county where the King's Bench ſits; but muſt in other caſes proſecute by Information before juſtices of aſſiſe, *&c.* as the ſtatute directs. 1 *Salk.* 373. *Sed qu.* as to this doctrine, as the juriſdiction of the King's Bench extends over the greateſt part of the kingdom in all caſes where an action may be brought? *J. M.*

Offences created ſince the ſtatute 21 *Jac.* 1. *cap.* 4, are not within that ſtatute, to be proſecuted in the county where the fact was done; ſo that Informations on ſubſequent penal ſtatutes are not reſtrained thereby. 1 *Salk.* 373.

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The *stats.* 18 *Eliz. c.* 5: 21 *Jac.* 1. *c.* 4, do not extend to Informations of officers, nor on the statutes of maintenance, champerty, concerning concealments of customs, *&c.* nor to parties grieved, and those to whom any forfeiture is given in certain. 1 *Salk.* 373.

An Informer upon a popular statute shall never have costs, if not given by statute; but the party grieved in action on the statute shall, where a certain penalty is given. 2 *Hawk. P. C. c.* 26.

In an action *qui tam* on *stat.* 5 *Eliz. c.* 4, the plaintiff shall pay costs. Ld. *Raym.* 1333. But it seems unsettled whether an informer shall be obliged to give security for the payment of costs on account of his poverty. *Cowp.* 24. It has been refused, for the statute having given him a power to sue, it is a debt due to him; *Bull. N. P.* 197; but an informer who is gone abroad must give security, *Str.* 697; and it seems that a foreign informer must do the same. *Str.* 1206. *Vide* 1 *Wils.* 166. Also if a prosecution is brought in a feigned name, the court will oblige the real prosecutor to give security. *Shiler* v. *Roberts, Easter* 12 *Geo.* 2. *C. B.* The defendant, on motion, may pay the costs and penalty into court. *Rex* v. *Walker, Trin.* 31 *Geo.* 2. *B. N. P.* Vide *Cowper,* 367.

If a Prosecutor does not go on to trial he shall pay costs. *Hard.* 159. But if he gives notice of trial, and neither goes to trial or countermands in time, unless the defendant draws him in to give notice, defendant shall pay costs. 3 *Bur.* 1304. So where a *qui tam* informer, in debt on *stat.* 21 *Hen.* 8. *c.* 13, is nonsuited, the defendant is entitled to costs. *Cowp.* 366, where 3 *Bur.* 1723, is denied to be law. But the court will not stay proceedings in a *qui tam* action, till costs in a *non pros* in a former action, by a different plaintiff against the same defendant, be paid. *Cowp.* 322. If prosecutor *qui tam,* for killing game, *&c.* does not reply, defendant shall have costs, for *stat.* 18 *Eliz. c.* 5, extends to informers on all penal statutes. 1 *Wils.* 177.

If an Informer dies, the Attorney-General may proceed in the Information for the King: nonsuit of an informer, is no bar against the King; and if the King's Attorney enter a *nolle prosequi,* it is not any bar *quoad* the informer. *Cro. El.* 583: 1 *Leon.* 119. If two Informations are had on the same day, they mutually abate one another: because there is no priority to attach the right of the suit in one informer, more than in the other. *Hob.* 138.

If an Information contain several offences against a statute, and be well laid as to some of them, but defective as to the rest, the informer may have judgment for such as are well laid. *Hob.* 266. After a plea pleaded to an Information for any crime, the defendant, by favour of the court, may appear by attorney; also the court may dispense with the personal appearance before plea pleaded, except in such cases where a personal appearance is required by some statute: and it is the same of Indictments for crimes under the degree of capital. *Hob.* 273.

If a defendant plead *nil debet* to an Information *qui tam, &c.* it is safest to say he owes nothing to the informer, nor the King, which is an answer to the whole. On breach of a statute alleged from a matter *in pais,* the defendant may plead that he owes nothing, or not guilty, *&c.* And if there be more than one defendant, they ought to plead severally, and not jointly, not guilty: but if it be alleged from a matter of record, the record not being triable by the country, but by itself, such plea is not good. 2 *Hawk. P. C. c.* 26. § 66, *&c. Bro. Issues* 23.

A replication to an Information on a special plea in the courts at *Westminster,* is to be made by the Attorney General, and before Justices of Assise, by the Clerk of the Assise: though the replication to a general issue in an Information *qui tam* in the courts at *Westminster,* may be made in the name of the Attorney-General only; and in actions *qui tam,* most of the precedents are, that the replication is to be made by the plaintiff. A demurrer may be to an Information *qui tam,* without the Attorney General. 2 *Hawk. P. C. c.* 26. § 72.

Informations are not quashed for insufficiency, like indictments; but the defendant must demur to them. 2 *Lill.* 59. Fines assessed in court by judgment on an Information, cannot afterwards be qualified or mitigated. *Cro. Car.* 251.

In the construction of *stat.* 4 & 5 *W. & M. c.* 18, it hath been holden,

1. That if process be issued on such Information before such recognizance is given as the statute directs, the same may be set aside and discharged on motion. 2 *Hawk. P. C. c.* 26.

2. That this statute extends to all Informations, except those exhibited in the name of his Majesty's Attorney-General; so that an Information in nature of a *quo warranto,* though a proper remedy to try a right, in respect of which it may not in strictness come within the words *trespasses, &c.* yet being also intended to punish a misdemeanor, and also as the proceedings therein may be as vexatious as in any other, the same is within the purview of the statute, which, being a remedial law, shall receive as large a construction as the words will bear. *Carth.* 503: 1 *Salk.* 376. *S. C.*

3. That no costs can be had on this statute on an acquittal by a trial at bar; not only because the clause that gives costs, unless the judge certify a reasonable cause, seems only to have a view to trials at *nisi prius,* but also because a cause, which is of such consequence as to be thought proper for a trial at bar, cannot well be thought within the purview of the statute; which was chiefly designed against trifling and vexatious prosecutions. 2 *Hawk. P. C. c.* 26.

4. That if there be several defendants, and some of them acquitted, and others convicted, none of them can have costs. 1 *Salk.* 194.

5. That wherever a defendant's case is such as authorises the court to award him costs, he has a right to them *ex debito justitiæ*; for it seems a general rule, that where Judges are empowered by statute to do a matter of justice, they ought to do it of course. 2 *Chan. Cas.* 191: 2 *Hawk. P. C. c.* 26.

INFORMATUS NON SUM, or more properly, *non sum informatus.* A formal answer made of course by an attorney who is authorised by his client to let judgment pass in that form against him. It is commonly used in warrants of attorney, given for the express purpose of confessing judgment.

INFORMER,

INFORMER, *informator.*] The person who informs against, or prosecutes in any of the King's courts, those who offend against any law, or penal statute; no man may be an Informer who is disabled by any misdemeanor. *Stat.* 31 *Eliz. c.* 5.

INFORTIATUM, One part of the digests of the civil law; according to *Benedict*, abbot of the monastery of *Peterborough*, in the reign of K. *Hen.* III.

INFUGARE, To put to flight. *Leg Canuti. c.* 32.

INFULA, Was antiently the garment of a priest, like that which we now call a cassock; sometimes it is taken for a coif.

INGE. This syllable, in the names of places, denotes meadow or pasture; and in the north, meadows are called the *Inges*; from the Saxon *ing*, i. e. *pratum*.

INGENIUM. Any instrument used in war, *arte* & ingenio *confectum*; from whence it is said we derive the the word *engine*.

INGENUITAS. Liberty given to a servant by manumission *Leg. H.* 1. *c.* 89.

INGENUITAS REGNI, *Ingenui, liberi & legales homines*; freeholders, and the commonalty of the kingdom; sometimes this title was given to the barons and lords of the King's council. *Eadmer. Hist.* 1. *Nov. fol.* 70.

INGRESS, EGRESS, AND REGRESS, Words in leases of lands, to signify a free entry into, going forth of, and returning from some part of, the lands let; as to get in a crop of corn, &c. after the term expired.

INGRESSU, A writ of entry, whereby a man seeks entry into lands or tenements; and lies in many cases, having many different forms: this writ is also called *præcipe quod reddat*, because these are formal words inserted in all writs of entry. See title *Entry*.

INGRESSUS, The relief which the heir at full age paid to the head lord, for entering upon the fee, or lands fallen by the death or forfeiture of the tenant, &c. *Blount*.

INGROSSATOR MAGNI ROTULI. See *Clerk of the Pipe*.

IN GROSS. Advowson in gross, villain in gross, &c. see *Advowson*; *Gross*; *Villain*.

INGROSSER. See *Forestaller*.

INGROSSING OF A FINE. The making of the indentures by the *Chirographer*, for delivery of them to the party to whom the fine is levied. *F. N. B.* 147. See title *Fine of Lands*.

INHABITANT, A dweller or householder in any place, as Inhabitants in a vill, are the housholders in the vill. 2 *Inst.* 702.

The word Inhabitants includes tenant in fee-simple, tenant for life, years, by *elegit*, &c. tenant at will, and he who has no interest but only his habitation and dwelling. 6 *Rep.* 60. *a.* He who hath a house in his hands in a town, may be said to be an Inhabitant. *Carth.* 119. Inhabitants have not capacity to take an inheritance, as in 15 *Ed.* 4, to have common. 12 *Rep.* 120. See title *Poor*.

INHERITANCE, *hæreditas.*] An estate in lands or tenements to a man and his heirs; and the word Inheritance is not only intended where a man hath lands or tenements by descent of heritage; but also every fee-simple, or fee-tail, which a person hath by purchase, may be said to be an Inheritance, because his heirs may inherit it. *Lit.* § 9. And one may have Inheritance by creation; as in case of the King's grant of peerage, by letters patent, &c.

INHERITANCES; ARE CORPOREAL OR INCORPOREAL. Corporeal Inheritances relate to houses, lands, &c. which may be touched or handled; and incorporeal Inheritances are rights issuing out of, annexed to, or exercised with, corporeal Inheritances; as advowsons, tithes, annuities, offices, commons, franchises, privileges, services, &c. 1 *Inst.* 9, 49: See title *Hereditaments*.

There is also several Inheritance, which is where two or more hold lands severally; if two men have lands given to them and the heirs of their two bodies, these have a joint estate during their lives; but their heirs have several Inheritances. *Kitch.* 155. Without blood none can inherit; therefore he who hath the whole and entire blood, shall have an Inheritance, before him who hath but part of the blood of his ancestor. 3 *Rep.* 41. The law of Inheritance prefers the first child before all others; the male before the female; and of males the first born, &c. And as to Inheritances, if a man purchases land in fee, and dies without issue, those of the blood of the father's side shall inherit, if there be any; and for want of such, the lands shall go to the heirs of the mother's side: but if it come to the son by descent from the father the heirs of the mother shall not inherit it. *Plowd.* 132: *Lit.* 4, 12. Goods and chattles cannot be turned into an Inheritance. 3 *Inst.* 19, 126. See more fully this Dictionary, titles *Descent*; *Estate*.

INHIBITION, *inhibitio.*] A writ to forbid a judge from further proceeding in a cause depending before him, being in nature of a prohibition. See *statutes* 9 *Ed.* 2. *c.* 1: 24 *Hen.* 8. *c.* 12: *F. N. B.* 39. An Inhibition is most commonly issued out of a higher court christian, to an inferior, upon an appeal: Inhibitions are likewise on the visitations of archbishops and bishops, &c. This Inhibition is either *hominis* or *juris*; it is *Ne visitationem facies, vel aliquam jurisdictionem ecclesiasticam vel contentionem voluntariam habeas*: thus when the archbishop visits, he inhibits the bishop; and when a bishop visits, he inhibits the archdeacon; this is to prevent confusion, and continues till the last parish is visited. Now after such Inhibition by an archbishop, if a lapse happens, the bishop cannot institute, because his power is suspended; but the archbishop is to do it, &c. 2 *Inst.* 601: 3 *Salk.* 201. See title *Prohibition*.

INHOC, or INHOKE, From *In*, within, and *hoke* a corner or nook.] Any corner or part of a common field ploughed up and sowed with oats, &c. and sometimes fenced in with a dry hedge, in that year wherein the rest of the same field lies fallow and common. It is called in the north of *England* an *intock*, and in *Oxfordshire* a *hitchin*; and no such *Inhoke* is now made without the joint consent of all the commoners, who in most places have their share by lot in the benefit it, except in some manors, where the lord has a special privilege of so doing. *Kennett's Paroch. Antiq.* 297, &c. and his *Glossary*.

INJUNCTION, *injunctio.*] A kind of prohibition granted by Courts of Equity in divers cases; it is generally grounded upon an interlocutory order or decree out of the court of Chancery, or Exchequer on the equity side, to stay proceedings in courts at law; and sometimes it is issued to the Spiritual Courts, *West Symb.* *sect.* 25. It is likewise sometimes used to give possession to a plaintiff, for want of the defendant's appearance; and may be granted by the Chancery, or Exchequer, to quiet possession of lands.

An

An Injunction is usually granted for the purpose of preserving property in dispute pending a suit; as to restrain the defendant from proceeding at the common law against the plaintiff, or from committing waste, or doing any injurious act. *Mitford's Treatise on Chancery Pleadings.*

A Court of Equity will prevent the assertion of a doubtful right in a manner productive of irreparable injury. Therefore, where the tenants of a manor, claiming a right of estovers, cut down a great quantity of growing timber of great value, their title being doubtful, the court entertained a bill at the suit of the lord of the manor to restrain this assertion of it; and, indeed, the commission of waste of every kind, as the cutting of timber, pulling down of houses, ploughing of antient pasture, working of mines, and the like, is a very frequent ground for the exercise of the jurisdiction of courts of equity, by restraining the waste till the rights of the parties are determined. The courts of equity seem to have proceeded upon a similar principle in the very common cases of persons claiming copy right of printed books, and of patentees of alleged inventions; in restraining the publication of the book at the suit of the owner of the copy, and the use of the supposed invention at the suit of the patentees. But in both these cases the bill usually seeks an account, in one of the books printed, and the other of the profits arisen from the use of the invention; and in all the cases alluded to, it is frequently, if not constantly, made a part of the prayer of the bill, that the right if disputed, and capable of trial in a court of common law, may be there tried and determined under the direction of the court of equity; the final object of the bill being a perpetual Injunction to restrain the infringement of the right claimed by the plaintiff. *Mitford's Treatise.*

A bill of interpleader generally prays an Injunction to restrain the proceedings of the claimants in some other court: and as this may be used to delay the payment of money by the plaintiff, if any is due from him, he ought by his bill to offer to pay the money into court. *Mitford's Treatise.*

In many cases, the courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question. To put an end to the oppression occasioned by the abuse of this privilege, the courts of equity have assumed a jurisdiction. Thus actions of ejectment having become the usual mode of trying titles at the common law, and judgments in those actions not being in any degree conclusive, the courts of equity have interfered; and after repeated trials, and satisfactory determinations of questions, have granted perpetual Injunctions to restrain further litigation; and have thus, in some degree, imposed that restraint in personal, which is the policy of the common law in real, actions. *Bath* (E) v. *Sherwin*: *Leighton* v. *Leighton*: *Bro. P. C.*: 1 *P. Wms.* 671. See this Dictionary, title *Ejectment.*

When a bill in Chancery is filed in the office of the Six Clerks, if an Injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an Injunction will issue of course; and when the answer comes in, the Injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an Injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by *affidavits*, the court will grant an Injunction immediately, to continue till the defendant has put in his answer, and till the court shall make some further order concerning it: and when the answer comes in, whether it shall then be dissolved, or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavits together. 3 *Comm.* 443.

If an attorney proceeds at law, after he is served with an Injunction to stay proceedings, on affidavit made thereof, interrogatories are to be exhibited against him, to which he must answer on oath; and if it appears that he was duly served with the Injunction, and hath proceeded afterwards contrary thereto, the court of Chancery will commit the attorney to the Fleet for the contempt. 2 *Lill. Abr.* 64. But if an Injunction be granted by the Court of Chancery in a criminal matter, the court of *B. R.* may break it, and protect any that proceed in contempt of it. *Mod. Cas.* 16. But a court of law will take such notice of an Injunction, that the defendant shall have no advantage against the plaintiff for not proceeding within the time allowed by the rules of the court, if the delay was occasioned by the defendants obtaining an Injunction. 2 *Burr.* 660.

If a cause at law be at issue, the Injunction may give leave to go to trial, and stay execution, *&c.* The writ of Injunction is directed to the party proceeding, and to all and singular their counsellers, attorneys, and solicitors whosoever; and concludes, *Injoining*, We command that you, and each of you, desist from all further prosecution whatever at common law, for or concerning any matters in the complaint contained, under pain, *&c.* *Vide* more on this subject, 3 *New Abr*: 14 *Vin. Abr.* title *Injunction*: *Com. Dig.* title *Chancery* D. (8).

INJURY, *Injuria.*] A wrong or damage to a man's person or goods. The law punisheth Injuries; and so abhors them, that, in certain cases, it grants writs of anticipation for their prevention. But the law will suffer a private Injury rather than a public evil; and the act of God, or of the law doth Injury to none. 4 *Rep.* 124: 10 *Rep.* 148.

INLAGARE, To admit or restore to the benefit of the law. *Annal. Waverl. sub anno* 1074.

INLAGATION, *Inlagatio*, from the Saxon *In lagian*, i. e. *Inlagare.*] A restitution of one outlawed, to the protection of the law, and benefit of a Subject. *Bract. lib.* 3. *tract.* 2. *c.* 14: *Leg. Canut. par.* 1. *c.* 2.

INLAGH, Inlagatus, *vel homo sub lege.*] He who was of some frank-pledge, and not outlawed. It seems to be the contrary to *Utlagh*. *Bract. tract.* 2. *lib.* 3. *c.* 11.

INLAND, Is said to be *terra dominicalis, pars manerii dominica, terra* interior *vel inclusa*; for that which was let to tenants was called *Outland*. In an antient will there are these words; To *Wulfee* I give the Inlands or demeans, and to *Elsey* the *utlands* or tenancy. *Testam. Britberico.* This word was in great use among the *Saxons*, and often occurs in *Domesday-book*. See *Inlantal.*

INLAND BILLS. See *Bills of Exchange.*

INLAND TRADE, A Trade wholly managed at home, in one country. *Merc. Dict.* It is properly used in contradistinction to *Commerce*, and so is the word Trade generally; though the words Trade and commerce are frequently confounded, especially with respect to the former being used for the latter.

INLANTAL, INLANTALE, Demesne or inland, to which was opposed *delantal*, land tenanted or outlawed. *Cowell.*

INLEASED, From Fr. *enlass.*] Intangled or insnared; the word we may read in the champion's oath. *Co. Inst.* 2 *par. fol* 247.

INLEGIARE. When a delinquent has satisfied the law, and is again *rectus in curiâ*, he is said *se inlegiare*. *Leg. Hen.* I. *cap.* 11. See *Inlagare*.

INMATES, Persons who are admitted to dwell with and in the house of another, and not able to maintain themselves. *Kitch.* 45. These Inmates are generally idle persons harboured in cottages; wherein it hath been common for several families to inhabit, by which the poor of parishes have been increased; but suffering this was made an offence by statute, 31 *Eliz. c.* 7, repealed by *stat.* 15 *Geo.* 3. *c.* 32, liable to a forfeiture of 10*s.* a month, inquirable of in the court leet, &c. If one have a house wherein he dwells, and lets part of it, so that there are several doors into the street, it is as two houses, and the under-tenant shall not be accounted an Inmate: But it is otherwise if there be but one outer door for both families. 2 *Co. Inst.* 378. A man keeps his daughter that is married, and her husband, &c. by covenant, and they have some rooms in his house, they are not Inmates; though if they live in one cottage, and part the house between them, and diet themselves severally, they will be Inmates within the statute. If a person take another to table with him; or let certain rooms to one to dwell in, if he be of ability, and not poor, he is no Inmate. *Kitch.* 45: See titles *Poor*; *Vagrants*.

INNAMIUM FOR NAMIUM, A pledge. *Du Cange.*

INNATURALITAS, Unnatural usage. *Hen. de Knyghton*, in *Edw.* 3. *p.* 2572.

INNINGS, Lands recovered from the sea in *Romney Marsh*, by draining: antient records mention the Innings of archbishops *Becket*, *Boniface*, and others; and at this day there is *Elderton's Innings*, &c. Where they are rendered profitable, and termed *Gainage* lands. *Law of Sewers*, 31.

INNONIA, From Sax. *innan*, i. e. *intus*.] An inclosure. *Spelm. Gloss.*

INNOTESCIMUS. The same as *videmus*; it signifies *letters patent*, so called, which are always of a charter of feoffment, or some other instrument, not of record, concluding *Innotescimus per præsentes*, &c.

INNOVATIONS, Are thought dangerous by our laws; and the antient Judges of the law have ever suppressed them, lest the certainty of the common law should be disturbed. In the reign of King *Ed.* III. the judges said, we will not change the law, which always hath been used; and in the time of King *Hen.* IV. they declared it would be better that it should be turned to a default, than that the law should be changed, or any Innovation made. 1 *Inst.* 379, 303.

INNOXIARE, To purge one of a fault, and make him innocent. *Leg. Ethelred*, *c.* 10.

INNS AND INNKEEPERS. Common Inns are instituted for passengers; for the proper Latin word is *diversorium*, because he who lodgeth there is *quasi divertens se à viâ*. 8 *Rep. Cayle's case*. *Cowel.*

Inns were instituted for lodging and relief for travellers; and, at common law, any man might erect and keep an Inn, or alehouse, to receive travellers, but now they are to be licensed. See title *Alehouses*.

Every Inn is not an alehouse, nor every alehouse an Inn; but if an Inn uses common selling of ale, it is then also an alehouse; and if an alehouse lodges and entertains travellers, it is also an Inn. *Burn. J.*

If the keeper of an Inn harbours thieves, or persons of scandalous reputation, or suffers frequent disorders in his house; or sets up a new Inn, in a place where there is no manner of need of one, to the hindrance of other antient and well-governed Inns, or keep it in a situation wholly unfit for such a purpose, he may by the common law be indicted and fined. *H. P. C.* 146: *Dalt.* 33, 34: 1 *Hawk. P. C. c.* 78.

By the commission of the peace, two Justices (one of the *quorum*,) may inquire of Innholders, and of all and singular other persons who shall offend in the abuse of weights and measures, or in the sale of victuals, against the form of the ordinances in that behalf. *Burn. J.*

Innkeepers not selling their hay, oats, beans, &c. and all kinds of victuals for man and beast, at reasonable prices, having respect to the price sold in the markets adjoining, without taking any thing for litter, they shall be fined for the first offence, and for the second be imprisoned for a month, and for the third stand on the pillory. Rates and prices may be set on all the commodities sold by Innkeepers: and if they extort any unreasonable rates, they may be indicted. 2 *Cro.* 609: *Carthew* 150. See also *stats.* 12 *E.* 2. *c.* 6: 3 *Hen.* 8. *c.* 8: and this Dictionary, title *Victuallers*.

If any Innkeeper, alehouse-keeper, victualler, or sutler, in giving any account or reckoning in writing, or otherwise shall refuse or deny to give in the particular number of quarts or pints, or shall sell in measures unmarked, it shall not be lawful for him, for default of payment of such reckoning, to detain any goods, or other thing, belonging to the person or persons from whom such reckoning shall be due, but he shall be left to his action at law for the same, any custom or usage to the contrary notwithstanding. *Stat.* 11 & 12 *W.* 3. *c.* 15. § 2.

If one who keeps a common Inn, refuse to receive a traveller as guest into his house, or to find him victuals, or lodging, upon his tendering a reasonable price for the same; the Innkeeper is liable to render damages, in an action at the suit of the party grieved, and may also be indicted and fined at the suit of the King: it is said, he may be compelled by the constable of the town, to receive and entertain such a person as his guest; and that it is not material whether he have any sign before his door or not, if he make it his common business to entertain travellers. 1 *Hawk. P. C. c.* 78: 1 *Vent.* 333: *Dalt. c.* 7.

Action on the case on an *implied assumpsit* will lie against the guests for things had, where the Innkeeper is obliged by law to furnish him with meat, drink, &c. And, when a guest calls for any thing at an Inn, the Innkeeper may justify detaining the person of the guest, or a horse, or other thing, till he is paid his just reckoning. *Dyer* 30:

Bac. Abr. title *Inns.* By the custom of the realm, if a man lies in an Inn one night, the Innkeeper may detain his horse until he is paid for the expences; but if he gives the party credit for that time, and lets him depart without payment, he hath waived the benefit of the custom, and must rely on his other agreement, having given credit to the person. 8 *Mod.* 172.

By the custom of *London* and *Exeter*, if a man commit a horse to an Innkeeper, and he eat out his price, the Innkeeper may take him as his own, upon the reasonable appraisement of four of his neighbours; which was, it seems, a custom arising from the abundance of traffick with strangers, that could not be known to charge them with the action; but the Innkeeper hath no power to sell the horse by the general custom of the realm. *Bac. Abr.* title *Inns.*

A person brings his horse to an Inn, and leaves him in the stable there; the Innkeeper may keep him till the owner pay for the keeping: and, it is said, if he eat out as much as he is worth, the master of the Inn, after a reasonable appraisement, may sell the horse and pay himself. *Yelv.* 66. But if one bring several horses to an Inn, and afterwards takes them all away, but one; the Innkeeper may not sell this horse for payment of the debt for the others, but every horse is to be sold to satisfy what is due for his own meat. 1 *Bulst.* 207, 217.

If an Innkeper receives a stage coach, and from time to time suffers the coach and horses to depart without payment, he gives credit to the owners, and cannot afterwards detain the coach and horses for what was formerly due. *Stra.* 556.

A guest in a common Inn arising in the night time, and carrying goods out of his chamber into another room, and from thence to the stable, intending to ride away with them, is guilty of felony, although there was no trespass in the taking of them; which is yet generally required in cases of felony. *Dalt. c.* 40: *Burn. J*: 1 *Hawk. P. C. c.* 33. § 18. So a guest who hath a piece of plate set before him in an Inn, may be guilty of felony in fraudulently taking away the same. 1 *Hawk. P. C. c.* 33. § 6.

Inns were allowed for the benefit of travellers, who have certain privileges whilst they are in their journies, and are in a more peculiar manner protected by the law: it is for this reason that the Innkeeper shall answer for those things which are stolen within the Inn; though not delivered to him to keep, and though he was not acquainted that the guests brought the goods to the Inn; for it shall be intended to be through his negligence, or occasioned by the fault of him or his servants. 8 *Rep. Caley's case.* Soldiers billetted are guests. *Clayt.* 97.

If an attorney hires a chamber in an Inn for a whole term, the host is not chargeable with any robbery in it, because the party is, as it were, a lessee. *Mo.* 877.

If one comes to an Inn, and makes a previous contract for lodging for a set time, and doth not eat or drink there, he is no guest, but a lodger, and so not under the Innkeeper's protection; but if he eats and drinks, or pays for his diet, it is otherwise. 12 *Mod.* 255.

If any theft be committed on a guest that lodgeth in an Inn, by the servants of the Inn, or by any other persons (not the guest's servant or companion), the Innkeeper is answerable in action on the case: but if the guest be not a traveller, but one of the same town, the master of the Inn is not chargeable for his servant's theft; and if a man is robbed in a private tavern, the master is not chargeable. 8 *Rep.* 32, 33.

One came to an Innkeeper and requested him to take charge of goods till a future day, which the Innkeeper refused, because his house was full of parcels; the person bringing the goods then sat down in the Inn, had some liquor, and put the goods on the floor immediately behind him, when he got up the goods were missing. Held, that the Innkeeper was liable, the goods being lost during the time the plaintiff staid *as a guest*. 5 *Term Rep.* 273.

In this action the Innkeeper shall not answer for any thing that is out of his Inn, but only for such things as are *infra hospitium*, the words of the writ being *eorum bona & catalla infra hospitia illa existentia*, &c. But if the Innkeeper put the guest's horse to grass, without orders, and the horse is stolen, he shall make it good. 8 *Rep.* 34. The Innkeeper shall not be charged, unless there shall be some default in him or his servant; for, if he that comes with the guest, or who desires to lodge with him, steal his goods, the host is not chargeable: though if an Innkeeper appoint one to lie with another, he shall answer for him. Although the guest deliver not his goods to the Innkeeper to keep, *&c.* if they be stolen, he shall be charged: but not where the hostler require his guest to put them in such a chamber under lock and key, if he suffers them to be in an outward court, *&c.* 2 *Shep. Abr.* 334. See title *Bailment.* See further as to Inns this Dictionary, titles *Alehouses*; *Drunkenness*; *Action*; *Gaming*; and 1 *Hawk. P. C c.* 78, at length.

INNS OF COURT, *Hospitia Curiæ.*] Are so called, because the students therein, do not only study the law to enable them to practise in the Courts in *Westminster*, but also pursue such other studies, as may render them better qualified to serve the King in his Court. *Fortescue, c.* 49. Of these (say, Sir *Edward Coke*) there are four well known, *viz.* the *Inner Temple, Middle Temple, Lincoln's Inn*, and *Gray's Inn*; which, with the two *Serjeant's Inns*, and eight Inns of Chancery, *viz. Clifford's Inn, Symond's Inn, Clement's Inn, Lyon's Inn, Furnival's Inn, Staple's Inn, Bernard's Inn*, and *Thaive's Inn*, (to which is since added *New Inn*,) make the most famous university for profession of the Law, or of any one human science in the world.

Our Inns of Court, or Societies of the Law, which are famed for their production of learned men, are governed by Masters, Principals, Benchers, Stewards, and other proper officers; and the chief of them have chapels for divine service, and all of them public halls for exercises, readings and arguments, which the students are [*were!*] obliged to perform and attend for a competent number of years, before admitted to speak at the bar, *&c.* The admission and forms for this purpose must be in one of the *Inns of Court*, not in the Inns of Chancery. These societies or colleges, nevertheless, are no corporation, nor have any judicial power over their members, but have certain orders among themselves, which, by consent, have the force of laws; for light offences, persons are only excommoned, or put out of commons; for greater, they lose their chambers, and are expelled; and when expelled out of one Society, shall never be received by any of the others. All the lesser Inns of Chancery are mostly inhabited by attornies, solicitors, and clerks, and belong to some or other of the principal Inns of court, who

who have been used to send yearly some of their barristers to read to them. *Fortescue. Clifford's Inn, Clement's Inn,* and *Lyon's Inn* belong to *The Inner Temple*; *New Inn* to *The Middle Temple*; *Furnival's Inn* and *Thaive's Inn* to *Lincoln's Inn*; and *Staple's Inn* and *Barnard's Inn* to *Gray's Inn. Dugd. Orig.* 320.

INNUENDO, From *innuo*, to nod or beckon with the head.] A word used in declarations, indictments, and other pleadings, to ascertain a person or thing which was named before; as to say, he (*innuendo*, i. e. *meaning*, the plaintiff) did so and so, when there was mention before of another person, 4 *Rep.* 17. An Innuendo is in effect no more than a *prædict*, and cannot make that certain, which was uncertain before; and the law will not allow words to be enlarged by an Innuendo, so as to support an action on the case for speaking of them. *Hob.* 2, 6, 45: 5 *Mod.* 345. An Innuendo may not enlarge the sense of words, nor make supply, or alter the case where the words are defective. *Hut. Rep.* 44. In slander, both the person and scandalous words ought to be certain, and not want an Innuendo to make them out: if a plaintiff declares that the defendant said these words, *Thou art a thief, and stolest a mare*, &c. (Innuendo the plaintiff,) without an averment that the words were spoken to the said plaintiff, this is not good; because it doth not certainly appear of whom they were spoken, and the Innuendo doth not help it. 1 *Danv. Abr.* 158. The usual method of declaring is, if the words were spoken to the plaintiff, the defendant said the words *to*, of, and concerning the plaintiff. If said to a third person, the word *to* is omitted. A man shall not be punished for perjury, by the help of an Innuendo. 5 *Mod.* 342. And an Innuendo will not make an action for a libel good; if the matter precedent imports not scandal, &c. to the damage of the party. *Mich.* 5 *Ann.* Where action lies without an Innuendo, an Innuendo shall be repugnant and void; see 1 *Danv.* 158. See titles *Indictment*; *Libel*; *Action*; *Perjury*.

INOPERATIO. Of the legal excuses to exempt a man from appearing in court, one is, *inoperationis causâ*, viz. on the days in which all pleadings are to cease, or *in diebus non juridicis*. *Leg. H.* 1. *c.* 61.

INORDINATUS. One who died intestate. *Mat. Westm.* 1246.

INPENY AND OUTPENY. Money paid by the custom of some manors, on the alienations of tenants, &c. *Regist. Prior. de Cokesford, p.* 25.

INPRISII. Adherents or accomplices. *Claus.* 18 *Hen.* 3. *in Brady Hist. Engl. Append. p.* 180.

INQUEST, *inquisitio.*] An inquisition of jurors, in causes civil and criminal, on proof made of the fact on either side, when it is referred to their trial, being impanelled by the sheriff for that purpose; and as they bring in their verdict, judgment passeth. *Staundf. P. C. lib.* 3. *c.* 12.

AN INQUEST OF OFFICE, or *Inquisition*, is an inquiry made by the King's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ to them sent for that purpose; or by commissioners specially appointed, concerning any matter that entitles the King to the possession of lands or tenements, goods, or chattles. *Finch, L.* 323, 4, 5. This is done by a jury of no determinate number, being either twelve, or less, or more. As, to inquire, whether the King's tenant for life died seised, whereby the reversion accrues to the King; whether *A.*, who held immediately of the Crown, died without heirs, in which case the lands belong to the King by escheat; whether *B.* be attainted of treason, whereby his estate is forfeited to the Crown; whether C. who has purchased lands be an alien, which is another cause of forfeiture; whether *D.* be an idiot, *à nativitate*, and, therefore, together with his lands, appertains to the custody of the King; and other questions of like import, concerning both the circumstances of the tenant, and the value or identity of the lands. These Inquests of Office were more frequently in practice than at present, during the continuance of the military tenures amongst us; when, upon the death of every one of the King's tenants, an Inquest of Office was held, called an *inquisitio post mortem*, to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the King to his marriage, wardship, relief, *primer seisin*, or other advantages, as the circumstances of the case might turn out. To superintend and regulate these inquiries the Court of wards and liveries was instituted by *stat.* 32 *Hen.* 8. *c.* 46, which was abolished at the Restoration, together with the tenures upon which it was found.

With regard to other matters, the Inquests of Office still remain in force, and are taken upon proper occasions, being extended not only to lands, but also to goods and chattels personal, as in the case of wreck, treasure-trove, and the like; and especially as to forfeitures for offences. For every jury which tries a man for treason or felony, every Coroner's Inquest that sits upon a *felo de se*, or one killed by chance-medley, is, not only with regard to chattels, but also to real interests, in all respects an Inquest of Office; and if they find the treason or felony, or even the flight of the party accused, (though innocent,) the King is thereupon, by virtue of this *Office found*, entitled to have his forfeitures; and also, in the case of chance-medley, he or his grantees are entitled to such things by way of deodand, as have moved to the death of the party. See titles *Deodand*; *Forfeiture*.

Whether a criminal be a lunatick, or not, shall be tried by an Inquest of Office, returned by the sheriff of the county; and if it be found by the jury that he only feigns himself lunatick, and he refuses to plead, he shall be dealt with as one standing mute. *H. P. C.* 226: 1 *And.* 107. Where a person stands mute without making any answer, the court may take an Inquest of Office, by the oath of any twelve persons present, if he do so out of malice, from a perverse or obstinate disposition, &c. But after the issue is joined, when the jury are in court, if there be any need for such inquiry, it shall be made by them, and not by an Inquest of Office. 2 *Hawk. P. C. c.* 30. § 5. If a person attainted of felony escape, and, being retaken, denies he is the same man, Inquest is to be made of it by a jury before he is executed. 2 *Hawk. P. C. c.* 51. See 1 *Bur.* 18; 19. Inquisition on an untimely death, may be taken by Justices of gaol-delivery, oyer and terminer, or of the peace; if omitted by the Coroner. But it must be done publicly and openly, otherwise it shall be quashed. By *Magna Charta*, nothing is to be taken for Inquest of life or member. *Stat.* 9 *Hen.* 3. *c.* 26.

It is said, there are two sorts of Inquisitions, one to inform the King, the other to vest an interest in him; the one need not be certain, but the other must; and where an

an Inquisition finds some parts well, and nothing others, it may be helped by *melius inquirendum*. 2 *Salk*. 469.

There is also a judicial writ *ad inquirendum*, to inquire by a jury into any thing touching a cause depending in court: Inquisition may also be had upon extents of land, writs of *elegit*, where judgment is had by default, and damages and costs are recovered, &c. *Finch* 484: 2 *Lil. Abr*. 65.

These *Inquests of Office* were devised by law, as an authentic means to give the King his right by solemn matter of record; without which he in general can neither take, nor part with any thing. *Finch, L*. 82. For it is a part of the liberties of *England*, and greatly for the safety of the subject, that the King may not enter upon or seise any man's possessions upon bare surmises without the intervention of a jury. *Gilb. Hist. Exch*. 132: *Hob*. 347. It is however particularly enacted by *stat*. 33 *Hen*. 8. *c*. 20, that, in case of attainder for high treason, the King shall have the forfeiture instantly without any Inquisition of Office. And, as the King hath (in general) no title at all to any property of this sort before office found; therefore, by *stat*. 18 *Hen*. 6. *c*. 6, it was enacted, that all letters patent or grants of lands and tenements before office found, or returned into the Exchequer, shall be void. And by the Bill of Rights at the Revolution, 1 *W.& M. stat*. 2. *c*. 2, it is declared, that all grants and promises of fines and forfeitures of particular persons before conviction, (which is here the Inquest of Office,) are illegal and void; which indeed was the law of the land in the reign of *Edward* the Third. 2 *Inst*. 48. See title *Forfeiture*.

With regard to real property, if an office be found for the King, it puts him in immediate possession, without the trouble of a formal entry, provided a Subject in the like case would have had a right to enter: and the King shall receive all the mesne or intermediate profits from the time that his title accrued. *Finch, L*. 325, 6. As, on the other hand, by the *articuli super cartas*, 28 *Ed*. 1. *st*. 3. *c*. 19, if the King's escheater or sheriff seize lands into the King's hand without cause, upon taking them out of the King's hand again, the party shall have the mesne profits restored to him.

There is not such nicety required in an Inquisition as in pleading; because an Inquisition is only to inform the court how process shall issue for the King, whose title accrues by the attainder, and not by the Inquisition; yet, in the cases of the King and a common person, Inquisitions have been held void for incertainty. *Lane* 39: 2 *Nels. Abr*. 1008.

In order to avoid the possession of the Crown acquired by the finding of such office, the Subject may not only have his *petition of right*, which discloses new facts not found by the office, and his *monstrans de droit*, which relies on the facts as found; but also he may (for the most part) traverse or deny the matter of fact itself, and put it in a course of trial by the common-law process of the Court of Chancery; yet still, in some special cases, he hath no remedy left but a mere petition of right. *Finch, L*. 324. These *traverses*, as well as the *monstrans de droit*, were greatly enlarged and regulated for the benefit of the Subject, by the statutes before-mentioned, and others *stats*. 34 *Ed*. 3. *c*. 13: 36 *Ed*. 3. *c*. 13: 2 & 3 *Ed*. 6. *c*. 8. And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff. *Law of Nisi Prius* 201, 2: and must therefore make out his own title, as well as impeach that of the crown, and then shall have judgment *quod manus Domini Regis amoveantur*, &c. 3 *Comm*. 258, 260.

Some of these Inquisitions are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the Inquest or Jury, ought to hear all that can be alledged on both sides. Of this nature are all Inquisitions of *felo de se*; of flight in persons accused of felony; of deodands, and the like; and presentments of petty offences in the sheriff's tourn or court leet, whereupon the presiding officer may set a fine. Other Inquisitions may be afterwards traversed and examined; as particularly the Coroner's Inquisition of the death of a man, when it finds any one guilty of homicide; for in such cases the offender so presented must be arraigned upon this Inquisition, and may dispute the truth of it, which brings it to a kind of indictment, the most usual and effectual means of prosecution. 4 *Comm*. 301.

INQUIRENDO. An authority given in general to some person, or persons, to inquire into something for the King's advantage. *Reg*. 72.

INQUIRY, WRIT OF. See *Writ*.

INQUISITION. See title *Inquest*.

INQUISITION, *Ex officio mero*, Is one way of proceeding in Ecclesiastical Courts. *Wood's Inst*. 596. And formerly the oath *ex officio* was a sort of Inquisition.

INQUISITORS, *inquisitores*.] Sheriffs, Coroners *super visum corporis*, or the like, who have power to inquire in certain cases; and by the statute of *Westm*. 1, inquirors or Inquisitors are included under the name of *Ministri*. 2 *Inst*. 211.

INROLLMENT, *Irrotulatio*.] The registering or entering in the rolls of the Chancery, King's Bench, Common Pleas, or Exchequer, or by the Clerk of the Peace in the records of the Quarter Sessions, of any lawful act; as a statute or recognizance acknowledged, a deed of bargain and sale of lands, &c.

An Inrollment of a deed, may be either by the common law, or according to the statute: and Inrollment of deeds ought to be made in parchment, and recorded in court, for perpetuity's sake. *Trin*. 23 *Car*: *Pasch*. 24 *Car*. 1 *B. R*. But the inrolling a deed doth not make it a record, though it thereby becomes a deed recorded: for there is a difference between matter of record, and a thing recorded to be kept in memory; a record being the entry in parchment of judicial matters controverted in [illegible] of record, and whereof the court takes notice; whereas an Inrollment of a deed is a private act of the parties concerned, of which the court takes no cognizance at the time of doing it, although the court permits it. 2 *Lil. Abr*. 69.

Every deed, before it is inrolled, is to be acknowledged to be the deed of the party before a Master of the Court of Chancery, or a Judge of the court, wherein inrolled; which is the officer's warrant for inrolling of the same: and the Inrollment of a deed, if it be acknowledged by the grantor, will be good proof of the deed itself upon a trial. A deed may be inrolled without the examination of the party himself; for it is sufficient if oath is made of the execution. If two are parties, and the deed is acknowledged by one, the other is bound by it: and if a man lives in *New York*, &c. and would pass land in *England*, a nominal person may be joined with him in

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the deed, who may acknowledge it here, and it will be binding. 1 *Salk*. 389.

If the party dies before it is inrolled, it may be inrolled afterwards; and Inrollments of deeds operate by virtue of the statute of Inrollments; but if livery and seisin, &c. be had before the inrolling, it prevents the operation of the Inrollment, and the party shall be in by that, as the more worthy ceremony to pass estates. 1 *Leon* 5: 2 *Nelf. Abr*. 1010. Although Inrollment, or matter of record, shall not be tried *per pais*, yet the time, when the Inrollment of a deed was made, shall. 2 *Lil*. 68.

An indorsement on the back of the deed by the proper officer is sufficient evidence of the Inrollment. *Doug*. 56, 8. And by *stat*. 10 *Ann*. *c*. 18, where a bargain and sale enrolled shall be pleaded with a profert, a Copy of the Inrollment signed by the proper officer, and proved on oath to be a true copy, shall be of the same force as the deed itself. See titles *Bargain and Sale*; *Deed*; *Conveyance*; *Annuity*.

Inrollment is ordained in divers cases by statute; of bargains and sales by *stat*. 27 *H*. 8 *c*. 16.—Deeds in corporations, &c. *stat*. 34 & 35 *H*. 8. *c*. 22. Of writings in the counties of *Lancaster* and *Chester*, &c. *stat*. 5 *Eliz*. *c*. 26. Grants from the Crown of felon's goods, &c. *stat*. 4 & 5 *W*. & *M*. *c*. 22. Of deeds and wills made of lands of Papists. See title *Papists*: and further on this subject, title *Registry of Deeds*.

INSCRIPTIONES. Written instruments by which any thing was granted. *Blount*.

INSECTATOR. A prosecutor or adversary at law. *Paroch*. *Antiq*. 388.

INSERVIRE. To reduce persons to servitude. *Du Cange*.

INSETENA, *Sax*.] An inditch. *Ordin*. *Romn*. *Marisf*. *p*. 72.

INSIDIÆ, The same with *Vigiliæ* or *Excubiæ*. *Fleta*, *lib*. 2. *cap*. 4. *par*. 3.

INSIDIATORES VIARUM. Way-layers; which words are not to be put in indictments, appeals, &c. by *stat*. 4 *H*. 4. *c*. 2. And before this statute, clergy might be denied felons charged generally as *Insidiatores Viarum*, &c. See *stat*. 23 *Car*. 2. *c*. 1; and title *Clergy*, *Benefit of*.

INSIGNIA, Ensigns or arms. See *Arms* and *Gentility*.

INSILIUM, Evil advice or counsel. Hence, *Insiliarius*, an evil counsellor. *Sim*. *Dunelm*.

INSIMUL COMPUTASSET, Is a writ or action of account, which lies not for things certain, but only for things uncertain. *Bro*. *Acco*. 81. Also, in *assumpsit*, a count is often added to the declaration, called an *Insimul computasset*, i. e. setting forth an *account stated*, wherein the defendant was found indebted to the plaintiff in so much, as a consideration for the defendant's promise to pay the sum found in arrear. See this Dictionary, titles *Actions*; *Pleading*; *Assumpsit*.

INSIMUL TENUIT. One species of the writ of *formedon* brought against a stranger by a coparcener on the possession of the ancestor, &c. See *Formedon*.

INSINUATION, *insinuatio*.] A creeping into a man's mind or favour covertly; mentioned in the *stat*. 21 *H*. 8. *c*. 5. Insinuation of a Will is, among the civilians, the first production of it; or leaving it in the hands of the Registrar, in order to its probate.

INSOLVENT. Till of late the Chancery would not put out an insolvent trustee; for that he was intrusted by the donor; an insolvent person made executor cannot be put out by the Ordinary; for he is intrusted by the testator. *Comb*. 185: *Carth*. 457. But Chancery granted an injunction against him, not to intermeddle with the assets, any further than to satisfy the legacy given to himself; for in equity he is but a trustee for the other legatees; (who in this case were infants;) and where a trustee is insolvent, the Court of Chancery will compel him to give security before he shall enter upon the trust. *Carth*. 458. See titles *Chancery*; *Trustees*; *Bankrupt*; *Executor*.

INSOLVENT DEBTORS, See titles *Debtors*; *Execution*.—Many acts have been from time to time made for the relief of these; the last before these leaves went through the press was *stat*. 34 *Geo*. 3. *c*. 69, by which persons actually in custody on the 12th of *February* 1794, and whose whole debts did not exceed the sum of 1000 *l*. were released, on making affidavit of the surrender of all their estate and effects, and signing a schedule thereof, delivered to the Clerk of the Peace at the sessions next following their respective notices, of their name, trade, and two last places of abode (if so many); which were to be given in the London Gazette, and in the county newspaper nearest to the gaol where confined, (if out of London or the bills of mortality,) three times; the first notice to be at least twenty-one days before the said sessions. The estate and effects of discharged Debtors, are vested in the clerk of the peace, who is directed by the statute to assign the same to such creditors as the court shall direct; when the assignees are to use their best endeavours to receive and collect the estate and effects of every such Debtor, and with all convenient speed make sale thereof; and if the Debtor be interested in, or entitled to any real estate, either estates-tail, or in possession, reversion, or expectancy, the same to be sold by public auction within two months after the assignment, being first advertised in the Gazette, some daily paper, or country paper, if out of the bills of mortality, thirty days previous to such sale; and, at the end of three months after such assignment, an equal dividend of the Debtor's effects was ordered to be made, and, if a surplus, the same to be paid to the Debtor. Mortgages to take place of claims of an inferior nature. Prisoners not to be discharged of debts subsequent to *February* 12, 1794.—Attornies, or servants, imprisoned for embezzling money received for their employers, or any persons who have obtained money, or bills of exchange, under false pretences, or removed goods to defraud landlords, or fraudulently assigned their effects, are excluded from the benefit of the statute. Prisoners in custody for fees, on contempt for not obeying awards, not paying costs, or on *excom. cap*., to be discharged; but the statute does not extend to Debtors to the Crown or Revenue; 20*l*. *per cent*. to be allowed as a reward for discovering any part of a Debtor's estate not comprised in the schedule; and the discharge of fraudulent Debtors to be void. Perjury of prisoners to be punishable as in other cases of perjury.

INSPECTION. See *Age*; *Infancy*; *Trial*.

Trial by Inspection, or examination, is, when for the greater expedition of a cause, in some point or issue, being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the Judges of the court, upon the testimony of their own senses, decide the point in dispute. See 3 *Comm*. 331.

INSPEXIMUS. A word used in letters patent giving name to them, being the same with exemplification, and called *inspeximus*, because it begins, *Rex omnibus*, &c. *Inspeximus irrotulamentum quarund'*, *literar'*, *patent'*, &c.

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INSTALLMENT. A settlement, establishing, or sure placing in; as Installment into dignities, &c. See *Stat.* 20 *Car.* 2. c. 2.

In ecclesiastical promotions, where the freehold passes to the persons promoted, corporal possession is required, to vest the property completely in the new proprietor; who, according to the distinction of the Canonists, acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by Installment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. 2 *Comm.* 312.

Installment signifies also either the payment, or the time appointed for payment, of different portions of a sum of money; which, by agreement of the parties, in stead of being payable in the gross, at one time, is to be paid in parts, at certain stated times; such as are frequently specified in conditions to bonds, &c. or defeasances, or warrants of attorney to confess judgments.

INSTANT, Lat. *instans*, *instanter*.] An indivisible moment of time; which, though it cannot be actually divided, yet in intendment of law it may, and be applied to several purposes: he who lays violent hands upon himself commits no felony till he is dead, and when dead he is not in being so as to be termed a felon; but he is so adjudged in law *eo instante*, at the very Instant of this fact done. See title *Forfeiture*. And there are many other like cases where the Instant of time that is not divisible in nature, in the consideration of the mind is divided. *Plowd.* 258. *b.*: and vide *Co. Lit.* 185. *b*: *Vin. Abr.* title *Instant*. *A. pl.* 2.

An Instant is not to be considered in law, as in logick, as a point of time, and no parcel of time; but in our law, things which are to be done in an Instant, have in consideration of law a priority of time in them. Vide *Co. Lit.* and *Plowd.* as cited before. And in several cases, a difference is allowed in our law in an Instant, as *per mortem & post mortem*, &c. See *Show.* 415

INSTANTER, *Lat.*] Instantly or presently. *Law Lat. Dict.*

Trial shall be had *instanter* where a prisoner between attainder and execution, pleads that he is not the same that was attainted. In such a case a jury is to be impanelled to try this collateral issue, *viz.* the identity of his person, and in such collateral issue, the trial shall be *instanter*. See *Staundf. P. C.* 163: *Co. Lit.* 157: 3 *Burr.* 1809 - 1812, where an issue on the identity of the person was joined, and the several points following were determined. First, It is to be tried *instanter*, unless the court (upon circumstances) give time. 2dly, The award of the execution is to be by the second judge, if the sentence before pronounced was for felony. 3dly, The defendant is not entitled to a copy of the record. 4thly, The court will not name the day of execution, but leave it to the sheriff. See also this Dictionary, title, *Execution of Criminals*; *Inquisition*.

INSTAURUM, Is used in ancient deeds for a stock of cattle; *Staurum* and *instauramentum*, signify young beasts, store or breed. *Mon. Angl. tom.* 1. *p.* 548. *Instaurum* was commonly taken for the whole stock upon a farm, as cattle, waggons, ploughs, and all other implements of husbandry. *Fleta, lib.* 2. *cap.* 72. *Instaurum ecclesiæ* is applied to the books, vestments, and all other utensils belonging to a church *Synod. Exet. ann.* 1287.

INSTIRPARE, To plant or establish. *Brompt.* 935.

INSTITUTION, *Institutio.*] Is when the bishop says to a clerk, who is presented to a church living, *Instituo te rectorem talis ecclesiæ, cum curâ animarum, & accipe curam tuam & meam*: or it is a Faculty made by the Ordinary, whereby a Parson is approved to be inducted to a rectory or parsonage. If the bishop upon examination finds the Clerk presented capable of the benefice, he admits and institutes him; and Institution may be granted either by the bishop under his episcopal seal; or it may be done by the bishop's vicar-general, chancellor or commissary; and if granted by the vicar-general, or any other substitute, their acts are taken to be the acts of the bishop: also the instrument or letters testimonial of Institution may be granted by the bishop, though he is not in his diocese; to which some witnesses should subscribe their names. 1 *Inst.* 344. The bishop by Institution transfers the cure of souls to the clerk; and if he refuseth to grant Institution, the party may have his remedy in the court of audience of the archbishop, by *duplex querela*, &c; for Institution is properly cognizable in the Ecclesiastical Court: where Institution is granted, and suspected to be void for want of title in the patron, &c. a superinstitution hath been sometimes granted to another, to try the title of the present incumbent by ejectment. 2 *Rol. Abr.* 220. 4 *Rep.* 79.

Taking a reward for Institution incurs a forfeiture of double value of one year's profit of the benefice, and makes the living void. *Stat.* 31 *Eliz* c 6. On Institution the clerk hath a right to enter on the parsonage house and glebe, and take the tithes; but he cannot grant, let, or do any act to charge them, till he is inducted into the living: he is complete parson as to the spiritualty, by Institution; but not as to the temporalty, &c. By the Institution he is only admitted *ad officium*, to pray and preach; and is not entitled *ad beneficium*, until formal induction. *Plowd.* 528. See *Installment*. The Church is full by Institution against all common persons, so that if another person be afterwards inducted, it is void, and he hath but a mere possession; but a church is not full against the King till induction. 2 *Inst.* 358: 1 *Rol. Rep.* 151. When a bishop hath given Institution to a clerk, he issues his mandate for induction; and if the archbishop should inhibit the archdeacon to induct the clerk thus instituted, he may do it notwithstanding. The first beginning of Institutions to benefices, was in a national synod held at *Westminster*, *anno* 1124. For patrons did originally fill all churches by collation and livery; till this power was taken from them by canons. *Seldon's Hist. of Tithes, cap.* 6 & 9 *p.* 375. See further, titles *Parson*; *Advowson*; *Simony*, &c.

INSUPER, Is used by auditors in their accounts in the Exchequer; as when so much is charged upon a person as due on his account, they say so much remains *insuper* to such an accountant. See titles *Accounts-Publick*.

INSURANCE or ASSURANCE.

A Security given, in consideration of a sum of money paid in hand of so much *per cent* to an Assurer or Insurer, to indemnify the Insured from such losses as shall be specified

cified in the policy, or instrument of Assurance, subscribed by the Insurer or Insurers for that purpose. *Dict. Tr. and Com.* 135: *Savary's Dict.* title *Assurance & Police d' Assurance.*

It has been conceived, from a passage in *Suetonius*, that *Claudius Cæsar* was the first who invented this custom of Assurance; but, with greater probability, *Savary*, in his *Dictionaire de Commerce*, title *Assurance*, thinks this custom was first introduced by the Jews in the year 1182; but whoever was the first contriver, or original inventor of this useful branch of business, it has been many ages practised in this kingdom, and is supposed to have been introduced here by some *Italians* from *Lombardy*, who at the same time came to settle at *Antwerp*, and among us: and this being prior to the building of the *Royal Exchange*, they used to meet in a place where *Lombard-street* now is, at a house they had called the Pawn House, or *Lombard*, for transacting business; and as they were then the sole negociators in Insurance, the policies made by others in after-times had a clause inserted, that those latter ones should have as much force and effect as those formerly made in *Lombard-street*.

This latter opinion is adopted by Mr. *Parke*, in his "System of the Law of Marine Insurances, *&c.*" a book long wanted by the profession, and containing information the most necessary to the commercial part of the community. It is founded almost solely on the decisions of the late venerable Chief Justice *Mansfield*; a name that will ever be inestimably dear to all lovers of *Equity*, and to none more than to the Merchants of *London*.

From Mr. *Parke's* excellent Digest of the Law on this subject, (2d. *edition*, 1790) the following abridgment has been compiled.

Varying a little from the order in which Mr. *Parke* has disposed his matter, the subject may, for our present purpose, be aptly divided as follows:

I. *Of* MARINE INSURANCES. First, considering,

1. *The* Policy, *its Nature.*
2. *The Construction to be put on it.*
3. *Warranties in Policies.*
4. *The Proceedings on Policies.*
5. *Of Re-assurances, and Double Insurances.*

II. *Of* Losses *under such Policies.*

1. *Of total Losses, by Peril of the Sea.*
2. *By Capture.*
3. *Detention.*
4. *Barratry, &c.*
5. *Of general or gross Average; Average or partial Loss; and Adjustment.*
6. *Of Salvage.*
7. *Of Abandonment.*

III. *Of* Fraud, Illegality, *or* Irregularity; *which either vitiate the Policy, or prevent a Recovery, though a Loss happen.*

1. *Of direct Fraud in Policies.*
2. *Of changing the Ship.*
3. *Deviation in the Voyage.*
4. *Sea-worthiness.*
5. *Of Wager Policies.*
6. *Of illegal Voyages, and Enemies' Ships, &c.*
7. *Of prohibited Goods.*
8. *Of the Return of Premium; in Cases of void or fraudulent Policies.*

IV. *Of* Bottomry *and* Respondentia.

V. *Of* INSURANCES *on* LIVES.

VI. *Of* INSURANCES *against* FIRE.

Previous to entering into this detail it may be proper to say a few words as to who may be Insurers or Underwriters; and what property may in general be insured.

At common law, and by the usage of merchants, any person whatever might be an Insurer: but this having led to dangerous confidence on the one hand, and unprincipled fraud on the other, the *stat.* 6 *Geo.* 1. *c.* 18, was passed, authorizing his Majesty to grant charters to the *Royal Exchange Assurance Company*, and the *London Assurance Company*; and which statute prohibited any other Society or *Partnership* from underwriting policies of Insurance. Policies therefore are now either underwritten by those Companies, or individual underwriters; a policy subscribed by any Society, or Partnership, being absolutely void. *Parke* 5, 9.

The most frequent subjects of Insurance are, 1st, Ships, goods, merchandizes; the freight or hire of ships. 2d, Houses, warehouses, and the goods in them from danger *by fire*. And 3d, Lives. (Of the two latter, see *Post* V. VI.) *Bottomry* and *Respondentia* are also particular species of property which may be insured; but which must be particularly expressed in the policy. 3 *Burr.* 1394: 1 *Black. Rep.* 405; unless by the usage of the trade it is understood. *Parke* 11. See *post* IV. And the lien of a factor upon goods is included in the term *goods*. 1 *Burr.* 489. Insurance on seamen's wages is prohibited. *Parke* 12. A governor of a fort may insure it against the attacks of an enemy. 3 *Burr.* 1905. Insurance on enemies' property is now prohibited by *stat.* 33 *Geo.* 3. *c.* 27. § 4. See *post* III. 5, 7.

I. 1. *Policy* is the name given to the instrument by which the contract of indemnity is effected between the Insurer and the Insured; and it is not, like most contracts, signed by both parties, but only by the Insurer, [the party who takes on him the risk,] who, on that account, it seems, is called *The Underwriter.*—Of Policies there are two kinds, *valued* and *open*; the difference is, that, in the former, property insured is valued at prime cost at the time of effecting the policy; in the latter, the value is not mentioned. In the case of an open policy the real value must be proved; in the other it is *agreed*, and it is just as if the parties had admitted it at the trial. 2 *Burr.* 1117.

They are only simple contracts, but of great credit, and ought not to be altered when once they are signed; unless there be some written document to shew that the meaning of the parties was mistaken, or unless they be altered by *consent*. 1 *Vez.* 317: 1 *Atk.* 545: *Salk.* 444.

A Policy is a species of property for which *trover* will lie at the instance of the Insured, if it be wrongfully withheld from him. *Parke* 4.

The form of the policy now used, is two hundred years old, and is very irregular and confused, and often ambiguous. It is partly printed, to serve for general purposes common to all policies, and partly written, for the purpose of inserting the names of the parties, and to express

express their meaning; and the written clauses shall accordingly control the printed words. See 3 *Burr.* 1555: *Parke* 5, 15.

There are *nine* requisites of a policy. *First*, The name of the person Insured. It was formerly much the practice to effect policies of Insurance *in blank* without naming the persons on whose account they were made; this was found both mischievous and inconvenient: to remedy which, the *stat.* 25 *Geo.* 3. *c.* 44, directed the name of *all* persons interested, or if they resided abroad, the name of their agents in this kingdom to be inserted in the policy. The provisions of this act however, not being without their attendant evils, (see 1 *Term Rep.* 313, 464,) it was repealed by *stat.* 28 *Geo.* 3. *c.* 56; which enacts, that it shall not be lawful for any person to make Assurance on ships or goods, without inserting the name or firm of *one* or more of the parties interested; *or* the name or firm of the consignor or consignee; *or*, of the person receiving the order for, or effecting, the policy; *or*, of the person giving directions to effect the same. All policies without one or other of these requisites to be null and void.

Secondly, The names of the ship and master; unless the Insurance be general, on any ship or ships. *Parke*, 19.

Thirdly, Whether the Insurance be made on ships, goods, or merchandizes. We may here observe, that a policy *on goods* generally does not include goods lashed on deck, the captain's clothes, or the ship's provisions. *Parke* 21. But a policy on the ship and furniture includes provisions sent out in a ship for the use of the crew. 4 *Term Rep.* 206. See *post* II. 1, 5.

Fourthly, The name of the place at which the goods are laden, and to which they are bound. A policy, therefore, from *London* to ——— is void. *Moll. b.* 2. *c.* 7. §. 14. It is also usual to state at what ports or places the ship may touch or stay; to avoid questions on deviation. *Parke* 22.

Fifthly, The time when the risk commences, and when it ends. On the goods it usually begins from the lading on board the ship, and continues till they are safely landed; on the ship, from her beginning to lade at *A*, and continues till she arrive at the port of destination, and be there moored in safety twenty-four hours. *See post* II.

Sixthly, The various perils against which the Underwriter insures. The words now used in policies are so comprehensive that there is scarcely any event unprovided for. The Insurer undertakes to bear "all perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of Kings, Princes, and People of what nation, condition, or quality soever, barratry of the master and mariners; *and all other perils*, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, or any part thereof."

The policy is frequently made with the words *lost or not lost* in it; which are peculiar to *English* policies, and add greatly to the risk: as though the ship be lost at the time of the Insurance made, the Underwriter is liable, if there be no fraud. *Parke* 24. See 5 *Burr.* 2083.

Seventhly, The *Premium* or consideration for the risk, which is always expressed in the policy to be received at the time of underwriting; but policies in general are effected by the intervention of a broker, between whom and the Insurers open accounts are kept by the usage of trade; and who are therefore, it seems, liable, in an action, to the Insurers, notwithstanding such admission by the words of the policy. *Parke* 26.

Eighthly, The day, month, and year on which the policy was executed.

Ninthly, The policy must be duly stamped, *viz.* on a policy for 1000*l.* and under, with a 6*s.* stamp, and above that sum with a stamp of 11*s.*

By *stat.* 11 *Geo.* 1. *c.* 30, When an Insurance is made, a policy must be made out within three days under a penalty of 100*l.*; and by the same statute, promissory notes for Insurances are void.

It is stated above, that policies are generally effected by the intervention of a Broker, and that the name of the agent of an Insurer residing abroad must be mentioned in the policy. It seems therefore the proper place here to mention, that such agent or correspondent is liable to an action *for not insuring*, which is to be tried on the same principles as an action on a policy; and the defendant is entitled to every benefit of which the Underwriter might take advantage. The whole law on this subject is laid down in *Smith* v. *Lascelles*, where *Buller*, J. mentioned three instances in which such order to insure must be obeyed. 1. Where a merchant abroad has effects in the hands of his correspondent here. 2. Where, though the merchant has no effects in the hands of his correspondent, yet the course of dealing has been such, that the one has been used to send orders for Insurance, and the other to comply with them. 3. If the merchant abroad send bills of lading to his correspondents here, and ingrafts on them an order to insure, as the implied condition on which the bills of lading shall be accepted. 2 *Term Rep.* 187. and *note*.

2. A Policy being considered as a simple contract of indemnity, must always be construed, as nearly as possible, according to the intention of the contracting parties, and not according to the strict meaning of the words. And, in questions on such construction, no rule has been more frequently followed, than the usage of trade, with respect to the voyage insured. 1 *Burr.* 347, 8: See also 2 *Salk.* 443, 5: 2 *Str.* 1265, and *post* III. 3.

A Policy on a ship generally from *A.* to *B.* was construed to mean till the ship was unladen. *Skinn.* 243. But if it contain the usual words *till moored twenty-four hours in safety*, the Insurers shall be answerable for no loss, that does not actually happen before the expiration of the time. Even though the loss was occasioned by an act (of barratry by the master) committed during the voyage insured. 1 *Term. Rep.* 252.

Under a policy containing those words, the Underwriters were held liable for a subsequent loss; because the Captain, the very day on which the ship arrived at her moorings, was served with an order from Government to return in order to perform quarantine; and therefore the ship could not be said to have moored *twenty-four hours in safety*, although she did not go back for some days. 2 *Stra.* 1243.

In a policy upon freight, if an accident prevent the ship fro[illegible]g, the Insured cannot recover the freight, which he [illegible]d have earned if she had completed her voyage.

voyage. 2 *Stra.* 1251. But if the policy be a valued policy, and part of the cargo be on board, when such accident happens, the Insured may recover to the whole amount. 3 *Term Rep.* 362.

When an Insurance is *at and from* any place the ship is protected, from her first arrival during her preparation for the voyage; but if all thoughts of the voyage be laid aside, the Insurer is discharged. 1 *Atk.* 548: 2 *Atk.* 359: and see 1 *Black. Rep.* 417, 8.

The great and leading cases on questions of construction are two, *Tiernay* v. *Etherington*, and *Pelly* v. *Royal Exchange Company*. See 1 *Burr.* 341, 8. In these cases, the principles to be observed in the construction of policies, are fully considered; and in the latter of them, Lord *Mansfield* observed, that "the Insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of doing it; and what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy." The same principles were adhered to in a subsequent case, where the same learned Judge remarked that every Underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself. *Dougl.* 510—513. So in the construction of a policy upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid. *Dougl.* 527—531.

The usage of trade with respect to *East-India* voyages has been more notorious than in any other, the question having more frequently occurred. The charter-parties of the *India* Company give leave to prolong the ship's stay in *India* for a year, and it is common by a new agreement to detain her a year longer. The words of the policy too are very general, without limitation of time or place. These charter-parties are so notorious, and the course of the trade is so well known, that the Underwriter is always liable for any intermediate voyage, upon which the ship might be sent while in *India*, though not expressly mentioned in the policy. These principles were fully laid down and settled in the nine causes tried upon the ship, *Winchelsea*, East Indiaman; the nine verdicts in which were ultimately uniform, for the plaintiffs the Insured, against the Underwriters. 3 *Burr.* 1707: & *seqq.* They have been since recognized and allowed in subsequent cases. See *Parke* 49, 51.

However, the parties may, by their own agreement, prevent such latitude of construction: nor need this be done by express words of exclusion; but if, *from the terms used*, it can be collected, that the parties meant so, that construction shall prevail. *Dougl.* 27. And the equitable principles of construction shall never be carried so far as that when a man has insured one species of property, he shall recover a damage which he has suffered by the loss of a different species. Thus, one who has insured a cargo of goods cannot, under that Insurance, recover the freight paid for the carriage; nor can an owner who insures *the ship merely* demand satisfaction for the loss of merchandize laden thereon, or extraordinary wages paid to seamen, or the value of provisions by reason of *detention* of the ship at any port. *Parke* 52—61. See also 1 *Term Rep.* 127, 130 and *post* [illegible]

3. *A Warranty*, in a policy of Insurance, is a condition, or a contingency, that a certain thing shall be done or happen, and unless that is performed, there is no valid contract. 1 *Term Rep.* 345. It is immaterial for what end, if any, the warranty is inserted in the contract; but, being inserted, it becomes a binding condition upon the Insured, and he must shew a literal compliance with it. *Parke* 318. So on the contrary warranties shall be strictly construed in favour of the Insured. As where a ship is warranted well on any day certain, though she be lost by eight in the morning of the day when the policy was effected at noon, the Underwriter shall be liable. 3 *Term. Rep.* 360. It is no matter whether the loss happened in consequence of the breach of warranty or not, for the very meaning of inserting a warranty is to preclude all inquiry about its materiality. 1 *Term Rep.* 346. It is also immaterial to what cause the non-compliance is to be attributed; for although it might be owing to the merest accident, or to the most wise and prudential reasons, the policy is avoided. *Cowp.* 607.

In this strict and literal compliance with the terms of a Warranty consists the difference between a Warranty and a Representation; the latter of which need only be performed *in substance*, while a Warranty must always be complied with *strictly*. In a Warranty the person making it takes the risk of its truth or falsehood on himself; in a Representation, if the Insured assert that to be true which he either knows to be false, or about which he knows nothing, the policy is void on account of fraud; but a Representation made without fraud, if not false in a *material* point, does not vitiate the policy. *Cowp.* 787: *Parke, c.* 18: See *post* III. 1.

In order to make written instructions binding as a Warranty they must appear on the face of, and make a part of, the policy. *Cowp.* 790. For though a written paper be *wrapt up in the policy*, and shewn to the Underwriters at the time of subscribing, or even if it be *wafered to the policy*, it is not a Warranty, but a Representation. *Dougl. p.* 12. in *n.* But a Warranty written *in the margin* (transversely, or otherwise) of the policy is considered to be equally binding, and liable to the same strict construction as if written in the body of the policy. *Doug.* 11, 12. *n.* 4. 13, *n.* If the Underwriter pay the loss on a policy, and after find that such Warranty was not strictly complied with, he may recover back the money again by action: See 1 *Term Rep.* 343; which was also a case arising on a Warranty in the margin of a policy.

The *various kinds* of Warranties are too numerous to be mentioned; depending generally upon the particular circumstances of each case. The three cases of Warranty, on which most questions have arisen, are, as to the *time* of sailing, *convoy*, and *neutrality* of property.

As to the first of these: if a man warrant to sail *on* a parcular day, and be guilty of a breach of that Warranty, the Underwriter is no longer answerable. *Parke* 325. *c.* 18. And a detention by Government, previous to the proposed day of sailing, is no excuse for not complying with the Warranty, nor a peril within the terms of the policy. *Cowp.* 784. So if the Warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case. *Parke* 326. *c.* 18.

But

But when a ship leaves her port of lading, having a full and complete cargo on board, and having no other view but the safest mode of sailing to her port of delivery, for which purpose she touches at any particular place of rendezvous for convoy, *&c.* her voyage must be said to commence from her departure from that port, and though she be detained at such place of rendezvous by an embargo, she has complied with the Warranty. *Cowp.* 601—8: and see *Thellusson* v. *Fergusson*, *Dougl.* 361. *acc.* What shall be a departure from the port of *London*, or rather what is the port of *London*, remains yet undecided. It seems, however, that *Gravesend* is the limit of that port, where vessels receive the Custom-house cocket, their final clearance, on board, and from whence they must depart on the day mentioned in the Warranty. *Parke*, *c.* 18.

As to Warranty of sailing with convoy. If the Insured warrant that the vessel *shall depart with convoy*, and it do not, the policy is defeated, and the Underwriter is not responsible. *A convoy* means a naval force under the command of that person whom Government, or any authorized by them, may happen to appoint. *Parke*, *c.* 18.

A sailing with convoy from the usual place of rendezvous, as *Spithead* for the port of *London*, is *a departure* with convoy within the meaning of such a Warranty. 2 *Salk.* 443: 2 *Str.* 1263, 5. And although the words used are generally *to depart with convoy*, or to *sail with convoy*, yet they extend to sailing with convoy throughout the voyage. 3 *Lev.* 320. And this point was unanimously confirmed by the whole Court in more modern times. *Dougl.* 72. *Lilly* v. *Ewer*.

But an unforeseen separation from convoy is a peril to which the Underwriter is liable. 3 *Lev.* 320: 2 *Salk.* 443: *Carth.* 216: 1 *Show.* 320: 4 *Mod.* 58: *S. C.* And even where the ship has without any neglect, by tempestuous weather, been prevented from joining the convoy at all; at least, so as to receive the orders of the commander of the ships of war; if she do every thing in her power to effect it, it shall be deemed a satisfaction of the Warranty to sail with convoy. 2 *Str.* 1250. The duty of officers appointed for convoy to merchant ships is prescribed by *stat.* 13 *Car* 2. *st.* 1. *c.* 9. *art.* 17. confirmed by *stat.* 22 *Geo.* 2. *c.* 33. § 2. *art.* 17. *Parke* 350, *n.* See *post* II. 4.

The last species of Warranty above mentioned is that of *neutrality*; or that the ship and goods insured are neutral property. This is different from the two former; for, if this Warranty be not complied with, the contract is not merely voided as for a breach, but it is absolutely void, *ab initio*, on account of fraud, being a fact at the time of insuring within the knowledge of the Insurer; an error in which must therefore arise from a deliberate falsehood on his part. 4 *Burr.* 1419: 1 *Black. Rep.* 427. And see *post* III. But if the ship, *&c.* is neutral at the time the risk commences, the Insurer takes upon himself the chance of war and peace during the continuance of the policy. *Dougl.* 732. *Eden* v. *Parkinson*.

4. The oldest case in the books on a marine policy of Insurance is in 7 *Rep.* 47. *b*, which only serves however to shew that this contract was at that time very little understood. In the reign of Queen *Elizabeth*, a statute was passed, (43 *Eliz.* *c.* 12,) to erect a particular court for the trial of Insurance causes in a summary way, by a commission to the Judge of the Admiralty, the Recorder of *London*, two Doctors of the civil law, two common Lawyers, and eight Merchants, with an appeal by bill to the Court of Chancery. This statute was explained by *stat.* 13 & 14 *Car.* 2. *c.* 23; but the court erected by them is now entirely disused; for this among many other reasons, that its jurisdiction was not sufficiently extensive. See *Str.* 166: 1 *Show.* 396: 2 *Sid.* 121. Insurance causes are now therefore decided, like all other questions of property, by a trial by jury in a court of common law; and which, on due consideration, will appear the most safe, eligible, and (as now regulated) expeditious, mode that could be adopted. *Parke Introd.*

Courts of Equity have no jurisdiction over such questions, because the demand is plainly a demand at law, and the damage as much the object of proof by witnesses, as any other species of damage whatever. *De Ghetoff* v. *London Assur. Comp.*, *Bro. P. C.* If, indeed, the trustee in a policy of Insurance actually refuse his name to the *Cestuy que trust*, in an action, or a commission is necessary to examine witnesses residing abroad; or where fraud is suspected, and a disclosure of circumstances is to be procured upon the oath of the Insured; in these cases, application may be to a Court of Equity. But, in all other cases, a court of common law is the proper forum. See 1 *Atk.* 547: 2 *Atk.* 359: *Parke*, *c.* 20. And even if the parties, by a clause in the policy, should agree to refer any dispute to arbitration, that will not be a sufficient bar to an action at law, unless a reference is in fact made, or is depending. 1 *Wils.* 129.

In order to recover upon a policy against either of the Insurance Companies, (the *Royal Exchange*, or *London Assurance*,) the action must be *Debt*, or *Covenant*, as their policies are under seal; from hence arose an inconvenience, as under the plea of a general issue in those actions the true merits of the case could seldom come in question; to remedy this, the *stat.* 11 *Geo.* 1. *c.* 30. § 43, enables the jury to give such part only of the sum demanded in debt, or so much damages in covenant, as on the evidence it appears the plaintiff in justice ought to have.

In order to recover against a private Underwriter upon the policy, who merely subscribes his name without any seal, the form of action is a special *Indebitatus assumpsit*, founded upon the express contract, which action may be brought in the name of the broker, effecting the policy; and by *stat.* 19 *Geo.* 2. *c.* 37. § 6, within fifteen days after action brought, the plaintiff, on request in writing, must declare the amount of all Insurances on the same ship. *Parke*, *c.* 20.

It was formerly usual for the Insured to bring separate actions against each of the Underwriters (how many soever) on a policy, and proceed to trial on all. This was found to be expensive, and, in fact, unjust; and the Court of King's Bench intimated, that in such a case they would grant imparlances in all the actions but one, till that could be tried. 2 *Bar* At length Lord *Mansfield* introduced the present *Consolidation-Rule*, which is now admitted in general practice, by which the proceedings in all the actions but one are staid; and in consequence of this convenience the defendant under-

takes not to file any bill in equity, or bring a writ of error for delay, and to produce all books and papers material to the point in issue. *Parke Introd.*

The *stat.* 19 *Geo.* 2. *c.* 37. § 7, also enables defendants to pay money into court in all such actions; after which, if the plaintiff proceeds, and has not a verdict for more than the money paid in, he shall pay costs to the defendant.

When money has been paid by mistake to the Insured, or where the Insured wishes to recover back the premium, the proper remedy is by action for money had and received to the plaintiff's use. 1 *Salk.* 22: *Skinn.* 412: 1 *Show.* 156.

The declaration on a policy of Insurance must set out the policy, and aver that it was signed by the defendant, and, that in consideration of the premium, he undertook to indemnify the Insured: it must then state the interest of the Insured, and shew the loss to have happened by one of the perils mentioned in the policy, which must always be stated according to the truth of the fact. *Parke, c.* 20.

More particularly as to the manner of alledging the loss to have happened within the perils of the policy.—To aver that the loss happened by the fraud and negligence of the master, has been held a sufficient averment of barratry, 2 Ld. *Raym.* 1349: 1 *Str.* 581; though it is now usual to aver precisely, in terms, that the loss happened by the barratry of the master or mariners. *Parke, c.* 20. Though the declaration alledge a total loss, the Insured may recover for a partial one; for in actions for damages merely, the plaintiff may always recover *less*, but not *more*, than the sum laid in the declaration. 2 *Burr.* 904: 1 *Black. Rep.* 198. So though the plaintiff appear in proof to have a larger interest than is averred in the declaration, yet he is entitled to recover to the amount alledged. *Parke* 402. *c.* 20.

In order to entitle the Insured to recover expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy. They may be given in evidence, because an Insurance is against all accidents, and salvage is an immediate and necessary consequence of some of those stated in a policy. *Hardw.* 304.

The general issue, *non assumpsit*, is the usual plea to a declaration upon a policy against private persons; and under this plea and the general issue, pleadable by corporations, the defendant has a right to take advantage of all those circumstances which either render the policy void, or make it of no effect; such as fraud, want of interest, not being sea-worthy, deviation, non-performance of Warranties, &c. *Parke* 404. *c.* 20.

The evidence to be given, and the proof necessary in actions on policies of Insurance, may be collected from the statement of the allegations requisite in the plaintiff's declaration. It may, in addition, be shortly observed on this part of the subject, that the first piece of evidence is proof of the defendant's hand-writing to the policy, which, however, is most generally admitted. Though the general usage of trade is allowed to be given in evidence to control, or extend the words, yet no parole evidence shall be given which directly tends to contradict the terms, of a policy. *Skinn.* 54. In an action against the Underwriter, the policy is evidence that the premium was paid; the Insured however must prove his *interest* by a production of all the usual documents, bills of sale, bills of parcels, of lading, &c. See 2 *Str.* 1127: 2 *Term Rep.* 187. And, in the last place, the plaintiff must prove that the loss happened by the very means stated in the declaration. 1 *Term Rep.* 304. See *Hardw.* 304.

Sentences of foreign Courts of Admiralty are frequently brought forward in Insurance causes. It may be requisite therefore, to remark, that wherever the ground of such sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties, or wherever the sentence is general, and no special ground is stated, there it shall be conclusive and binding; and the Courts here will not take upon themselves, in a collateral way, to review the proceedings of a forum, having competent jurisdiction of the subject-matter. But if the sentence be so ambiguous and doubtful, that it is difficult to say on what ground the decision turned, or if there be colour to suppose, that the Court abroad proceeded upon matter not relevant to the matter in issue, there evidence will be allowed in order to explain; and if the sentence upon the face of it be manifestly against law and justice or be contradictory, the Insured shall not be deprived of his indemnity; because any detention, by condemnation under particular ordinances or decrees, which contravene or do not form apart of the law of nations, is a risk within a policy of Insurance. *Parke, c.* 18. *ad fin.* And see *Dougl.* 554!(574). *Bernardi* v. *Motteux*. See *post* II. 3.

5. *Re-assurance* is a contract, which the first Underwriter enters into, in order to relieve himself from those risks which he has previously undertaken; by throwing them upon other Underwriters, who are called Re-assurers. It is a species of contract still countenanced in most parts of Europe, and which was admitted in *England* till it was found productive of glaring and enormous frauds, which rendered it destructive of the benefits it was originally intended to promote. The Legislature, therefore, found it necessary to interpose, by an act which permitted only such contracts of Re-assurance as tended to the advancement of commerce, or the real benefit of an individual. For this purpose the *stat.* 19 *Geo.* 2. *c.* 37. § 4, declares it to be unlawful to make Re-assurance, "unless the Assurer or Underwriter should be *insolvent*, become a *bankrupt*, or *die*; in either of which cases such Assurer, his executors, administrators, or assigns, may make Re-assurance to the amount before by him assured, expressing in the policy that it is a Re-assurance;" which statute extends to Re-assurances on *foreign* ships previously insured by foreign Underwriters. 2 *Term Rep.* 161.

In *France*, as in other countries, it was formerly allowed to the Insured to insure the solvency of the Underwriter; but this practice is not allowed in *England*; and, though no express notice is taken of it in the above statute, it seems that such a policy would be looked on as a wager policy, and treated accordingly. See *post* III. 5.

Double Insurance is totally different from Re-assurance. It is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two Insurances upon the same property. 1 *Burr.* 496. It makes no difference whether such Insurances are both or either made in the name of the Insurer, or of another person, if actually made on his account. *Parke* 285.

These double Insurances are not void. The person insuring, however, shall receive only one satisfaction to the

the real amount of his loss, and no more, which he may recover against which set of Underwriters he pleases. And when one set of Underwriters pay the loss, they may call upon the other Underwriters to contribute in proportion to the sums they have insured. 1 *Black. Rep.* 416: 1 *Burr.* 492. But though a double Insurance cannot be wholly supported, so as to enable a man to recover a two-fold satisfaction; yet various persons may insure various interests on the same thing, and each to the whole value, as the master for wages, the owner for freight, one person for goods, and another for bottomry, &c. See *Godin* v. *London Assur. Comp.* 1 *Burr.* 489. 1 *Black. Rep.* 103: In which case the defendants were expressly apprised that there might probably be another Insurance than that which they under wrote.

II. 1. THE Loss must always be a *direct and immediate consequence* of the peril insured, and not a remote one, in order to entitle the Insured to recover. 1 *Term Rep.* 130. *n. a.*

A total loss in Insurances does not always mean that the property insured is irrecoverably lost or gone; but that, by some of the perils mentioned in the policy, it is in such a condition as to be of little use or value to the Insured, and to justify him in abandoning his right to the Insurer, and calling upon him to pay the whole of his Insurance. *Parke* 98, 143.

The Insured may call upon the Underwriter for a total loss, if the voyage be absolutely lost, or not worth pursuing; if the salvage be high, as half the value; or if further expence be necessary, and the Underwriter will not engage at all events to bear that expence. See *Hamilton* v. *Mendes*, 2 *Burr.* 1198: 1 *Black. Rep.* 276; and *post* 7.

In a total loss, properly so called, the prime cost of the property insured, or the value in the policy, must be paid by the Underwriter, according to his proportion of the Insurance. Where the policy is a valid one, it is only necessary to prove that the goods were on board at the time of the loss; unless the defendant can shew that the plaintiff had only a colourable interest, or has greatly overvalued the goods; but, where it is an open policy, the value must also be proved. *Parke* 103, 111.

Questions as to losses by *Perils of the Sea* have very seldom arisen; the general rule is, that every accident happening by the force of wind or waves, by thunder and lightening by driving against rocks, or by the stranding of the ship, or any other violence that human prudence could not foresee, nor human strength resist, is to be considered as a peril of the sea; and for such losses the Underwriter is answerable. *Parke* 61: 1 *Show.* 323: 2 *Rolle's Abr.* 248. *p.* 10: *Comb.* 56.

An action was brought to recover the value of certain slaves insured by the policy; the facts were, that the captain of the ship missed the island, for which he was bound, (Jamaica,) and their water running short, some of the slaves were thrown overboard to preserve the rest, and the declaration stated the loss to have happened by perils of the sea. But it was held, the mistake of the captain cannot be called a peril of the sea. *Gregson* v. *Gilbert*, *Pasch.* 23 *Geo.* 3: *Parke*, *c.* 3.

A ship which is never heard of after her departure, shall be presumed to have perished at sea. See 2 *Stra.* 1199: *Parke* 63. In *England* no time is fixed within which payment of a loss may be demanded from the Underwriter, in case the ship is not heard of. But a practice prevails among merchants, that a ship shall be deemed lost, if not heard of within six months after her departure for any port of Europe, or within twelve, if for a greater distance. This latter term, however, seems too short with respect to *India* voyages, and is extended in *Spain* to a year and a half, and formerly in *France* to *two* years; and in case of an adjustment on such supposed loss, if the ship arrives, the Underwriter may recover back the money paid by him. *Parke* 63—5.

2. *Capture*, as applied to the subject of Marine Insurances, is a taking of the ships or goods belonging to the Subjects of one country, by those of another, when in a state of public war. *Parke*, *c.* 4. As, between the Underwriter and the Insured, a ship is to be considered as lost by the *Capture*, though she be never condemned at all, nor carried into any port or fleet of the enemy; and the Underwriter must pay the loss actually sustained. If, therefore, either before or after condemnation she be retaken, and the owner have paid salvage, the Insurer must pay the loss sustained in consequence. 2 *Burr.* 694, 6.

No Capture by the enemy can be so total a loss as to leave no possibility of recovery. If the owner himself should retake at any time he will be entitled: and by *stat.* 29 *Geo.* 2. *c.* 34. § 24, if an *English* ship retake the vessel captured, either before or after condemnation, the owner is entitled to restitution on stated salvage. See *post* 6. In all such cases, if the loss be paid by the Underwriter before the recovery, he stands in the place of the Insured, and will be entitled to the benefits of the restitution. *Parke* 66: 2 *Burr.* 683.

Before the *stat.* 19 *Geo.* 2. *c.* 37, which abolished wager-policies, the re-capture had a considerable effect upon the contract of Insurance, and several cases were determined on that question. See 10 *Mod.* 77: 2 *Burr.* 695: *Com.* 360: 1 *Wils.* 191: 2 *Stra.* 1250: *Parke* 73—77; but now the contract is not at all altered between the Underwriter and the Insured by such event. 2 *Burr.* 695, 1198.

By the marine law of *England*, as practised in the Court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or re-captor, till there had been a sentence of condemnation. 2 *Burr.* 694. And now by *stat.* 29 *Geo.* 2. *c.* 34, already mentioned, this right of the original owner, in case of a re-capture, is preserved to him *for ever*, upon payment of certain salvage, from one-eighth to half the value, to the re-captors. See *post* 6.

A Capture having been illegal, but the charges and delay being great, the Insured made a compromise *bonâ fide* for the liberation of the ship; the Underwriters were held to be answerable for the charges of that compromise. *Berens* v. *Rucker*, 1 *Black. Rep.* 313: *Parke* 67.

On this head it may also be proper to state the following act of parliament, against *ransoming* captured ships. It is remarkable that this statute is not noticed by Mr. *Parke*; as previous to its passing, it seems, from the above case, that the Insurers would have been liable to make good sums paid by the master for ransom, particularly as Mr. *Parke* states, that the Insurers are liable for the charges of such compromise made, *bonâ fide*, whether the capture was legal or not. And in the case of

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Yates v. *Hall*, the circumstances of which took place before the passing of the act, the Court of *B. R.* determined, that a promise by a captain of a ship on behalf of his owners to pay monthly wages to a sailor, in order to induce him to become a hostage, was binding on the owners, although they abandoned the ship and cargo. 1 *Term Rep.* 73, 80.

By *stat.* 22 *Geo.* 3. *c.* 25, it is made unlawful for any Subject to ransom, or to enter into any contract for ransoming any ship belonging to any Subjects, or any goods on board the same, which shall be captured by the Subjects of any State at war with his Majesty, or by any persons committing hostilities against his Subjects. § 1.

All contracts which shall be entered into, and all bills, notes, and other securities which shall be given by any person for ransom of any ship, or of any goods on board the same, shall be absolutely void. § 2.

If any person shall ransom or enter into any contract for ransoming any such ship, or any goods on board the same, such person shall forfeit 500*l.*, which may be sued for by any one. § 3.

3. On questions of *Detention* not much difficulty has arisen: the Underwriter, by express words, undertakes to indemnify against all damages arising from the arrests, restraints, and detainments of Kings, Princes, or People. *Parke* 78.

Under these terms, in a policy, *Detention* is said to be an arrest or embargo in time of war, or peace, laid on by the public authority of a State. And, therefore, in case of an arrest, or embargo by a prince, though not an enemy, the Insured is entitled to recover against the Underwriter. 2 *Burr.* 696. See this Dictionary, title *Embargo*.

In case of Detention by a foreign power, which in time of war may have seized a neutral ship, in order to be searched for enemy's property, the costs and charges consequent thereon must be borne by the Underwriter. *Salucci* v. *Johnson*, *B. R. Hil.* 25 *Geo.* 3; *Parke* 79. But a detention for non-payment of customs, or for navigating against the laws of those countries where the ship happens to be, shall not fall upon the Underwriter. 2 *Vern.* 176.

A detention by particular ordinances which do not form a part of the general law of nations, is a risk within a policy of Insurance. *Per Buller*, J. *Parke* 365. It is an undecided question, whether a detention by the governing power of the country to which the ship belongs, is a peril within the policy; though it seems that it is. See 2 *Ld. Raym.* 840: 2 *Salk.* 444: *Parke* 80. But if an armed force board a ship, and take part of the cargo, the Underwriters are not liable, on a count stating the loss to be by *people* to the plaintiffs unknown; for *people* in the policy means the governing power of the country. 4 *Term Rep.* 783.

In all cases of losses by detention before the Insured can recover, he must abandon to the Underwriter whatever claims he may have to the property Insured. *Parke* 82. See *post* 7.

4. The derivation of the word *Barratry* is very doubtful; it comes most probably from the Italian *Barratrare*, to cheat. *Cowp.* 154. It may be thus defined: any act of the master or mariners, of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the *owners of the ship*, and without their consent or privity. See 1 *Stra.* 581: 2 *Stra.* 1173: *Cowp.* 143: 1 *Term Rep.* 323.

It is Barratry in the master to smuggle on his own account. *Cowp.* 143: 1 *Term Rep.* 252: 3 *Term Rep.* 277. And in *Robertson* v. *Ewer*, (1 *Term Rep.* 127,) *Buller* J. seemed to think the breach of an embargo was an act of Barratry in the master. But if the act of the captain be done for the benefit of his owners, and not with a view to his own interest, it is not Barratry. Some question has been made in certain cases, Who shall be considered as owner? and it has been determined, that if the owner of the ship freight it out for a specifick voyage, the freighter is to be considered as owner *pro hac vice*; and if the master commit a criminal act, without *his* privity, though with the knowledge of the original owner, it is Barratry. *Cowp.* 143, 154.

An act of the captain, *with the knowledge of the owners of the ship*, though without the privity of the owner of the goods, who happened to be the person insured, is not Barratry, as that crime can only be committed *against the owner of the ship*, and without his consent. 1 *Term Rep.* 323. And if the master of the ship be also the owner, he cannot be guilty of Barratry. *Parke* 94.

In an action by the Assured of goods, against the Underwriters for a loss by the Barratry of the master, proof that the person described in the policy as master, and who was treated with, and acted as such, carried the ship out of her course, for fraudulent purposes of his own, is *primâ facie* sufficient to entitle the plaintiff to recover, without shewing negatively that he was not the owner, or affirmatively, that any other person was. 4 *Term Rep.* 33.

It is not necessary, in order to make the Underwriters liable, that the loss should happen *in the very act of Barratry*; for, in case of a deceitful deviation, the moment the ship is carried from its proper track with an evil intent, Barratry is committed; but the loss, in consequence of the act of Barratry, must happen *during the voyage insured*, and within the time limited for the expiration of the policy. 1 *Term Rep.* 252: 4 *Term Rep.* 33: *Cowp.* 143: *Parke* 84—90.

The Underwriters, by express words, undertake generally for the Barratry of the master and mariners, even though the master is appointed by the Insured himself; a circumstance peculiar to the Insurance Law of *England*. *Parke* 85.

If a ship take a prize, and, instead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, against the orders of his owners, the captain is justified by necessity, and it is not Barratry, because not done to defraud the owners. 2 *Stra.* 1264.

Barratry in the master is severely punished by the laws of foreign nations; and several statutes have been passed to prevent these crimes in our own country. The *stat.* 1 *Ann. st.* 2. *c.* 9, inflicted the penalty of felony, without benefit of clergy, on any captain, master, mariner, or officer belonging to any ship, who should wilfully burn or destroy her, to the prejudice of the owner or any merchant lading goods thereon. This was extended by *stat.* 4 *Geo.* 1. *c.* 12, to owners and others guilty of those acts, to the prejudice of *Underwriters*, as well as merchants: and the *stat.* 11 *Geo.* 1. *c.* 29, still further enlarges it to all such persons guilty *with intent* to prejudice Underwriters, merchants, or owners. The

stat.

stat. 29 *Geo.* 3. *c.* 46, enforces the above acts in *Scotland*. Provisions are made, that, if the offence be committed within the body of a county, the offender shall be tried in a court of common law; if upon the high seas, he shall be tried according to the directions of *stat.* 28 *Hen.* 8. *c.* 15.

To this head may also be referred the provision in *stat.* 33 *Geo.* 3. *c.* 66. § 8, which subjects the captain of any merchant-ship under convoy, who shall wilfully disobey the signals or instructions of the commander of the convoy, or deserting the convoy without notice or leave, to prosecution in the Admiralty court, there to be sentenced to a fine not exceeding 500*l.* and imprisonment for not more than one year. See *ante* I. 3.

5. The word *Average* is applied in various senses in policies of Insurance, which in this, above all other particulars, are indistinct and confused. It is used as well for a contribution to a general loss as for a particular partial loss. On the present occasion we shall consider the term of *general* or *gross average*, in the former sense, and average *loss* in the latter. *Parke* 99: 3 *Burr.* 1555.

Small or Petty Average consists of such charges as the master is obliged to pay, by custom, for the benefit of the ship and cargo; such as pilotage, beaconage, &c. The term is also used for a small duty paid by merchants, who send goods in the ships of other men, to the master, over and above the freight, for his care and attention; none of these charges ever falls upon the Underwriter. *Parke* 100. See this Dictionary, title *Average*.

When goods are thrown overboard in a storm to lighten the ship, for the general safety of the ship and cargo, the owners of the ship and of goods saved are to contribute for the relief of those whose goods are ejected; this is called contribution, or general average; and was first used by the Rhodians, and introduced into *England* by *William* the Conqueror; against all losses arising from hence, the Underwriter by his contract expressly undertakes to indemnify the Insured. *Parke* 99, 121, 9: 3 *Burr.* 1555. *Lex. Merc.*

Three things, it has been said, must concur to make the act of throwing goods overboard legal. 1st, That what is so condemned to destruction, be in consequence of a deliberate and voluntary consultation between the master and men. 2d, That the ship be in distress, and that sacrificing a part be necessary for the preservation of the rest. 3d, That the saving of the ship and cargo be owing to the means used with that view. But the second seems to be the only material one: if, therefore, this jettison (the throwing over of the goods) do not save the ship, but she perish in the storm, there shall be no contribution of such goods as may happen to be saved; but if the ship, being once preserved by such means, be afterwards lost, the property (if any) saved from the second accident, shall contribute to the loss occasioned by the former jettison. *Parke* 123. And see 12 *Co.* 63.

The various accidents and charges, which will entitle the suffering party to call for a contribution, cannot easily be enumerated, but it may be laid down as a general principle, that all losses sustained and expences incurred voluntarily and deliberately, with a view to prevent the total loss of the ship and cargo, ought to be equally borne by the ship and her remaining lading. *See Parke* 124, 6. *Lex. Merc.*; 2 *Term Rep.* 407.

If goods be put on board a lighter to enable the ship to sail into harbour, and the lighter perish, the owners of the ship and remaining cargo are to contribute; but if the ship be lost, and the lighter saved, the owners of the goods preserved are not to contribute, the lightening of the ship being an act of deliberation for the general benefit, but the saving the lighter being accidental, and no way proceeding from a regard for the whole. *Parke* 124.

Diamonds and jewels, when a part of the cargo, must contribute according to their value; but ship provisions, the persons of the passengers, wearing apparel, and such jewels as merely belong to the person, Bottomry, or *respondentia* bonds, and the wages of the sailors, shall not any of them contribute. *Parke* 126, 7, 9, 422: See also this Dictionary, title *Carrier*.

In order to fix a right sum on which the average or contribution may be computed, and which in general is not made till the ship's arrival at her port of discharge, it is to be considered, what the whole ship, freight, and cargo would have produced net, if no jettison had been made; and then the ship, freight, and cargo are to bear an equal and proportionable part of the loss. According to the custom of merchants in England, the goods thrown overboard are to be estimated at the price for which the goods saved were sold, freight and all other charges being first deducted. *Parke* 127, 8.

The general rules as to a *partial loss*, and its consequences, were settled in the case of *Lewis* v. *Rucker*, 2 *Burr.* 1167, & *seqq.* from whence much of the subsequent information is drawn; but the whole of the law on this part of the subject is more intricate and perplexed than on any other question of Insurance.

Partial Loss then, when applied to the ship, means a damage, which she may have sustained in the course of her voyage, from some of the perils mentioned in the policy; when to the cargo, it means the damage which the goods have suffered from storm, &c. though the whole or greater part thereof may arrive in port. By express stipulation in the terms of the *London* policies these losses do not fall upon the Underwriters, unless they amount to 3*l. per cent.*; but if a loss, arising from a *general average*, (i. e. a contribution to a general loss,) should be under 3*l. per cent.* there the Underwriter is liable. And in all cases of a partial loss, the value in the policy can be no guide to ascertain the damage, but it becomes the subject of proof as in case of an open policy. *Parke* 101—3.

When goods are partially damaged, the Underwriter must pay the owner such proportion of the *prime cost* or value, in the policy, (or if no value is stated in the policy, then of the invoice price, with all charges and premium of Insurance,) as corresponds to the proportion of diminution in value occasioned by the damage. Where an entire thing, as one hogshead of sugar, happens to be spoiled, if you can fix whether it be a third or fourth worse, then the damage is ascertained; but this can only be done at the port of delivery, where the whole damage is known, and the voyage is completed; and, whether the price of the commodity be high or low, it equally ascertains the proportion of damage; though no regard is to be paid to the rise or fall of the market, as to the sum to be paid by the Insurer, which is, in either case, to be regu-

regulated only by the prime cost or invoice price. *Parke* 103, *&c.*: 2 *Burr.* 1167.

These rules can only apply to cases where there is a specific description of goods, but where the property is of various kinds, an account must be taken of the value of the whole, and a proportion of that as the amount of the goods lost. *Parke* 111.

Some goods are of a perishable nature; and, against the losses arising from the principle of corruption inherent in such, the Underwriters of *London* have exempted themselves, by declaring in a memorandum contained in all their policies, that they will not be answerable for any partial loss happening to corn, fish, salt, fruit, flour, or seed, unless it arise by way of general average, or in consequence of the ship being stranded; against a loss by which latter event, however, in cases of these perishable commodities, the two Insurance Companies already mentioned do not undertake to be answerable. See *Burr.* 1553.

On this clause it has in several cases been uniformly held, that no loss shall be deemed total so as to charge the Insurers in case of such perishable commodities, as long as the commodity specifically remains, though perhaps wholly unfit for use. 3 *Burr.* 1550. The case in 2 *Stra.* 1065, to the contrary, has been since over-ruled by that of *Mason* v. *Skurray*, *Parke* 116; in which it was also held, that the term Corn included peas and beans, and other particulars. See *Parke* 112—117.

Where, after seizure by an armed mob, the vessel was stranded, and part of the cargo (consisting of corn) taken by the mob at their own price, the loss cannot be recovered as for a general average: but for such part as, in consequence of the stranding, was damaged and thrown overboard, the Insured may recover, on a count, stating the loss to be by stranding. 4 *Term Rep.* 783.

When the quantity of damage, sustained in the course of the voyage, is known, and the amount, which each Insurer is to pay, is settled, it is usual for the Underwriter to indorse on the policy, "Adjusted this loss at so much *per cent.*" This is called an adjustment; after which, if the Underwriter refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances, the adjustment being considered as a note of hand. *Parke* 117, 8. So after judgment by default upon a valued policy, the plaintiff's title to recover is confessed, and the amount of the damage is fixed by the policy. *Dougl.* 315: *Thellusson* v. *Fletcher.* And if a loss be total at the time of the adjustment, and the Insurer pay for a total loss, the Insured is not obliged to refund, if it should afterwards turn out to be partial, but the Insurer will stand in the place of the Insured. 4 *Burr.* 1966.

6. *Salvage* is an allowance made for saving a ship or goods, or both, from the danger of the seas, fire, pirates, or enemies; in which sense it is here used, though it is also sometimes incorrectly applied to signify the thing itself which is saved. *Parke* 131. And the Saver has such a property in the goods, saved by his own exertions and danger, that, in an action of trover, it has been held the defendants might retain the goods till payment of the salvage. 1 *Ld. Raym.* 393: 2 *Salk.* 654.

When a ship has been wrecked, the law of *England*, by various statutes, declares, that *reasonable* salvage only shall be allowed to those who save the ship or any of the goods; and what shall be a reasonable allowance must be ascertained by three Justices of the Peace. See *stats.* 12 *Ann. st.* 2. *c.* 18: (made perpetual by *stat.* 4 *Geo.* 1. *c.* 12:) *stat.* 26. *Geo.* 2. *c.* 19: and this Dictionary, title *Wreck.*

The right of Owners on Re-capture has been already noticed, (*ante* 2.) The salvage in this case is regulated by *stats.* 13 *Geo.* 2. *c.* 4. § 18: 29 *Geo.* 2. *c.* 34. § 24: which enact, that if any prize, taken from the enemy, shall appear to have belonged to any of his Majesty's subjects, it shall be restored to the former owner, upon his paying, in lieu of salvage, one-eighth of the value, if retaken at any time by one of his Majesty's ships. If retaken by a privateer, before it has been twenty-four hours in the possession of the enemy, the salvage paid to be one-eighth of the value; if above twenty four and under forty-eight hours one-fifth; if above forty-eight and under ninety-six hours one-third part thereof; and if above ninety-six hours, a moiety or one-half part thereof; or, if the ship so retaken have been fitted out by the enemy as a ship of war, the salvage is in all cases settled at a moiety.

Wearing-apparel of the Master and seamen is always excepted from the allowance of salvage. The valuation of a ship and cargo, in order to ascertain the rate of salvage, may be determined by the policies of Insurance made on them respectively; if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices, *&c.* *Parke* 140: *Lex. Merc.*

Underwriters, by their policy, expressly undertake to bear all expences of salvage. It is therefore not necessary to state them in a declaration as a special breach of the policy. *Hardw.* 304. See *ante* I. 4. But if the Insurer pay to the Insured such expences, and from particular circumstances the loss be repaired by unexpected means, the Insurer shall stand in the place of the Insured, and receive the sum thus paid to atone for the loss. 1 *Vez.* 98.

Where the Salvage is high, and the other expences are great, and the object of the voyage is defeated, the Insured is allowed to *abandon* to the Insurer, and call upon him to contribute for a total loss: which brings us to the subject of,

7. *Abandonment.*—Before a person insured can demand from the Underwriter a recompence for a total loss, he he must *abandon* to him whatever claims he may have to the property insured; and when the Underwriter has discharged his Insurance, and the abandonment is made, he stands in the place of the Insured, and is entitled to all the advantages resulting from that situation, in case the ship or property, *&c.* is not totally lost, or is afterwards restored by re-capture, *&c.* See *Parke*, *c.* 9: 1 *Vez.* 98.

Abandonment is as ancient as the Contract of Insurance itself: the time, within which it must be made, was not however fixed in *England* till lately. It is now held, that as soon as the Insured receive accounts of such a loss as entitles them to abandon, they must, in the first instance, make their election whether they will abandon or not; and if they abandon, they must give the Underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can never after recover for a total loss. 1 *Term Rep.* 608. But if the Insured, hearing that the ship is disabled and has put into port to repair, express his desire to the Underwriters to abandon, and be dissuaded from it by them, and they order the repairs

repairs to be made, they are liable to the Owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. 2 *Term Rep.* 407.

When an abandonment is made, it must be total and not partial. And though the Insured may in all cases choose not to abandon, yet he cannot at his pleasure abandon, and thereby turn a partial into a total loss. 2 *Burr.* 697.

We have already seen (*ante* II. 1.) that the Insured may abandon to the Underwriter, and call upon him for a total loss, if the damage exceed half the value; if the voyage be absolutely lost or not worth pursuing; if further expence be necessary, and the Insurer will not engage, at all events, to bear that expence, though it should exceed the value, or fail of success. But he cannot abandon unless at some period or other of the voyage there has been a total loss. 1 *Term Rep.* 187: *Parke, c.* 9. *p.* 166. Also, if neither the thing insured, nor the voyage be lost, and the damage does not amount to a moiety of the value, he shall not be allowed to abandon. See 2 *Burr.* 1211: 3 *Atk.* 195: and *Goss* v. *Withers*, 2 *Burr.* 683: Which latter was the first case in which the doctrine of Abandonment was gone into at large, and the above principles fully settled; which have ever since been strictly adhered to, and were particularly recognized in *Milles* v. *Fletcher, Dougl.* (219.) 231.—And, in *Hamilton* v. *Mendes*, it was solemnly determined that the right to abandon must depend on the nature of the case at the time of the action brought, or at the time of the offer to abandon; in that case, therefore, where there was a capture and re-capture, and it was stated, that at the time of the offer to abandon, the peril was over, as the ship was safe in port, and had suffered no damage, the Court held that the Insured had no right to abandon. 2 *Burr.* 1198: 1 *Black. Rep.* 276: See also, *Parke, c.* 9.

III. 1. Policies are annulled by the least shadow of *Fraud*, or undue concealment of facts; both parties are therefore equally bound to disclose circumstances within their knowledge. And if the Underwriter, at the time he underwrote, knew that the ship was safe arrived, the contract will be equally void, as if the Insured had concealed any accident that had befallen the ship. *Parke, c.* 10: 2 *Comm.* 460: 1 *Black. Rep.* 594: 3 *Burr.* 1909.

Cases of fraud upon this subject are liable to a threefold division: 1st, The *allegatio falsi*; 2d, The *suppressio veri*; 3d, *Misrepresentation*. The latter is made a separate head; as though, if wilful, it is a direct fraud, yet if it happen by mistake, if in a material point, it will equally vitiate the policy. *Parke, c.* 10. See *Dougl.* (247.) 260.

As to the first point, several cases have determined that the policy shall be void, where goods, &c. are insured as the property of an ally, or as neutral property, when in fact they are the goods of an enemy: and such false assertions in a Policy will vitiate the contract, though the loss happen in a mode not affected by that falsity. *Parke, c.* 10: *Skin.* 327: 3 *Burr.* 1419: 1 *Black. Rep.* 427.

The second species of fraud, concealment of circumstances, vitiates all contracts of Insurance. The facts upon which the risk is to be computed lie, for the most part, within the knowledge of the Insured only. The Underwriter relies upon him for all necessary information; and must trust to him that he will conceal nothing, so as to make him form a wrong estimate; on this ground, where one having an account that a ship, described like his, was taken, insured his own ship, without giving any notice to the Insurers of what he had heard, the Policy was decreed in equity to be delivered up. 2 *P. Wms.* 170: See 1 *Black. Rep.* 463, 594: 2 *Stra.* 1183: *Parke, c.* 10. But there are many matters as to which the Insured may be innocently silent; 1st, As to what the Insurer knows; however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what lessens the risk. And it may here be remarked, that an Underwriter is bound to know political perils, as to the state of war or peace: He also ought to be acquainted with the nature and danger of every voyage, which may be called natural perils; if he insure a privateer, it is understood that he is not to be informed of its destination; and, as men reason differently from different facts, he needs not be told another's conclusion from known facts. In short, the question, in cases of concealment, must always be, "Whether there was, under all the circumstances, at the time the Policy was underwritten, a fair statement or concealment; fraudulent, if designed, or, if not designed, varying *materially* the object of the Policy, and changing the risk understood to be run."—The above rules, and the whole doctrine of concealment were laid down in *Carter* v. *Boehm*, which was an Insurance by the Governor of *Fort Malborough* in *Bencoolen*, against the event of the fort being taken by any European Power in the course of a year. 3 *Burr.* 1905: 1 *Black.* 593: And the rules there advanced and illustrated have been confirmed in subsequent cases. *Planche* v. *Fletcher, Dougl.* (238.) 251; and see *Parke, c.* 10.

A Representation is a state of the case, not forming a part of the written instrument or Policy, as a Warranty does. Therefore if there be a misrepresentation it will avoid the Policy, as a fraud, but not as a part of the agreement, as in the case of Warranty. And if a Representation be false in any *material* point, even through mistake, it will avoid the Policy, because the Underwriter has computed the risk upon circumstances which did not exist. *Parke, c.* 10. In the case of *Pawson* v. *Watson*, Lord Mansfield stated, that "there cannot be a clearer distinction than that which exists between a Warranty, which makes part of the written Policy, and a Collateral Representation which, if false in a point of materiality, makes the Policy void; but if not material it can hardly ever be fraudulent." *Cowp.* 785. And in *Macdowal* v. *Frazer*, the same learned Judge laid down, that "a Representation must be fair and true. It should be true as to all the Insured knows; and if he represents facts to the Underwriter, without knowing the truth, he takes the risk upon himself:" But the difference between the fact, as it turns out, and as represented, must be material. *Dougl.* (247.) 260: See also *Bize* v. *Fletcher*, or *Lavabre* v. *Wilson, Dougl.* (271.) 284. and *ante* I. 3.

The Policy is void if the Broker conceal any *material* circumstances, though the only ground for not mentioning them should be that the facts concealed appeared immaterial to him. *Shirley* v. *Wilkinson, Dougl.* (293.) 306. *n.* But the thing concealed must be some *fact*,

not a mere speculation or expectation of the Insured. *Barber* v. *Fletcher*, *Dougl.* (292.) 305.

In all these cases of fraud, wherever there has been a an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, *or of his agent*; for in either case the contract is founded in deception, and the policy is consequently void. And this rule prevails, even though the act cannot be at all traced to the owner of the property insured. *Stewart* v. *Dunlop*, in *Dom. Proc.* 1785: *Fitzherbert* v. *Mather*, 1 *Term Rep.* 12: *Parke*, *c.* 10.

A Policy will not however be set aside on the ground of fraud, unless it be *fully* and *satisfactorily* proved; and the burden of proof lies on the person wishing to take advantage of the fraud. At the same time, positive and direct proof of fraud is not to be expected, and from the nature of the thing circumstantial evidence is all that can be given. *Parke* 214. As to the return of premium in cases of fraud, see *post* 8.

2. It being necessary, except in some special cases, to insert the name of the ship, on which the risk is to be run, in the Policy; it follows as an implied condition, that the Insured shall neither substitute another ship for that mentioned in the Policy before the voyage commences, in which case there would be no contract at all; nor, during the voyage, remove the property insured from one ship to another, without consent of the Insurer, or without an *unavoidable necessity*, under which every thing possible must be done for the benefit of all concerned; if he do, the implied condition is broken, and he cannot, in case of loss, recover against the Underwriter. *Parke*, *c.* 16: See 2 *Stra.* 1248: 1 *Burr.* 351: 1 *Term Rep.* 611, *note*.

3. *Deviation* is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever this happens, the voyage is determined; and the Insurers are discharged from any responsibility: because the ship goes upon a different voyage from that against which the Insurer undertook to indemnify. And it is not material in this case whether the loss be or be not an actual consequence of the deviation: for the Insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference whether the Insured was or was not consenting to the deviation. *Parke*, *c.* 17. *p.* 294: and see *Elliot* v. *Wilson*, *Bro. P. C.*—If therefore the Master of a vessel put into a port not usual, or stay an unusual time, it is a deviation. And if the deviation be but for a single night, or for an hour, it is fatal. But if a merchant ship carry letters of Marque she may *chase* an enemy, though she may not cruise without being deemed guilty of a deviation. *Parke* 295—9.

Wherever the deviation is occasioned by absolute necessity; as where the crew force the Captain to deviate, the Underwriters continue liable. 2 *Stra.* 1264. And the general justifications for a deviation seem to be these: to repair the vessel, to avoid an impending storm, to escape from an enemy, or to seek for convoy.

If therefore a ship is decayed, or hurt by a storm, and goes to the nearest port to refit, it is no deviation, because it is for the general interest of all concerned. 1 *Atk.* 545: *Parke*, *c.* 17. So, whenever a ship, in order to escape a storm, goes out of the direct course, or, when in the due course of the voyage, is driven out of it by stress of weather, this is no deviation. And if a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return to the point from which she was driven. 1 *Term Rep.* 22. *Parke*, *c.* 17.

A deviation may also be justified, if done to avoid an enemy, or seek for convoy; because it is in truth no deviation to go out of the course of a voyage, in order to avoid a danger, or to obtain a protection against it: if in all cases the master of a ship act fairly and *bonâ fide* according to the best of his judgment. 2 *Salk.* 445: 2 *Stra.* 1265: *Parke*, *c.* 17.

In all cases of deviation, it may be laid down as a general rule, that, wherever a ship does that which is for the general benefit of all parties concerned, the act is as much within the spirit of the policy as if it had been expressed: and, in order to say whether a deviation be justifiable or not, it will be proper to attend to the motives, end, and consequence, of the act as the true ground of judgment. *Cowp.* 601. But, to avoid as much as possible any additional risk, in case of a deviation from necessity, the ship must pursue such *voyage of necessity*, in the direct course, and in the shortest time possible, as nothing more must be done than the necessity requires, otherwise the Underwriters will be discharged. *Lavabre* v. *Walter*, *Dougl.* (271.) 284.

A Deviation *merely intended*, but never carried into effect, does not discharge the Insurers, and whatever loss happens before actual deviation, or the dividing-point of the voyage, falls upon the Underwriters. 2 *Stra.* 1249: *Thellusson* v. *Fergusson*, *Dougl.* (346.) 361. See also 2 *Ld. Raym.* 840: 2 *Salk.* 444. But if it can be shewn that the parties never intended to sail upon the voyage insured, if all the ship's papers be made out from a different place from that described in the policy, the Insurer is discharged, though the loss should happen before the dividing-point of the two voyages. *Wooldridge* v. *Boydell*, *Dougl.* 16. And, in all cases, Deviation or not is a question of fact to be decided, subject to the above rules, according to the circumstances of the case. *Dougl.* 781.

4. Every ship insured must, by a tacit and implied Warranty at the time of the Insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect, wholly unknown to the parties, that will vacate the contract, and the Insurers are discharged. But though the Insured ought to know whether she was *Sea-worthy* or not at the time she set out upon her voyage, yet he cannot tell how long she will remain so; and if it can be shewn that the decay, to which the loss is attributable, did not commence till a period subsequent to the Insurance, the Underwriter will be liable though she should even be lost a few days after her departure. *Parke*, *c.* 11: 5 *Burr.* 2804: *Dougl.* (708.) 735.

The whole doctrine of *Sea-worthiness* was settled in the case of *The Mills* Frigate, where the Insurance was upon a ship which had a latent defect totally unknown to the parties; and it was held, that the Insurers were not liable, because the ship was not Sea-worthy; and that however innocent or unfortunate the Insured

sured might be, yet if the ship be not sea-worthy at the time of insuring, there is no *contract at all* between the parties; because the very foundation of the contract, the ship, was in the same condition as if it did not exist; and the doctrine is the same in Insurance upon goods, as when it is upon the ship itself. See *Parke, c.* 11.

5. In *Wager-Policies*, or Policies upon *Interest or no Interest*, the performance of the voyage in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of Insurance. But such Policies being contradictory to the real nature of an Insurance, which is a contract of indemnity, seem to have been originally bad, because Insurances were invented for the benefit of trade, and not that persons unconcerned or uninterested should profit by them. Indeed these Wager-Policies were not introduced into *England*, till after the Revolution, and the Courts of Law looked upon them with a jealous eye; while the Courts of Equity considered them as absolutely void. *Parke, c.* 14: See 10 *Mod.* 77: *Com. Rep.* 360: 2 *Vern.* 269, 716.

The great distinction between *Interest*, and *Wager*, *Policies* was, that in the former the Insured recovered for the loss actually sustained, whether it was a total or partial loss; in the latter he never could recover but for a total loss. 2 *Burr.* 683. At length it was found that the indulgence given to these fictitious, or to speak more plainly, gambling Policies, had increased to such an alarming degree as to threaten the very annihilation of that security, which it was the original intent of Insurances to introduce. It was, therefore, enacted by *stat.* 19 *Geo.* 2. *c.* 37, that Insurances made on ships or goods, *Interest or no Interest*, or without further proof of interest than the Policy, or by way of gaming or wagering, or without benefit of salvage to the Insurer, should be null and void. The statute, however, contains an exception for Insurances on private ships of war fitted out solely to cruize against his Majesty's enemies: and also provides, that any merchandizes or effects from any ports or places in *Europe* or *America*, in the possession of the crowns of *Spain* or *Portugal*, may be insured in such way or manner, as if the statute had not been made. And it has been decided, that the statute does not extend to Insurances of foreign property, on foreign ships. *Thellusson* v. *Fletcher*; *Dougl.* (301) 315.

The above provision of the statute relative to Insurances from any ports or places in *Europe* or *America*, in the possession of *Spain* or *Portugal*, is founded on the regulations of those States to prohibit illicit trade: it is loosely worded, and admits of some latitude of interpretation, perhaps more than the Legislature meant to allow. See *Parke, c.* 14. *ad fin.*

A *Valued Policy* is not a Wager-Policy; it originates from the circumstances of its being sometimes troublesome to the trader to prove the value of his interest, or to ascertain the quantity of his loss: he therefore gives the insurer a higher premium to agree to estimate his interest at a sum certain. In this case the plaintiff must prove some interest, although he need not prove the value of his interest. But if a Valued Policy were used merely as a cover to a wager in order to evade the statute, it would be void. 2 *Burr.* 1167: 4 *Burr.* 1966: *Parke, c.* 14.

Upon a joint capture by the army and navy, the officers and crew of the ships, before condemnation, have an insurable interest, by virtue of the prize-act, which usually passes at the commencement of a war. *Parke, c.* 14, cites *Le Cras* v. *Hughes*.

All contracts of Insurance made by persons having no interest in the event about which they insure, or without reference to any property on board, are merely wagers, and as such void. *Cowp.* 583. And wherever the court can see upon the face of the Policy that it is merely a contract of gaming, where indemnity is not the object in view, they are bound to declare such Policy void. *Lowry* v. *Bourdieu*, *Dougl.* (451) 468.

6. Whenever an Insurance is made on a *voyage* expressly prohibited by the common, statute, or maritime law of this country, the Policy is void. And in such a case it is immaterial whether the Underwriter did or did not know that the voyage was illegal; for the Court cannot substantiate a contract in direct contradiction to law. *Johnston* v. *Sutton*, *Dougl.* (241) 254. In like manner, if a ship, though neutral, be insured on a voyage prohibited by an embargo, such an Insurance is void. *Parke, c.* 12. An Insurance upon a smuggling voyage, prohibited by the revenue laws of this country, is void; but the rule has never been extended to cases against the revenue laws of a foreign State, as no country pays attention to the revenue laws of another. *Parke, c.* 12: *Dougl.* 251.

The questions how far trading with an enemy in time of actual war, and how far Insurances upon the goods of an enemy are legal, expedient, or political, have been frequently considered. As to the first it was expressly prohibited, by the laws of ancient *France*, to the subjects of that country; and it appears scarcely to admit of a doubt in *England*, though the cases on the subject are very few. See 2 *Rol. Ab.* 173: 1 *Vez.* 317. In a very modern case Lord *Mansfield* said, that by the maritime law, trading with an enemy is cause of confiscation, provided you take him in the fact. But this does not extend to neutral vessels. The common law, however, does not seem directly to forbid such trading; and one argument to show that it does not, is, that several statutes have been *specially* passed, in order to make such trading illegal. 1 *Term Rep.* 84. As to the second question, the Insurance of enemies' property; under the common law it has been sanctioned; and Lord *Hardwick*, in a case before him, observed, that there had been no determination that Insurances on enemies' ships during the war is unlawful, and that there had been several Insurances of this sort during the (then) war, which a determination on the legality of trading with an enemy might hurt. 1 *Vez.* 319. The Legislature have, however, repeatedly thought it necessary to interfere to prevent these Insurances; and in the war which commenced in 1793, to prevent also all kind of trading with the enemy, (*France*,) whose proceedings, indeed, were then such as to threaten the dissolution of all civil society. See *stat.* 21 *Geo.* 2. *c.* 4, which expired about a twelvemonth after the (then) war; and *stat.* 33 *Geo.* 3. *c.* 27, which not only renders Insurances on *French* property void, during the war, but also subjects the offender to three months' imprisonment, and imposes the penalties of treason on all persons trading with so perfidious a foe. Many strong and ingenious arguments have, however, been urged against what is termed the impolicy of preventing such Insurances. The most forcible arise from the assertions that the

the balance of that trade has always been found in favour of *England*, and that it has been the means of detecting many of the enemy's plans. But as even the advocates for this measure allow that no Insurance can be made upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them; or upon ammunition, warlike stores, or provisions; surely the admitting of any sort of Insurance, is affording a tempting opening to this which is acknowledged to be dangerous; and it may be worthy the consideration of the Legislature to settle both these points in a permanent manner. See at length on this subject, *Parke, c.* 12.

7. All Insurances upon *commodities*, the importation or exportation of which is prohibited by law, are void; and the rule prevails in this instance also, whether the Underwriter did or did not know that the subject of the Insurance was a prohibited commodity, *Parke, c.* 13. And to prevent all such Insurances, the *stat.* 4 & 5 *W. & M. c.* 15, inflicts a penalty of 500*l.* on any person who, by way of Insurance, shall procure the importation of any uncustomed or prohibited goods, with a like penalty on the Insured. Also by the *stat.* 8 & 9 *W.* 3. *c.* 36, for the protection of the *Royal Lustring Company*, the importation of any foreign alamodes or lustrings, by way of Insurance, or otherwise, without paying the duties, &c. is expresly prohibited. *Wool* being the staple manufacture of this kingdom, it was always deemed a heinous offence to transport it out of the realm; (see this Dictionary, title *Wool*); and as the practice of insuring it tended only to encourage such illicit commerce, it has been restrained by divers statutes; one of which enacts, that whoever, by way of Insurance, undertakes to export *Wool* from *England* to parts beyond the seas, shall be liable to pay 500*l*; the like penalty is also inflicted on the Insured; and all Insurances on wool, wool-fells, &c. are declared void. *Stat.* 12 *Geo.* 2. *c.* 21. § 29—33. And a subsequent statute declares, that both the Insurer and Insured shall be considered as exporters of Wool, &c. and liable to the penalties inflicted by that statute, *viz.* 3*l. per* sheep, and three months solitary imprisonment; and 3*s. per lb.* of wool, or 50*l.* in the whole at the election of the offender, and the like imprisonment, and the wool, &c. to be forfeited. *Stat.* 28 *Geo.* 3. *c.* 38. § 2, 9, 45, & *seqq.*

Upon the same principle that *voyages* prohibited by the common, statute, or maritime law, may not be the subject of Insurance, (see *ante* 6.) it is, that Insurances are also void, on prohibited or uncustomed goods; or if made in any way to protect smuggling, or to defraud the *British* revenue laws; to obstruct the effect of the Navigation Acts; or to import or export goods prohibited by Royal Proclamation in time of war; and goods, which, from their nature, are contraband, as arms and ammunition to an enemy, or money, provisions, or ships, according to peculiar circumstances. But Insurances on goods, the exportation or importation of which are forbidden by the laws of other countries, are valid. On the whole of this part of the subject, see *Parke, c.* 13; and this Dictionary, titles *Navigation Acts*; *Customs.*

8. It is a question not decided, whether in cases of fraudulent Insurance, where the Underwriter has run no risk, he shall be liable to return the premium? In some equitable cases, where the Underwriters have been relieved on account of fraud, it has been decreed, that the *premium* should be returned. 2 *Vern.* 206: 2 *P. Wms.* 170: and see *Burr.* 1361. And it has been laid down as clear law, that if the Underwriter has been guilty of fraud, an action lies against him, to recover the premium. 3 *Burr.* 1909. On the other hand, if the fraud be on the part of the Insured, and is notoriously palpable and gross in its nature, the Court of B. R. will order the Underwriter to retain the premium. *Parke, c.* 10, cites *Tyler* v. *Horne*. By the *stat.* 28 *Geo.* 3. *c.* 38. § 47, to prevent Insurance on exported wool, if the Underwriter informs against the party insuring, he may retain the premium: but if the Insurer inform he shall be entitled to recover it back. When a Policy is void as a Wager-Policy under *stat.* 19 *Geo.* 2. *c.* 37, though the ship arrive safe, the Underwriter may retain the premium. *Lowry* v. *Bourdieu, Dougl.* 468. And so he may in the case of a Re-assurance void, by the same statute. 3 *Term Rep.* 266.

In general, when property has been insured to a larger amount than the real value, the overplus premium, or if goods are insured to come in certain ships from abroad, but are not in fact shipped, the whole premium, shall be returned. If the ship be arrived before the Policy is made, the Insurer being apprized of it, and the Insured being ignorant of it, he is entitled to have his premium restored on the ground of fraud: but if both parties are ignorant of the arrival, and the Policy *be lost or not lost*, it seems the Underwriter ought to retain it, as if the ship had been lost at the time of underwriting, he would have been liable to pay the amount of his subscription. Clauses are frequently inserted by the parties, that upon the happening of a certain event there shall be a return of premium. These clauses have a binding operation on the parties, and the construction of them is a matter for the Court and not for the Jury to determine. In short, if the ship or property insured was never brought within the terms of the contract, so that the Insurer never ran any risk, the premium must be returned. *Parke, c.* 19: see 3 *Burr.* 1240: *Cowp.* 668: 1 *Show.* 156: *Dougl.* (255) 268. *Simond* v. *Boydell.*

Two rules are solemnly established, 1st, That whether the cause of the risk not being run is attributable to the fault, will, or pleasure of the Insured, the premium is to be returned. *Cowp.* 668. And, 2dly, Where the contract is entire, whether for a specified time, or for a voyage, and the risk is once commenced, and there is no contingency on which the risk is to end at any immediate period, there shall be no apportionment or return of premium afterwards. Hence, in cases of deviation, though the Underwriter is discharged he shall retain the premium. So in cases of Insurance for twelve months where the loss happens in two; even though the premium is calculated at so much *per* month: likewise where different ports are mentioned in the course of an outward and homeward bound voyage, and the ship is lost before setting out on her return; in all these cases also the premium shall be retained. See *Cowp.* 666: *Loraine* v. *Thomlinson, Doug.* (564) 584: *Bermon* v. *Woodbridge, Dougl.* (751) 780. But it is otherwise if the Jury find an express usage upon the subject of return of premium; and, indeed, it seems that there never has been an apportionment, unless there be something like an usage found to direct the judgment of the Court. But if there are two distinct points of time, or in effect, two

two voyages, either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one Policy. 3 *Burr.* 1237: 1 *Black. Rep.* 318. See *Parke, c.* 19, for a fuller discussion of the subject.

IV. BOTTOMRY is a contract by which the owner of a ship borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship, as a security for the repayment. In which case it is understood, that if the ship be lost the lender loses also his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations for the benefit of commerce, and by reason of the extraordinary hazard run by the lender: and in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who, therefore, in this case, is said to take up money at RESPONDENTIA. It may be added, that in a loan upon Bottomry, the lender runs no risk though the *goods* should be lost; and on *Respondentia*, the lender must be paid his principal and interest, though the *ship* perish, provided the goods are safe. In this consists the chief difference between *Bottomry* and *Respondentia*; in most other respects they are the same. 2 *Comm.* 457, 8: *Parke, c.* 21.—The term is also spelt thus, *Bottomree*.

There is a third kind of contract, included in these terms, for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; as when a man lends a merchant 1000 *l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case a certain voyage be safely performed: which kind of agreement is sometimes called *fœnus nauticum*; and sometimes *usura maritima*. But as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted, by stat. 19 *Geo.* 2. *c.* 37, that all monies lent on *Bottomry*, or at *Respondentia*, on vessels bound to or from the *East Indies*, shall be expressly lent only upon the ship, or upon the merchandize; that the lender shall have the benefit of salvage; and that if the borrower has not on board effects to the value of the sum borrowed, he shall be responsible to the lender, for so much of the principal as hath not been laid out, with legal interest, and all other charges, though the ship and merchandize be totally lost. See *Parke, c.* 21.

This statute has entirely put an end to that species of contract which arose from a loan upon the mere voyage itself, as far only as relates to *India* voyages; but these loans may still be made in all other cases, as at the common law, except in the following instance, which is another statute prohibition. The *stat.* 7 *Geo.* 1. *c.* 21. § 2, declares, that all contracts made or entered into by any of his Majesty's subjects, or any person in trust for them, for or upon the loan of any monies by way of Bottomry, on any ship or ships in the service of foreigners, and bound or designed to trade in the *East Indies*, or places beyond the *Cape of Good Hope*, (mentioned in the statutes relating to the *English East-India* Company,) shall be null and void.—This act, it should seem, does not mean to prevent the lending money on Bottomry, on foreign ships trading, from their own country, to *their* settlements in the *East Indies*. The purpose of the statute was only to prevent the people of this country from trading to the *British* settlements in *India* under foreign commissions; and to encourage the lawful trade thereto. It seems to be allowed that an *American* ship, since the declaration of *American* independency, is a foreign ship within the meaning of this statute. See *Sumner* v. *Green*, *Parke, c.* 21.

Bottomry is a contract of more antiquity than that of Insurance, and arose from the power given to the master of a ship, to hypothecate the ship and goods for necessaries in a foreign country. But the ship must be abroad, and in a state of necessity, to justify such an act of the master. See *Moor* 918: *Hob* 11: *Salk* 34: *Parke, c.* 21.

The *principle* upon which Bottomry is allowed, is, that the lender runs the risk of losing his principal and interest; and therefore it is not usury to take more than the legal rate. See 2 *Vez.* 148, 154: *Cro. Jac.* 208, 508: *Hardr.* 418: 1 *Sid.* 27: 1 *Lev.* 54: 1 *Eq. Ab.* 372. But if a contract were made by colour of Bottomry, in order to evade the statute against usury, it would then be usurious. 2 *Vez.* 146. And as the hazard to be run is the very basis and foundation of this contract, it follows, that if the risk be not run, the lender is not entitled to the extraordinary premium. 1 *Vern.* 263.

The risks to which the lender exposes himself are generally mentioned in the condition of the bond, and are nearly the same as those against which the Underwriter, in a Policy of Insurance, undertakes to indemnify. It has been determined, that *piracy* is one of these risks. *Comb.* 56. And if a loss by *capture* happen, the lender cannot recover against the borrower: but this does not mean a temporary taking, but such as occasions a total loss. Therefore, where a ship was taken and detained for a short time, and yet arrived at the port of destination within the time limited, it was held, that the bond was not forfeited, and the obligee may recover. *Joice* v. *Williamson*, *Parke, c.* 21. In the same case it was also settled, that a lender on *Bottomry*, or at *Respondentia*, is neither entitled to the benefit of salvage, nor liable to contribute in case of a general average; for which reason the *stat.* 19 *Geo.* 2. *c.* 37, above mentioned, contains a positive provision to allow the benefit of salvage in the cases there mentioned. If, however, a man insure *Respondentia*-interest on a foreign ship, and be obliged to contribute to an average loss, by the laws of her country, *English* Underwriters are bound to indemnify. *Walpole* v. *Ewer*; *Parke, c.* 21.

If the ship be lost by a wilful deviation from the track of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation; as she was not lost by a peril to which the lender agreed to make himself liable. *Skin.* 152, 345: *Holt* 126: 1 *Eq. Ab.* 372: 2 *Ch. Ca.* 130. And, indeed, it is generally expressly provided against in the bond.

If the borrower becomes bankrupt after the loan of the money, and before the event happens which entitles the lender to repayment, the lender may prove his debt under the commission, after the contingency shall have happened.

happened; as if the event had actually happened before the Commission of Bankruptcy issued. *Stat.* 19 *Geo.* 2. *c.* 32. § 2. See this Dictionary, title *Bankrupt.*

Bottomry and *Respondentia* may be insured, provided it be specified in the Policy to be such interest. And by *stat.* 19 *Geo.* 2. *c.* 37, the *Lender* alone can make such Insurance; and the Borrower can only insure the surplus value of the goods over and above the money borrowed. But money expended by the Captain for the use of the ship, and for which *Respondentia*-interest is charged, may be recovered under an Insurance on *goods, specie,* and *effects*, provided it is sanctioned by the usage of trade. See *Glover* v. *Black*, 3 *Burr.* 1394: 1 *Black. Rep.* 405: and *Gregory* v. *Christie*, *Parke, c.* 1. *p.* 11.—Finally, where a person insures a Bottomry Interest, and recovers upon the Bond, he cannot also recover upon the Policy. *Parke, c.* 21. *p.* 428.

FORM OF A RESPONDENTIA-BOND.

KNOW All Men by these presents, That I A. B. *of,* &c. *am held and firmly bound to* C. D. *of,* &c. *in the sum, or penalty of* 1000 l. *of good and lawful money of Great Britain, to be paid to the said* C. D. *or to his certain Attorney, Executors, Administrators, or Assigns; for which payment, well and truly to be made, I bind myself, my Heirs, Executors, and Administrators, firmly by these presents, sealed with my seal. Dated this day of in the year of the reign of our Sovereign Lord George the Third, by the Grace of God, of* Great Britain, France, *and* Ireland *King, Defender of the Faith, and so forth, and in the year of our Lord one thousand seven hundred and ninety-four.*

THE CONDITION *of the above-written obligation is such, that whereas the above-named* C. D. *hath, on the day of the date above-written, lent unto the above-bounden* A. B. *the sum of* 500 l. *upon merchandizes and effects, to that value, laden or to be laden on board the good ship or vessel, called the of the burden of tons, or thereabouts, now in the river* Thames, *whereof* E. F. *is commander: If the said ship or vessel do and shall, with all convenient speed, proceed and sail from, and out of the said river of* Thames, *on a voyage to any ports or places in the* East Indies, China, Persia, *or elsewhere beyond the* Cape of Good Hope, *and from thence do and shall sail and return unto the said river of* Thames, *at or before the end and expiration of thirty-six Calendar months, to be accounted from the day of the date above written, and that without deviation (the dangers and casualties of the seas excepted): And if the above-bounden* A. B. *his heirs, executors, or administrators, do and shall, within—days next after the said ship or vessel shall be arrived in the said river of* Thames, *from the said voyage, or at the end and expiration of the said thirty-six Calendar months, to be accounted as aforesaid (which of the said times shall first and next happen), well and truly pay, or cause to be paid, unto the above-named* C. D. *his executors, administrators, or assigns, the sum of* 500 l. *of lawful money of* Great Britain, *together with pounds of like money, by the Calendar month, and so proportionably for a greater or lesser time than a Calendar month, for all such time, and so many Calendar months, as shall be elapsed and run out of the said thirty-six Calendar months, over and above twenty Calendar months, to be accounted from the day of the date above written; or, if in the said voyage, and within the said thirty-six Calendar months, to be accounted as aforesaid, an utter loss of the said ship or vessel, by fire, enemies, men of war, or any other casualties, shall unavoidably happen; and the above-bound* A. B. *his heirs, executors, or administrators, do and shall, within six months next after the loss, pay and satisfy to the said* C. D. *his executors, administrators, or assigns, a just and proportional average on all goods and effects which the said* A. B. *carried from* England *on board the said ship or vessel, and on all other the goods and effects of the said* A. B. *which he shall acquire during the said voyage, and which shall not be unavoidably lost: Then the above-written obligation to be void, and of no effect, or else to stand in full force and virtue.*

Sealed and delivered (being first duly stamped) in the presence of — A. B.

V. INSURANCE UPON LIFE, is a contract by which the Underwriter, for a certain sum, proportioned to the age, health, and profession of the person whose life is the object of the Insurance, engages that that person shall not die within the time limited in the policy; or if he do, that he (the Underwriter) will pay a sum of money to the person in whose favour the policy is granted. *Parke, c.* 22.

These contracts have been found to be attended with so many advantages, to persons whose incomes might otherwise determine with their own lives, or those of others, that a Society obtained a Charter from Queen Anne, for the purpose of granting such annuities, and still subsists, under the name of *The Amicable Society for a Perpetual Assurance Office.* A similar Society is established, by deed inrolled in the Court of King's Bench, at *Westminster*, called, *A Society for Equitable Assurances on Lives and Survivorships.* The two Companies of *The Royal Exchange* and *London Assurance* also obtained a charter for the same purpose: and by *stat.* 33 *Geo.* 3. *c.* 14, the two Companies of *The Royal Exchange Assurance* for insuring of ships, and for insuring houses, &c. against fire, are authorised to grant annuities for lives or on survivorship; and are incorporated, for that purpose, by the name of *The Royal Exchange Assurance Annuity Company.* Private Underwriters may also enter into policies of this nature, if an Insured chooses to trust to their single security.

To avoid the iniquitous gambling which had begun to take place upon this, as well as on other Insurances, the *stat.* 14 *Geo.* 3. *c.* 48, provides, that "No Insurance shall be made on the life or lives of any person or persons, wherein the person for whose use the policy is made, shall have no interest, or by way of gaming, or wagering, but such Insurance shall be null and void." And, in order more effectually to guard against any imposition or fraud, and to be the better able to ascertain what the interest of the person entitled to the benefit of the Insurance really is, it is further enacted, by the same statute, "That it shall not be lawful to make any policy or policies, on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies,

policies, the person's name interested therein, or for whose use or benefit, or on whose account such policy is so made or underwritten. And that in all cases where the Insured has an interest in such life or lives, event or events, no greater sum shall be recovered or received from the Insurer, than the amount or value of the interest of the Insured in such life or other event."

On this statute it has been determined, that the holder of a note for money won at play, has not an insurable interest in the life of the maker of the note. *Dwyer* v. *Edie*, *Parke* 432.

The general rules and maxims which govern Insurances in general, and on which so much has already been said, apply also to this species of them. The following are such as relate more directly to the contract now immediately in question:

As to the *Risk*.—In a Life-Insurance the Insurer undertakes to answer for all those accidents to which the life of man is exposed, except suicide, or the hands of justice. The death must happen within the time limited by the policy, otherwise the Insurers are discharged: and though a man receives a mortal wound during the existence of the policy, if he does not in fact die till after the expiration of it, the Insurers are not liable. See *Willes J.*'s opinion in *Lockyer* v. *Offley*, 1 *Term Rep.* 252: but if a man whose life is insured goes to sea, and the ship in which he sailed is never heard of afterwards, the question whether he did or did not die within the time insured, is a fact for the Jury to ascertain from the circumstances. *Paterson* v. *Black*, *Parke* 433.

With respect to the *Loss*.—This sort of policy being on the life or death of a man, does not admit of the distinction between total and partial losses. *Parke* 434.—If the Insurer become bankrupt before the loss happens, the person interested may prove the debt, under the commission, as if the loss had happened before it issued, by virtue of the *stat.* 19 *Geo.* 2. *c.* 32: (See *ante* IV): *Cox* v. *Liotard*, *Dougl.* (160) 166. *n.*—A policy was made for one year *from the day of the date* thereof: the policy was dated *September* 3, 1697: The person died *on* September 3, 1698, about one o'clock in the morning, and the Insurer was held liable. 2 *Salk.* 625: 1 *Ld. Raym* 480. To prevent disputes, it is now usual to insert in the policy the words, *the first and last days included*. *Parke* 436.

Fraud equally vitiates policies on lives, as it does those in Marine Insurances. *Pre. Ch.* 20: 2 *Vern.* 206. But where there is a warranty that the person is in good health, it is sufficient that he be in a reasonable good state of health: for it can never mean that he is free from the seeds of disorder. And even if the person, whose life was insured, laboured under a particular infirmity; if it be proved by medical men, that, in their judgment, it did not at all contribute to his death, the warranty of health has been fully complied with, and the Insurer is liable. 1 *Black. Rep.* 312: *Parke* 438, 9.

We have already seen (*ante* III. 8;) that when the risk is entire, and is once begun, there shall be no apportionment of premium: if, therefore, the person whose life was insured, should commit suicide, or be put to death by the hands of justice, the next day after the risk commenced, there would be no return of premium. See *Tyrie* v. *Fletcher*, *Cowp.* 669.

VI. INSURANCE AGAINST FIRE is a contract by which the Insurer undertakes, in consideration of the premium, to indemnify the insured against all losses, which he may sustain in his house, or goods, by means of fire, within the time limited in the policy. Various offices have been instituted for these kind of Insurances: some established by Royal Charter, others by deed inrolled; and others which give security on land for the payment of losses. The rules by which these Societies are governed, are established by their own managers, and a copy given to every person at the time he insures; so that by his acquiescence, he submits to their proposals, and is fully apprised of those rules, upon the compliance or non-compliance with which, he will or will not be entitled to an indemnity. There are not, therefore, many cases on the subject in our law-books. The following are the most requisite to be noticed:

The London Assurance Company insert a clause in their proposals, by which they declare, that they will not hold themselves liable for any damage by fire occasioned by any invasion, foreign enemy, or any *military or usurped power* whatever. Under this proviso it has been held, that the Insurers were not exempted from, but liable to make good, a loss by fire occasioned by a mob, which arose under pretext of the high price of provisions, and burned down the plaintiff's malting house. 2 *Wils.* 363.

The SUN *Fire-Office*, in addition to the above words, adds, *civil commotion*. It was held, that under these latter words the Company were exempt from, and not liable to satisfy, losses occasioned by rioters, who rose in the year 1780, to compel the repeal of a statute which had passed in favour of the Roman Catholicks. *Langdale* v. *Mason*, *Parke*, *c.* 23.

When a *loss* happens, the Insured is bound by the proposals of most of the Societies, and ought, in all cases, to give immediate notice of the loss, and as particular an account of the value, &c. as the nature of the case will admit. He must also produce a certificate of the Minister and Church-wardens as to his character, and their belief of the loss sustained, and the truth of what he advances. *Parke* 448.

In these Insurances against fire, the loss may be either partial or total, and some of the Offices, if not all, expressly undertake to allow all reasonable charges, attending the removal of goods in cases of fire, and to pay the sufferer's loss, whether the goods are destroyed, lost, or damaged, by such removal. *Parke* 449

These policies are not, in their nature, assignable, nor can the interest in them be transferred without the consent of the Office; contrary to what has been expressly determined in cases of Marine Insurances. 1 *Term Rep* 26. It is provided, however, that when any person dies, the interest shall remain to his heir, executor, or administrator, respectively, to whom the property insured belongs; provided they procure their right to be indorsed on the policy, or the premium be paid in their name. *Parke* 449.

It is necessary that the party injured should have an interest or property in the house insured, at the time the policy is made out, and at the time the fire happens: and therefore, after the lease of the house is expired, the Insured's assigning the policy does not oblige the Insurers to make good the loss to the assignee. *Lynch* v. *Dalzell*, *Bro. P. C*: and see 2 *Atk.* 554.

The

The *Premium* upon common Insurances is 2*s. per cent.* for any sum not exceeding 1000*l.*; and 2*s.* 6*d.* from 1000*l.* upwards. Besides which there is a duty to Government under *stat.* 22 *Geo.* 3. *c.* 48, of 1*s.* 6*d. per cent.* but which latter does not extend to Insurances upon public hospitals.

By *stat.* 17 *Geo.* 3. *c.* 50. § 24, if any person sign a policy of Insurance against fire, not being duly stamped, he shall forfeit 10*l.* and must pay 5*l.* over and above the usual stamp-duties, (see *ante* I. 1.) before it can be received in evidence.

The same principles as to *fraud*, and the *return of premium*, apply to cases in Insurance against fire as to all other contracts of Insurance.

INTAKERS, a kind of thieves in the northern parts of *England*, so called, because they did take in and receive such booties as their confederates, the outpartners, brought to them from the borders of *Scotland*; they are mentioned in *stat.* 9 *H.* 5. *c.* 7.

INTASSARE. See *Tassum.*

INTENDMENT OF LAW, *intellectus legis.*] The understanding, intention, and true meaning of law. Lord *Coke* says, the judges ought to judge according to the common Intendment of law. 1 *Inst.* 78.

Intendment shall sometimes supply that which is not fully expressed or apparent, and when a thing is doubtful, in some cases, Intendment may make it out; also many things shall be intended after verdict, in a cause, to make a good judgment: but Intendment cannot supply the want of certainty in a charge in an indictment for any crime, &c. 5 *Rep.* 121.

Sometimes a thing is necessarily *intended* by what precedes or follows it; and where an indifferent construction may have two Intendments, the rule is to take it most strongly against the plaintiff. *Show.* 162. Though if a plaintiff declares, that the defendant is bound to him by obligation, it shall be intended that the obligation was sealed and delivered: if one is bound in a bond, and in the *solvend'* of the bond it is not expressed unto whom the money shall be paid, or if said to the obligor; the law will intend it is to be paid to the obligee: and where no time is limited for payment of the money, it shall be intended to be presently paid. 2 *Lill. Abr.* 71.

The intent of parties in deeds, contracts, &c. is much regarded by the law: though it shall not take place against the direct rules of law: the law doth not in conveyances of estates admit them regularly to pass by Intendment and implication; in devises of lands they are allowed, with due restrictions. *Vaugh.* 261, 262. Where seisin of an inheritance is once alledged, it shall be intended to continue till the contrary is shewn. *Jones* 181. A court pleaded generally to be held *secund' consuetud'* shall be intended held according to the common law. *Goldsb.* 111.

By Intendment of law every parson, or rector of a church, is supposed to be resident in his benefice, unless the contrary be proved. *Co. Lit.* 78. *b.*

One part of a manor by common Intendment shall not be of another nature than the rest. *Co. Lit.* 73. *b.*

Of common Intendment a will shall not be supposed to be made by collusion. *Co. Lit.* 78. *b.* The law presumes that every one will act for his best advantage; therefore credits the party in whatever is to his own prejudice. *Fin. Law* 10: *Max.* 53. Usury shall not be intended, unless expresly found by the jury. *Bridgm.* 112: 10 *Rep.* 59. Covin shall not be intended or presumed in law, unless expressed averred. *Bridgm.* 112. When one word may have a double Intendment, one according to the law, and another against the law, that Intendment shall be taken which is according to law; and this by a reasonable Intendment. 3 *Bulst.* 306: *Yelv.* 50. See further titles *Implication*; *Indictment*; *Deed*; and such other titles as are applicable to this subject.

INTENDMENT OF CRIMES. In antient times felonious attempts, intending the death of another, were adjudged felony; for the will was taken for the fact. *Bract.* 1 *E.* 3. But at this day the law does not generally punish Intendments to do ill, if the intent be not executed; except in case of treason, where intention proved by circumstances shall be punished as if put in execution. 3 *Inst.* 108. And if a person enter a house in the night, with intent to commit burglary, it is felony: and by statute 22 & 23 *C.* 2. *c.* 1, maliciously cutting off or disabling any limb or member, with an intent to disfigure, &c. is felony. See also *Plowd.* 474. Assault, with intent to commit robbery on the highway, is made felony punishable by transportation; *stat.* 7 *Geo.* 2. *c.* 21. —Intention of force and violence makes riots criminal. 3 *Inst.* 9. Where men do evil, and say they intend none; or if the intention be only to beat, and they kill a person, they are to be punished for the crime done. *Plowd.* 345. If a man entering a tavern, &c. commit a trespass, the law will judge that he originally intended it. 8 *Rep.* 147. See this Dictionary, titles *Homicide*; *Treason*; &c.

INTENT, OR INTENTION. The words of deeds shall be construed according to the Intent of the parties, and not otherwise. The Intent shall be destroyed where it does not agree with the law. *Pl. C.* 160. *b*; 162 *b.*

In every agreement the Intent is the chief thing that is to be considered; and if by the act of God, or other means not arising from the party himself, the agreement cannot be performed according to the words, yet the party shall perform it as near the Intent as he may. *Pl. C.* 290.

Common usage and reputation frequently govern the matter, and direct the Intention of the parties; as upon sale of a barrel of beer the barrel is not sold, but upon sale of a hogshead of wine it is otherwise. *Savil* 124: *Hardr.* 3. The Intention of a man is not always to be pursued in equity; as if a man settles a term in trust for one and his heirs, yet it shall go to the executor. 1 *Vern.* 164.

All deeds are but in nature of contracts, and the Intent of the parties reduced into writing, and the Intention is to be chiefly regarded. In an act of parliament the Intention appearing in the preamble shall controul the letter of the law; and from the regard which the law itself gives to the Intention of the party, it is, that where there is fine by render, there shall be no dower; and so a rent or recognizance shall not be extinguished by levying a fine to the party. *Vern.* 58. See 14 *Vin. Abr.* tit. *Intent*, and this Dictionary, titles *Deed*; *Limitation*; *Agreement*; *Statute*; &c.

INTENTIONE, A writ that lies against him who enters into lands after the death of tenant in dower or for life, &c. and holds out him in reversion or remainder. *F. N. B.* 203.

INTER CANEM & LUPUM, Words formerly used in appeals to signify the crime being done in the twilight. *Inter Placita de Trin.* 7 *Ed.* 1: *Rot.* 12: *Glouc. Plac. Cor. apud Novum Castrum.* 24 *Ed.* 6. *Rot.* 6. This in *Herefordshire*, they call the *mock-shadow*, corruptly the *mock-shade*, and in the north, *daylight's-gate*; others, *betwixt hawk and buzzard*. *Cowell.*

INTERCOMMONING, Is where the commons of two manors lie together, and the inhabitants of both have time out of mind depastered their cattle promiscously in each. *Cowell.* See title *Common.*

INTERDICTION, *interdictio*; *interdictum.*] An ecclesiastical censure, prohibiting the administration of divine ceremonies. See *Walf. Hist. an.* 1357. It is a general excommunication of a whole country or province: it is mentioned in some of our historians, *viz. Knighton* tells us, *anno* 1208, that the Pope excommunicated King *John*, and all his adherents, *Et totam terram Anglicanam suppofuit interdicto*, which began the first *Sunday* after *Easter*, and continued six years and one month; during all which time nothing was done in the churches besides baptism and confessions of dying people.

THE ANCIENT FORM OF AN INTERDICT.

IN the name of Christ, *We the Bishop, in behalf of the Father, Son, and Holy Ghost, and of* St. Peter, *the chief of the apostles, and in our own behalf, do excommunicate and* interdict *this church, and all the chapels thereunto belonging, that no man from henceforth may have leave to sing* mass, *or to hear it, or in any wise to administer any divine office, nor to receive God's tithes without our leave; and whosoever shall presume to sing or hear mass, or perform any divine office, or to receive any tithes, contrary to this* interdict, *on the part of God the Father Almighty, and of the Son, and of the Holy Ghost, and on the behalf of* St. Peter, *and all the saints, let him be accursed and separated from all Christian society, and from entering into Holy Mother Church, where there is forgiveness of sins; and let him be* Anathema, Maranatha, *for ever, with the devils in* hell. Fiat, fiat, fiat. *Amen.*—DU CANGE.

This severe church-censure has been long disused. See further titles *Papist*; *Rome.*

INTERDICTUM, In the civil law, was a prohibition nearly equivalent to the *injunction* of our Court of Chancery. See title *Injunction.*

INTERDICTED OF WATER AND FIRE. Were anciently those persons who suffered banishment for some crime; by which judgment, order was given that no man should receive them into his house, but deny them fire and water, the two necessary elements of life, which amounted as it were to a civil death; and this was called *legitimum exilium*, says *Livy.*

INTEREST, *interesse.*] Is commonly taken for a chattel real, as a lease for years, &c. and more particularly for a future term; in which case it is said in pleading, that one is possessed *de interesse termini*. Therefore an estate in lands is better than a right or interest in them: though, in legal understanding, an interest extends to estates, rights, and titles, that a man hath in, or out of lands, &c. so as by grant of his whole interest in such land, a reversion therein, as well as possession in fee-simple, shall pass. *Co. Lit.* 345. Because no livery of seisin is necessary to a lease for years, such lessee is not said to be seised, or to have true legal seisin of the land. Nor indeed does the bare lease vest any *estate* in the lessee, but only gives him a right of entry on the enement, which right is called his interest in the term, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then and not before vested in him, and he is *possessed* not properly of the land but of the term of years; the possession or seisin of the *land* remaining still in him who hath the freehold. 1 *Inst.* 46: See 2 *Comm.* 144. *b.* 2. *c.* 9. I: and this Dictionary, titles *Lease*; *Term*; *Estate.*

A mortgage is an interest in land, and on non-payment, the estate is absolute in law, and his interest is good in equity to entitle him to receive and enjoy the profits till redemption or satisfaction; and on a foreclosure, he hath the absolute estate both in law and equity. 9 *Mod.* 196. See title *Mortgage.*

INTEREST OF MONEY, The legal profit or recompence allowed, on loans of money, to be taken from the borrower by the lender. The rate of legal Interest has varied and decreased, according as the quantity of specie in this kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The *stat.* 37 *H.* 8. *c.* 9, confined Interest to 10 *per cent.*; and so did the *stat.* 13 *Eliz c.* 8. The *stat.* 21 *Jac.* 1. *c.* 17, reduced it to 8 *per cent.*; and the *stat.* 12. *Car.* 2. *c.* 13, to *six*: and, lastly, by *stat.* 12 *Ann. st.* 2. *c.* 16, it was brought down to *five per cent. per annum*; which is now the extremity of legal Interest that can be taken on a loan of money. But yet if a contract which carries Interest be made in a foreign country, our courts will direct the payment of Interest, according to the law of the country in which the contract was made. 1 *Eq. Ab* 289: 1 *P. Wms.* 395: (See 2 *Bro. C. R.* 2.) Thus *Irish*, *American*, *Turkish*, and *Indian*, Interest have been allowed in our courts to the amount of ven 10 or 12 *per cent.*; for Interest depends on local circumstances, and the refusal to enforce such contracts would put a stop to all foreign trade. And by *stat* 14 *Geo.* 3. *c.* 79, all *bonâ fide* mortgages and securities on estates or property in Ireland, or the plantations, bearing Interest not exceeding 6 *per cent.* shall be legal, though executed in *Great Britain.* 2 *Comm* 460. *c.* 30. IX 4. See further this Dictionary, title *Usury.*

Where an estate is devised for payment of debts, Chancery will not allow Interest for book debts. 3 *Ch. Rep* 94. Where lands are charged with payment of a sum in gross, they are also chargeable in equity with payment of Interest for such sum. *Fin. R.* 286. Interest is recovered by way of damages, where damages are recovered *ratione detentionis debiti*; but not where damages only are recovered. for interest is not recovered *occasione dampnorum*; *per Powel* J. 2 *Salk.* 623. No Interest to be allowed for costs, 14 *Vin. Abr.* title *Interest.* In a long unsettled partnership account, rendered intricate by the neglect of a party, *he* shall have no Interest on the balance when settled. 1 *Bro. C. R.* 239. See further titles *Bankrupt*; *Account*; *Damages*; *Mortgage*, &c.

INTEREST ON LEGACIES. In case of a vested Legacy, due immediately, and charged on land, or money in the funds, which yield an immediate profit, Interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry Interest only from the end of the year after the death of the testator. 2 *P. Wms.* 26, 27. See title *Legacy*; *Executor.*

Interest, or no Interest. See title *Insurance*.

Interested Witness. Interested Witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court. 3 *Comm.* 370. See titles *Evidence*; *Witness*.

INTERLINEATION in a DEED. See tit. *Deed*, III.

INTERLOCUTORY DECREE in CHANCERY. See titles *Chancery*; *Injunction*; *Decree*.

Interlocutory Judgment. Interlocutory judgments are such as are given in the middle of a cause, upon some plea, proceeding on default, which is only intermediate, and does not finally determine or complete the suit. As judgment for the plaintiff in abatement, of *respondeat ouster*, i. e. that defendant shall answer over, or farther, plead in chief, or put in a more substantial plea.

But the Interlocutory Judgments, most usually spoken of, are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained, which is the province of a jury. In such case a writ of enquiry issues to the sheriff, who summons a jury, enquires of the damages, and returns to the court the inquisition so taken, whereupon the plaintiff's attorney taxes costs, and signs final judgment. 3 *Comm.* 396, 397. See title *Judgment*, I.

Interlocutory Order. See titles *Chancery*; *Injunction*.

INTERLOPERS, Persons who intercept the trade of a company of merchants. *Merc. Dict.* Applied principally to those who infringe the charters of the *East India Company*. See that title.

INTERPLEADER, Fr. *enterplaider* Lat. *interplacitare.*] To discuss or try a point incidentally happening as it were between, before the principal cause can be determined. Interpleader is allowed, that the defendant may not be charged to two severally, where no default is in him: as if one brings detinue against the defendant upon a bailment of goods, and another against him upon a trover, there shall be Interpleader, to ascertain who hath right to his action. 2 *Danv. Abr.* 779. If two bring several detinues against *A. B.* for the same thing, and the defendant acknowledges the action of one of them, without a prayer of Interpleader, they shall not interplead on the request of the other; for the Interpleader is given for the security of the defendant, that he may not be twice charged, and he hath waived that benefit. 18 *Ed.* 3. 22.

If one brings detinue against *B.* and counts upon a delivery of goods, &c. to re-deliver to him, and another brings detinue against him also, and counts so likewise; if there be not any privity of bailment between them, yet they shall interplead, to avoid the double charge of the defendant; and also because the court cannot know to whom to deliver the thing detained, if both should recover. *Br. Enterplead.* 3. And upon such several detinues, if the defendant says that he found it, and traverses the bailment, they shall interplead; for then he is chargeable as well to the one as the other; so if he says that they delivered jointly, *absque hoc*, that they delivered it as they have counted: but it is otherwise, if the defendant doth not traverse the bailment, because if there was a bailment, he is chargeable only to the bailor, and may plead in bar against the others. 2 *Danv.* 782.

Where two bring several detinues for one thing, and the defendant prays that he may interplead, and delivers the thing to the court, and before the award of the Interpleader, one discontinues the suit, the other shall not have judgment; but if he discontinues his suit after the Interpleader, the other may have judgment. 11 *H.* 6. 19.

If a recovery be had upon an Interpleader, judgment shall be given to recover the thing demanded against the defendant; and not against the garnishee, in case of garnishment, &c. 2 *Danv.* 783. When two have interpleaded in detinue, he that recovers shall recover damage against the other. *Br. Damage* 68.

There was formerly Interpleader relating to delivery of lands by the King to the right heir, where two persons out of wardship were found heirs, &c. 7 *Rep.* 45: *Staund. Prer. cap.* 17: *Bro.* title *Enterplead.* And anciently this head (spelt Enterpleader) made a great title in the law.

There are also *Bills of Interpleader* in a Court of Equity. Thus, where two or more persons claim the same thing by different or separate interests, and another person not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of Interpleader against them. In this bill he must state his own rights, and their several claims; and pray that they may interplead, so that the court may adjudge to whom the thing belongs, and he may be indemnified. *Mitford's Treat.* 47. See *Bunb.* 303: 1 *Eq. Ab.* 80: 2 *Eq. Ab.* 173: 1 *Burr.* 37: *Pract. Reg.* 38.

The principles upon which courts of equity proceed in these cases, are similar to those by which the courts of law are guided in the case of *bailment*: the courts of law compelling interpleader between persons claiming property, for the indemnity of a third person in whose hands the property is, in those cases only where, by agreement of both claimants, the property has been bailed to a third person; and the courts of equity extending the remedy to all *other* cases (leaving those of bailment to the common law) to which in conscience it ought to extend. *Mitf. Treat.* 125.

If a bill of Interpleader does not show that each of the defendants, whom it seeks to compel to interplead, claims a right, both the defendants may demur; one because the bill shows no claim of right in him; the other, because (for that very reason) the bill shows no cause of Interpleader. 1 *Ves.* 248. Or if the bill shows no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur. As the court will not permit such a bill to be brought in collusion with either claimant, the plaintiff must annex to his bill an affidavit that it is not exhibited in collusion with any of the parties; the want of which affidavit is a cause of demurrer. 1 *Ves.* 248. A bill of this nature generally prays an injunction to restrain the proceedings of the claimants in some other court; and as this may be used to delay the payment of money by the plaintiff, if any is due from him, he ought by his bill to offer to pay the money due into court. *Mitf. Treat.* 126.

After a decree on a bill of Interpleader, there is generally an end of the suit as to the plaintiff; and if he dies, the cause may proceed without revivor. 1 *Vern.* 351. See further titles *Chancery*; *Injunction*, &c.

INTERREGNUM. There cannot be any *Interregnum* in this country, by the policy of the Constitution; for the right of sovereignty is fully vested in the successor to the throne by the very descent of the crown. Hence the statutes passed in the first year after the restoration of *Car.* II. are always called the acts of the 12th year of his reign: and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

INTERROGATORIES, Are particular questions in writing, demanded of witnesses brought in to be examined in a cause, especially in the Court of Chancery. These Interrogatories must be exhibited by the parties in the suit on each side; which are either direct for the party that produces them, or counter on behalf of the adverse party: and generally both Plaintiff and Defendant may exhibit direct, and counter, or cross Interrogatories.

They are to be pertinent and only to the points necessary, and either drawn or perused by counsel, and must be signed by them: if they are leading, *viz.* such as these, *Did not you do or see such a thing*, &c. the depositions on them will be suppressed; for they should be drawn, *Did you see, or did you not see*, &c. without leaning to either side; and not only where they point more to one side of the question than the other; but if they are too particular, they will likewise be suppressed. The Commissioners, &c. who examine witnesses on Interrogatories, must examine to one Interrogatory only at a time; they are to hold the witnesses to every point interrogated; and take what comes from them on their examination, without asking any idle questions, or putting down any impertinent answers not relating to the Interrogatories, &c. See titles *Depositions*; *Equity*.

If a contempt be committed in the face of the Court, the offender may be instantly apprehended and imprisoned at the discretion of the Judges, without any farther proof or examination. *Staundf. P. C.* 73. *b.* In matters arising at a distance, the Court generally grant a rule to show cause why an attachment should not issue, or in very flagrant instances of contempt, an attachment issues in the first instance. *Salk.* 84: *Stra.* 185, 564. This process is intended to bring the party into Court, and when there he must either stand committed or put in bail, in order to answer such *Interrogatories* as shall be administered to him for the information of the Court. These *Interrogatories* are in the nature of a charge or accusation; and if any of them are improper, the defendant may refuse to answer it, and move the Court to have it struck out. *Stra.* 444. If the party can clear himself upon oath, he is discharged; but if perjured, may be prosecuted for the perjury. 6 *Mod.* 73. If the contempt be of such a nature, that, when the fact is once acknowledged, the Court can receive no farther information by Interrogatories than it is already possessed of (as in case of a rescue): the defendant may be admitted to make such simple acknowledgment, and receive his judgment without answering to any Interrogatories; but refusing to answer or answering evasively is punishable as a high and repeated contempt. 4 *Comm.* 287. *c.* 20.

With regard to this singular mode of trial, thus admitted in this *one* particular instance, and so contrary to the genius of the common law in any other, it may be sufficient to observe, that as the process by attachment in general appears to be extremely ancient; (*Y. B.* 20 *H.* 6. 37: 22 *E.* 4. 29;) and has, in more modern times, been recognized, approved, and confirmed by several express acts of parliament; (*Statutes* 4. *Eliz. c.* 6. § 3: 13 *Car.* 2. *st.* 2. *c.* 2. § 4: 9 & 10 *W.* 3. *c.* 15: 12 *An. st.* 2. *c.* 15. § 5.) so the method of examining the delinquent upon oath with regard to the contempt alledged, is at least of as high antiquity, and, by long and immemorial usage, is now become the law of the land. *M.* 5 *E.* 4. *rot.* 75, cited *Rast. Ent.* 268. *pl.* 5: 4 *Comm.* 288. *c.* 20.

It has been remarked, that the admission of the party to purge himself by oath is more favourable to his liberty, though perhaps not less dangerous to his conscience. Some declamation has also been used against the temptation to perjury afforded by this proceeding; this latter, however, is an argument which can never affect the case of any honest man.

INTESTATES, *Intestati.*] There are two kinds of Intestates; one who makes no will; another who makes a will, and nominates executors, but they refuse; in which case he dies an Intestate, and the Ordinary commits administration. 2 *Par. Inst. fol* 397. In former times, he who died Intestate, was accounted damned, because (as *Mat. Par.* tells us) he was obliged by the canons, to leave at least a tenth part of his goods to pious uses, for the redemption of his soul; therefore, whoever neglected so to do, took no care of his own salvation. They made no difference between a suicide and an Intestate; for as, in one case, the goods were forfeited to the King, so in the other they were forfeited to the chief Lord. But because it was accounted a very wicked thing to die without making any distribution of his goods to pious uses, and such cases often happen by sudden deaths, therefore, by subsequent constitutions, the Bishops had power to make such distribution as the Intestate himself was bound to do; and this was called *Eleemosyna rationalilis.* And it was by this means that the spiritual courts came first to have jurisdiction in testamentary cases. See this Dict. titles *Executors*; *Will.*

INTESTATES' ESTATES, The goods and chattels of persons dying intestate. 2 *Lil. Abr.* 73. See this Dict. title *Executor*, I. 1: V. 7. 8.

INTOL & UTTOL, Toll or custom paid for things imported or exported, or brought in and sold out. *Cowell.*

INTRARE MARISCUM, To drain any low ground, and by dykes, walls, &c. take in, and reduce it to herbage or pasture; whence comes the word *Innings.* *Wil. Thorn.*

INTRUSION, *Intrusio.*] Is when the ancestor dies seised of any estate of inheritance, expectant upon an estate for life, and then tenant for life dies, between whose death and entry of the Heir, a stranger intrudes. *Co. Lit.* 277: *Bract. lib.* 4. *cap.* 2. Intrusion, therefore, signifieth an unlawful entry into lands or tenements void of a possessor, by him who hath no right to the same; and the difference between an Intruder and an Abator is this, that an *Abator* entereth into lands void by the death of a tenant in fee; and an Intruder enters into land void by the death of tenant for life or years. *F. N. B.* 203.

Blackstone ranks Intrusion as a species of injury by ouster, or amotion of possession from the freehold, and states it to be, The entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. It happens, says he, where a tenant for term of life dieth seised of lands and tenements, and a stranger entereth thereon, after such death of the tenant, and before any entry of him in remainder or reversion. The difference between Intrusion and Abatement, he states to be, that an Abatement is always to the prejudice of the heir, or immediate devisee; an Intrusion is always to the prejudice of him in remainder or reversion. So that an Intrusion is always immediately consequent upon the determination of a particular estate: an Abatement is always consequent upon the descent or devise of an estate in fee-simple. 3 *Comm.* 169. *c.* 10. (2).

There is a writ of Intrusion, which lies where the tenant for life, *&c.* dies; but if a man doth intrude after the death of such a tenant, he in reversion *in tail* shall not have this writ, but is put to his *formedon:* for it lieth only for him who hath the reversion in fee simple, *&c.* after the death of tenant for life, or in dower, *&c. New Nat. Br.* 509. Also one having such a fee-estate in remainder, shall have writ of Intrusion; and the assignee of the remainder may bring it, as well as an heir, *&c. New N. B.* 509.

As he who enters and keeps the right heir from the possession of his ancestor is an Intruder punishable by common law; so he who enters on the King's land and takes the profits, is an Intruder against the King. *Co. Litt.* 277. For this Intrusion information may be brought; but before office found, he who occupies the land shall not be said to be an Intruder, for Intrusion cannot be but where the King is actually possessed, which is not before office; though the King is intitled to the mesne profits after the tenant's estate ended. *Moor* 295. See title *Information*, I.

By *stat.* 21 *Jac.* 1. *cap.* 14, the defendants may plead the general issue in informations of Intrusion, brought on behalf of the King, and retain their possession till trial, where the King hath been out of possession, and not received the profits for twenty years: and no *scire facias* shall issue, whereupon the subject shall be forced to special pleading, *&c.*

INTRUSION DE GARD, A writ that lay where the infant within age entered into his lands, and held out his Lord. *Old Nat. Br.* 90.

INTRUSIONE, Is the writ brought against an Intruder, by him that hath fee-simple, *&c. New Nat. Br.* 453.

INVADIARE, To engage or mortgage lands; *Invadiationes*, mortgages of land. *Mon. Angl. tom.* 1. p. 478.

INVADIATUS, One, who having been accused of some crime, not fully proved, is put *sub debita fidejussione.*

INVASIONES. In the inquisition of serjeancies and knights' fees; *anno* 12 and 13 of King *John*, there are some titles called *Invasiones*; *et Invasiones super regem.*

INVENTIONES, Is used in antient charters for *treasure-trove*; money or goods found by any person, and not challenged by the owner; which, by the common law, is due to the King, who grants the privilege or benefit to some particular Subjects. *Chart. K. Ed.* I. *to the Barons of the Cinque Ports*: *Placit. temp. Edw.* I. & *Edw.* II. MS. *f.* 89.

INVENTORY, *Inventorium.*] A list or schedule containing a true description of all the goods and chattels of a person deceased at the time of his death, with their value appraised by indifferent persons; which every executor or administrator ought to exhibit to the Bishop or Ordinary at such time as he shall appoint. *West. Symb. lib* 2. *pag.* 696. By *stat.* 21 *Hen.* 8. *c.* 5, executors and administrators are required to make and deliver in upon oath to the Ordinary, inventories indented, of which one part shall remain with the Ordinary, and the other part with the executor or administrator. The intention of this statute was for the benefit of the creditors and legatees, that the executor or administrator might not conceal any part of the personal estate from them: though as to the valuation it is not conclusive, but the real value must be found by a jury; if they are under-valued, the creditors may take them as appraised; and if over-valued, it shall not be prejudicial to the executor.

But though generally all the personal estate of the deceased, of what nature or quality soever, ought to be put into the Inventory; yet goods given away in the life-time of the deceased, and actually in the possession of the party to whom given, and the goods to which a husband is entitled as administrator to his wife, are not to be included. 2 *Bulst.* 355.—Notwithstanding the law requires that the Inventory be exhibited within three months after the death of the person, if it is done afterwards, it is good, for the Ordinary may dispense with the time, and even in some cases, whether it shall be exhibited, or not; as where creditors are paid, and the will performed, *&c. Raym.* 470. These Inventories proceed from the civil law; and as, by the old *Roman* law, the heir was obliged to answer all the testator's debts, *Justinian* ordained, that Inventories should be made of the substance of the deceased, and he should be no further charged. *Justin. Inst.*

In common parlance, *&c.* the term Inventory is applied on other and more frequent occasions, as on the sale of goods, by agreement between parties, accounts of the goods sold (supposing them passing with the possession of an house, *&c.*) are called Inventories. So the accounts taken by sheriffs, of goods levied and sold under executions, under distresses of the goods distrained for rent, are called Inventories, *&c.* See this Dictionary, title *Executor*, V. 4; *Distress.*

IN VENTRE SA MERE, *Fr.*] In the mother's belly, relating to which there is a writ mentioned in the register of writs; and in *stat.* 12 *Car.* 2. *cap.* 24, infant *in ventre sa mere*, is applied to the case where a woman is with child at the time of her husband's death; which child, if he had been born, would have been heir to the land of the husband; and this is sometimes privily, and sometimes open and visible. 1 *Shep. Abr.* 142. The law hath consideration of such a child, on account of the apparent expectation of his birth. He may be vouched in his mother's belly; and action lies for detainment of charters from him as heir, *&c. Hob.* 222: *Dyer* 186. When a female comes into land by descent, there the son born after, shall oust her and have the land. 3 *Rep.* 61: *Plowd.* 375. But if the daughter and female heir cometh to land in nature of a purchaser; as on a will of lands given to *J. S.* and his heirs, and he hath a daughter when the devisor dies, his wife being

then with child of a son; in this case the daughter shall enjoy the land, and not the after-born son. 3 *Rep.* 61: 5 *Ed.* 4. 6: 9 *Hen.* 7. 24. See titles *Infant*, II; *Posthumous Children*; *Descent*; *Limitation*.

INVERITARE, To verify or make proof of a thing. *Leg. Inæ. c.* 16.

To INVEST; INVESTITURE, from the Fr. *investir.*] The giving possession: some define it thus, *Investitura, est alicujus in suum jus introductio*; a giving livery of seisin or possession.—Investitures in their original rise were probably intended to demonstrate in conquered countries the actual possession of the lord; and that he did not grant a bare litigious right which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And after conveyance by deed came into use, these Investitures were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate, and that such as claimed title by other means might know against whom to bring their actions. 2 *Comm.* 311. *c.* 20. And see *pp.* 23, 53, 209: and this Dictionary, titles *Feoffment*; *Conveyance*; *Tenure*; as also titles *Advowson*; *Institution*, &c.

The customs and ceremonies of Investiture or giving possession, were long practised with great variety: at first Investitures were made by a form of words; afterwards by such things as had most resemblance to what was to be transferred; as lands passed by the delivery of a turf, *&c.* which was done, by the grantor, to the person to whom the lands were granted: but in afterages, the things by which Investitures were made were not so exactly observed. *Ingulph. p.* 901. In the church, it was the custom of old, for princes to promote such as they liked to ecclesiastical benefices, and declare their choice and promotion, by delivery, to the persons chosen, of a pastoral staff and ring; the one a symbolical representation of their spiritual marriage with the church; and the other of their pastoral care and charge, which was termed Investiture; after which they were consecrated by ecclesiastical persons. *Hoveden* tells us, that King *Richard*, being taken by the Emperor, gave this kingdom to him, *et investivit eum inde per pileum suum*; and that the Emperor immediately afterwards returned the gift; *et investivit eum per duplicem crucem de auro. Hoved.* 724. *Walsingham* says, that *John* Duke of *Lancaster* was invested Duke of *Aquitaine, per virgam et pileum, p.* 343.

INVITATORIA & VENITARIUM, Those hymns and psalms that were sung in the church to invite the people to prayer: they are mentioned in the statutes of St. *Paul's Church.* MS.

INVOICE, A particular account of merchandise, with its value, custom, and charges, *&c.* sent by a merchant to his factor or correspondent in another country. See *stat.* 12 *Car* 2. *c.* 34.

INVOLUNTARY MANSLAUGHTER, Differs from homicide excusable by misadventure, in this; that misadventure always happens in consequence of some lawful act, but this species of Manslaughter in consequence of an unlawful act. Yet, in general, when an Involuntary killing happens in consequence of an unlawful act, it will be either murder or Manslaughter, according to the nature of the act which occasioned it. 4 *Comm.* 192, 3. See title *Homicide*.

To INURE, To take effect; as the pardon *inureth. Staund. Prær. fol.* 40. See *Enure*.

JOBBER, One who buys or sells cattle for others. There are also stock-jobbers, who buy and sell stocks for other persons, and gamble in the funds for themselves. See titles *National Debt*; *Stock-jobbers*.

JOCALIA, Fr. *joyaux.*] Jewels; derived from the Lat. *jocus, joculus*, and *jocula*, which comprehend every thing that delighteth; but, in a special and more restrained sense, it signifies those things which are ornaments to women, and which in *France* they call their own; as diamonds, ear-rings, bracelets, *&c.* But in this kingdom a wife shall not be entitled to jewels, diamonds, *&c.* on the death of her husband, unless they are suitable to her quality, and the husband leaves assets to pay debts, *&c.* 1 *Roll. Abr.* 911. See title *Baron and Feme*, IV. *ad fin.*

JOCARI, To contend with pikes. *Mat. Paris, anno* 1252.

JOCARIUS, A jester. In an ancient deed of *Richard*, abbot of *Bernay*, to *Henry Lovet*, among the witnesses to it was *Willielmo tunc jocario Domini Abbatis.* In *Domesday* it is said *Berdic* was *Joculator Regis*, the King's Jester.

JOCELET, Sax. *Prædiolum, agri colendi portiuncula*] A little farm or manor; in some parts of *Kent* a *yoklet*, as requiring but a small yoke of oxen to till it. *Sax. Dict.*

JOCULATOR, See *Jocarius*.

JOCUS PARTITUS. It is so called when two proposals are made, and a man hath liberty to choose which he will. *Bracton, lib.* 4. *tract.* 1. *c.* 32. *p.* 2: *Hengham Magn. c.* 4.

JOINDER IN ACTION, The coupling or joining of two in a suit or action. *F. N. B. fol.* 118, 201, 221. In all personal things, where two are chargeable to two, the one may satisfy it, and accept of satisfaction, and bind his companion; and yet one cannot have an action without his companion, nor both only against one. 2 *Leon.* 77. In joint personal actions against two defendants, if they plead severally, and the plaintiff is nonsuit by one before he hath judgment against the other, he is barred (in that suit) against both. *Hob.* 180. A person, in consideration of a sum of money paid to him by *A.* and *B.* promises to procure their cattle distrained to be delivered; if they are not delivered, one joint action lies by the parties; for the consideration cannot be divided. *Style* 156, 203: 1 *Danv. Abr.* 5. And where two joint owners of a sum of money are robbed upon the highway, they are to join in one action against the hundred. It is otherwise if they have several properties. *Latch.* 127: *Dy.* 307.

Upon a joint grievance all parties may join; as the inhabitants of a hundred, *&c.* And an action brought against owners of a ship, in case of goods damaged, *&c. quasi ex contractu*, must be brought against all of them. 3 *Lev.* 258: 3 *Mod.* 321: 2 *Salk.* 440. Though one partner acts in trade, where there are many partners, actions are to be brought against all the partners jointly for his acts. 1 *Salk.* 292. If two men are partners, and one of them sells goods in partnership, action for the money must be brought in both their names. *Godb.* 244. But where there are two partners in merchandise, and one

one of them appoints a factor, they may have several writs of account against him, or they may join. *Moor* 188. And if one of the merchants dies, the survivor is to bring the action. 2 *Salk.* 444.

If one man calls two other men thieves, they shall not join in an action against him; and one joint action will not lie for, or against several persons for speaking the same words; for the wrong done to one is no wrong to the other; and the words of the one are not the words of the other. 1 *Danv.* 5: *Palm.* 313.

So, in assault and battery, on a joint trespass, the plaintiff may declare severally; but it remains joint till severed by the declaration. 2 *Salk.* 454. A man cannot declare in an action against one defendant for an assault and battery, and against another for taking away his goods; because the trespasses are of several natures. But where they are done by two persons jointly at one time, they may be both guilty of the whole. *Style* 153: 10 *Rep.* 66. If two men procure another to be indicted falsely of barratry, he may have action against them both jointly; and it is the same if two conspire to maintain a suit, though one only gives money, &c. *Latch.* 226.

Tenants in common cannot join in an action of waste against their lessee; but it is otherwise in the case of Coparceners or Joint-tenants. *Moor* 34. See those titles; and farther on this subject, this Dictionary, title *Action*.

JOINDER OF COUNTIES. There can be no Joinder of Counties for the finding of an indictment: though in appeal of death, where a wound was given in one county, and the party died in another, the jury were to be returned jointly from each county, before the statute 2 & 3 *Ed.* 6. *c.* 24; but by that statute the law is altered; for now the whole may be tried either on Indictment or appeal, in the county wherein the death is. See titles *Indictment*; *Homicide*; *Trial*.—Where several persons are arraigned upon the same indictment or appeal, and severally plead not guilty, the prosecutor may either take out a *joint venire* or several. But after a *joint venire*, several ones cannot be taken out. *H. P. C.* 256.

JOINDER IN DEMURRER. See title *Demurrer*.

JOINDURE IN BATTEL. See title *Battel*.

JOINDURE OF ISSUE. When one party denies the fact pleaded by his antagonist who has tendered the issue thus, "And this he prays may be inquired of by the country," or "And of this he puts himself upon the "country," the party denying the fact, may immediately subjoin, "And the said *A. B.* doth the like." Which done, the Issue is said to be joined. See title *Issue*.

JOINT ACTIONS. See titles *Action*; *Joinder in Action*.

JOINT AND SEVERAL. An interest cannot be granted jointly and severally; as if a man grants the next advowson, or makes a lease for years, to two jointly and severally, those words (severally) are void, and they are joint-tenants. A power or authority may be joint and several. 5 *Rep.* 19. Joint words of parties shall, by construction of law, be taken respectively and severally. 5 *Rep.* 7. *b.*

When it appears by the count, that the several covenantees have, or are to have, several interests or estates, there when the covenant is made with the covenantees, and each of them, these words make the covenant several, in respect of their several interests. 5 *Rep.* 19. And see *Jenk.* 262, 263. *pl.* 63. Grant of the next avoidance to two, and each of them, to present *A.* to the said church, is good; for the contention is avoided by restraining both to present *A. Jenk* 263. *pl* 63 See 14 *Vin. Abr.* 48, 469, and this Dictionary, titles *Covenant*; *Estate*.

JOINT EXECUTORS See title *Executor*, II. V. 3, 5.

JOINT FINES. If a whole vill is to be fined, a Joint Fine may be laid, and it will be good for the necessity of it; but in other cases, fines for offences are to be severally imposed on each particular offender, and not jointly upon all of them. 1 *Rol. Rep.* 33: 11 *Rep.* 42: *Dyer* 211. See title *Fines for Offences*.

JOINT INDICTMENTS. See title *Indictment*.

JOINT LIVES. A bond was made to a woman *dum sola*, to pay her so much yearly as long as she and the obligor should live together, &c. Afterwards the woman married, and debt being brought on this bond by husband and wife, the defendant pleaded that he and the plaintiff's wife did not live together; but it was adjudged, that the money should be paid during their Joint Lives, so long as they were living at the same time, &c. 1 *Lutw.* 555. Were a person in consideration of receiving profits of the wife's lands on marriage, during their Joint Lives, was to pay a sum of money yearly, in trust for the wife, though it was not paid every year during, &c. it was held, that the payment shall be intended to continue every year also during their Joint Lives. 1 *Lutw.* 459. Lease for years to husband and wife, if they, or any issue of their bodies should so long live, has been adjudged so long as either the husband, wife, or any of their issue should live; and not only so long as the husband and wife, &c. should jointly live. *Moor* 339. See titles *Agreement*; *Covenant*, &c

JOINTENANTS, As it is frequently written, or rather, as seems most consistent,

JOINT-TENANTS,

simul tenentes, or *qui conjunctim tenent*.] They who hold lands or tenements by joint tenancy.

AN ESTATE IN JOINT TENANCY is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants an estate is called an estate in Joint-tenancy: *Litt.* § 277: and sometimes an estate in *jointure*, which word, as well as the other, signifies an union or conjunction of interest; though in common speech the term *Jointure* is now usually confined to that joint estate, which, by virtue of the statute 27 *Hen.* 8. *c.* 10, is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower. See title *Jointure*.

I. *Of the Nature of an Estate in Joint-tenancy, and how created.*

II. *The Consequences and Incidents of such Estate; and of the Acts of Joint-tenants to alienate or incumber the same.*

III. *How it may be severed or destroyed.*

I. THE CREATION of an estate in Joint-tenancy depends on the wording of the deed or devise, by which the tenant claims title; for this estate can only arise by purchase or grant, that is, by the act of the parties; and never

never by the mere act of law. Now if an eſtate be given to a plurality of perſons, without adding any reſtrictive, excluſive, or explanatory words, as if an eſtate be granted to *A.* and *B.* and their heirs, this makes them immediately Joint-tenants in fee of the lands; for the law interprets the grant ſo as to make all parts of it take effect, which can only be done by creating an equal eſtate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other reſpects. 2 *Com.* 180. *c.* 12.

The eſſential difference between Joint-tenants and tenants in common is, that Joint-tenants have the lands by one joint title, and in one right, and tenants in common by ſeveral titles, or by one title and by ſeveral rights; this is the reaſon, ſays Lord *Coke*, that Joint-tenants have one joint freehold, and tenants in common have ſeveral freeholds, though this property is common to them both, *viz.* that their occupation is undivided, and neither of them knoweth his part in ſeveral. *Co. Lit.* 189. *a.*

The properties of a joint eſtate are derived from its unity, which is fourfold; the unity of *intereſt*, of *title*, of *time*, and of *poſſeſſion*; or in other words, Joint-tenants have one and the ſame intereſt accruing by one and the ſame conveyance, commencing at one and the ſame time, and held by one and the ſame undivided poſſeſſion.

Firſt, They muſt have one and the ſame *intereſt*. One Joint-tenant cannot be entitled to one period of duration or quantity of intereſt in lands, and the other to a different. One cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail. 1 *Inſt.* 188. But if land be limited to *A.* and *B.* for their lives, this makes them Joint-tenants of the freehold; if to *A.* and *B.* and their heirs, it makes them Joint-tenants of the inheritance. *Litt.* § 277. If land be granted to *A.* and *B* for their lives, and to the heirs of *A.*, here *A.* and *B.* are Joint-tenants of the freehold during their reſpective lives, and *A.* has the remainder of the fee in ſeveralty; or if land be given to *A.* and *B.* and the heirs of the body of *A.*, here both have a joint eſtate for life, and *A.* hath a ſeveral remainder in tail. *Litt.* § 285.

In the creation of a Joint-tenancy in fee, particular care muſt be taken not to inſert the words, *and the ſurvivor of them.* For the grant of an eſtate to two and the ſurvivor of them, and the heirs of the ſurvivor, does not make them Joint-tenants in fee, but gives them an eſtate of freehold during their joint lives, with a contingent remainder in fee to the ſurvivor. Whether during their joint lives the fee continues in the grantor or remains in abeyance, and whether they can convey their eſtate, and what is the proper mode of conveyance to be uſed, are points which have been much agitated, and which perhaps are not yet quite ſettled: They were all mentioned in the caſe of *Vick* v. *Edwards*, 3 *P. Wms.* 372. In that caſe lands were devised to *B.* and *C* and the ſurvivor of them, and the heirs of ſuch ſurvivor, in truſt to ſell. Ld. *Talbot* held, that the fee was in abeyance, that the truſtees joining in a fine of the premiſes might make a title to a purchaſer by way of *eſtoppel*, and that the heirs joining might be of uſe, as it would ſupply the want of proving the will; but that in every other reſpect it would be void. In this caſe the word *eſtoppel* muſt not be underſtood in its ſtrict technical ſenſe; all that is meant by it is, that the fine operates by way of concluſion upon, or bar to the vendors, till the contingency happens upon which the fee is to ariſe, and then it paſſes to the purchaſer. This doctrine is open to objection: (ſee 1 *P. Wms.* 575: 2 *Saund.* 380); but it ſeems to be generally acquieſced in, and perhaps the liberality of ſucceeding times may think a common conveyance, by leaſe and releaſe, or bargain and ſale, ſufficient in ſuch caſes to paſs the fee, without a fine or a common recovery. 1 *Inſt.* 191. *a.* [illegible]

Secondly, Joint-tenants muſt alſo have a *unity* [illegible] their eſtate muſt be created by one and the ſame act, whether legal or illegal; as by one and the ſame grant, or by one and the ſame diſſeiſin. *Litt.* § 278. Joint-tenancy cannot ariſe by deſcent or act of law; but, as has been already ſaid, merely by purchaſe or acquiſition, by act of the party; and unleſs that act be one and the ſame, the two tenants would have different titles; and if they had different titles, one might prove good, and the other bad, which would abſolutely deſtroy the Joint-tenancy. 2 *Comm.*

Thirdly, There muſt alſo be an *unity of time*; their eſtates muſt be veſted at one and the ſame period, as well as by one and the ſame title. As in caſe of a preſent eſtate made to *A.* and *B.* or a remainder in fee to *A.* and *B.* after a particular eſtate; in either caſe *A.* and *B.* are Joint-tenants of this preſent eſtate, or this veſted remainder. But if after a leaſe for life, the remainder be limited to the heirs of *A.* and *B*; and during the continuance of the particular eſtate, *A.* dies, which veſts the remainder of one moiety in his heir; and then *B.* dies, whereby the other moiety becomes veſted in the heir of *B.*; now *A.*'s heir and *B.*'s heir are not Joint-tenants of this remainder, but Tenants in common; for one moiety veſted at one time, and the other at another. 1 *Inſt.* 188. Yet where a feoffment was made to the uſe of a man and ſuch wife as he ſhould afterwards marry, for term of their lives, and he afterwards married; in this caſe it ſeems to have been held, that the huſband and wife had a joint eſtate, though veſted at different times; becauſe the *uſe* of the wife's eſtate was in abeyance, and dormant till the intermarriage, and on that event had relation back, and took effect from the time of creation. *Dy.* 340: 1 *Rep.* 101.

Laſtly, In Joint tenancy there muſt be an *unity of poſſeſſion*. Joint tenants are ſaid to be ſeiſed *per my & per tout*, by the half or moiety, and by all: that is, they each of them have the entire poſſeſſion, as well of every parcel as of the whole. They have not one of them a ſeiſin of one half or moiety, and the other of the other moiety, neither can one be excluſively ſeiſed of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety. *Litt.* § 288: 5 *Rep.* 10: *Bract. l.* 5. *tr.* 5. *c.* 26. And, therefore, if an eſtate in fee be given to a man and his wife, they are neither properly Joint-tenants, nor Tenants in common; for huſband and wife being conſidered as one perſon in law, they cannot take the eſtate by moieties, but both are ſeiſed of the entirety *per tout & non per my*; the conſequence of which is, that neither the huſband nor the wife can diſpoſe of any part without the aſſent of the other, but the whole muſt remain to the ſurvivor. *Litt.* § 665: 1 *Inſt.* 187: 4 *Bro. Ab. t. Cui in vita*, 8: 2 *Vern.* 120: 2 *Lev.* 39.

If a father makes a deed of bargain and sale of lands to his son, to hold to him and his heirs, *&c.* to the use of the father and son, and their heirs and assigns for ever, they are Joint tenants. 2 *Cro.* 83. And if the father devises lands to his eldest and other sons, they are Joint-tenants, and not tenants in common. *Goldsb.* 28: *Poph.* 52.

A man devised lands to his wife for life, and after her death to his three daughters, and the heirs males of their bodies, *&c.* The wife and the two eldest daughters died; and it was held that the surviving daughter should have the whole for life, the three sisters being Joint-tenants for life, and several tenants in tail of the inheritance. *Leon.* 47.

Two or more purchase land, and advance the money in equal parts, and take a conveyance to them and their heirs; this makes a Joint-tenancy with the chance of survivorship: But where the proportions of money are not equal, they are in nature of partners; and though the legal estate survives, the survivor shall be as a trustee for the others, in respect of the sums paid by each. So, if where two having purchased jointly, afterwards one lays out a considerable sum on improvements, *&c.* and dies, in equity it shall be a lien on the lands, and a trust for the representative of him who advanced it. 1 *Eq. Ab.* 291.

A rent of 10*l.* a year is granted to *A.* and *B.* to hold to one until he marry, and to the other till he is presented to such a church; it was holden they were Joint-tenants, and that if either of them die before marriage or presentment, the rent shall survive. *Co. Lit.* 180. If lands are given to two men, and the heirs of their bodies, the remainder to them and their heirs; they shall be Joint-tenants for life, tenants in common of the estate-tail, and Joint-tenants of the fee-simple. *Ibid.* 183. But where a remainder is limited to the right heirs of two persons, in this case they shall take severally, though the words be joint. 5 *Rep.* 8. Land is granted to a man, and such woman as shall be his wife; here is no Joint-tenancy, but the man will have the whole: Though if one make a feoffment in fee to the use of himself, and of such wife as he shall after marry, for their lives; when he takes a wife, they are Joint-tenants. *Co. Lit.* 188: 1 *Rep.* 101.

One person is in by the common law, and another by limitation of use, yet they may be Joint-tenants by virtue of a deed of grant, *&c.* *Jenk. Cent.* 330. Lands given in the premises of a deed to three, to hold to one for life, remainder to another for life, remainder to the third for life, they are not Joint-tenants, but shall take successively. *Dyer* 160.

In a case in the King's Bench during Lord *Holt*'s time, the question was, how the surrender of a copyhold to the use of three sons and two daughters, *equally to be divided*, and their *respective* heirs, ought to be construed; and the following passage in 1 *Inst.* 190. *b.* was much relied upon, by two of the judges, as an authority to show, that the words *equally to be divided*, imply a *tenancy in common*. "If a verdict find that a man hath *duas partes manerii, &c. in tres partes divisas*, this shall not be intended to be in common; but if verdict be, *in tres partes dividendas*, then it seemeth that they are tenants in common by the intendment of the verdict." But Lord *Holt*, who was for a Joint-tenancy, observed, that no such matter appears in the case, of 21 *E.* 4, there cited by Lord *Coke* in the margin as his authority, and that he was not positive therein, but only wrote it as his conjecture. *Fisher* v. *Wigg*, 1 *P. Wms.* 14, &c. and Mr. *Cox*'s notes there: *Salk.* 391: *Com. Rep.* 88, 92: 12 *Mod.* 296: 1 *Ld. Raym.* 622. In the two latter books, and in *P. Wms.* the case is reported very much at large; and as the arguments on each side are very elaborate, it is an authority fit to be resorted to wherever the doubt is, whether there shall be a tenancy in common or Joint-tenancy; and seems an acknowledged authority in cases of surrenders of copyholds. 1 *Wilf.* 341. See also *Anglesey (E.)* v. *Ram*, *Dom. Proc.* September 1727: *Barker* v. *Gyles*, 2 *P. Wms.* 280: *Bro. P. C.*: *Hall* v. *Digby & al. Bro. P. C.*: *Hawes* v. *Hawes*, 1 *Wilf.* 165: *Gaskin* v. *Gaskin*, or *Denn* v. *Gaskin*, *Cowp.* 660. In this last case the word *equally* was deemed sufficient to create a tenancy in common in a will; and Lord *Mansfield* declared the opinion of the two Judges, who differed from *Holt*, to be the better and more liberal one; and *Aston J.* noticed, that *equally to be divided* had been adjudged a tenancy in common, even in a deed. See 1 *Inst.* 190. *b.* in *n*; and further title *Tenants in Common*.

II. Upon the principles of a thorough and intimate union of interest and possession, depend many other *consequences* and *incidents* to the Joint-tenant's estate, besides those already casually noticed. If two Joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint-reversion. *Co. Lit.* 214. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity or relation of their estate. *Ibid.* 192. On the same reason, livery of seisin, made to one Joint-tenant, shall enure to both of them. *Ibid.* 49: and the entry, or re-entry, of one Joint-tenant is as effectual in law as if it were the act of both. *Ibid.* 319, 364. In all actions also relating to their joint-estate, one Joint-tenant cannot sue or be sued without joining the other. *Ibid.* 195. But if two or more Joint-tenants be seised of an advowson, and they present different clerks, the bishop may refuse either, because neither Joint-tenant hath a several right of patronage, but each is seised of the whole: and, if they do not both agree within six months, the right of presentation shall lapse. But the Ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued, so as to incur a lapse: and, if the clerk of one Joint-tenant be so admitted, this shall keep up the title of both of them, in respect of the privity and union of their estate. *Co. Lit.* 185. Upon the same ground it is held, that one Joint-tenant cannot have an action against another for trespass, in respect of his land, for each has an equal right to enter on any part of it. 3 *Leon.* 262. But one Joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds. 1 *Leon.* 234: And, if any waste be done, which tends to the destruction of the inheritance, one Joint-tenant may have an action of waste against the other, by construction of the stat. *Westm.* 2. *c.* 22: 2 *Inst.* 403. So too, though at common law no action of account

account lay for one Joint-tenant against another, unless he had constituted him his bailiff or receiver, 1 *Inst.* 200; yet now by the stat. 4 *Ann. c.* 16, Joint-tenants may have actions of account against each other, for receiving more than their due share of profits of the tenements held in Joint-tenancy. This action is however seldom brought; but the practice is, to apply to a court of equity to compel an account. 2 *Comm. c.* 12. See *post.* III, 2.

From the same principle also arises the remaining grand incident of joint-estates, *viz.* the doctrine of *Survivorship*; by which, when two or more persons are seised of a joint-estate of inheritance, for their own lives, or *pour autre vie*, or are jointly possessed of any chattel-interest, the intire tenancy, upon the decease of any of them, remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. *Lit.* § 280, 1. This is the natural and regular consequence of the union and entierty of their interest. The interest of two Joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the Joint-tenancy instantly ceases. But, while it continues, each of the two Joint-tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a *joint-estate* with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own: neither can any one claim a *separate* interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant. 2 *Comm. c.* 12.

This right of survivorship is called by our ancient authors the *jus accrescendi*, because the right, upon the death of one Joint-tenant, accumulates and encreases to the survivors. *Brac. l.* 4. *tr.* 3. *c.* 9. § 3; *Fleta. l.* 3. *c.* 4. And this *jus accrescendi* ought to be mutual; which seems to be one reason why neither the King, nor any corporation, can be a Joint-tenant with a private person. For here is no mutuality; the private person has not even the remotest chance of being seised of the entierty by benefit of survivorship; for the King and Corporation can never die. 2 *Comm. c.* 12. cites 1 *Inst.* 190: *Finch L.* 83: 2 *Lev.* 12.

But Lord *Coke* expresly says, "there may be Joint-tenants though there be not *an equal* benefit of survivorship: as if a man let lands to *A.* and *B.* during the life of *A.*: if *B.* die, *A.* shall have all by survivorship: but if *A.* die, *B.* shall have nothing." 1 *Inst.* 181. The *mutuality* of survivorship does not therefore appear to be the reason, why a Corporation cannot be a Joint-tenant with a private person: for two Corporations cannot be Joint-tenants together: but whenever a joint estate is granted to them, they take as tenants in common. *Co. Lit.* 190.—The above is Mr. *Christian*'s observation on the preceding passage in the Commentaries.—It may however be remarked, that *Blackstone* merely states this as *one* reason, against the King or a Corporation being a Joint-tenant with a private person. In the passage cited from 1 *Inst.* 181. the assertion that Joint-tenancy may be without *equal benefit* of survivorship, and the case put by Lord *Coke*, do not extend to instances where no benefit of survivorship can possibly arise to either party; as must be the case between two Corporations.

If there are two Joint-tenants for life, it is said each of them hath an estate for life, and for the life of his companion; and for that reason, if one of them make a lease, it shall continue not only during the life of the lessor, but after his death during the life of his companion, as long as the original estate out of which it was derived: Though it hath been resolved, that such a Joint-tenant hath only an estate for his own life, and a possibility of surviving his companion to be entitled to his part; therefore if he grants over his estate, that possibility is gone; and if he dies, the estate of the grantee shall revert to him in reversion. 1 *Roll.* 441: *Jones* 55: 3 *Salk.* 204, 205.

If one Joint-tenant grants a rent charge, &c. out of his part, and dies, the survivor shall have the whole land discharged: For he hath the land by survivorship, and not by descent from his companion. *Lit.* 286: 1 *Co. Inst.* 184. And if one Joint-tenant in fee makes a lease for years, reserving a rent, and dieth; the survivor shall have the reversion, but not the rent, because he claims by title paramount. *Co. Lit.* 18.

Joint-tenants, as to the possession of lands in jointure, are seised by entierties of the whole, and of every part equally; (and the possession of any Joint tenant is the possession of both;) but as to the right of the land, they are seised only of moieties; therefore if one grant the whole, a moiety only passeth. 1 *Bulst.* 3: *Cro. Eliz.* 809. If there be two Joint-tenants, and each make a several lease of the whole, their several moieties only shall pass, by each lease. 1 *Wils.* 1. Joint-tenants cannot singly dispose of more than the part that belongs to them; where they join in a feoffment, in judgment of law each of them gives but his respective part; so it is of a gift in tail, lease for life, &c. And for a condition broken they shall only enter on a moiety of the lands. 1 *Inst.* 186.

Every Joint-tenant hath a right, as to his own share, to several purposes, as to give, lease, forfeit, &c. 1 *Inst.* 186: *Lit.* 287. One Joint-tenant may lease to his companion: But one Joint-tenant cannot make a feoffment, or grant to another Joint-tenant, though he may release. 1 *Vent.* 78: *Raym.* 187. By whatever means a Joint-tenant comes to the estate of his companion, by conveyance, &c. from him, it may enure by way of release. 2 *Cro.* 649.

Action of trespass or trover may not be brought by one Joint-tenant against his companion, because the possession of one is the possession of the other. 1 *Salk.* 290. One Joint-tenant may distrain for rent alone; and he may avow in his own right, and as bailiff to the others, but he cannot avow solely; and he may not bring debt alone. 5 *Mod.* 73, 150.

If a Joint-tenant in fee-simple is indebted to the King, and dieth; the lands cannot be extended in the hands of the survivor; who claimeth not from his companion, but

but from the feoffor, &c. 1 *Inst.* 185. Where there are two Joint tenants, and one is indebted to the King, and dieth, the other shall hold the land discharged of the debt: But if husband and wife have a term jointly, and the husband is indebted to the King, and dieth, in such case the term shall be subject to the debt, because the husband might have disposed of the whole estate. *Plowd.* 321.

Judgment in action of debt, is had against one Joint-tenant for life, who, before execution, releases to his companion; adjudged that the moiety is still liable to the judgment during the life of the releasor; but, if he had died before execution, the survivor should have had the land discharged of the debts and judgment. 6 *Rep.* 78. Husband and wife were Joint-tenants, and action was brought against the husband alone, who made default, thereupon the wife prayed to be received; but it was not allowed, because she was not a party to the writ; but he in reversion may be received, and plead Joint-tenancy in abatement of the writ. *Moor* 242.

If a feme sole and *A. B* purchase a term for years jointly, and afterwards intermarry, the Joint-tenancy continues. *Dyer* 318: 2 *Nels. Abr.* 1035. But where there are two women Joint-tenants of a lease for years, and one taketh husband, and dies, the term shall survive; if the husband hath not aliened her part, and severed the jointure: But it is otherwise in case of goods, vested in the husband by marriage. 1 *Inst.* 185.

If there be two Joint-tenants, and one releaseth to the other, this passeth a fee without the word heirs, because it refers to the whole fee, which they jointly took, and are possessed of, by force of the first conveyance: but tenants in common cannot release to each other; for a release supposeth the party to have the thing in demand; but tenants in common have several distinct freeholds, which they cannot transfer, otherwise than as persons who are sole seised. *Co. Lit.* 9, 200. *b.*

III. AN ESTATE in Joint tenancy may be *severed* and *destroyed*, by destroying any of its constituent unities. 1: That of *time*, which respects only the original commencement of the joint estate, cannot indeed (being now past) be affected by any subsequent transactions. But, 2: The Joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*. For Joint-tenants being seised *per my et per tout*, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two Joint-tenants agree to part their lands, and hold them in severalty, they are no longer Joint-tenants; for they have now no joint interest in the whole, but only a several interest respectively in the several parts. And for that reason also, the right of survivorship is by such separation destroyed. *Co. Lit.* 188, 193. By common law all the Joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do. *Lit.* § 290: for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the *stats.* 31 *Hen.* 8 *c.* 1.; 32 *Hen.* 8. *c.* 32, Joint tenants either of inheritances or other less estates, are compellable by writ of partition to divide their lands. And the *stat.* 8 and 9 *W.* 3. *c.* 11, made perpetual by *stat.* 3 and 4 *Ann. c.* 18, directs the manner of proceeding upon such writs.

In this case of Partition of estates, as also in settling accounts between the parties, resort is most frequently had to a Court of Equity. For though accounts may be taken before auditors in an action of account in the courts of common law, (see this Dictionary, title *Account*,) yet a court of equity, by its modes of proceeding, is enabled to investigate, more effectually, long and intricate accounts in an adverse way, and to compel payment of the balance. In the case of partition, if the titles of the parties are in any degree complicated, it is extremely difficult to proceed in the courts of common law; and where the tenants in possession are seised of particular estates only, the person entitled in remainder cannot be bound by the judgment in a writ of partition. The courts of equity having thus assumed the jurisdiction in complicated cases, seem by degrees to have been considered, as having on their subjects a concurring jurisdiction with the courts of common law, in cases where no difficulty could have attended the proceeding in those courts. *Mitf. Treat.* 109--111.

3. The Joint-tenancy may be severed by destroying the unity of *title*. As if one Joint-tenant aliens and conveys his estate to a third person, here the Joint-tenancy is severed, and turned into a tenancy in common; for the grantee and remaining Joint-tenant hold by different titles; (one derived from the original, the other from the subsequent, grantor;) though till partition made the unity of possession continues. *Lit.* § 292, 319, 321. But a devise of one's share by will is no severance of the jointure: for no testament takes effect till after the death of the testator; and by such death the right of the survivor, which accrued at the original creation of the estate, and has therefore a priority of the other, is already vested. 1 *Inst.* 185: *Lit.* § 287: and see 3 *Parr.* 128, and this Dictionary, title *Will.* And it has been determined that articles of marriage entered into by a female infant Joint-tenant, who died before attaining her age of twenty-one years, were not in equity a severance of the Joint tenancy. *May* v. *Hook*; *in Canc.* 1 *Inst.* 246. *a. in n.*

4. It may be also destroyed by destroying the unity of *interest*. If therefore there be two Joint-tenants for life, and the inheritance is purchased by, or descends upon either, it is a severance of the jointure. *Cro Eliz.* 470. Though if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance: because, being created by one and the same conveyance, they are not separate estates, (which is requisite in order to a *merger*,) but branches of one entire estate. 2 *Rep.* 60: 1 *Inst.* 182. If a Joint-tenant in fee makes a lease for life of his share, this defeats the jointure, for it destroys the unity both of title and interest. *Lit.* § 302, 3. And wherever, or by whatever means, the jointure ceases or is severed, the right of survivorship, or *jus accrescendi*, the same instant, ceases with it. 1 *Inst.* 188. Yet if one of three Joint-tenants aliens his share, the two remaining tenants still hold their parts by Joint-tenancy and survivorship. *Lit.* § 294. And if one of three Joint-tenants releases his share to one of his companions, though the Joint-tenancy is destroyed with regard to that part, yet the

the two remaining parts are still held in jointure; for they still perserve their original constituent unities. *Lit.* § 304.

Whenever, therefore, by any act or *event*, different *interests* are created in the several parts of the estate, or they are held by different *titles*, or if merely the *possession* is separated, so that the tenants have no longer these four indispensable properties, a sameness of interest and undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the Joint-tenancy is instantly dissolved. 2 *Comm.* 186. *c.* 12.—Of this proposition the following cases may afford some further illustration:

When a fee-simple estate is limited by a new conveyance, there one may have the fee, and another an estate for life; but when two persons are tenants for life first, and one of them gets the fee-simple, there the jointure is severed. 2 *Rep.* 6. If a reversion descend upon one Joint-tenant, the jointure is severed, and by operation of law they are then tenants in common. 1 *Bulst.* 113. And a diversity has been taken, that where the reversion comes to the freehold, the jointure is destroyed; but when the freehold comes to him in reversion, and to another, it is otherwise. *Cro. Eliz.* 470; 743.

Two infants are Joint-tenants, and one of them makes a feoffment of his moiety: this will be a severance of the Joint-tenancy. *Bro. Jointen.* 13. A Joint-tenant in fee grants a lease for life, and then dies; it severs the jointure: though if the tenant for life die before either of the Joint-tenants, then it is *in statu quo prius. Co. Lit.* 193. If there be two Joint-tenants in fee, and one makes a lease for life to a stranger, the freehold and reversion is severed from the jointure: but in case one such Joint-tenant leases for years, the jointure of the inheritance is not severed; and the other Joint-tenant shall have the reversion by survivorship. *Lut.* 729, 1173. Two Joint-tenants are of a lease for twenty-one years, and one lets his part but for three years, the jointure is severed, so that survivorship shall not take place. 1 *Inst.* 188, 192. In case three persons are jointly interested in a term, and one of them mortgages his third part; by this it has been held, the Joint-tenancy was severed. 1 *Salk.* 158. But where one Joint-tenant of lands, in order to sever the Joint-tenancy, and provide for his wife, makes a deed of gift of his moiety to her; this being made to the wife, and so void in law, cannot be made good. *Preced Canc.* 124.

If two Joint-tenants be of a term, and one commits felony, or is outlawed, &c. the jointure will be severed; for the King shall have the moiety by the forfeiture: and if the Joint-tenancy is of personal things, all will be forfeited. *Plowd.* 410.

Where there are several Joint-tenants in fee-tail, and some of them suffer a common recovery of the whole, the estate of the others is turned to a right; and contingent remainders may be destroyed, and a new estate gained thereby. *Sid.* 241. And if one Joint-tenant levies a fine, it severs the Joint-tenancy; but it doth not amount to an actual turning out of his companion. 1 *Salk.* 286. A Joint-tenant in fee makes a lease for years, of the land, to begin presently, or *in futuro*, and dies, it is a severance of the Joint-tenancy, and cannot be avoided by the survivor; because immediately, by force of the lease, the lessee hath a right in the same land, of all that to the lessor belongs. *Lit.* 286.

In general, it is advantageous for the Joint-tenants to dissolve the jointure, since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint-estate: as if there be Joint-tenants for life, and they make partition, this dissolves the jointure; and though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in the moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety. 1 *Jon.* 55. And therefore if there be two Joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture; for, in the first place, by the severance of the jointure, he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant, by a tenant for his own life merely, is a forfeiture of his estate; for it is creating an estate which may, by possibility, last longer than that which he is legally entitled to. 4 *Leon.* 237: 1 *Inst.* 252: 2 *Comm.* 187. *c.* 12.

In ancient times Joint-tenancy was favoured by the courts of law, because it was more convenient to the Lord, and more consistent with feudal principles: but those reasons have long ceased, and a Joint-tenancy is now every where regarded, as Lord *Cowper* says it is in equity, as an odious thing. 1 *Salk.* 158. See further this Dictionary, title *Tenants in Common.*

JOINT-TENANCY in THINGS PERSONAL.—Goods and chattels may belong to their owners in Joint-tenancy, and in common, as well as real estates. They cannot indeed be vested in coparcenery, because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners; but if a horse, or other personal chattel, be giv n to two or more absolutely, they are Joint-tenants thereof; and unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements. *Lit.* § 282: 1 *Vern.* 482. And in like manner if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common without any *jus accrescendi* or survivorship. *Lit.* § 321. So also if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common, as the same words would have done in regard to real estates. 1 *Eq. Ab.* 292. Residuary legatees and executors are also Joint-tenants, unless the testator uses some expression which converts their interest into a tenancy in common: and if one dies before a division or severance of the surplus, the whole that is undivided will pass to the survivor or survivors. 2 *P. Wms.* 347, 529: and see 3 *Bro. C. R.* 25: 1 *Bro. C. R.* 118: 3 *Bro. C. R.* 455. But for the encouragement of husbandry it is held, that a stock on a farm, though occupied jointly, shall always be considered as common, and not as joint property, and there shall be no survivorship therein. 1 *Vern.* 217. So, for the encouragement of trade, there is no survivorship of a capital or stock in trade among merchants and traders: for this would be ruinous to the family of the deceased partner; and it is a legal maxim, *jus accrescendi inter mercatores, pro beneficio commercii, locum non habet.* 1 *Inst.* 182.

JOINTURE OF LANDS. A Jointure is A Settlement of lands and tenements made to a woman in consideration of marriage; or it is A Covenant, whereby the husband, or some friend of his, assureth to the wife, lands or tenements, for term of her life: it is so called, either because it is granted *ratione juncturæ in matrimonio*, or for that land in frank-marriage was given jointly to husband and wife, and after to the heirs of their bodies, whereby the husband and wife were made as it were joint-tenants during the coverture. 3 *Rep*. 27. By some, a Jointure is defined to be A Bargain and contract of livelihood, adjoined to the contract of marriage; being a competent provision of freehold lands or tenements, *&c*. for the wife, to take effect after the death of the husband, if she herself is not the cause of the determination or forfeiture of it. 1 *Inst*. 36: 4 *Rep*. 2, 3. See this Dict. title *Dower*, IV.

It hath been often ruled in Chancery, that if lands, money, goods, *&c*. are devised to a woman, without saying in lieu or satisfaction of dower, *&c*. the wife shall have both; because a devise is to be considered as a bounty, and implies a consideration in itself; but if it be said in lieu or recompence of dower, there the wife cannot have both, but may waive which she pleases. 2 *Chan. Cases*, 24: 2 *Vern*. 365: *Preced. Chan*. 133. Also *vide Bro. Dow*. 69: 4 *Rep*. 4: *Dyer*, 220: 2 *Vent*. 365: 1 *Eq. Ab*. 218: 1 *Vern*. 463.

A devise by will cannot be averred to be in satisfaction of dower, unless it be so expressed in the will. 1 *Inst*. 36, *b*: 3 *Rep*. 1.

But though a devise cannot at law be averred to be in satisfaction of dower, if the will is silent, yet sometimes the Courts of Equity have been induced, by special circumstances, to consider such devises as a satisfaction; and it has therefore been decreed, that the wife should make her election to waive her dower and accept under the will, or to waive the will and take her dower. In *Laurence* v. *Laurence*, 1 *Vern*. 463, *Somers* C. made such a decree; because he inferred an intention to give in bar of dower, from the testator's having devised the residue of his *whole* estate to another. But this decree was reversed by Lord Keeper *Wright*; and the reversal was afterwards affirmed in the House of Lords. 2 *Bro. P. C*. 483. And this is said to have settled the doctrine. 1 *Eq. Ab. Dower B. pl*. 2.; and see *acc. Pre. Ch*. 133: *Vin*. title *Devise* T. c. *pl*. 45: 2 *Atk*. 427: 3 *Atk*. 8; 436. See also *Broughton* v. *Errington*, 7 *Bro. P. C*. 12.

However, notwithstanding the doctrine on which the case of *Laurence* v. *Laurence* was finally decided, and the frequent recognition of that case, devises have been since frequently deemed a satisfaction of dower, on account of very strong and special circumstances; as where allowing the wife to take a double provision would have been quite inconsistent with the dispositions of the will. On this latter principle *Northington* C. is said to have decided for a satisfaction of dower in *Arnold* v. *Kempstead*, July 1764: and *Camden* C. in *Villareal* v. *Galway*. See 1 *Inst*. 36, *b*. *inn*.

If a Jointure be made to a woman, during coverture, in satisfaction of dower, she may waive it after her husband's death; but if she enters and agrees thereto, she is concluded; for though a woman is not bound by any act when she is not at her own disposal, yet if she agrees to it when she is at liberty, it is her own act, and she cannot avoid it. 4 *Co*. 3: Also vide *Co. Lit*. 29. *b*; 36, *b*; 348, *a*; 357: 1 *Bulst*. 163: *Moor* 717. *pl*. 1002: *Perk*. 352—3: 3 *Co*. 27: 3 *Leon*. 272: *Cro. Jac*. 490: *Dyer* 351: *Hob*. 72: 2 *Rol. Abr*. 422.

All other settlements in lieu of Dower, not made according to the statute, are Jointures at common law, and no bars to claim of dower: and a Jointure was no bar of dower before this statute; as a right or title to a freehold cannot be barred, [at law,] by acceptance of a collateral satisfaction. *Co. Lit*. 36. A father made a settlement to the use of himself for life, and afterwards to the use of his son and his wife, for their lives, for the Jointure of the wife; this was adjudged no Jointure to bar the wife of her dower, because it might not commence immediately after the death of the husband, who might die in the life-time of the father. So, if a feoffment be made to the use of the husband for life, remainder to another for years, remainder to the wife for life for her Jointure. 2 *Cro*. 489. But a feoffment in fee, upon condition that the feoffee shall make another feoffment to the use of the son of the feoffor, and to his son's wife in tail, remainder to the right heirs of the feoffor, which feoffment is made accordingly; is a good Jointure within the statute, and bar to the dower of the wife. *Moor* 28.

An estate settled in Jointure, coming from the ancestors of the wife, and not of the purchase of the husband or his ancestors, is not within the *stat*. 11 *H*. 7. *c*. 20, as to discontinuances, alienations, *&c*. by the wife. Where a father of the intended wife, in consideration of marriage, *&c*. covenanted to assure lands to the husband and wife, his (the covenantor's) daughter, and the heirs of her body, *&c*. this was held no Jointure, within the meaning of the *stat*. 11 *H*. 7. *c*. 20; being an advancement of the woman by her own father. 2 *Cro*. 264: 2 *Lill. Abr*. 80. And an estate in fee-simple conveyed to a woman for her Jointure, was held not to be any Jointure within the statute; which never extended to lands granted to women in fee: but an estate in fee, conveyed to a woman for her Jointure, and in satisfaction of her dower, is a Jointure within the statute 27 *H*. 8. *c*. 10: 4 *Rep*. 3.

An estate for life is the usual Jointure: and an estate for life upon condition, may bar the wife if she accepts it; as a Jointure to a woman on condition to perform the husband's will, was judged good, where the wife entered and agreed to the estate. 3 *Rep*. 1, 2, *&c*. If no inheritance is reserved to the husband and his heirs, but the estate is limited to the wife for life, or in tail, the remainder to a stranger; it is not a Jointure within the *stat*. 11 *H*. 7. *c*. 20, though made by the husband or his ancestor. *Cro. Eliz*. 2. A husband covenanted to stand seised of lands, to the use of himself and his heirs, till the marriage should take effect; and afterwards to himself, his wife, and their heirs; and it was adjudged a good Jointure within this *stat*. 27 *H*. 8. *c*. 10; *Dyer* 248.

A man makes his wife a Jointure after marriage; and afterwards by will devises, that she shall have a third part of all his lands, with her Jointure; here the wife will have the third part of all as a legacy, and if she waives her Jointure, she may have a third part of the residue for dower. *Dyer* 62. If a master, in consideration of service done by his servant, grants lands to the servant and a woman he intends to marry, and the heirs of their bodies, creating an estate-tail; this is not a Jointure; not being a gift of the husband, or any of his ancestors, but of his

master, and in consideration of service, which will not make the husband such a purchaser as the law requires. *Moor* 683. But as to considerations, if an estate is settled in Jointure upon a woman, in consideration of money paid, and also of a marriage to be had; the marriage shall be looked upon to be the consideration. *Cro. Jac.* 474. A husband, tenant in tail, remainder to his wife for life, makes a feoffment in fee to the use of himself and wife for life, for her Jointure; it is no bar to the wife's dower, because it may be avoided by a remitter to her first estate for life. *Moor* 872. If lands are conveyed to a woman before marriage, in part of her Jointure only, and after marriage, other lands are granted in full; it is said she may waive and refuse the lands conveyed to her after coverture, and retain her first Jointure-lands and dower also. 3 *Rep.* 1, 5 : 4 *Co.* 5.

Where a Jointure is made of lands, (according to the direction of the statute of 27 *H.* 8. 10,) before coverture, and after the husband and wife alien them by fine, she shall not have dower in any other lands of her husband; but it is otherwise where the Jointure is made after marriage, when the wife's estate is waivable, and her election of choosing comes not till the death of the husband. 1 *Inst.* 36.

The important question whether a Jointure on an Infant, before marriage, may be waived, was not quite settled till the case of *Drury* v. *Drury*, which was heard before Ld *Northington* (*Hil. T.* 1 *Geo.* 3. The points determined by Ld. *Northington* in that case were; first, That the *stat.* of 27 *H.* 8, which introduced Jointures, extends to adult women only, Infants not being particularly named; and therefore that, notwithstanding a Jointure on an Infant, she may waive the Jointure, and elect to take dower; secondly, That a covenant by the husband, that his heirs, executors, or administrators shall pay the wife an annuity for her life, in full for her *Jointure*, and in bar of dower, without expressing that it shall be charged on any particular lands, or be secured out of lands generally, is not a good equitable Jointure within the statute; thirdly, That a woman, being an Infant, cannot, by any contract previous to her marriage, bar herself of a distributive share of her husband's personalty, in case of his dying intestate.

But from this decree there was an appeal to the House of Lords; and, after hearing the Judges *seriatim* on the question, whether a Jointure on an infant could be waived, on which they were divided in opinion, the *decree* was *reversed* as to all the above points. See 3 *Bro. P. C.* 492, *Buckingham* (Earl) v. *Drury*; where it appears that, by the decree of the Lords, it was DECLARED, "that the respondent (the widow,) is bound by the agreement entered into in consideration of, and previous to, her marriage; and that the same ought to be performed and carried into execution; and that the respondent *is thereby barred of her dower*, and of any share of her husband's personal estate, under the statute of Distributions."

Before the above decision, the only judicial opinions, as to the effect of a Jointure on an Infant, were Sir *J. Jekyll's*, in *Cray* v. *Willis*, against its barring; and Ld. *Hardwicke's*, in *Seys* v. *Price*, and in *Harvey* v. *Ashley*, to the contrary. See *Vin.* tit. *Dower*, Q. 4. pl. 18: *Barn. C.* 117: 3 *Atk.* 607.

A man levies a fine of his land, and it is granted back again to him and his wife, for her Jointure, and to the heirs of the husband; then he and his wife levy a fine to another use; the wife, if she survive her husband, will have dower notwithstanding the fine. 1 *And.* 350. If the husband make a lease of lands to his friends for any number of years, in trust for his wife and children, that she shall have 100*l.* a-year out of it, or in any such manner; by this she may have the provision, which is no Jointure, and likewise her dower. By *Bridgman*, Ch. J. an estate is made to husband in tail, with remainder to the wife for life, and remainder to others; this is not such a Jointure, as, with her acceptance, within the statute will hinder her from dower; and though the husband die without issue, it will not help it, but the wife shall be endowed in his other land: but if the estate were made to the husband and wife for their lives, it would be otherwise. 13 *Jac.* 1. *B. R*: 2 *Shep. Abr.* 74.

After the death of the husband, the wife may enter into her Jointure, and is not driven to a real action, as she is to recover dower by the common law; and upon a lawful eviction of her Jointure, she shall be endowed according to the rate of her husband's land, whereof she was dowable at common law. *Co. Lit.* 37: *Stat.* 27 *H.* 8. *c.* 10. If she be evicted of part of her Jointure, she shall have dower *pro tanto*. A wife's Jointure shall not be forfeited by the treason of the husband: but feme-coverts, committing treason or felony, may forfeit their Jointures; and being convict of recusancy, they shall forfeit two parts in three of their Jointures and dower, by *stat.* 3 *Jac.* 1. *c.* 4. If a woman conceals her Jointure, and brings dower and recovers it, and then sets up her Jointure, she is barred of her Jointure; and by bringing writ of dower for her thirds, the wife waives the benefit of entry into lands, so as to hold them in Jointure. *Cro. Eliz.* 128. 137: 3 *Rep.* 5: *Stat.* 3 *Jac.* 1. *c.* 5. *sect.* 13. See further, titles *Baron and Feme*; *Dower*, II. IV; *Forfeiture*; *Marriage*; &c.

JOINTRESS, or JOINTURESS, She who hath an estate settled on her by the husband, to hold during her life, if she survive him. *Stat.* 17 *H.* 8. *c.* 10: 1 *Inst.* 46. When estates settled on a wife are a jointure, if the Jointress makes any alienation of them by fine, feoffment, &c. with another husband, it is a forfeiture of the same; but if they are not a jointure by law, it is otherwise. 2 *Nels.* 1040. A Jointress within the statute may make a lease for forty years, &c. if she so long live; and also for life, and be no forfeiture, though she levies a fine *sur cognisance de droit*, &c. *Cro. Jac.* 688: 3 *Rep.* 50: 1 *Lill.* 81. In other cases, if she levies a fine, it is a forfeiture; and if a Jointress, within the statute 11 *H.* 7. *c.* 20, suffer a recovery covinously to bar the heir, the heir may enter presently, &c. 2 *Leon.* 206: 1 *Plowd.* 42.

With respect to the acts of a Jointress, or those of her husband defeating her of her jointure, and how far equity will relieve her, *vide Co. Lit.* 36: *Dyer.* 358: 2 *Inst.* 673: *Hob.* 225: 1 *Chan. Cas.* 119, 120: 2 *Chan. Cas.* 162: 2 *Vent.* 343: 1 *Vern.* 427. 479: 1 *Eq. Abr.* 18, 221, 222: 2 *Vern.* 701: and 14 *Vin. Abr.* tit. *Jointress* and *Jointure*; and this Dict. titles *Baron and Feme*; *Dower*.

JOUR, Fr.] A day, used in heads of our old law; *tout jours*, for ever. *Law Fr. Dict.*

JOURNAL, Is a day-book or diary of transactions used in many cases: as by merchants and other tradesmen in their accounts; by mariners in observations at sea, &c.

JOURNALS OF PARLIAMENT, Are not records, but remembrances, and have been of no long continuance. *Hob. Rep.* 109. See title *Evidence.*

JOURNEHOPPERS, Regrators of yarn, which formerly perhaps was called *journ.* They are mentioned in the *stat.* 8 *H.* 6. *c.* 5.

JOURNEYMAN, from the Fr. *journée, i. e.* A day, or day's work.] Was properly one who wrought with another by the day; though it is extended by statute to those also who covenant to work with others in their trades or occupation by the year. *Stat.* 5 *Eliz. c.* 4. See tit. *Labourers*; *Servants.*

JOURNEYS ACCOUNTS, *dietæ computatæ, journées accompts.*] Was a term in our old law thus understood: If a writ abated by the death of the plaintiff or defendant, or for false *Latin*, want of form, &c. the plaintiff might have a new writ by *Journeys Accounts, i. e.* within as little time as he possibly could after the abatement of the first writ; and this second writ was a continuance of the cause, as if the first writ had not abated. *Terms of the Law.* See 6 *Rep.* 10: 1 *Lut.* 297: *Cro. Jac.* 590.

This learning is now of little use, it being customary to enter a judgment that the writ be quashed, and then to sue forth another.

And by *stat.* 8 & 9 *W.* 3. *c.* 11. § 7, the death of one plaintiff or defendant where there is another surviving, shall not abate the suit. The death to be suggested on the roll. And by § 6, death of the party after interlocutory judgment shall not abate the suit. See title *Abatement.*

IPSO FACTO, Where the same person obtains two or more preferments in the church with cure, not qualified by dispensation, &c. the first living is void *Ipso Facto, viz.* without any declaratory sentence, and the patron may present to it. *Dyer*, 275. For crimes in striking persons in a church or church-yard, the offenders are to be excommunicated *Ipso Facto. Stat.* 5 & 6 *Ed.* 6. *c.* 4. An estate or lease may be *Ipso Facto* void by condition, &c. 1 *Inst.* 45, 215.

IRE AD LARGUM, To go at large, to escape, or be set at liberty. *Blount.*

IRELAND,

Is a distinct Kingdom from *England*, but subordinate to it in government.

It was only entitled the Dominion or Lordship of *Ireland, stat. Hib.* 14 *H.* 3, and the King's style was no other than *Dominus Hiberniæ* till the 33 *H.* 8, when the title of King was expresly conferred on him by an *Irish* statute, and which title is recognized by *stat.* 35 *H.* 8. *c.* 3. As *Scotland* and *England* are now one and the same kingdom, and yet differ in their municipal laws, so *England* and *Ireland* are on the other hand distinct kingdoms, and yet in general agree in their laws. The inhabitants of *Ireland* are for the most part descended from the *English*, who planted it as a kind of colony, after the conquest of it by *Hen.* II, and the laws of *England* were then received and sworn to by the *Irish* nation assembled at the Council of *Lismore. Pryn* on 4 *Inst.* 249.

At the time of this conquest, the *Irish* were governed by what they called the *Brehon* law, so stiled from the *Irish* name of judges, who were denominated *Brehons.* 4 *Inst.* 358. But King *John*, in the 12th year of his reign, went into *Ireland*, and carried over with him many able Sages of the law; and there, by his letters patent, in right of the dominion of conquest, is said to have ordained and established, that *Ireland* should be governed by the laws of *England*; (*Vaugh.* 294: 2 *Pryn. Rec.* 85: 7 *Rep.* 23;) which letters patent, Sir *Ed. Coke* apprehends to have been there confirmed in Parliament. 1 *Inst.* 141. But to this ordinance many of the *Irish* were averse to conform, and still stuck to their *Brehon* law; so that both *H.* III. and *Ed.* I, were obliged to renew the injunction; and at length, at a Parliament holden at *Kilkenny*, 40 *E.* III, under *Lionel*, Duke of *Clarence*, the then Lieutenant of *Ireland*, the *Brehon* law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of latter times. 1 *Comm.* 100.

But as *Ireland* was a distinct dominion, and had Parliaments of its own, though the immemorial customs or common law of *England* were made the rule of justice in *Ireland* also, yet no acts of the *English* Parliament after the 12 *John*, extended into that kingdom, unless it were specially named, or included under general words, as within any of the King's dominions See 1 *Comm.* 100.

The original method of passing statutes in *Ireland* was nearly the same as in *England*; the chief governor holding Parliaments at his pleasure, which enacted such laws as they thought proper. But an ill use having been made of this liberty, a set of statutes were there enacted in the 10th *H.* VII, (Sir *Ed. Poynings* being then Lord Deputy, from whence they were called *Poynings'* laws,) which restrained the power as well of the Deputy as the *Irish* Parliament; and, in time, there was nothing left to the Parliament in *Ireland* but a bare negative or power of rejecting, not of proposing or altering any law. With regard to *Poynings'* law in particular, it could not be repealed or suspended, unless the bill for that purpose, before it should be certified to *England*, were approved by both Houses.

But the *Irish* nation, being excluded from the benefit of the *English* statutes, were deprived of many good and profitable laws, made for the improvement of the common law; and the measure of justice in both kingdoms becoming thence no longer uniform, it was therefore enacted, by another of *Poynings'* laws, that all acts of Parliament before that time made in *England*, should be of force within the realm of *Ireland*. 4 *Inst.* 351. After this, *Ireland* continued to be bound by all *English* acts of Parliament, in which it was specially named, or included under general words. See 1 *Comm.* 103.

This state of dependence being disputed by the *Irish* nation, it was, by *stat.* 6 *Geo.* 1. *c.* 5, expresly declared; that the Kingdom of *Ireland* ought to be subordinate to and dependent on the Imperial Crown of *Great Britain*, as being inseparably united thereto; and that the King's Majesty, with the consent of the Lords and Commons of *Great Britain* in Parliament, had *power* to make laws to bind the people of *Ireland*. The same statute also expresly "declared, that the Peers of *Ireland* had no jurisdiction to affirm or reverse any judgments or decrees whatsoever." And a writ of error, in the nature of an appeal, lay from K. B. in *Ireland* to K. B. in *England*, as the appeal from Chancery in *Ireland* lay immediately to the House of Lords in *England*.

Thus stood the matter, till the 22d year of King *Geo.* III, when, on some further struggles by the *Irish*, the

the above *stat.* 6 *Geo.* 1. *c.* 5, was simply *repealed* by *stat.* 22 *Geo.* 3. *c.* 53. But as the statute of *Geo.* 1, was thought to be merely declaratory of the former law, the repeal of it could produce no further operation, than to render the law in some degree less clear than that statute had made it. Therefore, to produce the effect earnestly contended for by the *Irish*, it required another statute, which was accordingly passed, *viz stat.* 23 *Geo.* 3. *c.* 28, by which, "The *Right* claimed by the people of *Ireland*, to be bound *only* by laws enacted by *his Majesty and the Parliament of that kingdom*, in all cases whatever, and to have all actions and suits, instituted in that kingdom, decided in his Majesty's courts there *finally*, and *without appeal from thence*, is *established* and ascertained FOR EVER; and at no time to be questioned or questionable: and all Writs of Error, and Appeals in the *English* Courts, shall be null and void."

This latter provision, as to writs of error and appeals, is in some degree a natural consequence of the former; otherwise, as has been well remarked, the privation of the benefit of the learning and impartiality of the *English* Judges and House of Lords might be considered as a real and substantial advantage lost, by grasping at liberty and independence, which are often, as in this instance, *a mere shadow and a name.* See 1 *Comm.* 99—104. *edit.* 1793; and Mr. *Christian's* notes thereon.

Lord *Mountmorres*, in his *History of the Proceedings of the Irish Parliament*, observes upon the statute referred to by *Blackstone*, that to repeal *Poynings'* law, it required the consent of *the greater number of the Lords and Commons*; which, if it meant any thing, must signify a majority not of those who happened to be present, but of the whole number summoned to Parliament; and the requisition, in that sense, was strictly complied with in 1782, when *Poynings'* law was repealed. *Hist.* 1 *vol. p.* 53.

The following short view of the former and of the present method of passing laws in *Ireland*, is extracted from the same work, *p.* 57.

"Before a Parliament was held, it was expedient, antecedent to 1782, that the Lord-Lieutenant and council should send over an important bill, as a reason for summoning that assembly. This always created violent disputes, and it was constantly rejected; as a money-bill, which originated in the council, was contrary to a known maxim, that the commons hold the purse of the nation; and as all grants originate from them, since in early times, they were used to consult with their constituents upon the mode, duration, and quantum of the supply.

"Propositions for laws, or heads of bills, as they are called, originated indifferently in either House. After two readings and a committal, they were sent by the council to *England*, and were submitted, usually by the *English* Privy Council, to the Attorney and Solicitor-general; and from thence they were returned to the council of *Ireland*, from whence they were sent to the Commons, if they originated there, (if not, to the Lords,) and after three readings they were sent up to the House of Lords, where they went through the same stages; and then the Lord-Lieutenant gave the royal assent, in the same form which is observed in *Great Britain*.

"In all these stages in *England* and *Ireland*, it is to be remembered that any bill was liable to be rejected, amended, or altered; but that when they had passed the great seal of *England*, no alteration could be made by the *Irish* Parliament.

"At present, it is not necessary for the council to certify a bill under the great seal of *Ireland*, as a reason for summoning a parliament, but it is ordered to be convoked by proclamation from the crown, as it is summoned in *England*.

"Touching bills, they now originate in either House, and go from one to the other, as they do in *England*; after which, they are deposited in the Lords' office, when the clerk of the crown takes a copy of them, and this parchment is attested to be a true copy, by the great seal of *Ireland* on the left side of the instrument. Thus they are sent to *England* by the *Irish* council; and if they are approved of by the King, this transmiss or copy comes back with the great seal of *England* on the right side, with a commission to the Lord-lieutenant to give the royal assent. All bills, except money-bills, remain in the Lords' office; but bills of supply are sent back to the House of Commons, to be presented by the speaker at the bar of the Lords for the royal assent. Hence it is manifest, that no alteration can now be made in bills, except in Parliament, as the record, or original roll, remains in the Lords' office till it obtains the royal assent.

"As to the rejection of bills, or not returning them from *England*, it is said there are very few instances of such a refusal by the Crown since 1782; though, doubtless, the royal negative, in both kingdoms, is as clear a privilege as any other prerogative."

Treason committed in *Ireland*, by an *Irish* Peer, is not triable in *England*, because he is entitled to a trial by his Peers, which cannot be in *England*, but *Ireland*. *Dyer*, 360.

By statute 17 *Ed.* 1. *c.* 1, no pardon for the death of a person, or for felony, shall be granted by the Justices of *Ireland*, but at the King's command, and under his seals.

The *stat.* 1 *W.* & *M. c.* 9, enacted and declared, "That the pretended Parliament assembled at *Dublin*, was an unlawful assembly; and that all acts done by them are void." All cities, boroughs, *&c.* were restored by this statute to their privileges, and the proceedings against them vacated; and all Protestants restored to their possessions, *&c.* By *stat.* 3 *W.* & *M. c.* 2, members of Parliament, officers in the government, ecclesiastical persons, lawyers, *&c.* in *Ireland*, are to take the oaths, or be liable to forfeitures. See title *Papist.*

A man may be sent over to *Ireland* to be tried for a crime there committed, notwithstanding the clause in the *Habeas Corpus* act. *Fitzgib.* 111. See titles *False Imprisonment*; *Habeas Corpus.* And Justices of peace in *England* may commit a person offending against the *Irish* laws, in order to his being sent thither. *Stra.* 848.

Papists are disqualified from purchasing the forfeited estates in *Ireland*. *Stat.* 1 *Ann. st.* 1. *c.* 32.—Forfeited impropriations in *Ireland* applied to the building of churches. *Stat.* 5 *Ann. c.* 25.—The *stat.* 1 *Ann. c.* 32, ordains, that persons educated in the Popish religion in *Ireland* shall take the oaths, or be disabled to take lands by descent, devise, *&c.*—Protestant families, being Palatines settled in *Ireland*, are declared naturalized on their taking the oaths to the Government. *Stat.* 1 *Geo.* 1. *c.* 29. See title *Papists.* See further, as to *Ireland*, title *Navigation Acts.*

IRISHMEN Coming to live in *England*, by an obsolete statute, 2 *H.* 6. *c.* 8, were to give security for their good behaviour.

IRON, Made in this kingdom, or brought into *England* and sold, shall not be exported, on pain of forfeiting the value; and justices assigned by the King have power to inquire of such as sell Iron at too dear a price, and punish them. 28 *Ed.* 3. *c.* 5. None shall convert to coal or other fuel, for the making of Iron metal, any trees of such a size; or within a certain compass of *London*, under penalties by statute: nor shall any new Iron mills be set up in *Sussex*, *Surry*, or *Kent*. *Stats.* 1 *Eliz. c.* 15: 23 *Eliz. c.* 5: 27 *Eliz. c.* 19. See title *Woods*.

By *Stat.* 4 *Geo.* 2. *c.* 32, to steal, or sever with intent to steal, any lead or Iron, fixed to a house, or in any court or garden thereunto belonging, is made felony, liable to transportation for seven years. See titles *Felony*; *Larceny*; *Robbery*. As to the importing and exporting of Bar Iron, see title *Navigation Acts*.

IRONS, *To secure prisoners*. See titles *Gaol* and *Gaolers*; *Trial*; *Indictment*; *False Imprisonment*; *Arraignment*; &c.: and 4 *Comm. c.* 22. *ad fin*: *c.* 25.

IRON WIRE. See *Wire*.

IRONY, In libels, makes them as properly libels as what is expressed in direct terms. *Hob.* 215. See title *Libel*.

IRREGULARITY, *Irregularitas*.] Disorder, or going out of rule. In the canon law, it is used for an impediment to the taking holy orders; as where a man is base born, notoriously defamed of any crime, maimed, or much deformed in body, *&c.* In common speech, in our law, it means a transgressing of form in point of practice, *&c.*

IRREPLEVIABLE or IRREPLEVISABLE, That neither may nor ought to be replevied, or delivered on sureties. *Stat.* 13 *Ed.* 1. *st.* 1 *c.* 2. It is against the nature of a distress for rent, to be irreplevisable. 1 *Inst.* 145. See titles *Distress*; *Replevin*.

ISELAND, Composition fish to be taken as usual of subjects travelling into *Iseland*, *Stat.* 5 *El. c.* 5. § 5. Fishing vessels not to proceed on their voyage to *Westmony* and *Iseland*, till the 10th of *March* yearly. 15 *Car.* 2. *c.* 16. See titles *Fish*; *Navigation Acts*.

ISINGLASS, A kind of fish glue, brought from *Iseland*, used by some persons in the adulterating of wine; but for that prohibited by *Stat.* 12 *Car.* 2. *c.* 25.

ISLE, *Insula*] Land inclosed in, and environed with the sea or fresh water. There are several islands belonging to *England*; as the isles of *Jersey* and *Guernsey*, *Man*, &c. See titles *Jersey*; *Man*.

As to islands arising in rivers, or the sea, see titles *Occupancy*; *Plantations*.

ISLE OF ELY. See *Ely*.

ISLE OF MAN. See *Man*.

ISLE OF WIGHT. See *Wight*.

ISLET, A small island. See *Ilet*.

ISSUABLE TERMS. *Hilary* and *Trinity* Terms are usually called issuable terms, from the making up of the issues therein. Though for causes tried in *Middlesex* and *London*, many issues are made up in *Easter* and *Michaelmas* terms. See title *Terms*; *Judges*.

ISSUE, *Exitus*, from the Fr. *Issuer*, i. e. *Emanare*.] Hath divers significations in law; sometimes it is taken for the children begotten between a man and his wife; sometimes for profits growing from amerciaments and fines; sometimes for the profits of lands and tenements: but it generally signifies the point of matter, issuing out of the allegations and pleas of the plaintiff and defendant in a cause. 1 *Inst.* 126: 11 *Rep.* 10.

Issues is the term applied to the profits on land, which the sheriff is directed to take by a writ of *distringas*, in order to compel the appearance of a party in court, and which, by the common law, he forfeits to the King, if he does not appear. *Finch. L.* 352. But now, by *stat.* 10 *Geo.* 3. *c.* 50, the Issues may be sold, if the Court shall so direct, in order to defray the reasonable costs of the plaintiff. See titles *Process*; *Attachment*; *Distringas*; *Appearance*; &c.

As to Issue, in the sense of children or heirs, see titles *Estate*; *Limitation*; *Executory Devise*; *Remainder*; *Will*; &c.

When, in the course of pleading, the parties in a cause come to a point, which is affirmed on one side and denied on the other, they are then said to be at Issue; all their debates being at last contracted into a single point, which must be determined either in favour of the plaintiff or the defendant. 3 *Comm.* 313.

The Issues concerning causes are of two kinds: Upon matter of fact, and matter of law.

An Issue in fact is where the plaintiff and defendant have agreed upon a point to be tried by a jury: An Issue in law is where there is a demurrer to a declaration, plea, *&c.* and a joinder in demurrer, which is to be determined by the judges. 1 *Inst.* 71, 72. See this Dictionary, title *Demurrer*.

As to Issues of fact, *viz.* whether the fact is true or false, which are triable by the jury, they are either general or special.

General, when it is left to the jury to try whether the defendant hath done any such thing as the plaintiff lays to his charge; as when he pleads not guilty to a trespass, *&c.* *Non assumpsit*, or that he made no promise, in an action of *assumpsit*. *Not guilty* is the General Issue in all criminal cases.

Special, is when some special matter, or material point alleged by the defendant in his defence, is to be tried; as in assault and battery, where the defendant pleads that the plaintiff struck first, *&c.* 1 *Inst.* 126.

There is also a General Issue, wherein the defendant may give the special matter in evidence, for excuse or justification, by virtue of several statutes, made for avoiding prolixity of pleading; and upon the General Issue in such cases, the defendant may give any thing in evidence, which proves the plaintiff hath no cause of action. 1 *Inst.* 283. Matter amounting to the General Issue, and special matter of justification, have been joined in one intire plea, and held good. 3 *Lev.* 41. And where there is an Issue upon not guilty, and there are other Issues upon justifications, the trial of the General Issue of not guilty, is but matter of form, and the substance is upon the special matter. *Cro. Jac.* 599. But the General Issue is pleaded, to put the plaintiff on proof of the fact.

In real actions, causes grown to Issue are tried by a jury of twelve men of the county where the cause of action arises; and in criminal cases, Issues ought to be tried in the county where the offence was committed; but this hath admitted of some alteration by statute. 3 *Inst.* 80. 135: 2 *Rep.* 93. See titles *Indictment*; *Trial*.

The place ought not to be made part of the Issue, in a transitory action; it is not material, as it is in real and mixed actions. *Trin.* 24 *Car. B. R.* If the place is mate-

material, and make a part of the Issue, there the jury cannot find the fact in another place, because, by the special pleading, the point in Issue is restrained to a certain place; but upon the General Issue pleaded, the jury may find all local things in another county, and where the substance of the Issue is found, it is good, and the finding more may be surplusage. 6 *Rep.* 46. If an Issue is of two matters in two counties, trial may be in one county, by *stat.* 21 *Jac.* 1. *c.* 4; for that statute extends to cases where the matter in Issue arises in two counties, and the trial is by one only, as well as where the matter in Issue arises in two places in one county, and the trial is by one. 2 *Lev.* 121. Every Issue is to be joined in such a court that hath power to try it, otherwise the Issue is not well joined; for if the cause cannot be tried, the Issue is fruitless, and if it be tried, the trial is *coram non judice.* 2 *Lil. Abr.* 84.

Where an issue is not joined, there cannot be a good trial, nor ought judgment to be given. 2 *Nelf. Abr.* 1042. All Issues are to be certain and single, and joined upon the most material thing in the cause; that all the matter in question between the parties may be tried. 2 *Lil.* 85. An immaterial Issue joined, which will not bring the matter in question to be tried, is not helped after verdict by the statute of jeofails; but there must be a repleader: but an informal Issue is helped. 18 *Car.* 2. *B. R.*

A repleader may be awarded after verdict, for the badness and incertainty of the Issue: and a judgment may be reversed in error, being on an immaterial Issue. 2 *Lutw.* 1608: 2 *Lev.* 194. On a joint trespass by many persons, there must be only one Issue in each plea joined: and if several offences are alleged against the defendant, he ought to take all but one by protestation, and offer an Issue upon that one, and no more. *Moor* 80. But in action for damages, according to the loss which the plaintiff hath sustained, every part ought to be put in Issue. 1 *Saund.* 269. In action upon the case for service done for a time certain, the defendant ought to put in Issue all the time alleged in the declaration. *Lutw.* 1268. And upon a General Issue in waste, the plaintiff must shew his title. *Ibid.* 1547. Though when any special point is in Issue, the plaintiff is not obliged to set forth any other matter. *Cro. Eliz.* 320. If there are several things in a declaration, upon which an Issue may be joined, and it is joined on any of them, it is good; and an affirmative and an implied negative will make a good Issue. *Style,* 151. 210.

There must be in every Issue an affirmation on the one part, as that the defendant owes such a debt, &c. and a denial on the other part, as that he oweth not the debt, &c. And though the matter contradicts, yet there must be a negative and affirmative of it, to make a right Issue. 1 *Ventr.* 213.

An Issue may be of two affirmatives. 1 *Wils.* 6. A negative should be as full as the affirmative, or it is no negative to make an Issue; as if a defendant pleads a grant of four acres, and two acres only are denied, &c. 1 *Rol. Rep.* 86. It has been held, that Issue ought not to be joined on a traverse only, without answering in the affirmative, &c. 2 *And.* 6. 102. But where the matter, which is the gist or cause of the action, is found, it has been adjudged good after verdict, though there was no negative and affirmative to make the Issue; as where in debt upon bond the defendant pleads payment, and concludes to the country, without giving the plaintiff opportunity to deny the payment, if the jury in such case find the money paid, it is good after verdict. *Sid.* 341.

Where there are two Issues joined, one good and the other bad, if entire damages are given upon the trial on both Issues, it will be error; but if several damages are found, the plaintiff may release the damages on the bad Issue, and have judgment for the rest. 2 *Lil. Abr.* 87, 88. See title *Damages*. And it is said, judgment may be entered as to one part of the Issue; and a *nolle prosequi* to another part of the same Issue, where it may be divided. *Pasch.* 23 *Car. B. R.* Where two Issues are joined, and a verdict only on one of them, it is a mistrial, and the judgment may be arrested, and a *venire facias de novo* awarded; if error brought, the judgment must be arrested. *Annaly,* 246.

There may be a plea to Issue to part, and a demurrer to part; which have no dependence on each other. 1 *Saund.* 338. Where the declaration of the plaintiff is good, and the plea of the defendant is ill; if the plaintiff in his replication tender an Issue upon such ill plea, and a trial is had, and it is found for the plaintiff, he shall have judgment. *Cro. Car.* 18. And generally, when a plea is bad, that the plaintiff might have demurred upon it, and he doth not, but takes Issue, and it is found for the defendant; this is aided by the statute of jeofails, and the defendant shall have judgment: so likewise where the replication is bad, and Issue is taken upon it, and found for the plaintiff, he shall have judgment. *Cro. Eliz.* 455: *Cro. Jac.* 312. But there are many cases where, if the plea or replication is bad in substance, it is not aided by the statute of jeofails. See title *Amendment*.

If Issue be taken on a dilatory plea, &c. and found against the defendant, final and peremptory judgment shall be given; but it is otherwise on a demurrer. *Raym.* 118. In such case there must be a *respondeat ouster*. A good Issue is offered to the defendant, he ought not to plead over; and if he plead over, the plaintiff shall have judgment. 1 *Saund.* 318, 338. If he does not join Issue, but demurs, it is the same.

When Issue is joined between the parties, it cannot be afterwards waived, if it be a good Issue, without consent of both parties: but where defendant pleads the General Issue, and it is not entered, he may, within four days of the term, waive that Issue, and plead specially; and when the defendant pleads in abatement, he may at any time after waive his plea of special matter, and plead the General Issue, unless there be a rule made for him to plead as he will stand by it. 3 *Salk.* 211.

If the plaintiff will not try the Issue after joined, in such time as he ought by the course of the court, the defendant may give him a rule to enter it: which if he does not, he shall be nonsuit, &c. 2 *Lil.* 84. If the tender of the Issue comes on the part of the plaintiff, the form of it is; *And this he prays may be inquired by the record,* or *by the country*; and when on the part of the defendant, *And of this he puts himself upon the country*; and *The plaintiff doth the like,* &c.

What is here stated on the subject of Issues and pleadings, is but immethodical. For more complete and useful information, see this Dictionary, titles *Pleading*; *Practice*; and the various titles of subjects on which points of pleading arise.

There are many acts of parliament, that enable the defendant to plead the General Issue, and give the special matter in evidence.

Issue, feigned. See *Feigned Issue*.

Issues on Sheriffs, Are for neglects and defaults, by amercement and fine to the King, levied out of the Issues and profits of their lands; and double or treble Issues may be laid on a Sheriff for not returning writs, &c. But they may be taken off before estreated into the Exchequer, by rule of court, on good reason shewn. 2 *Lil. Abr.* 89. Issues shall be levied on jurors, for non-appearance; though on reasonable excuse, proved by two witnesses, the justices may discharge the Issues. *Stat.* 35 *Hen.* 8. *cap.* 6. See 1 *Keb.* 475. and this Dictionary, title *Jury*.

ITINERANT, *Itinerans.*] Travelling or taking a journey: and those were anciently called *Justices Itinerant*, who were sent with commission into divers counties to hear causes.

The King's courts were formerly Itinerant, being kept in the King's palace, and removing with his household. The Common Pleas is now fixed by *Magna Charta*; but though the court of King's Bench is constantly held in *Westminster-Hall*, yet there is nothing but custom to fix it there, as it is supposed to be before the King, and if actually so, must be Itinerant. See titles *Judges*; *Justices*; *Common Pleas*; *King's Bench*; &c.

ITINERARY, *Itinerarium.*] A commentary concerning things falling out in journies. *Law Lat. Dict.*

JUBILEE, *Annus Jubilaeus.*] The most solemn time of festival at *Rome*, when the Pope gives his blessing and remission of sins. It was first instituted by *Boniface* the 8th, in the year 1300, who granted a plenary indulgence and remission of sins to all who should visit the churches of St. *Peter* and St. *Paul* at *Rome* in that year, and stay there fifteen days; and this he ordered to be observed once in every hundred years; which Pope *Clement* the 6th reduced to fifty years, *anno* 1350, and to be held upon the day of the circumcision of our Saviour: and *Urban* IV. in the year 1389, ordained it to be kept every thirty-three years, that being the age of our Saviour: after which, Pope *Sixtus* the 6th, reduced it to twenty-five years. In imitation of the grand Jubilee of *Rome*, the Monks of *Christ-Church* in *Canterbury*, every fiftieth year invited a great concourse of people to come thither, and visit the tomb of *Thomas Becket*. And King *Edw.* III. in the fiftieth year of his age, which was 1362, caused his birth-day to be observed at court, in the name of a Jubilee; giving pardons, privileges, and other civil indulgences.—Jubilaeus, signified afterwards a man one hundred years old, and likewise a possession or prescription for fifty years. *Du Fresne.*

JUDAISM, *Judaismus*] The customs, religion, or rites of the *Jews*: also the income heretofore accruing from the *Jews* to the King: and the word *Judaism* was formerly used for a mortgage; and sometimes taken for usury. *Ex Magno Rot. Pipae, de anno* 9 *Ed.* 2.

Judaismus is also taken for the mansion or dwelling-place of the *Jews* in any town. And it sometimes signifies usury. *Mon.* 1 *tom. p.* 834.

JUDGES, *Judices*] Chief magistrates in the law, to try civil and criminal causes, and punish offences. Of these in *England*, it is commonly said that there are twelve; *viz.* the *Lord Chief Justices* of the Courts of King's Bench and Common Pleas; the *Lord Chief Baron* of the Exchequer; the three *Puisne* (*i. e.* younger, or rather inferior) *Judges* of the two former courts; and the three *Puisne Barons* of the latter. To whom may be added, the *Lord Chancellor*, and the *Master of the Rolls*.

The Chief Justice of the King's Bench is called *Capitalis Justiciarius Banci Regis, vel ad placita coram rege tenenda*; he hath the title of Lord, whilst he enjoys his office, and is styled *Capitalis Justiciarius*, because he is chief of the rest; and for this reason he hath usually the title of Lord Chief Justice of *England*. This Judge was antiently created by letters patent under the great seal, but is now made by writ, in a very short form.

The antient dignity of this supreme Magistrate was very great; he had the prerogative to be Vicegerent of the kingdom, when any of our Kings went beyond sea, being chosen to this office out of the greatest of the nobility; and had the power alone, which was afterwards distributed to three other great Magistrates; that is, he had the power of the Chief Justice of the *Common Pleas*, of the Chief Baron of the *Exchequer*, and the Master of the *Court of Wards*; *and he commonly sat in the King's Palace*, and there executed that authority which was formerly performed *per comitem palatii*, in determining differences which happened between the barons and other great persons of the kingdom, as well as causes criminal and civil between other men: but King *Richard* I. first diminished his power, by appointing two other Justices, to each whereof he assigned a distinct jurisdiction; *viz.* to one the *North* parts of *England*, to the other the *South*: and in the reign of King *Edward* I. they were reduced to one court, with a further abridgement of their authority, both as to the dignity of their persons and extent of their jurisdiction; for no more were chosen out of the nobility, as antiently, but out of the commons, who were men of integrity, and skilful in the laws of the land; whence, it is said, the study of the law dates its beginning. *Orig. Jud.*

In the time of King *John*, and other of our ancient Kings, it often occurs in Charters of Privilege, *Quod non ponatur respondere, nisi coram nobis*, vel *Capitali Justitiâ nostra*: and this high officer hath, at this time, a very extensive power and jurisdiction in pleas of the crown, and is particularly intrusted, not only with the prerogative of the King, but the liberty of the Subject.

The Chief Justice of the *Common Pleas* hath also the title of Lord, whilst he is in office, and is called *Dominus Justiciarius Communium Placitorum*; *vel Dominus Justiciarius de Banco*; who, with his assistants, did originally, and doth yet, hear and determine *Common Pleas* in civil causes, as distinguished from the King's Pleas, or Pleas of the Crown. *Bract. lib.* 3. The Chief Justices are installed or placed on the bench by the Lord *Chancellor*; and the other Judges by the Lord *Chancellor* and the Lords Chief Justices.

Besides the Lords Chief Justices, and the other Judges of the courts at *Westminster*, there are many other Justices commissioned by the King to execute the laws: as *Justices of Assize*; of the *Forest*; of *Nisi Prius*; *Oyer* and *Terminer*; *Justices of the Peace*; &c. See those several titles.

The Judges of the Court of K. B. are sovereign Justices of oyer and terminer, gaol-delivery, and of eyre; conservators of the peace, and sovereign coroners of the land. 4 *Inst.* 73: 9 *Co.* 118. *b.*

The

The salaries of the Judges in the Court of K. B. are, The Chief 5500*l*; the three puisne Judges 2400*l*; and in nearly the same proportion in the other Courts. See *stats.* 32 *Geo.* 2. *c.* 35: 19 *Geo.* 3. *c.* 65: 1 *Geo.* 3. *c.* 23. § 4.

In *Great Britain* the King is considered as the fountain of justice and general conservator of the peace of the kingdom. The original power of Judicature, by the fundamental principles of society, is lodged in the society at large: but as it would be impracticable to render complete justice to every individual by the people in their collective capacity, therefore, every nation has committed that power to certain select magistrates, who, with more ease and expedition, can hear and determine complaints; and in this kingdom, this authority has immemorially been exercised by the King or his substitutes. He, therefore, has alone the right of erecting Courts of Judicature; for though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary, that Courts should be erected, to assist him in executing this power; and equally necessary, that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of Courts are either mediately or immediately derived from the Crown, their proceedings run generally in the King's name, they pass under his seal, and are executed by his officers.

It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our Kings, in person, often heard and determined causes between party and party. But, at present, by the long and uniform usage of many ages, our Kings have delegated their whole judicial power to the Judges of their several Courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the Crown itself cannot now alter, but by act of parliament. 2 *Hawk. P. C. c.* 1. § 3.

In order to maintain both the dignity and independence of the Judges in the Superior Courts, it is enacted by the *stat.* 13 *W.* 3. *c.* 2, that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu se bene gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And now by the noble improvements of that law in the statute of 1 *Geo.* 3. *c.* 23, enacted at the earnest recommendation of THE PRESENT KING (*George* III,) himself, from the throne, the Judges are continued in their offices during their good behaviour, notwithstanding any demise of the Crown, (which was formerly held immediately to vacate their seats); and their full salaries are absolutely secured to them during the continuance of their commissions, by which means the Judges are rendered completely independent of the King, his Ministers, and his Successors; his Majesty having been pleased to declare, that "he looked upon the independence and uprightness of the Judges, as essential to the impartial administration of justice, as one of the best securities of the *rights and liberties of his Subjects*, and as most conducive to the honour of the Crown." *Com. Journ.* 3 *March*, 1761. See Ld. *Raym.* 747: and *stat.* 1 *Ann. st.* 1. *c.* 8, which continued the commissions of the Judges for six months after the demise of the Crown.

In criminal proceedings, or prosecutions for offences, it would be still a higher absurdity, if the King, personally, sate in judgment; because, in regard to these, he appears in another capacity, that of prosecutor. All offences are either against the King's peace, or his crown and dignity; and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason and a very few others) to be rather offences against the kingdom than against the King, yet as the Public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible Magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is, therefore, the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And hence also arises the most mild and equitable branch of the prerogative, *One of the most distinguishing features in a* MONARCHY, that of *pardoning* offences; for it is reasonable that he only who is injured should have the power of forgiving.

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists one main preservative of the public liberty; which cannot subsist long in any State, unless the administration of common justice be, in some degree, separated both from the Legislative, and also from the Executive Power. Were it joined with the Legislative, the life, liberty, and property of the Subject would be in the hands of arbitrary Judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though Legislators may depart from, yet Judges are bound to observe. Were it joined with the Executive, this union might soon be an over-balance for the Legislative. For which reason, by *stat.* 16 *Car.* 1. *c.* 10, which abolished the Court of Star-chamber, effectual care is taken to remove all judicial power out of the hands of the King's privy council. See 1 *Comm.* 266—9. *c.* 7.

The personal safety of the *Judges*, and the respect due to them, being also of essential consequence towards the preservation of their independence and integrity, which is no less in danger from the *ardor civium prava jubentium*, than from the *vultus instantis tyranni*; many provisions have been made by law to restrain and punish affronts and injuries, to them personally, and to the Courts of Justice, over which they preside.

One species of treason under *stat.* 25 *E.* 3. *c.* 2, (See title *Treason*,) is, "If a man slay the Chancellor, Treasurer, or the King's Justices of the one Bench or the other, Justices in Eyre, or Justices of Assise, and all other Justices assigned to hear and determine, being in their places doing their offices." But this statute extends only to the actually killing of them, and not to wounding or attempting to kill them. It extends also only to the officers therein specified; and therefore the Barons of the Exchequer as such, are not within the protection of this act. 1 *Hal. P. C.* 231. But the Lord Keeper, or Commissioners of the Great Seal, now seem to

to be within it, by virtue of the *stats.* 5 *Eliz. c.* 18: 1 *W. & M. c.* 21.—4 *Comm.* 84.

Striking in the King's superior Courts of Justice in *Westminster-Hall*, or at the assises, is more penal than even in the King's palace. The reason seems to be, that those Courts being anciently held in the King's palace and before the King himself, striking there included the contempt against the King's palace, and something more, *viz.* the disturbance of public justice. For this reason, by the ancient common law before the Conquest, striking in the King's Courts of Justice, or drawing a sword therein, was a capital felony. *Ll. Inæ. c.* 6: *Ll. Canut. c.* 56: *Ll. Alured. c.* 7. Our modern law retains so much of the ancient severity as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or blow in such a Court of Justice, whether blood be drawn or not, or assaulting a Judge sitting in the Court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of land during life. *Staundf. P. C.* 38: 3 *Inst.* 140, 1. A rescue also of a prisoner from any of the said Courts, without striking a blow, is punished with perpetual imprisonment and forfeiture of goods, and of the profits of land during life; being looked on as an offence of the same nature with the last, but only as no blow is actually given, the amputation of the hand is excused. 1 *Hawk. P. C. c.* 21. For the like reason, an affray or riot near the said Courts, but out of their actual view, is punished only with fine and imprisonment. *Cro. Car.* 373.

Not only such as are guilty of an actual violence, but of threatening, or reproachful *words* to any Judge sitting in the Courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment. *Cro. Car.* 503. And even in the inferior Courts of the King, an affray, or contemptuous behaviour, is punishable with a fine by the Judges there sitting, as by the steward in a Court-Leet, or the like. 1 *Hawk. P. C. c.* 21.

It may not be amiss to mention that King *Henry* IV. when his eldest son the Prince, afterwards *Henry* V. was by the Lord Chief Justice committed to prison, for a great misdemeanor, thanked God that he had a son of that obedience, and a Judge of that courage and impartiality. *Stowe.*

As the Judges are thus guarded against influence or injury, to enable them to do justice to the people, so are they protected in the upright discharge of their duty, by being indemnified from answering for the consequence of the Judgments given by them.

The Judges of Courts of Record are freed from all prosecutions whatsoever, except in parliament, where they may be punished, for any thing done by them in such Courts as Judges; this is to support their dignity and authority, and draw veneration to their persons, and submission to their Judgments: but if a Judge will so far forget the dignity and honour of his post, as to turn solicitor in a cause which he is to judge, and privately and extra-judicially tamper with witnesses, or labour Jurors, he may be dealt with according to the same capacity to which he so basely degrades himself. 12 *Rep.* 24: *Vaugh.* 138: *S. P. C.* 173.

Judges are not in any way punishable for a mere error of judgment: and no action will lie against a Judge for an erroneous Judgment; or for a wrongful imprisonment, *&c.* 2 *Hawk. P. C. c.* 1. § 17: 1 *Mod.* 184.

But it is said, that where Judges are limited to the subject-matter of their jurisdiction, and they exceed the limits of their jurisdiction, action lies against them; *per Powell* J. 3 *Lutw.* 1565, cites *Hard.* 480.

A Judge is not answerable to the King, or the party, for mistakes or errors of his judgment, in a matter of which he has jurisdiction. 1 *Salk.* 397.

If an action be brought against a *Judge of Record*, for an act done in his judicial capacity, he may plead that he did it as Judge of Record, and that will be a sufficient justification. And so may a Judge of a Court in a foreign country, under the dominion of the Crown. *Mostyn* v. *Fabrigas*, *Cowp.* 172. See this Dictionary, titles *Action*; *Courts Martial*; *Navy*, &c.

With respect to the general conduct of the Judges, the following observations are worthy attention:

A Judge at his creation takes an oath, *That he will serve the King, and indifferently administer justice to all men, without respect of persons, take no bribe, give no counsel where he is a party, nor deny right to any, though the King, or any other, by letters, or by express words, command the contrary,* &c. *and in default of duty, to be answerable to the King in body, land, and goods. Stat.* 18 *Ed.* 3. *st.* 4. See also *stat.* 20 *E.* 3. *c.* 1, 2.

Judex est lex loquens, and ought to judge by law, and not by examples: by *Glanvil* a Judge is called *justitia in abstracto*, because he should be, as it were, justice itself. *Co. Lit.* 71: 7 *Rep.* 4. And all the commissions of Judges are bounded with this limitation, *Facturi quod ad justitiam pertinet secundum legem & consuetudinem Angliæ.*

The Judges are to give Judgment according to law, and what is alledged and proved: and they have a private knowledge, and a judicial knowledge, though they cannot judge of their own private knowledge, but may use their discretion; but where a Judge has a judicial knowledge, he may and ought to give Judgment according to it. King *Henry* IV. demanded of Judge *Gascoigne*, If he saw one in his presence kill *A. B.* and another person, who was not culpable, should be indicted of this, and found guilty before him, what he would do in this case; to which he answered, That he ought to respite the Judgment against him, and relate the matter to the King, in order to procure him a pardon; for there he cannot acquit him, and give Judgment according to his private knowledge, *Plowd.* 82.

The King in all cases doth judge by his Judges; who ought to be of counsel with prisoners: and if they are doubtful or mistaken in matter of law, a stander-by may be allowed to inform the Court, as *amicus curiæ.* 2 *Inst.* 178. Our Judges are to execute their offices in proper person, and cannot act by deputy, or transfer their power to others; as the Judges of Ecclesiastical Courts may. 1 *Rol. Abr.* 382: *Bro. Judges*, 11. Yet where there are divers Judges of a Court of Record, the act of any one of them is effectual; especially if their commissions do not expressly require more. 2 *Hawk. P. C. c.* 1. Though what a majority rules when present, is the act of the court. If on a demurrer or special verdict,

dict, the Judges are divided in opinion, two against two, the cause must be adjourned into the Exchequer Chamber. 3 *Mod.* 156. And a rule is to be made for this purpose, and the record certified, &c. 5 *Mod.* 335. In fines levied, all the Judges of C. B. ought to be particularly named: but writs of *certiorari* to remove records out of that Court, &c. are directed to the Chief Justice, without naming his companions. 1 *H.* 7. 27: *Jenk. Cent.* 167.

When a record is before the Judges, they ought *ex officio* to try it: and they are to take notice of statutes, and of the terms, &c. *Jenk. Cent.* 215, 298. No Judge is compellable to deliver his opinion before-hand, in relation to any question which may after come judicially before him. 3 *Inst.* 29. Judges of the common law, have no ordinary jurisdiction to examine witnesses at their chambers; though by consent of parties, and rule of court, they may on interrogatories; and some things done by Judges at their chambers, in order to proceedings in court, are accounted as done by the court.

A Judge shall not be generally excepted against, or challenged; or have any action brought against him, for what he does as Judge. 1 *Inst.* 294: 2 *Inst.* 422.

A Judge ought not to judge in his own cause, or in pleas where he is party. 8 *Rep.* 118. If a fine be levied to a Justice of Bank, he cannot take the conusance; for he cannot be his own Judge. 8 *H.* 6. 21: *Br. Patents, pl.* 15. cites S. C. *per Martin.* If a fine be levied by, or to a Justice in Bank, his name shall not be in the fine. 11 *H.* 6. 49. *b.* So if a Justice of Bank be sued in Bank, he cannot record it; it shall be recorded by the other Justices. So if a Justice of Bank sues there, he cannot record it, but it shall be recorded by the other Justices. *Ibid.* If the Chief Justice of Bank be to sue a writ there, the writ shall not be in his name, but in the name of the secondary. 8 *H.* 6. 19. *b.*

None may judge in his own cause, for it is a manifest contradiction that a man can be agent and patient in the same thing, and what Lord *Coke* says in Dr. *Bonham's* case is far from any extravagancy; for it is a very reasonable and true saying, that if an act of parliament should ordain, that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void act of parliament; *per Holt,* Ch. J. 12 *Mod.* 687: *Bridgm.* 11, 12.

Judgment given by a Judge, who is party in the suit with another, and so entered of record, is error, although several other Judges sit there, and give Judgment for the Judge who is party. *Jenk.* 90. *pl.* 74.

Where a Judge has an interest, neither he nor his deputy can determine a cause, or sit in Court; and if he does, a prohibition lies. *Hard.* 503.

Judges are punishable, however, for wilful offences against the duty of their situation; instances of which happily live only in remembrance; and as to which, the following short extracts and references may be sufficient:

Among the laws of King *Edgar* is this, *viz. Judex, qui injustum judicium judicabit alicui, det Regi CXXs. nisi jurare audeat, quod rectius judicare nescivit. Decem Scriptores Anglicani* 872. *l.* 3. The same among the laws of *Canute, Ibid.* 924. *l.* 2. adds, that *Et dignitatem suæ legalitatis semper amittat, si non eam redimat erga Regem, sicut ei permittetur. In Danelaga Lahslitbes reus sit; si non juret, quod melius nescivit. Chronicon Johannis Bromton.*

There are ancient precedents of Judges, who were fined when they transgressed the laws, though commanded by warrants from the King; and it is said, that Earl *Typtoft*, who was a Chancellor, was beheaded, for acting upon the King's warrant against law. *Burnet's Rich.* 2. *pag.* 38.

Bribery in Judges is punishable by loss of office, fine, and imprisonment; and by the common law, bribery of Judges in relation to a cause depending before them, has been punished as treason. 1 *Leon.* 295: *Cro. Jac.* 65: 1 *Hawk. P. C.* See title *Bribery.*—A Judge ignorantly condemns a man to death for felony, when it is not felony; for this offence, the Judge shall be fined and imprisoned, and lose his office. *Jenk. Cent.* 162. If a Judge who hath no jurisdiction of the cause, give judgment of death and award execution, which is executed, such Judge is guilty of felony; and also the officer who executes the sentence. *H. P. C.* 35: 10 *Rep.* 76. And if Justices of Peace, on indictment of trespass, arraign a man of felony, and judge him to death, and he is executed, it is felony in them. *H. P. C.* 35: *Dalt. c.* 98.

A Justice cannot rase a record, nor embezzle it, nor file an indictment which is not found, nor give judgment of death where the law does not give it; if he does, it is misprision, he shall lose his office, and make fine for misprision; but it is not felony. *Br. Judges, pl.* 33. cites 2 *R.* 3. 9.

See further 14 *Vin. Abr.* title *Judges*; and this Dictionary, title *Justices.*

JUDGER. In *Cheshire*, to be Judger of a town, is to serve on the Jury there. *Leicester's Hist. Antiq.* 302.

JUDGMENT, *Judicium, quasi, juris dictum.*

The Sentence of the Law, pronounced by the Court, upon the matter contained in the record. 3 *Comm.* 395. *c.* 24.

I. *Of the various Kinds of Judgments in Civil Cases.*
II. *Points of Practice relating thereto.*
III. *Of Arrest of Judgment.*

I. JUDGMENTS are of four sorts. 1. Where the facts are confessed by the parties, and the law determined by the court; as in case of Judgment upon a *Demurrer.* 2. Where the law is admitted by the parties, and the facts disputed; as in case of Judgment upon a *Verdict.* 3. Where both the fact and the law arising thereon are admitted by the defendant; which is the case of Judgments by *Confession* or *Default.* Or, 4. Where the plaintiff is convinced, that fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in Judgments upon a *Nonsuit* or *retraxit.* 3 *Comm.* 396. *c.* 24.

The Judgment though pronounced or awarded by the Judges, is not their determination or sentence, but the determination and sentence of *the law.* It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: Against him, who hath rode over my corn, I may recover damages by law; now *A.* hath rode over my corn; therefore I shall recover damages against *A.* If the major proposition be denied, this is a demurrer in law: if the

minor, it is then an issue of fact; but if both be confessed (or determined) to be right, the conclusion or Judgment of the court cannot but follow. Which Judgment or conclusion depends not therefore on the arbitrary caprice of the Judge, but on the settled and invariable principles of justice. The Judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. What that remedy may be, is, indeed, the result of deliberation and study to point out; and, therefore, the stile of the Judgment is, not that it is decreed or resolved by the court, for then the Judgment might appear to be their own; but, "It is considered," *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like; which implies, that the Judgment is none of their own, but the act of law, pronounced and declared by the Court after due deliberation and enquiry. 1 *Inst.* 39.

All these species of Judgments are either *interlocutory* or *final*. *Interlocutory* Judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all Judgments for the plaintiff upon pleas in abatement of the suit or action; in which it is considered by the court, that the defendant do answer over, *respondeat ouster*; that is, put in a more substantial plea. 2 *Saund.* 30. It is easy to observe, that the Judgment here given is not final, but merely interlocutory; for there are afterwards farther proceedings to be had, when the defendant hath put in a better answer.

But the Interlocutory Judgments, most usually spoken of, are those incomplete Judgments, whereby the right of the plaintiff is, indeed, established, but the *quantum* of damages sustained by him is not ascertained; which is a matter that cannot be done without the intervention of a Jury. This can only happen where the plaintiff recovers; for when Judgment is given for the defendant, it is always complete as well as final. This sort of interlocutory Judgment happens in the first place, where the defendant suffers Judgment to go against him by default, or *nihil dicit*; as if he puts in no plea at all to the plaintiff's declaration: by confession, or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just: or by *non sum informatus*, when the defendant's attorney declares he has no instructions to say any thing in answer to the plaintiff, or in defence of his client; which is a species of Judgment by default.

If these, or any of them, happen in actions where the specific thing sued for is recovered, as in action of debt for a sum certain, the Judgment is absolutely complete. And therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a Judgment by either of the ways just now mentioned, (by *nihil dicit*, *cognovit actionem*, or *non sum informatus*,) in an action of debt to be brought by the creditor against the debtor for the specific sum due; which Judgment, when confessed, is absolutely complete and binding; provided the same (as is also required in all other Judgments), be regularly docketed; that is, abstracted and entered in a book, according to the directions of *stat.* 4 & 5 *W.* & *M.* *c.* 20, by which it is provided, that no Judgment shall affect purchasers of lands, and mortgagees, till docketed, nor have any preference against heirs, executors, &c. in the administration of estates. See *post*, *Judgments acknowledged for Debts.*

But, where damages are to be recovered, a Jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the Judgment is, "that the plaintiff ought to recover his damages (indefinitely); but because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men, he enquire into the said damages, and return such inquisition into court." This process is called a *Writ of Inquiry*; in the execution of which the sheriff sits as Judge, and tries by a Jury, subject to nearly the same law and conditions as the trial by Jury at *nisi prius*, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll in manner of a *postea*, and thereupon it is considered, that the plaintiff do recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the Judgment is also incomplete, without the aid of a writ of inquiry.

It was said by *Wilmot*, C. J. that a writ of inquiry is an inquest of office to inform the conscience of the court; who, if they please, may themselves assess the damages. 3 *Wils.* 62. Hence, a practice is now established in the courts of K. B. and C. P. in actions where Judgment is recovered by default, upon a bill of exchange, or promissory note, to refer it to the Master or Prothonotary, to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry. 4 *T. R.* 275: *H. Black. Rep.* 541. In cases of difficulty and importance, the court will give leave to have the writ of inquiry executed before a Judge, at Sittings or *Nisi prius*; and then the Judge acts only as an assistant to the sheriff. The number of the Jurors sworn upon this inquest need not be confined to twelve; for when a writ of inquiry was executed at the bar of the court of K. B. in an action of *scand. mag.* brought by the Duke of *York* (afterwards *James* II.) against *Titus Oates*, who had called him a traitor; fifteen were sworn upon the Jury, and gave all the damages laid in the declaration; *viz.* 100,000 *l.* In that case, the sheriffs of *Middlesex* sate in court covered, at the table below the Judges. 3 *St. Tr.* 987.

Final Judgments are such as at once put an end to the action, by declaring, that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case, if the Judgment be for the plaintiff, it is also considered, that the defendant be either amerced, for his wilful delay of justice, in not immediately obeying the King's writ, by rendering the plaintiff his due, 8 *Rep.* 40. 61: or be taken, *capiatur*, till he pays a fine to the King for the public misdemeanor, which is coupled with the private injury, in all cases of force; (8 *Rep.* 59: 11 *Rep.* 43: 5 *Mod.* 285;) of falshood, in denying his own deed; (*F. N. B* 121: 1 *Inst.* 131: 8 *Rep.* 60: 1 *Roll. Ab.* 219: *Lill. Entr.* 379: *C. B. Hil.* 4 *Ann. Rot.* 430;) or unjustly claiming property in replevin; or of contempt by disobeying the command of the King's writ, or the express prohibition of any statute,

statute. 8 *Rep.* 60. But in case of trespass, ejectment, assault and false imprisonment, it is provided by the *stat.* 5 & 6 *W.* & *M. c.* 12, that no writ of *capias* shall issue for this fine, nor any fine be paid; but the plaintiff shall pay 6*s.* 8*d.* to the proper officer, and be allowed it against the defendant among his other costs. And therefore, upon such Judgments in the Common Pleas, they used to enter that the fine was remitted, and now in both courts they take no notice of any fine or *capias* at all. *Salk.* 54: *Carth.* 390. But if Judgment be for the defendant, then, in case of fraud and deceit to the Court, or malicious or vexatious suits, the plaintiff may also be fined; 8 *Rep.* 59, 60. But in most cases it is only considered, that he and his pledges of prosecuting, be (nominally) amerced for his false claim, *pro falso clamore suo*, and that the defendant may go thereof without a day, *eat inde sine die*; that is, without any farther continuance or adjournment; the King's writ commanding his attendance being now fully satisfied, and his innocence publicly cleared. 3 *Comm.* 395—99.

II. Judgment is sometimes had with a *cessat executio*; and if the defendant gives a Judgment, with stay of execution, till a certain day, the plaintiff may, notwithstanding, sue forth a *capias* or a *fieri facias* into the county where the action is laid, returnable before the day, to enable him at that day to take a *testatum* against the defendant; though he shall not in that case sue out a *capias* to warrant a *scire facias* against the bail. *Pasch.* 22 *Car.* 2. See title *Capias*. If debt be brought against an executor upon the bond of the testator, and he pleads *plene administravit*, this is a confession of the debt; and the plaintiff may have Judgment with a *cessat executio* till the defendant hath assets. 4 *Rep*: 2 *Nels. Abr.* 1052.

If the plaintiff or defendant die after interlocutory Judgment, the action shall not abate. *Stat.* 8 & 9 *W.* 3. *c.* 11. See title *Abatement*, I. 6. *c.* Judgment upon a demurrer to a declaration, &c. is no bar to any other action; because it is not on the merits, and the plaintiff may afterwards make his declaration right, and then proceed. 2 *Lill.* 113. But other Judgments may be pleaded in bar to any other action for the same cause; and Judgment in an inferior court, may be alledged in bar to an action in a superior court. 2 *Lev.* 93.

Judgment final ought not to be given upon default in real actions; but a grand cape upon default before appearance, and a petit cape on default after appearance. 1 *Lev.* 105.

All Judgments given in any court of record, must be duly entered: the plaintiff's attorney, four days after the *postea* is brought into court, if the rule for Judgment is out, may enter Judgment for his client by the course of the court. 2 *Lill. Abr.* 95. But on a rule for Judgment, *Sunday* is not one of the four days, though the rule is given the last day of the term. After a rule to sign Judgment, there ought to be four days exclusive of the day on which the rule was made, before the Judgment is signed, that the party may have a reasonable time to bring writ of error: in *C. B.* they never give rules for signing Judgment, but stay till the *quarto die post*, which makes but four days inclusive. *Mod. Cas.* 241. A plaintiff got his Judgment signed on the very day, but it was not executed till after the sixth day, so that the defendant had time enough to bring a writ of error, or move any thing in arrest of Judgment: but the court of *B. R.* held the signing of the Judgment to be irregular, it being before the day allowed by the rules of the court; and though execution was taken out afterwards, Judgment was set aside. 5 *Mod.* 205. If a *distringas* is returnable within term, and the cause is tried two or three days only before the end of the term, the Judgment shall be entered that very term, though there be not four days to move in arrest of Judgment. 1 *Salk.* 77. But a four-day rule must be given, and the party cannot sign Judgment, till four days exclusive are elapsed, and if *Sunday* intervenes, that is not to be reckoned one of the four days. But if verdict be given after term, no Judgment can be given on it till the next term following; for the Judgment is the act of the Court, and the Court sits not but in term. *Mich.* 22 *Car. B. R.* See title *Practice*.

If verdict pass for the plaintiff, and he will not enter his Judgment, the defendant, by motion of course, may oblige him to it. 2 *Lill. Abr.* 97. The defendant may enforce the plaintiff to enter his Judgment to the end he may plead it to another action. *Latch.* 216: 1 *Danv.* 722: *Palm.* 281. So if the defendant wants to bring a writ of error.

Judgments are not only to be signed by the proper officer, but entered of record; before which they are not Judgments: and in a Judgment given to recover a sum of money, the sum must be entered in words at length; and not in figures, which may be easily altered; and a Judgment was reversed, because the time when given was in figures, and the sum recovered expressed in figures, &c. But the court may amend their Judgments of the same term, because the term is but as one day in law; though they may not do it in another term. 2 *Lill.* 103: 3 *Lev.* 430. If a Judgment be unduly obtained, the court will vacate the Judgment, and restore the party damnified; if not punish the offender: but it is against the course of the court to vacate a Judgment the last day of the term. *Pasch.* 1656.

A Judgment entered in *C. B.* shall relate to the essoin day of the term, and be a Judgment from that time: but a Judgment in *B. R.* shall relate only to the first day of the term. *Cro. Car.* 102. If a rule be given for the defendant to plead, at a certain day, and he do not plead accordingly, the plaintiff may enter Judgment against him, without moving the court; though in real actions, and criminal causes, on indictment, &c. there must be a motion in court, for a peremptory rule. 2 *Lill.* 116. Yet a plaintiff, after he hath signed Judgment against the defendant, may waive it if he will, and accept of a plea from the defendant. *Trin.* 23 *Car. B. R.*

If a Judgment be obtained, but the plaintiff doth not take out execution within a year and a day, the Judgment must be revived by *scire facias*. If any thing be entered in a Judgment, which is not mentioned in the plaintiff's declaration, the Judgment is not good. 2 *Lill.* 104. And where it appears upon the record, that the plaintiff hath no cause of action, he shall never have Judgment. 8 *Rep.* 120. In such case the Court may give Judgment for the defendant. 1 *Plowd.* 66.

In debt on specialty, the whole and exact sum must be demanded, or the Judgment upon it will not be good. 3 *Mod.* 41. If more be in the Judgment than the plaintiff demands, it is erroneous; though this may be helped

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by a *remisit dampna* for part. 2 *Lill.* 27. If in case, trespass, &c. a verdict is given for more damages than laid in the plaintiff's declaration, and he does not remit the surplus damages, but takes Judgment for the whole, it is an incurable error, and cannot be amended. See titles *Debt*; *Damages*.

If issue is found against one party in a suit, and not against the other, Judgment may be for the plaintiff to recover against him where the matter is found; and a *nil capiat per billam* be entered against the plaintiff as to the other. 1 *Saund.* 216. And when several damages are recovered against several defendants, the plaintiff may enter a *nolle prosequi* as to one of the defendants, &c. and have Judgment against one only for the damages against him. 3 *Mod.* 101. If one entire Judgment is given against two several persons, and one of them is an infant, appearing by attorney, the whole Judgment is void; which being entire cannot be divided, except the infant be joint executor with the other party. When a Judgment is entire, it cannot be divided, to make one part of it good, and another part thereof erroneous; but if it be not an entire Judgment, it may. 2 *Lill.* 100. See *post* III. On action where damages are to be recovered, if the declaration be good in part, and insufficient in part, and the defendant demurs upon the entire declaration; the plaintiff shall have Judgment for that which is well laid, and be barred for the rest. 2 *Saund.* 379. And if in action of debt upon three bonds, it appears that one of them is not forfeited, &c. the plaintiff shall have Judgment for the other two. 1 *Saund.* 286.

There were four counts in the declaration; *non assumpsit* pleaded to three, and a demurrer to the fourth. After Judgment on the demurrer, the plaintiff takes out a writ of inquiry, and executes it; the demurrer being determined, the Court held the Judgment regular, and that there was no occasion for a *nolle prosequi*, to be entered on the roll as to the three counts, until he enter final Judgment. *Stra.* 532.

Where a Judgment is partly by the common law, and partly by statute, the Judgment at common law may remain, and be complete, without the other. 1 *Salk.* 24.

Where there are two distinct Judgments, one at common law, and the other by statute, one may be affirmed, and the other reversed, on a writ of error. *Annaly* 50.

Every Judgment ought to be complete and formal: one Judgment cannot determine another Judgment, and the Judges will not give a Judgment against law, although the plaintiff and defendant do agree to it. 1 *Salk.* 213: *Cro. Eliz.* 817. In actions personal, Judgment given against the plaintiff upon any plea to bar him, is peremptory. *Jenk. Cent.* 52. If the defendant doth not deny the debt, or other matter in suit, but endeavours to elude the action by insufficient pleading; in this case, if it be found for the plaintiff, he shall have Judgment; but not *vice versa*, if for the defendant, because the matter of the suit is not fully and sufficiently denied, but in some measure confessed by the insufficient plea. *Ibid.* 70.

Judgment may not be given for the plaintiff upon an insufficient bar, if the replication be so, and shew no title; but a Judgment shall not be set aside for mispleading a point collateral to the issue. *Hob.* 8, 128. See *post* III. In debt upon an obligation, the defendant pleaded that he delivered it on a condition to be performed by the plaintiff, which he had not done, and therefore it was not his deed; the Jury found for the defendant, that the condition was not performed, yet the plaintiff had Judgment; for the defendant's plea confesses it to be his deed, and the verdict does not disprove it, and the issue is, deed or no deed, &c. Here, therefore, the plaintiff hath his Judgment upon the defendant's confession, not upon the verdict. *Jenk. Cent.* 102.—A Judgment contrary to the verdict found in the cause is generally void; for it is to be warranted by the verdict. *Mich.* 22 *Car. B. R.* There may be cases where Judgment may be given for one of the parties contrary to the verdict; as where the defendant pleads such a plea as in effect acknowledges the demand, there, though there should be a verdict for the defendant, Judgment shall be for the plaintiff, or the Judge of *nisi prius* may refuse to try it. *Annaly* 250. If a verdict is imperfect, Judgment cannot be given upon it; and for the incertainty of the verdict, Judgment may be void. 2 *Lill.* 111: *Raym.* 220. Action of debt lies upon a good Judgment, as well after writ of error brought as before. *Raym.* 100: 2 *Mod.* 127. But if error is brought, and depending, the court will, on motion, stay proceedings in the new action, or rather prevent plaintiff from taking out execution, defendant confessing judgment in the last suit. See title *Debt*. In actions of debt on bonds, a rule may be made to stay proceedings on payment of principal, interest, and costs. *Mod. Ca.* 60. See *stat.* 4 *Ann. c.* 16. *sect.* 13. and this Dictionary, title *Bond*. If a Judgment is recovered jointly against three defendants, the plaintiff cannot bring action of debt upon that Judgment against one alone. 2 *Leon.* 220. A plaintiff shall not have a new action of debt on the same bond, &c. after Judgment had on it, as long as the Judgment is in force. 6 *Rep.* 2: 2 *Nelf. Abr.* 1056. An erroneous Judgment in Chancery is reversible in *B. R. Dyer* 315. And if the House of Lords reverse a Judgment of *B. R.* the Lords are to enter the new Judgment, and not the Court of *B. R.* who by the first Judgment had executed their authority. 1 *Salk.* 403. See this Dictionary, titles *Appeal*; *Error*.

A regular Judgment in a crown cause cannot be set aside on payment of costs. 1 *Wils.* 163.

Where there is a Judgment and no surprize, it shall not be set aside on an affidavit of a matter relative to the merits which might have been pleaded. *Annaly* 157.

Where the condition of a bond was, that the money was not to be paid till a future day, and the conusee by virtue of a warrant of attorney entered Judgment, and took out execution before the day, the Court would not set the Judgment aside, but the execution. *Annaly* 270.

A regular interlocutory Judgment may be set aside, so as to let in the defendant to try the merits of his case: but it must be on payment of costs, and such merits likewise must appear upon affidavit. *Stra.* 823, 1242: 1 *Burr.* 568. A writ of inquiry was set aside, and defendant let in to plead a fair plea on payment of costs. *Salk.* 518: 6 *Mod.* 191.

The *stat.* 8 *W.* 3. *c.* 11, orders Judgment for costs, upon demurrers, and on suing writs of error, where the former Judgment is affirmed, &c. See this Dictionary, title *Costs*. The statutes of jeofails extend to Judgments

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upon *nihil dicit*, confession, *non sum informatus*, &c. *Stat.* ... *c.* 16. For further matter, see titles, *Abatement*; *Amendment*; *Execution*; *Issue*; *Practice*, &c.

III. ARRESTS OF JUDGMENT arise from intrinsic causes appearing upon the face of the record. Of this kind are: First, Where the declaration varies totally from the original writ; as where the writ is in debt or detinue, and the plaintiff declares in an action on the case for an *assumpsit*; for, the original writ out of Chancery being the foundation and warrant of the whole proceedings in the Common Pleas, if the declaration does not pursue the nature of the writ, the Court's authority totally fails. Also, secondly, Where the verdict materially differs from the pleadings and issue thereon; as if, in an action for words, it is laid in the declaration that the defendant said, "the plaintiff *is* a bankrupt;" and the verdict finds specially that he said "the plaintiff *will be* a bankrupt." Or, thirdly, If the case laid in the declaration is not sufficient in point of law to found an action upon.

It is an invariable rule with regard to Arrests of Judgment upon matter of law, "that whatever is alledged in Arrest of Judgment must be such matter, as would have been, upon demurrer, sufficient to overturn the action or plea." As if, on an action for slander, in calling the plaintiff a Jew, the defendant denies the words, and issue is joined thereon; now, if a verdict be found for the plaintiff, that the words were actually spoken, whereby the fact is established, still the defendant may move in Arrest of Judgment, that to call a man a Jew, is not actionable; and, if the Court be of that opinion, the Judgment shall be arrested, and never entered for the plaintiff. But the rule will not hold *è converso*, "that every thing that may be alledged as cause of demurrer, will be good in Arrest of Judgment;" for if a declaration or plea omits to state some particular circumstance, without proving which, at the trial, it is impossible to support the action or defence, this omission shall be aided by a verdict. As if, in an action of trespass, the declaration doth not alledge, that the trespass was committed on any certain day, *Carth.* 389; or, if the defendant justifies, by prescribing for a right of common for his cattle, and does not plead that his cattle were *levant* and *couchant* on the land, *Cro. Jac.* 44; though either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of such omission in due time, but takes issue, and has a verdict against him, these exceptions cannot, after verdict, be moved in Arrest of Judgment. For the verdict ascertains those facts, which before, from the inaccuracy of the pleadings, might be dubious; since the law will not suppose, that a Jury, under the inspection of a Judge, would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which, his general allegation is defective. 1 *Mod.* 292.

Exceptions, therefore, that are moved in Arrest of Judgment, must be much more material and glaring, than such as will maintain a demurrer; or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict; and not suffered, in the last stage of a cause, to unravel the whole proceedings. But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself, or if to an action of debt the defendant pleads *not guilty* instead of *nil debet*, these cannot be cured by a verdict, for the plaintiff in the first case, or for the defendant in the second. 3 *Comm.* 393—5.

Although it appear to the Court that the defendant's title is not good, if the plaintiff, in his declaration, hath not set forth a good title for himself, the Court shall never give him Judgment. 2 *Lill.* 98. Though the plaintiff destroys the defendant's title, if he gives him another title by pleading, *&c.* the defendant shall have Judgment; for the court are to judge upon the whole record. 8 *Rep.* 90. But if action of trespass is brought for trespass done in lands belonging to such a house, and it appears at the trial that the plaintiff had no title to the house, the Court cannot give Judgment to turn him out of possession, because that was not judicially before them. 3 *Salk.* 213.

Judgments are to continue, till they shall be attaint by error. *Stat.* 4 *H.* 4. *c.* 23. And after verdict given in any Court of record, there shall be no stay of Judgment for want of form in a writ, count, *&c.* or mistaking the name of either party, sum of money, day, month, year, *&c.* rightly named in any writ or record preceding, *&c.* 18 *Eliz. c.* 14: 16 & 17 *Car.* 2. *c.* 8. See titles *Abatement*; *Amendment*; *Error.*

JUDGMENTS ACKNOWLEDGED FOR DEBTS. The course for one to acknowledge a Judgment for debt, is for him that doth acknowledge it to give a warrant of attorney to some attorney of that court where the Judgment is to be acknowledged, to appear for him, to file common bail, and receive a declaration, and then plead *non sum informatus*, &c. or to let it pass by *nihil dicit*: whereupon Judgment is entered for want of a plea. 2 *Lill.* 105. The person to whom this warrant of attorney is given, has all the benefit of a Judgment and execution, against the debtor's person and property, without being delayed by any intermediate process, as in the course of a regular suit. It is frequently given by a person arrested, upon condition of his discharge, and that longer time shall be allowed him for the payment of the debt, or that some other indulgence shall be shewn him. But to prevent persons in this situation from being imposed upon, no warrant of attorney to confess a Judgment, given by a person arrested *upon mesne process*, shall be of any force, unless some attorney be present on behalf of the person in custody, who shall explain the nature of the warrant, and subscribe his name as a witness to it. *Cromp. Pract.* See 1 *Salk.* 402.

If one be seemingly discharged, with design that he should give a warrant of attorney to confess a Judgment, it is ill: but if one arrested by process of an inferior court, gives a warrant for confessing Judgment in that court, *B. R.* will not set it aside, though an attorney be not present. *Mod. Cas.* 85. By rule of *B. R. Easter* 15 *Car.* 2, No bailiff is to take from any prisoner in his custody, a warrant to acknowledge Judgment unless in the presence of an attorney. But where one has been in prison some time, and he confesses Judgment to his creditor voluntarily, that Judgment shall stand, although there be no attorney. 7 *Mod.* 115. See title *Arrest.*

If a warrant of attorney to confess a Judgment is given unconditionally, or without delay of execution,

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Judgment may be signed, and execution taken out upon the same day it is given; and thus a debtor may give one creditor a preference to another, who has obtained Judgment after a long litigation. 5 *Term Rep.* 235.

If one gives a warrant of attorney to confess Judgment, and dies before it is confessed, this is a countermand of the warrant. 1 *Ventr.* 310. Though the Courts have, on motion, allowed Judgment to be entered up. Where they may be entered after the party's death, see *Annaly* 158. But the rule does not hold in adversary suits. *Ibid.* 183. If a feme sole gives warrant of attorney to confess Judgment, and marries before it is entered, the warrant is absolutely countermanded; and Judgment shall not be entered against husband and wife. 1 *Salk.* 399.

A Judgment confessed upon terms, being in effect conditional, the Court will see the terms performed: but where a Judgment is acknowledged absolutely, and a subsequent agreement is made, this does not affect the Judgment, and the Court will take no notice of it. 7 *Mod.* 400. If a warrant be to enter Judgment as of such a term, or any time after; the attorney may enter it at any time during life: but without those words the Judgment must be entered the term expressed in the warrant: and if no term be mentioned, it may be intended the next term. 1 *Mod.* 1. Or it has been held it may be entered within a year after the date of it: and if Judgment upon a warrant of attorney be not entered within the year, it cannot be done without leave of the Court, on motion and affidavit made of the party's being living, and the debt not satisfied. *Cromp. Pract*: 2 *Lill. Abr.* 118: 2 *Show.* 253.

It is dangerous to take a Judgment acknowledged in the vacation, as of the preceding term; and if any such Judgment be taken, the warrant of attorney to confess the same must bear date before, or in the term whereof it is confessed: but the safest way is to make it a Judgment of the subsequent term. 2 *Lill.* 103.

By *Holt*, Chief Justice, If one will enter a Judgment as of a precedent term, he must actually enter it before the essoin day of the succeeding term: and if Judgment be signed in *Hilary* term, and in the subsequent vacation the defendant sells lands, if before the essoin of *Easter* term, the plaintiff enters his Judgment, it shall affect the lands in the hands of the purchaser; (but see *stat.* 29 *C.* 2. *c.* 3;) and if one enters Judgment so in vacation, when the party is dead, the Judgment shall be good by relation, if he was living in the precedent term. 1 *Salk.* 401. As to complaints for delay of entering Judgments, the same shall be examined into by commissioners and ordered to be entered, &c. See *stat.* 14 *Ed.* 3. *st.* 1. *c.* 5.

Judgments, as against purchasers, shall only relate to the day of signing. *Stat.* 29 *Car.* 2. *c.* 3. *sect.* 15. See title *Execution*. If any person having acknowledged or suffered a Judgment as a security for money, afterwards on borrowing other money of another, mortgage his lands, &c. without giving notice of such Judgment, unless he pay it off in six months, he shall forfeit his equity of redemption, &c. *Stat.* 4 *W.* & *M.* *c.* 16. See title *Mortgage*. To search for Judgments a fee is paid of 4*d.* a term.

On Judgments, a release of errors is usually entered into at the time of the warrant of attorney given, or Judgment had. And in case of several Judgments, if two are given in one term, and the last is first executed, that creditor hath the best title. *Latch.* 53. When a Judgment is satisfied, it is to be acknowledged on record by attorney, &c. Acknowledging a Judgment in the name of another, who is not privy or consenting to the same, is felony, by *stat.* 21 *Jac.* 1. *c.* 26.

JUDGMENTS IN CRIMINAL CASES. When, upon a capital charge, the Jury have brought in their verdict, Guilty, in the presence of the prisoner; he is either immediately, or at a convenient time soon after, asked by the court, if he has any thing to offer why Judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor, (the trial of which may, and does usually, happen in his absence, after he has once appeared,) a *capias* is awarded and issued, to bring him in to receive his Judgment; and if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may, at this period, as well as at his arraignment, offer any exceptions to the indictment, in *arrest* or stay of Judgment; as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again. 4 *Rep.* 45. And we may take notice, 1. That none of the statutes of jeofails, for amendment of errors, extend to indictments or proceedings in criminal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That in favour of life, great strictness has at all times been observed, in every point of an indictment. Sir *Matthew Hale*, indeed, complains, "that this strictness is grown to be a blemish and inconvenience in the law, and the administration thereof: for that more offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence." And yet no man was more tender of life than this truly excellent Judge. See 2 *Hal. P. C.* 193.

A pardon also may be pleaded in arrest of Judgment: and it has the same advantage when pleaded here, as when pleaded upon arraignment; *viz.* the saving the attainder, and of course the corruption of blood, which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible. See title *Pardon*.

Praying the benefit of clergy may also be ranked among the motions in arrest of Judgment. See title *Clergy, Benefit of*.

If all these resources fail, the Court must pronounce that Judgment which the law hath annexed to the crime, for which reference may be made to the titles of the several offences, in this Dictionary. Of these some are capital, which extend to the life of the offender, and consist generally of being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain, or disgrace are superadded; as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the King's person or government, embowelling alive, beheading, and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the Judgment

ment at common law was to be burned alive. But now, by *stat.* 30 *Geo.* 3. *c.* 48, it is enacted, "that in all cases of conviction of any woman for high or petit treason, the Judgment shall be, that she shall be drawn and hanged, and not burned; and if any woman is convicted of petit treason, she shall be liable to such farther Judgment as is directed by *stat.* 25 *Geo.* 2. *c.* 37, to be given upon persons convicted of wilful murder. Indeed the humanity of the *English* nation has ever authorised by a tacit consent, an almost general mitigation of such part of these Judgments as savours of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental, or by negligence) of any persons being embowelled or burned, till previously deprived of sensation by strangling.—Some punishments consist in exile or banishment, by abjuration of the realm or transportation; others, in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears; others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek. Some are merely pecuniary, by stated or discretionary fines; and, lastly, there are others that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for such crimes as either arise from indigence, or render even opulence disgraceful; such as whipping, hard labour in the House of Correction, or otherwise, the pillory, the stocks, and the ducking-stool. Disgusting as this catalogue may seem, it will afford pleasure to an *English* reader, and do honor to the *English* law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in *Europe*. And it is, moreover, one of the glories of our *English* law, that the species, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that it is not left in the breast of any Judge, nor even of a Jury, to alter that Judgment, which the law has before-hand ordained, for every Subject alike, without respect of persons. For, if Judgments were to be the private opinions of the Judge, men would then be slaves to their magistrates, and would live in society, without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity or mitigation, with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminals may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions. 4 *Comm.* 375, &c.

The discretionary fines and discretionary length of imprisonment, which our Courts are enabled to impose, may seem an exception to this rule. But the general nature of the punishment, *viz.* by fine or imprisonment, is, in these cases, fixed and determinate; though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, in particular, of pecuniary fines, neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's. Our statute law has not, therefore, often ascertained the quantity of fines, nor the common law ever: it directing such an offence to be punished by fine in general, without specifying the certain sum; which is fully sufficient, when we consider, that however unlimited the power of the Court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. 4 *Comm.* 378. See this Dictionary, title *Fines for Offences*.

No man can be attainted of treason or felony, but on Judgment by express sentence, or by outlawry, or abjuration. 2 *Hawk. P. C. c.* 48. § 25. And a person shall not have two Judgments for one offence; for in outlawry, which is a Judgment, execution shall be awarded against the offender, but no sentence pronounced. *Finch.* 389, 467. But one convicted of a scandalous libel, had Judgment to pay a fine, and to go to all the courts in *Westminster Hall* with a paper in his hat signifying his crime; and on his behaving impudently, his punishment was encreased. 1 *Salk.* 401. No Judgment or punishment can be inflicted unknown to our laws; but only by act of parliament. *Dalis.* 20. And the law makes no distinction, in fixed and stated Judgments, between a peer and a commoner; or between a common and ordinary case and one extraordinary. 2 *Hawk. P. C. c.* 48. § 2.

Judgment cannot be given for a corporal punishment, in the absence of the party. 1 *Salk.* 400. Though persons may have Judgment to be fined in their absence, having a clerk in court to undertake for the fine. 1 *Salk.* 56.

Judgment or Trial by the Holy Cross. A trial in ecclesiastical cases, anciently in use among the *Saxons*. *Cress. Church Hist.* 960.

JUDICATORES TERRARUM, Persons in the county palatine of *Chester*, who on a writ of error out of Chancery, are to consider of the judgment given there, and reform it; and if they do not, and it be found erroneous, they forfeit 100*l.* to the King by the custom. *Dyer* 348: *Jenk. Cent.* 71.

JUDICES FISCALES: So *Polidore Virgil* calls *Empson* and *Dudley*, who were employed by *Hen.* VII. for taking the benefit of penal statutes, and were put to death by *Hen.* VIII. See *Lord Herb H.* 8. *fol.* 5, 6.

JUDICIAL Decisions, Opinions, or Determinations, are the sentiments of the Judges delivered in a cause in Court before them, and which form the decree or judgment of the Court. See *Hale's Hist. Com. Law* 68, 69, cites *Plowden* 122 to 130, 140, &c.

An extra-judicial opinion, given in or out of Court, is no more than the *prolatum* or saying of him who gives it, nor can be taken for his opinion, unless every thing spoken at pleasure must pass as the speaker's opinion. *Vaugh.* 382.

So an opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given, if no such, or a contrary, opinion had been broached, is no Judicial opinion; nor more than a *gratis dictum*.

dictum. But an opinion, though erroneous, concluding to the judgment, is a Judicial opinion, because delivered under the sanction of the Judge's oath upon deliberation, which assures that it is or was, when delivered, the opinion of the deliverer. *Vaugh.* 382. See title *Judges.*

JUDICIAL POWER. See title *Judges.*

JUDICIAL WRITS. The *Capias*, and all other subsequent to the original writ, not issuing out of Chancery, but from the Court into which the original was returnable, and being grounded on what has passed in that Court in consequence of the sheriff's return, are called Judicial, not original writs; they issue under the private seal of that Court, and not under the Great Seal of *England*; and are tested, not in the King's name, but in that of the Chief Justice only. 3 *Comm.* 282. See titles *Capias*; *Writ*; *Process.*

JUDICIUM DEI, The Judgment of God; so our ancestors called those, now prohibited, trials of ordeal, and its several kinds. *Leges Edw. Conf. c.* 16.

See *Spelman's Glossary* on this word, and Dr. *Brady* in his *Glossary*, at the end of his *Introduct. to Eng.* And this Dictionary, title *Ordeal.*

JUDICIUM PARIUM. See *Jury.*

JUG, A watery place, *Domesday.*

JUGULATOR, A cut-throat, or murderer. *Thom. Walsingham*, p. 343.

JUGUM TERRÆ, A yoke of land, in *Domesday*, contains half a plow-land. So also 1 *Inst. fo.* 5. *a.* So in *Domesday*, *Unum Jugum de ora, & unum Jugum de berce*; *i. e.* The rent of a yoke of land, and another yoke of land to plough. *Gale* 760.

JUNCARE, To strew rushes, as was of old the custom for accommodating the parochial church, and the very bed-chamber of princes. *Pat.* 14 *Ed.* 1.

JUNCARIA, or JONCARIA, from *Juncus*, the *Latin* word for a rush.] A soil or place where rushes grow. *Co. Lit. fo.* 5: *Pat.* 6 *Ed.* 3. *p.* 1. *m.* 25.

JUNCTUM; JUNCTA, A measure of salt. 2 *Mon. Ang. p.* 99.

JURA REGALIA. See titles *Regalia*; *King.*

JURATS, *jurati.*] Officers in nature of aldermen, sworn for the government of many corporations. As *Romney Marsh* is incorporate of one bailiff, twenty-four *jurats*, and the commonalty thereof, by *Chart.* 1 *Ed.* 4. And we read of the mayor and Jurats of *Maidstone, Rye, Winchelsea*, &c. Also *Jersey* hath a bailiff and twelve Jurats, or sworn assistants, to govern that island. See *stat.* 2 & 3 *Ed.* 6. *c.* 30: 13 *Ed.* 1. *c.* 26.

JURE-DIVINO Right to the throne. See title *King.*

JURE-DIVINO Right to tithes. See title *Tithes.*

JURIDICAL DAYS, *Dies juridici.*] Days in court, on which the law was administered. See *Day.*

JURISDICTION, *jurisdictio.*] An authority or power, which a man hath to do justice in causes of complaint brought before him: of which there are two kinds; the one, which a person hath by reason of his fee, and by virtue thereof doth right in all plaints, concerning the lands within his fee; the other is a Jurisdiction given by the prince to a bailiff, as divided by the *Normans*; and by him whom they called a bailiff, we may understand all who have commission from the King to give judgment in any cause. *Custum. Normand. cap.* 2. The Courts and Judges at *Westminster* have Jurisdiction all over *England*; and are not restrained to any county or place: but all other Courts are confined to their particular Jurisdictions; which if they exceed, whatever they do is erroneous. 2 *Lil. Abr.* 120.

A Court shall not be presumed to have a Jurisdiction, where it doth not appear to have one. 2 *Hawk. c.* 10. If an action is brought in a corporate town, and the plaint sheweth not that the matter arises *infra Jurisdictionem* of the Court, it will be wrong, though the town be in the margin; but the county serves in the margin for the superior Courts. *Jenk Cent.* 322. The declaration in a base Court must alledge, that the goods were sold and delivered within the Jurisdiction thereof, as well as that the defendant promised within it. 1 *Wils. par.* 2. *p.* 16. See title *Inferior Courts.*

After a verdict for the plaintiff in *C. B.* for less than 40*s.* the defendant may enter a suggestion on the roll, that he resided in *Middlesex*, which if true, the Court of *C. B.* hath no Jurisdiction, by *stat* 22 *Geo.* 2. *c.* 33. See titles *County Courts*; *Courts of Conscience.*

Where commissioners or inferior Jurisdictions, whose powers are limited, assume a Jurisdiction they have not, the law gives an action against them. 2 *Wils.* 382.

Although a case be debated and have Judgment in the Spiritual Courts, yet the King's Courts may afterwards discuss the same matter. *Artic. Cleri, Stat.* 9 *Ed.* 2. *c.* 6.

In some causes, the Spiritual and Temporal Courts have a concurrent Jurisdiction. See title *Prohibition*: and further on this subject, titles *Cognizance*; *Courts*; *Abatement.*

JURIS UTRUM, A writ which lies for the parson of a church, whose predecessor hath alienated the lands and tenements thereof. *F. N. B.* 48. When a clerk is in full possession of the benefice, the law gives him the same possessory remedies to recover his glebe, his rents, his tithes, and other ecclesiastical dues, by writ of entry, assize, ejectment, debt, or trespass, (as the case may happen,) which it furnishes to the owners of lay property. Yet he shall not have a writ of right, nor such other similar writs as are grounded upon the mere right; because he hath not in him the entire fee and right; (*F. N. B.* 49;) but he is entitled to a special remedy called a writ of *Juris Utrum*, which is sometimes stiled the Parson's writ of right; (*Booth* 221;) being the highest writ which he can have. *F. N. B.* 48. This lies for a parson or a prebendary at common law, and for a vicar by *stat.* 14 *E.* 3. *st.* 1. *c.* 17, and is in the nature of an assize, to inquire whether the tenements in question are frank-almoign belonging to the church of the demandant, or else the lay fee of the tenant. *Registr.* 32. And thereby the demandant may recover lands and tenements, belonging to the church, which were aliened by the predecessor, or of which he was disseissed; or which were recovered against him by verdict, confession, or default, without praying in aid of the patron and Ordinary, or on which any person has intruded since the predecessor's death. *F. N. B.* 48, 9. But since the restraining statute of 13 *Eliz. c.* 10, whereby the alienation of the predecessor, or a recovery suffered by him of the lands of the church, is declared to be absolutely void, this remedy is of very little use; unless where the parson himself has been deforced for more than twenty years. *Booth.* 221.

For

For the successor, at any competent time after his accession to the benefice, may enter, or bring an ejectment. 3 *Comm.* 252, 3.

A *Vicar* shall have a *Juris Utrum* against a *Parson* for the glebe of his vicarage, which is part of the same church: and the plaintiff ought to be named parson or vicar, or such name in right of which he bringeth his action. *New Nat. Br.* 111.

JURNALE, From *jour*, or *journée*, Fr. a day.] The journal or diary of accounts in a religious house. *Paroch. Antiq. p.* 571: *Cowell.*

JURNEDUM, A journey, or one day's travelling. *Cowell.*

JUROR *jurator.*] One of those persons who are sworn on a Jury. See title *Jury.*

JURY; JURATA: *from* Lat. *jurare*, to swear.

A certain number of Men sworn to inquire of, and try, a matter of Fact, and declare the truth, upon such evidence as shall be delivered them in a cause: and they are sworn judges upon evidence in matter of fact.

The privilege of Trial by Jury, is of great antiquity in this kingdom; some writers will have it that Juries were in use among the *Britons*: but it is more probable that this trial was introduced by the *Saxons*: yet some say that we had our trials by Jury from the *Greeks*; the first trial by a Jury of twelve, being in *Greece*. By the laws of King *Ethelred*, it is apparent that Juries were in use many years before the Conquest; and they are, as it were, incorporated with our constitution, being the most valuable part of it. *Wilk. Ll. Angl. Sax.* 117.

The truth seems to be, that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other. Its establishment, however, and use, in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the *Norman* trial by battel, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In *Magna Charta* it is more than once insisted on as the principal bulwark of our liberties; but especially by chapter 29, that no freeman shall be hurt in either his person or property; "*nisi per legale judicium parium suorum, vel per legem terræ.*" And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.

Trials by Jury in civil causes are of two kinds; *extraordinary*, and *ordinary*. The extraordinary shall be only briefly hinted at. The first species of extraordinary trial by Jury is, that of the *Grand Assise*, which was instituted by King *Henry* VII. in parliament, by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous and unchristian custom of duelling. For this purpose a writ *de magnâ assisâ eligendâ* is directed to the sheriff, to return four knights, who are to elect and chuse twelve others to be joined with them, in the manner mentioned by *Glanville*; (*l.* 2. *c.* 11, 21;) who, having probably advised the measure himself, is more than usually copious in describing it: and these all together, form the grand assise, or great Jury, which is to try the matter of right, and must now consist of sixteen Jurors. *F. N. B.* 4: *Finch L.* 412: 1 *Leon.* 303. It seems not, however, to be ascertained that any specific number above twelve is absolutely necessary to constitute the grand assise; but it is the usual course to swear upon it the four knights, and twelve others. *Vin. Abr.* title *Trial* X e. See the proceedings upon a writ of right before the sixteen recognitors of the grand assise in 2 *Wils.* 541. And further this Dictionary, title *Writ of Right.*

Another species of extraordinary Juries, is the Jury to try an *Attaint*; which is a process commenced against a former Jury, for bringing in a false verdict. It is sufficient here to observe, that this Jury is to consist of twenty-four of the best men in the county, who are called the Grand Jury in the Attaint, to distinguish them from the first or *petit Jury*; and these are to hear and try the goodness of the former verdict. See this Dictionary, title *Attaint.*

With regard to the *Ordinary Trial by Jury*, it may be considered, according to the following divisions; first premising, that these Juries are not only used in the circuits of the Judges, but in other Courts and matters: as if a Coroner inquire how a person killed came by his death, he doth it by Jury; and the Justices of peace in their Quarter-sessions, the Sheriff in his County Court, the Steward of a Court-Leet or Court-Baron, *&c.* if they inquire of any offence, or decide any cause between party and party, they do it in like manner. *Lamb. Eiren.* 384.

I. *Of the Mode of summoning, and compelling the Appearance, of Juries.*

II. *Of Challenging Jurors; and herein of their Qualifications.*

III. *Of the Verdict of a Jury in civil Cases.*

IV. 1. *Of Juries in criminal Cases*; *and* 2. *How far they are Judges of Law, as well as Fact.*

I. When an issue is joined, between the parties in a suit, by these words, "and this the said *A.* prays may be inquired of by the country," or, "and of this he puts himself upon the country, and the said *B.* does the like," the Court awards a writ of *venire facias* upon the roll or record, commanding the Sheriff, "that *he cause to come here*, on such a day, twelve free and lawful men (*liberos et legales homines*) of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid *A.*, nor the aforesaid *B.*, to recognise the truth of the issue between the said parties." And such writ is accordingly issued to the Sheriff.

Thus the cause stands ready for a trial *at the bar* of the Court itself: for all trials were there anciently had, in actions which were there first commenced; which then never happened but in matters of weight and consequence; all trifling suits being ended in the Court-Baron, Hundred, or County Courts; and indeed all causes of great importance or difficulty are still frequently retained upon motion, to be tried at the bar in the Superior Courts. (See title *Trial.*) But when the usage began, to bring actions of any trifling nature in the Courts of *Westminster Hall*, it was found to be an intolerable burthen to compel the parties, witnesses, and Jurors to come from *Westmorland* perhaps, or *Cornwall*, to try an action of assault at *Westminster*. A practice, therefore, very early obtained, of *continuing* the cause from term to term in the Court above, provided the Jus-

tices in eyre did not previously come into the county where the cause of action arose; and if it appeared that they arrived there within that interval, then the cause was removed from the jurisdiction of the Justices at *Westminster*, to that of the Justices in eyre. *Bract. l.* 3. *tr.* 1. *c.* 11 § 8. Afterwards, when the Justices in eyre were superseded by the modern Justices of Assise, (who came twice or thrice in the year into the several counties, *ad capiendas assisas*, to take or try writs of assise, of *mort d'ancestor, novel disseisin, nusance*, and the like,) a power was superadded by *stat. Westm.* 2, 13 *Ed.* 1. *c.* 30, to these Justices of Assise to try common issues in trespass, and other less important suits, with directions to return them (when tried) into the Court above; where alone the judgment should be given. And as only the trial, and not the determination of the cause, was now intended to be had in the Court below, therefore the clause of *nisi prius* was left out of the conditional *continuances* before-mentioned, and was directed by the statute to be inserted in the writs of *venire facias*; that is, "that the Sheriff should cause the Jurors to come to *Westminster*, (or wherever the King's Courts should be held,) on such a day in *Easter* and *Michaelmas* terms; *nisi prius, unless before* that day the Justices assigned to take assises shall come into his said county." By virtue of which the Sheriff returned his Jurors to the Court of the Justices of Assise, which was sure to be held in the vacation before *Easter* and *Michaelmas* terms, and there the trial was had. See title *Justices of Assise*.

An inconvenience attended this provision: principally because as the Sheriff made no return of the Jury to the Court at *Westminster*, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason, by *stat.* 42 *Edw.* 3. *c.* 11, the method of trials by *nisi prius* was altered; and it was enacted that no inquests (except of assise and gaol-delivery) should be taken by writ of *nisi prius*, till after the Sheriff had returned the names of the Jurors to the Court above. So that now in almost every civil cause the clause of *nisi prius* is left out of the writ of *venire facias*, which is the Sheriff's warrant to warn the Jury; and is inserted in another part of the proceedings: for now the course is, to make the Sheriff's *venire* returnable on the last return of the same term wherein issue is joined, *viz. Hilary* or *Trinity* terms; which from the making up of the issues therein, are usually called *issuable* terms. And he returns the names of the Jurors in a *panel* (a little pane, or oblong piece of parchment) annexed to the writ. This Jury is not summoned, and therefore, not appearing at the day, must unavoidably make default; for which reason, a compulsive process is now awarded against the Jurors, called in the Common Pleas, a writ of *habeas corpora juratorum*, and in the King's Bench, a *distringas*, commanding the Sheriff to *have their bodies*, or to *distrain* them by their lands and goods, that they may appear upon the day appointed. The entry, therefore, on the roll or record is, "that the Jury is respited, through the defect of the Jurors, till the first day of the next term, then to appear at *Westminster*; *unless before* that time, *viz.* on *Wednesday* the fourth of *March*, the Justices of our Lord the King, appointed to take assises in that county, shall have come to *Oxford*;" [that is, to the place assigned for holding the assises;] and thereupon the writ commands the Sheriff to have their bodies at *Westminster* on the said first day of next term, *or* before the said Justices of *assise*, if before that time they come to *Oxford*; *viz.* on the fourth of *March* aforesaid. And, as the Judges are sure to come and open the circuit commissions on the day mentioned in the writ, the Sheriff returns and summons this Jury to appear at the assises, and there the trial is had before the Justices of *Assise* and *Nisi prius*: among whom are usually two of the Judges of the Courts at *Westminster*, the whole kingdom being divided into six circuits for this purpose. (See titles *Assise*; *Circuits*.) Thus it may be observed, that the trial of common issues, at *nisi prius*, which was in its original only a collateral incident to the original business of the Justices of assise, is now, by the various revolutions of practice, become their principal civil employment; hardly any thing remaining in use of the real *assises* but the name.

If the Sheriff be not an indifferent person, as if he be a party in the suit, or be either related by blood or affinity to either of the parties, he is not then trusted to return the Jury; but the *venire* shall be directed to the Coroners, who, in this, as in many other instances, are the substitutes of the Sheriff, to execute process when he is deemed an improper person. If any exception lies to the Coroners, the *venire* shall be directed to two clerks of the Court, or two persons of the county named by the Court, and sworn. And these two, who are called *Elisors*, or electors, shall indifferently name the Jury, and their return is final; no challenge being allowed to their array. *Fortesc. de Laud. Ll. c.* 25: *Co. Litt.* 158: see 3 *Comm. c.* 23.

The learned Commentator here pauses to enlarge in the praise of this mode of trial, even in these its preparatory stages, as most admirably adapted for the impartial investigation of truth. He then proceeds:

When a cause is ready for trial the Jury is called and sworn. To this end the Sheriff returns his compulsive process, the writ of *habeas corpora*, or *distringas*, with the panel of Jurors annexed, to the Judge's officer in Court. The Jurors contained in the panel are either *special* or *common* Jurors.

SPECIAL JURIES were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the Sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him; he is, in such cases, upon motion in Court, and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book; and the officer is to take, indifferently, forty eight of the principal freeholders in the presence of the attornies on both sides; who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel. By *stat.* 3 *Geo.* 2. *c.* 25, either party is entitled upon motion to have a Special Jury struck upon the trial of any issue as well at the assises as at bar; he paying the extraordinary expences, unless the Judge will certify (in pursuance of *stat.* 24 *Geo.* 2. *c.* 18,) that the cause required such special Jury.

By the said *stat.* 3 *Geo.* 2. *c.* 25, when any *Special Jury* shall be ordered by rule of the said Courts in any cause arising in any city, &c. the Jury is to be taken out of lists or books of persons qualified, which shall be produced

produced and brought by the Sheriffs, *&c.* before the proper officer, as the freeholder's book is for striking *Juries* in causes arising in counties. And by *stat.* 6 *Geo.* 2. *c.* 37, (which makes perpetual *stat.* 3 *Geo.* 2. *c.* 25,) the Justices of Assise for the counties palatine of *Chester*, *Lancaster*, &c. upon motion in behalf of the King, or any prosecutor, or defendant, in an indictment, information, or any suit, may appoint a Jury to be struck for trial of issues in like manner as *Special Juries* in the Courts of law at *Westminster*.

Though this Special Jury is allowed as well in indictments and informations for misdemeanors as in civil actions; but there cannot be a Special Jury in cases of treason or felony, on account of the prisoner's privilege of peremptory challenge. See *post* IV. 21 *Vin. Abr* 301. If after a Special Jury has been struck, the cause goes off for default of Jurors, no new Jury can be struck, but the cause must be tried by the Jury first appointed. 5 *Term Rep.* 453.

The nomination of a Special Jury, is to be in the presence of the attornies on each side; but if either of them refuse to come, then the Secondary, *&c.* may proceed *ex parte*, and he shall strike twelve for the attorney who makes default. *R. Trin.* 8 *W.* 3. *B. R.*

It has been also adjudged, that if a rule is made for a *Special Jury*, and it is not expressed, that the Master of the office or Secondary shall strike forty-eight freeholders, and that each of the parties shall strike out twelve; in such case the Master may strike twenty-four, and neither of the parties strike out any. 1 *Salk.* 405. A *Special Jury* may be granted to try a cause at bar, without the consent of parties. *Pasch.* 10 *Geo.* 1. A rule may be made for a good Jury, and that a special verdict may be found, *&c. Mod. Cas. in Law and Eq.* 221.

A Common Jury is one returned by the Sheriff according to the directions of *stat.* 3 *Geo.* 2. *c.* 25; which appoints that the Sheriff or officer shall not return a separate panel for every separate cause, as formerly, but one and the same panel for every cause to be tried at the same assises, containing not less than forty-eight, nor more than seventy-two, Jurors: and that their names being written on tickets, shall be put into a box or glass; and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the Jury, unless absent, challenged, or excused; or unless a previous view of the messuages, lands, or place in question, shall have been thought necessary by the Court: in which case it is provided by *stat.* 4 *Ann. c.* 16, that six or more of the Jurors returned, to be agreed on by the parties, or named by a Judge or other proper officer of the Court, shall be appointed by special writ of *habeas corpora*, or *distringas*, to have the matters in question shewn to them by two persons named in the writ; and then such of the Jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other Jurors. See this Dictionary, title *View*. These statutes are well calculated to restrain any suspicion of partiality in the Sheriff, or any tampering with the Jurors when returned.

It may be proper also to notice certain other provisions made with a view to the same desirable purposes. Panels of Juries returned to inquire for the King, may be reformed by the Judges of gaol delivery, *&c. Stat.* 3 *Hen.* 8. *c.* 12. Jurymen not appearing shall forfeit issues, if they have no reasonable excuse for their defaults, *viz.* 5*s.* on the first writ, upon the second 10*s.* and the third writ 13*s.* 4*d.* *Stat.* 35 *Hen.* 8. *c.* 6. No Jury is to appear at *Westminster* for a trial, when the offence was committed thirty miles off; except the Attorney General require it. *Stat.* 18 *Eliz. c.* 5. § 2. Constables of parishes, *&c.* at *Michaelmas* quarter-sessions yearly, are to return to the Justices of peace, lists of the names and places of abode of persons qualified to serve on Juries, between the ages of twenty-one and seventy, attested upon oath, on pain of forfeiting 5*l.* And the Justices of peace shall order the Clerk of the peace to deliver a duplicate of those lists to the Sheriff, *&c.* And Sheriffs are to impanel no other persons, under the penalty of 20*l.* *&c.* *Stats.* 7 *&* 8 *W.* 3. *c.* 32: 3 *Ann. c.* 18.

No Sheriff, Bailiff, *&c.* shall return any person to serve on a Jury, unless he hath been duly summoned six days before the day of appearance; nor shall take any money or other reward to excuse the appearance of any Juryman, on pain of forfeiting 10*l.* *Stat.* 4 *&* 5 *W. & M. c.* 24.

By the *stat.* 3 *Geo* 2. *c.* 25, lists of Jurors qualified are to be made from the rates of each parish, and fixed on the doors of churches, *&c.* twenty days before the feast of St. *Michael*, that public notice may be given of persons qualified omitted, or of persons inserted who are not so, *&c.* and the lists being set right by the Justices of peace in quarter-sessions, duplicates are to be delivered to the Sheriffs of counties, by the clerks of the peace; the names contained in which shall be entered alphabetically by the Sheriffs in a book, with their additions, and places of abode, *&c.* If any Sheriff shall return other persons to serve on Juries; or the clerk of the assise record any appearance, when the party did not appear, they shall be fined by the Judges, not above 10*l.* nor less than 40*s.* The like penalty for taking money to excuse persons from serving; and the Sheriffs may be fined 5*l.* for returning Jurors, who have served two years before, *&c.* Jurors making default in appearance shall be fined not exceeding 5*l.* nor under 40*s.* By *stat.* 4 *Geo.* 2. *c.* 7. § 2, no person shall be returned as a Juror at *Nisi prius* in *Middlesex*, who has been returned there in the two preceding *terms*, or *vacations*. By *stat.* 3 *Geo.* 2. *c.* 25, no persons shall be returned as Jurors at assises in counties who have served within *two years*; except in *Rutlandshire*, (the smallest county in *England*,) where the time is limited to one year; and in *Yorkshire*, (the largest.) where it is extended to *four* years The *stat.* 29 *Geo.* 2. *c.* 19, enacts, that persons summoned on Juries in Courts of Record in *London*, or in any other cities, corporations, and franchises, not attending, may be fined from 40*s.* to 20*l.*

If the Sheriff return twelve Jurors only according to the writ, where he ought to have returned twenty-four according to the usage, for speeding the trial in case of challenge, death, or sickness, *&c.* he shall be amerced, *Jenk. Cent.* 172.

Either the plaintiff or defendant may use their endeavours for any Juryman to appear; but one who is not a party to the suit, may not: and an attorney was thrown over the bar, because he had given the names of several persons

persons in writing to the Sheriff, whom he would have returned on the Jury, and the names of others whom he would not have returned. *Moor* 882. If a Juryman appear, and refuse to be sworn, or refuse to give any verdict, if he endeavours to impose upon the Court, or is guilty of any misbehaviour after departure from the bar, he may be fined, and attachment issue against him. 2 *Hawk. P. C. c.* 22. § 15—18.

If, by means of challenges, or other cause, a sufficient number of unexceptionable Jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of *such* men, as are summoned upon the first panel, in order to keep up the deficiency. For this purpose a writ of *decem tales, octo tales*, and the like, was used to be issued to the Sheriff at common law, and must be still so done at a trial at bar, if the Jurors make default. But at the Assises or *Nisi prius*, by virtue of *stat.* 35 *Hen.* 8. *c.* 6, and other subsequent statutes, (14 *Eliz. c.* 9: 7 & 8 *W.* 3. *c.* 32, &c.) the Judge is impowered at the prayer of either party to award a *tales de circumstantibus* of such persons present in Court, as are duly qualified to be joined to the other Jurors to try the cause, who are liable however to the same challenges as the principal Jurors. This is usually done till the legal number of twelve be completed. See 10 *Rep.* 102: *Finch* 414: 2 *Rol. Ab.* 67.

Upon a trial at bar, if the Jury do not appear full, the Court cannot grant a *tales de circumstantibus*, but will grant a *decem tales*, returnable in some convenient time the same Term, to try the cause. 2 *Lill. Abr.* 552. A plaintiff or defendant may have a *tales de circumstantibus*; and the statutes which authorise Justices of *nisi prius* to award a *tales de circumstantibus*, extend as well to capital cases as to others; but such a *tales* cannot be prayed for the King upon an indictment or criminal information, without a warrant from the Attorney General, or an express assignment from the Court before which the inquest is taken; though it may be awarded on an information *qui tam*, &c. because of the interest which the prosecutor hath in such prosecutions. 2 *Hawk. P. C. c.* 41. § 18: 3 *Salk.* 339. A *tales* is not to be granted where the whole Jury is challenged, &c. but the whole panel, if the challenge be made good, is to be quashed, and a new Jury returned; for a *tales* consists but of some persons to supply the places of such of the Jurors as were wanting of the number of twelve, and is not to make a new Jury. 2 *Lil. Abr.* 252.

If but one Juror appears on the principal panel, the Court may order a *tales* under *stat.* 35 *Hen.* 8 *c.* 6: 10 *Rep.* 102. And if upon a *habeas corpora*, or a *distringas jur.* none of the Jury appear, it is said a *decem tales* shall be awarded: but it shall not be had upon a *venire fac. Cro. Eliz.* 502: *Moor* 528. See *Dyer* 245: 2 *Roll. Rep.* 75. At the assises, one of the principal panel appeared, and no more, and a *tales* was awarded, the title whereof was *nomina decem talium*, and under it eleven were returned; this was, notwithstanding, held good; for it is only a misprision of the clerk, and *decem* was struck out, and then the title was *nomina talium*, &c. And it was adjudged, that if, after a *tales* granted, the principal panel should be quashed, the *tales* should stand good, and more be added, &c. 4 *Rep.* 103: 2 *Cro.* 316.

Before the *stat.* 3 *Geo.* 2. *c.* 25, twenty-four different Jurors were returned for the trial of each separate cause in the manner of twenty-four special Jurymen at present; hence the necessity of praying a *tales*, from the non-attendance of twelve unexceptionable persons in each panel, would frequently occur. And by *stat.* 7 & 8 *W.* 3. *c.* 32, it was enacted, that the *tales*-men should be selected from those who had been summoned on other panels. But since the practice was introduced by the said *stat.* 3 *Geo.* 2. *c.* 25, of impanelling not less than forty-eight, nor more than seventy-two, for the trial of all common causes, the provisions of the statutes respecting a *tales*, are now confined, in a great measure, to Special Juries. If a *tales* in default of special Jurymen is prayed, it is supplied agreeably to *stat.* 7 & 8 *W.* 3. *c.* 32, from the panel of common Jurymen. No *tales* can be prayed where all the special Jurymen are absent. A *tales* may be prayed as in civil actions in cases of misdemeanor tried by writ of *nisi prius.* 3 *St. Tr.* 57.

When a sufficient number of persons impanelled, or *tales*-men, appear, they are then separately *sworn*, "well and truly to try the issue joined between the parties, and a true verdict to give according to the evidence," and hence they are denominated the Jury, *jurata*; and Jurors, sc. *juratores.*

The number of the Jury thus sworn must in general be twelve; to this there are, however, a very few exceptions.

In the manor of *Penryn Farrein*, in *Cornwall*, there was a custom to try an issue with *six* Jurors; but this custom was adjudged no good custom, as *Rolle*, Chief Justice, affirmed, *Mich. Term*, 1652. MSS. *Not.* The printed books also furnish two cases against such a custom; in the first of which cases, *Rolle* appears to have argued for it; and to have noticed, that there was a multitude of records in twenty several Courts in *Cornwall*, proving its prevalency. See *Fredymock* v. *Perryman*, *Cro. Car.* 259: 1 *Ro. Abr.* 564: and *Aike* & *al.* v. *Aunkin*, 1 *Sid.* 233. In some special cases only, the Jury may be less than twelve; and in some, must or may be more.—*They may be less:* Thus it may be in *Wales* under the provision of *stat.* 34 & 35 *Hen.* 8. *c.* 26, concerning *Wales*, which allows of six: See the *stat.* § 74: *Cro. Car.* 259: 1 *Sid.* 233: and *stat.* 3 *Geo.* 2. *c.* 25. § 9. So also it is in some special cases in *England*, as six or eight in inquiry of damages on default, and in inquiry of waste; though this latter has been questioned, and even denied. *Spelm. Gloss. voc. Jurata*: *F. N. B.* 107. (C): *Dunc. Trials per Pais*, *c.* 6: : *Vent.* 113: *Finch L.* 400. Further, there is in *Glanvil*, a writ for a Jury of eight to inquire into the age where infancy is alledged. *Glanvil*, *l.* 13. *c.* 14, 15, 16. See title *Infant*—.Instances, in which the law allows or requires *more than twelve*, are, *Attaint*, in which there must be *twenty-four*; the *Grand Assise*, in which there must be sixteen; the *Grand Jury*, for indictments, which usually consist of some number between twelve and twenty-three; a writ of inquiry of *Waste*, in which thirteen have been allowed. *Finch L.* 484: *Spelm. Gloss. voc. Jurata*: 2 *H. H. P. C.* 161: *Cro. Car.* 414: 1 *Inst.* 155, *a. in n.*

II. As

II. As the Jurors appear, when called, they shall be sworn, unless *challenged* by either party. Challenges are of two sorts, challenges to the *array*, and challenges to the *polls*.

CHALLENGES to the Array, are at once an exception to the whole panel, in which the Jury are arrayed or set in order by the Sheriff in his return; and they may be made on account of partiality, or some default in the Sheriff, or his under officer who arrayed the panel. And, generally speaking, the same reasons that before the awarding the *venire* were sufficient to have directed it to the coroners or elisors, will also be sufficient to quash the array, when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the Sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array. Formerly, if a Lord of Parliament had a cause to be tried, and no knight was returned upon the Jury, it was a cause of challenge to the array. *Co. Lit.* 156: *Selden Baronage*, II, 11. But an unexpected use having been made of this dormant privilege by a spiritual Lord, (the Bishop of *Worcester*, *M.* 23 *Geo.* 2. *B. R.*) it was abolished by *stat.* 24 *Geo.* 2. *c.* 18. But still in an attaint, a knight must be returned on the Jury. *Co. Lit.* 156.

Also by the policy of the antient law, the Jury was to come *de vicineto*, from the neighbourhood of the vill or place where the cause of action was laid in the declaration, and therefore some of the Jury were obliged to be returned from the hundred in which such vill lay; and, if none were returned, the array might be challenged for defect of hundredors. For, living in the neighbourhood, they were properly the very country, or *pais*, to which both parties had appealed; and were supposed to know before-hand the characters of the parties and witnesses, and therefore the better knew what credit to give to the facts alleged in the evidence. But this convenience was over-balanced by another very natural and almost unavoidable inconvenience; that Jurors coming out of the immediate neighbourhood, would be apt to intermix their prejudices and partialities in the trial of right. And this our law was so sensible of, that it has for a long time been gradually relinquishing this practice; the number of necessary hundredors in the whole panel, which, in the reign of *Edward* III. were constantly six, being in the time of *Fortescue* reduced to *four*. *Gilb. Hist. C. P. c.* 8: *Fortesc. de Laud. Ll. c.* 25. Afterwards, indeed, *stat.* 35 *Hen.* 8. *c.* 6, restored the antient number of *six*; but that clause was soon virtually repealed by *stat.* 27 *Eliz. c.* 6, which required only *two*. And Sir *Edward Coke* also gives us such a variety of circumstances, whereby the Courts permitted this necessary number to be evaded, that it appears they were heartily tired of it. 1 *Inst.* 157. At length, by *stat.* 4 & 5 *Ann. c.* 16, it was entirely abolished upon civil actions, except upon penal statutes; and upon those also by *stat.* 24 *Geo.* 2. *c.* 18, the Jury being now only to come *de corpore comitatûs* from the body of the county at large, and not *de vicineto*, or from the particular neighbourhood.

The array, by the antient law, may also be challenged, if an alien be party to the suit, and, upon a rule obtained by his motion to the Court, for a Jury *de medietate linguæ*, such a one be not returned by the Sheriff, pursuant to the *stat.* 28 *Ed.* 3. *c.* 13, enforced by *stat.* 8 *Hen.* 6. *c.* 29; which enacts, that where either party is an alien born, the Jury shall be one half denizens, and the other aliens, (if so many be forth-coming in the place,) for the more impartial trial. A privilege indulged to strangers in no other country in the world, but which is as antient with us as the time of King *Ethelred*. But when both parties are aliens, no partiality is to be presumed to one more than another; and therefore it was resolved soon after the *stat.* 8 *Hen.* 6, that where the issue is joined between two aliens, (unless the plea be had before the Mayor of the Staple, and thereby subject to the restrictions of *stat.* 27 *Edw.* 3. *st.* 2. *c.* 8,) the Jury shall all be denizens. *Yearb.* 21 *Hen.* 6. 4. And it now might be a question, how far the *stat.* 3 *Geo.* 2. *c.* 25, (before referred to) hath in civil causes undesignedly abridged this privilege of foreigners, by the positive directions therein given concerning the manner of impanelling Jurors, and the persons to be returned in such panel. So that, (unless this statute is to be construed by the same equity, which *stat.* 8 *Hen.* 6. *c.* 29, declared to be the rule of interpreting *stat.* 2 *H.* 5. *st.* 2. *c.* 3, concerning the landed qualification of Jurors in suits to which aliens were parties,) a Court might perhaps hesitate, whether it has now a power to direct a panel to be returned *de medietate linguæ*; and thereby alter the method prescribed for striking a Special Jury, or balloting for common Jurors.

Challenges to the Polls, in capita, are exceptions to particular Jurors; by the laws of *England*, in the time of *Bracton* and *Fleta*, a Judge might be refused for good cause; but now the law is otherwise, and it is held, that Judges and Justices cannot be challenged. See *Bract. l.* 5. *c.* 15: *Fleta, l.* 6. *c.* 37: *Co. Lit.* 294.

Challenges to the Polls of the Jury (who are judges of fact) are reduced to four heads by Sir *Edward Coke*; *propter honoris respectum*; *propter defectum*; *propter affectum*; & *propter delictum*. 1 *Inst.* 156.

Propter honoris respectum, as if a Lord of Parliament be impanelled on a Jury, he may be challenged by either party, or he may challenge himself.

Propter defectum, as if a Juryman be an alien born, this is defect of birth: if he be a slave or bond-man, this is defect of liberty, and he cannot be *liber et legalis homo*. Under the word *homo* also, though a name common to both sexes, the female is however excluded, *propter defectum sexûs*: except when a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspected to be intended; then upon the writ *de ventre inspiciendo*, a Jury of women is to be impanelled to try the question, 'whether with child or not.' *Cro. Eliz.* 566. See this Dictionary, title *Ventre inspiciendo*.

But the principal deficiency is defect of estate, sufficient to qualify him to be a Juror. This depends upon a variety of statutes. First, by *stat. Westm.* 2. 13 *Ed.* 1. *c* 38, none shall pass on Juries in assises within the county, but such as may dispend twenty shillings by the year, at the least, which is increased to forty shillings by *stats.* 21 *Ed.* 1. *st.* 1: 2 *Hen.* 5. *st.* 2. *c.* 3. This was doubled by *stat.* 27 *Eliz. c.* 6, which requires, in every such case, the Jurors to have estate of freehold to the yearly value of four pounds at the least. This qualification was raised by *stat.* 16 & 17 *Car.* 2. *c.* 3, to twenty pounds *per annum*; which being only a tempo-

rary

trary act, so three years, was suffered to expire without renewal, to the great debasement of Juries. However, by *stat.* 4 & 5 *W.* & *M. c.* 24, it was again raised to ten pounds *per annum* in *England*, and six pounds in *Wales*, of freehold lands or *copyhold*; which is the first time that copyholders (as such) were admitted to serve upon Juries in any of the King's Courts; though they had before been admitted to serve in some of the Sheriff's Courts, by *stats.* 1 *Ric.* 3. *c.* 4: 9 *Hen.* 7. *c.* 13. All cities, boroughs, and corporate towns, are excepted out of the *stat.* 4 & 5 *W.* & *M. c.* 24. And by an antient statute, 23 *Hen.* 8. *c.* 15, trials *of Felons* in corporations may be by freemen worth forty pounds in goods. Lastly, by *stat.* 3 *Geo.* 2. *c.* 25, any leaseholder for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of twenty pounds *per annum*, over and above the rent reserved, is qualified to serve upon Juries. On account of the small number of freeholders in the county of *Middlesex*, and the frequent occasion for Juries at *Westminster*, in that county, it is enacted, by *stat.* 4 *Geo.* 2. *c.* 7, that a leaseholder for any number of years, if the improved annual value of his lease be fifty pounds, above all ground rents and other reservations, shall be liable to serve upon Juries for that county. By *stat.* 3 *Geo.* 2. *c.* 25, persons impanelled upon any Jury within the city of *London* shall be householders, and possessed of some estate either real or personal of the value of one hundred pounds. When the Jury is *de medietate linguæ*, that is, one moiety of the *English* tongue or nation, and the other of any foreign one, no want of lands shall be cause of challenge to the alien; for as he is incapable to hold any, this would totally defeat the privilege. See *ante*, and *stats.* 2 *Hen.* 5. *st.* 2. *c.* 3: 8 *Hen.* 6. *c.* 29.

Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a *principal* challenge, or *to the favour*. A *principal* challenge is such, where the cause assigned carries with it *primâ facie* evident marks of suspicion, either of malice or favour: as, that a Juror is of kin to either party within the ninth degree, *Finch L.* 401; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a Juror in the same cause; that he is the parties master, servant, counsellor, steward, or attorney, of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be over-ruled, for Jurors must be *omni exceptione majores*. Challenges *to the favour*, are where the party hath no principal challenge; but objects only some probable circumstances of suspicion, as acquaintance and the like; the validity of which must be left to the determination of *Triors*, whose office it is to decide whether the Juror be favourable or unfavourable. The Triors, in case the first man called be challenged, are two indifferent persons named by the Court, and, if they try one man, and find him indifferent, he shall be sworn; and then he and the two Triors shall try the next; and, when another is found indifferent and sworn, the two Triors shall be superseded, and the two first sworn on the Jury shall try the rest. *Co. Lit.* 158.

Challenges *propter delictum* are for some crime or misdemeanor, that affects the Juror's credit, and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if for some infamous offence he hath received judgment of the pillory, tumbrel, or the like, or to be branded, whipt, or stigmatized; or if he be outlawed or excommunicated; or hath been attainted of false verdict, *præmunire*, or forgery; or, lastly, if he hath proved recreant when champion in the trial by battel, and thereby hath lost his *liberam legem*. A Juror may himself be examined on oath of *voir dire, veritatem dicere*, with regard to such causes of challenge, as are not to his dishonour or discredit, but not with regard to any crime, or any thing which tends to his disgrace or disadvantage. *Co. Litt.* 158. *b*: and see the notes there.

Besides these challenges, which are exceptions against the fitness of Jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by the Jurors themselves, which are matter of exemption; whereby their service is *excused*. As by *stat. Westm.* 2. 13 *E.* 1. *c.* 38, sick and decrepit persons, persons not commorant in the county, and men above seventy years old; and by the *stat.* 7 & 8 *W.* 3. *c.* 32, infants under twenty-one. This exemption is also extended by divers statutes, customs, and charters, to physicians, and other medical persons, counsel, attornies, officers of the Courts, and the like; all of whom, if impanelled, must shew their special exemption. Clergymen are also usually excused, out of favour and respect to their function: but if they are seised of lands and tenements, they are, in strictness, liable to be impanelled in respect of their lay fees, unless they be in the service of the King or some Bishop. *F. N. B.* 166: *Reg. Brev.* 179.

Barons of the realm, as has been already hinted, and all above them, are not to serve in any ordinary Jury; and others may have this privilege by writ, or the King's grant, &c. 6 *Rep.* 53: 1 *Brownl.* 30. But such as have charters of exemption, shall be sworn on great assises, and in attaints, &c. when their oath is requisite. *Stat.* 52 *H.* 3. *c.* 14.

It has been already remarked that a person indicted of treason may challenge *thirty-five* of those returned on the panel of Jurors to try him, without cause shewn; and if two or more are to be tried, they may *challenge* so many each; but then they are to be tried singly, or all may *challenge* that number in the whole, and be tried jointly. 3 *Salk.* 81. By *stat.* 3 *Hen.* 7. *c.* 14, in treason, by the King's sworn servants, for compassing to kill the the King, tried before the steward of the King's household, &c. no *challenge* shall be allowed but for malice. Some statutes which take away the benefit of clergy from felons, exclude those from their clergy who peremptorily *challenge* more than *twenty*, whereby they are liable to judgment of death. See *stats.* 22 *Hen.* 8. *c.* 14: 28 *Hen.* 8. *c.* 1: 1 *E.* 6. *c.* 12. § 11: 3 & 4 *W.* & *M. c.* 9. But it is now settled, that if the offender be within the benefit of clergy, the *challenge* shall be over-ruled, and the party put upon his trial. 2 *Hawk. P. C. c.* 43.

All *peremptory challenges* are to be taken by the party himself; and where there are divers *challenges*, they must be taken all at once. But there can be no *challenge* till the Jury is full; and then the array is to be *challenged* before one of them is sworn. *Hob.* 235. Where the King is party, if the other side *challenge* a Juror above the number allowed by law, he ought to shew the

cause

cause of his *challenge* immediately. 1 *Bulst*. 191. A defendant shall shew all causes of *challenge*, before the King shall shew any. 2 *Hawk. P. C. c*. 43.

If the Juror is convicted and attainted of treason, felony, perjury, adjudged to the pillory, or other punishment whereby he becomes infamous, or is outlawed or excommunicate, these are all principal challenges; but in these cases and others, he that challengeth is to shew the record, if he will have it take place as a principal *challenge*; otherwise he must conclude to the favour, unless it be a record of the same Court. *Co. Litt*. 157. A person under prosecution for any crime, may, before indicted, *challenge* any of the *Grand Jury*, as being outlawed, &c. or returned at the instance of the prosecutor, or not returned by the proper officer, &c. 2 *Hawk. P. C. c*. 25. § 16.

A principal *challenge* being found true, is sufficient without leaving it to Triers; but if some of a Jury are *challenged* for favour, they shall be tried by the rest of the Jury whether indifferent. *Co. Litt*. 158. Where a *challenge* is made to the array, the Court appoint the two Triers, who are sworn, and then the cause of favour is shewed to them, which may be called the issue they are to try; and if it is proved, then they give their verdict that they are not indifferently impanelled, and this is entered of record; but if the favour is not proved, then they say the Jury were indifferently impanelled, and so the trial goes on, without making any entry of the matter. 1 *Bulst*. 114.

If one take a principal *challenge* against a Juror, he cannot afterwards *challenge* that Juror for favour, and wave his former *challenge*; but a *challenge* may be made to the polls after it has been made to the array. *Wood*. 592. A new Jury is to be impanelled by the Coroner, where the array is quashed for partiality, &c. of the Sheriff. *Trials per pais*, 15.

If a plaintiff or defendant have action of battery, &c. against the Sheriff, or the Sheriff against them, it is cause of *challenge*; and if either of the parties have action of debt against the Sheriff; or if the Sheriff hath any parcel of land depending on the same title as the parties; or if he, or his bailiffs who returned the Jury, be under the distress of either party, &c.; these are good causes of *challenge*. Where one of the Jurors hath a suit at law depending with the plaintiff, it is good *challenge*. *Stile*. 129. An action depending betwixt either of the parties and a Juror, implying malice, is cause of *challenge*; and a Juror may be challenged for holding lands by the same title as the defendant. 2 *Leon*. 40. If a person owes suit of court, &c. to a lord of a hundred who is plaintiff, it is a principal *challenge*, as he is within the distress of the plaintiff. *Dyer*. 176. But it is said to be no *challenge*, that a person is in debt to either party. 1 *Nels. Abr*. 426. A Juror returned by a wrong name may be challenged and withdrawn, so that the Jury shall not be taken; yet a *tales* may be granted. 1 *Lil. Abr*. 260. And if a Juror declares the right of either of the parties, &c. it is cause of *challenge*; though it hath been ruled that it is not sufficient cause of *challenge*, that a Juror delivered his opinion touching the title of the land in question, because his opinion may be altered on hearing the evidence. *Pasch*. 23 *Car. B. R.*

If there are two defendants in a real action, or two tenants, and one *challenge* a Juror, and the other will not, the Juror (the *challenge* being allowed) shall be drawn against the rest. 11 *H*. 6. 15: *Jenk. Cent*. 114. To say of a person to be tried for any crime, that *he is guilty, or will be hanged*, &c. is good cause of *challenge*; but the prisoner must prove it by witnesses, and not out of the mouth of the Juryman, who may not be examined: and though a Juryman may be asked upon a *voir dire*, whether he hath any interest in the case, or whether he hath a freehold, &c. yet a Juryman or a witness shall not be examined whether he hath been convict of felony, or guilty of any crime, &c. which would make a man discover that of himself which tends to make him infamous, and the answer might charge him with a misdemeanor. 1 *Salk*. 153.

If one *challenge* a Juror, and the challenge is entered, he may not have him afterwards sworn on the Jury. And if the defendant do not appear at the trial when called, he loseth his *challenge* to the Jurors, though he afterwards appear. 1 *Lil. Abr*. 259. When the Jury appear at a trial, before the Secondary calls them to be sworn, he bids the plaintiff and defendant to attend their challenges, &c.

III. The Jury, after the proofs in a cause are summed up, unless the case be very clear, withdraw from the Bar to consider of their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the Judge, till they are all unanimously agreed. If they eat or drink at all, or have any eatables about them, without consent of the Court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties, or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if, to prevent disputes, they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the Jurors do not agree in their verdict before the Judges are about to leave the town, though they are not to be threatened or imprisoned, the Judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. *Mirr. c*. 4. § 24: *Lib. Ass. fol*. 40. *pl*. 11. This necessity of a total unanimity seems to be peculiar to our own constitution. See *Barrington on the Statutes*, 19, 20, 21: 3 *Comm. c*. 23; and Mr. *Christian*'s notes there; and *post*. IV.

After a Juror is sworn he may not go from the bar until the evidence is given, for any cause whatsoever, without leave of the Court; and with leave he must have a keeper with him. 2 *Lil*. 123, 127. A witness may not be called by the Jury to recite the same evidence he gave in Court, when they are gone from the bar. *Cro. Eliz*. 189. Nor may a party give a brief or notes of the cause to the Jury to consider of; if he doth, he and the Jurors may be fined. *Moor*. 815.

If Jurymen after sworn, either before or after they are agreed of their verdict, eat and drink, the verdict may be good; but they are fineable: and if it be at the charge of either party, the verdict is void. *Dalis*. 10: *Cro. Jac*. 21. If they agree to cast lots for their verdict, or to bring in guilty or not guilty, as the Court shall seem inclined, they may be fined. 2 *Lev*. 205: *Cro. Eliz*. 779. But a Jury have been permitted to recall their verdict; as where one was indicted of felony, the Jury found

found him not guilty, but immediately before they went from the bar, they said they were mistaken, and found him guilty, which last was recorded for their verdict. *Plowd.* 211.

The Jury are to judge upon the evidence given, but the *Jurors* may not contradict what is agreed in pleading between the parties; if they do, it shall be rejected; and where the *Jury* find the fact, but conclude upon it contrary to law, the Court may reject the conclusion. 1 *And.* 41: 10 *Rep.* 56: *Co. Litt.* 22: *Hob.* 222. The *Jury* may find a thing done in another county, upon a general issue; and foreign matters done out of the realm, &c. *Moor. c.* 238: *Godb.* 33. Jurors having once given their verdict, although it be imperfect, shall not be sworn again in the same issue, unless it be in assize. 2 *Cro.* 210.

If a *Juryman* is guilty of bribery, he is disabled to be of any assize or *Jury*; and shall be imprisoned and ransomed at the King's will. *stat.* 5 *E.* 3. *c.* 10. *Jurymen* accused of bribery, are to be tried presently by a *Jury* then taken. *stat.* 34 *E.* 3. *c.* 8. And if a Juror takes any thing of either party to give his verdict, he shall pay *ten times as much* as taken; or suffer a year's imprisonment. *stat.* 38 *E.* 3. *c.* 12. And on this statute a writ of *decies tantum* lies; and this though they give no verdict, or the verdict be true; if they take money. *Reg. Orig.* 188: *F. N. B.* 171: *New Nat. Br.* 380: *Dyer* 95: See this Dict. tit. *Decies tantum*; *Embracery.*

A *Jury* sworn and charged in case of life and member, cannot be discharged till they give a verdict: In civil cases, it is otherwise; as where nonsuits are had, &c. And sometimes when the evidence has been heard, the parties doubting of the verdict, do consent that a Juror shall be withdrawn or discharged. 1 *Inst.* 154, 227.

A *Verdict*, *vere dictum*, is either *privy* or *public*. A privy verdict is when the Judge hath left or adjourned the Court, and the Jury being agreed, in order to be delivered from their confinement, obtain leave (in civil cases) to give their verdict privily to the Judge out of Court; which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in Court; wherein the Jury may if they please vary from their privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, and therefore very seldom indulged. But the only effectual and legal verdict, is the public verdict; in which they openly declare to have found the issue for the plaintiff or for the defendant; and if for the plaintiff, they assess the damages also sustained by him. Sometimes if there arises in the case any difficult matter of law, the Jury for the sake of better information, and to avoid the danger of having their verdict attainted, will find a *special* verdict, which is grounded on *stat. Westm.* 2. 13 *E.* 1. *c.* 30. § 2. And herein they state the naked facts as they find them to be proved, and pray the advice of the Court thereon; concluding conditionally, that if upon the whole matter the Court shall be of opinion that the plaintiff had cause of action, they then find for him; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the Court at *Westminster*, from whence the issue came to be tried.—Another method of finding a species of special verdict is where the Jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the Judge or the Court above, on a special case stated by the counsel on both sides with regard to a matter of law.—But in both these instances the Jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law; and without either special verdict or special case, may find a verdict absolutely either for the plaintiff or the defendant. *Litt.* § 386: 3 *Comm. c.* 23.—It may be sufficient in this place to remark, that in case the Jury find against what in the opinion of the Court above is law, such Court will *repeatedly* grant a new trial, till what they consider to be a proper verdict is found.—This might alone be an answer as to the Juries being judges of law in *civil* cases; but see *post.* IV. 2. and this Dict. title *Trial*; *(New Trial.)*

It was an antient doctrine, that such evidence as the Jury might have in their own consciences, by their private knowledge of facts, had as much right to sway their judgment, as written or parol evidence delivered in Court. And therefore it hath been often held, that though no proofs be produced on either side, yet the Jury might bring in a verdict. *Yearb.* 14 *Hen.* 7. 29: *Plowd.* 12: *Hob.* 227: 1 *Lev.* 87. For the oath of the Jurors, to find according to their evidence, was construed to be, to do it according to the best of their own knowledge. *Vaugh.* 148, 149. This seems to have arisen from the antient practice in taking recognitions of assize, at the first introduction of that remedy; the Sheriff being bound to return such recognitors as knew the truth of the fact, and the recognitors, when sworn, being to retire immediately from the bar, and bring in their verdict according to their own personal knowledge, without hearing extrinsic evidence, or receiving any direction from the Judge. *Bract. l.* 4. *tr.* 1. *c.* 19 § 3: *Fleta. l.* 4. *c.* 9. § 2. And the same doctrine, (when attaints came to be extended to trials by Jury, as well as to recognitions of assize,) was also applied to the case of common Jurors; that they might escape the heavy penalties of the *attaint*, in case they could show by any additional proof that their verdict was agreeable to the truth, though not according to the evidence produced: with which additional proof the law presumed they were privately acquainted, though it did not appear in Court. But this doctrine was again exploded, when *attaints* began to be disused, and *new trials* introduced in their stead. For it is quite incompatible with the grounds upon which such new trials are every day awarded, *viz.* that the verdict was given *without*, or *contrary to*, evidence. And therefore, together with new trials, the practice seems to have been first introduced, which now universally obtains, that if a Juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publickly in Court. See *Styl.* 233: 1 *Sid.* 133.

IV. 1. The *Trial by* Jury, *in Criminal Cases*, is more peculiarly the grand bulwark of the liberties of every subject of Great Britain; and is secured, as has already been mentioned, by the Great Charter, 9 *H.* 3 *c.* 29.

The antiquity and excellence of this trial, in civil cases, has already been explained at length. The arguments in its favour hold much stronger in criminal cases. Our law has therefore wisely and mercifully placed the strong *twofold* barrier, of a *presentment* and a *trial* by Jury, between the liberties of the People and the prerogative of the Crown. It has with excellent forecast contrived, that

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that no man should be called to answer for any capital crime, unless on the preparatory accusation of twelve *or more* of his fellow-subjects, the Grand Jury: and that the truth of every accusation should be afterwards confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist so long as this *Palladium* remains sacred and inviolate; unawed by the power of the Monarch, and unstained by the weakness or wickedness of those who are called upon to exercise this invaluable privilege.

The Grand Jury generally consists of twenty-four men of greater quality than the other, chosen indifferently out of the whole county by the Sheriff; and the Petit Jury consisteth of twelve men, of equal condition with the party indicted, impanelled in criminal cases, called the Jury of Life and Death: The Grand Jury find the bills of indictment against criminals, and the Petit Jury convict them by verdict, in the giving whereof all the twelve must agree; and according to their verdict the judgment passeth. 3 *Inst.* 30, 31, 221. See this Dict. title *Indictment.*

When a prisoner on his arraignment has pleaded *not guilty*, and for his trial hath put himself upon his country, which country the Jury are, the Sheriff of the county must return a pannel of Jurors; freeholders without just exception, and of the neighbourhood; that is, of the county where the fact is committed. 2 *Hal. P. C.* 264: 2 *Hawk. P. C. c.* 40. If the proceedings are before the Court of K. B. time is allowed, between the arraignment and trial, for a Jury to be impanelled by writ of *venire facias* to the Sheriff as in civil causes: But before Commissioners of *oyer and terminer*, and gaol delivery, the Sheriff, by virtue of a general precept directed to him beforehand, returns to the Court a pannel of forty-eight Jurors, to try all felons that may be called upon their trial at that session. 4 *Comm. c.* 27.

Challenges may be made in criminal cases either on the part of the King, (the prosecution,) or on that of the prisoner; and either to the whole array or to the separate polls, for the very same reasons that they may be made in civil causes. For it is here at least as necessary as there, that the Jury be liable to no objection; that the Sheriff or returning officer be totally indifferent; and that where an alien is indicted, the Jury should be half foreigners, if so many are found in the place: this latter privilege however does not hold in treasons, aliens being very improper judges of the breach of allegiance. See 2 *Hawk. P. C. c.* 43. § 37: 2 *Hal. P. C.* 271.

Challenges upon any of the accounts specified in civil cases are styled challenges *for cause*: which may be without stint in both criminal and civil trials. But in criminal cases, at least in capital ones, there is in favour of life allowed to the prisoner an arbitrary and capricious species of challenge, to a certain number of Jurors, without shewing any cause at all: a provision full of that tenderness and humanity to prisoners for which the *English laws* are justly famous. This is grounded on two reasons, *viz.* the sudden impressions and unaccountable prejudices, which every one is apt to conceive on the bare looks and gesture of another; and the consideration that the very questioning a person's indifference may provoke resentment;—a Juror therefore challenged for insufficient cause may afterwards be peremptorily challenged.

This privilege of peremptory challenges, though allowed to the prisoner is denied to the King, by *stat.* 33 *E.* 1. *st.* 4; which enacts, that the King shall challenge no Jurors without assigning a cause certain, to be tried and approved by the Court. However, it is held that the King need not assign his cause of challenge till all the pannel is gone through, and unless there cannot be a full Jury without the persons so challenged: and then and not sooner the King's counsel must shew the cause, otherwise the Jurors shall be sworn. 2 *Hawk. P. C. c.* 43. § 3: 2 *Hal. P. C.* 271: *Raym.* 473.

These peremptory challenges of the prisoner must however have some reasonable boundary: this is settled by the common law at the number of *thirty-five*, that is one under the number of three full Juries: and if a prisoner peremptorily challenged above that number, and would not retract his challenge, he was formerly to be dealt with as one who stood mute, or refused his trial, by sentencing him in cases of *felony* to the *peine forte & dure*; (pressing to death, now totally abolished: See that title, and title *Trial*;) and by attainting him in treason. And so the law stands at this day with regard to treason of any kind. But by stat. 22 *H.* 8. *c.* 14, (which with regard to felonies stands unrepealed by stat. 1 & 2 *P. & M. c.* 10,) no person arraigned for *felony* can be admitted to make any more than *twenty* peremptory challenges. If in such case the prisoner peremptorily challenged twenty-one, the old opinion was, that judgment of *peine forte & dure* should be given as where he challenged thirty-six at the common law. 2 *Hawk. P. C. c.* 43. § 9. But the better opinion seems to be, that such challenge shall be only disregarded and overruled, and the Juror be regularly sworn. 3 *Inst.* 227: 2 *Hal. P. C.* 270.

If by reason of challenges, or the default of Jurors, a sufficient number cannot be had of the original pannel, a *tales* may be awarded, as in civil causes: Though this cannot take place in mere commissions of gaol-delivery, but in which the Court may by word order a *new* pannel to be returned *instanter*. 4 *Inst.* 68: 4 *St. Tr.* 728. *Cook's Ca.* See *ante.* When at length the number of twelve is completed, they are sworn, "well and truly to try, and true deliverance make, between our Sovereign Lord the King, and the prisoner whom they have in charge; and a true verdict to give according to their evidence." 4 *Comm.* 27.

When the evidence on both sides is closed, and indeed when any evidence hath been given, the Jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict; but are to consider of it, and deliver it in with the same forms as upon civil causes; only they cannot, in a criminal case which touches life or member, give a *privy* verdict. See 1 *Inst.* 227: 3 *Inst.* 110: *Fost.* 27: 2 *Hal. P. C.* 300: 2 *Hawk. P. C. c.* 47. § 1, 2. But the Judges may adjourn, while the Jury are withdrawn to confer, and return to receive the verdict in open Court. 3 *St. Tr.* 731: 4 *St. Tr.* 231, 455, 485.

On the State Trials for *High Treason*, at the Sessions-house in the *Old Bailey, London*, under a special commission in 1794, against *Tho. Hardy, Horne Tooke*, and several others charged with having formed the destructive

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project of *A Convention of the People*, to overthrow the Monarchy and the Constitution, the Jury on each Prisoner were kept together in the Custody of the *Sheriff* or his *Bailiffs* night and day, for several days successively, during the whole of the proceedings on each trial, and till they gave their verdicts. The Court adjourned from evening till morning; and also once in the day for the purpose of refreshment, and from Saturday evening till Monday morning, when Sunday intervened.—The Sheriff was charged to see that no improper communication was had with the Jury during these intervals. And the first Jury having been sent several nights to an Hotel in Covent Garden, at some distance from the Court, a slight suspicion arising that they were not kept quite free from extraneous information, the subsequent Juries were accommodated with beds, in rooms nearly adjoining the Court.

A Culprit was indicted for murder. The Jury were sworn, and part of the evidence given, but before the trial was over, one of the Jurymen was taken ill, went out of Court with the Judge's leave, and presently after died. The Judge, doubting whether he could swear another Jury, discharged the eleven, and left the prisoner in gaol. The Court was moved for a writ of *habeas corpus*, to bring up the prisoner that he might be discharged, having been once put upon his trial. This being a new case, the Court said they would advise with the other Judges upon it; and afterwards they all agreed that the prisoner might be tried at the next assizes, or the Judge might have ordered a new Jury to have been sworn immediately. *Mich.* 4 *Geo.* 3. *R.* v. *Gould. Burn's J.* title *Jurors* V. *ad fin.*

The verdict in a criminal case thus publickly and openly given may be either *general*, *Guilty*, or *Not Guilty*; in which precise terms alone a general verdict must be given; or *special*, when it must set forth all the circumstances of the case, and pray the judgment of the Court whether for instance, on the facts stated, it be murder, manslaughter, or no crime at all.

This special verdict is where the Jury *doubt* the matter of law, and therefore *choose* to leave it to the determination of the Court; though they have an *unquestionable right* of determining upon *all the circumstances*, and finding a general verdict if they think proper so to hazard *a breach of their oaths*: and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attaint at the suit of the King, but not at the suit of the prisoner. 2 *Hal. P. C.* 310: 4 *Comm.* 361. *c.* 27: See *post.* IV. 2.

The instances which formerly happened of *fining*, *imprisoning*, or otherwise punishing Jurors, merely at the discretion of the Court, for finding their verdict contrary to the direction of the Judge, were *arbitrary*, *unconstitutional*, *and illegal*; and indeed it would be a most unhappy case for the Judge himself, if the prisoner's fate depended on his directions; unhappy also for the prisoner; for if the Judge's opinion must rule the verdict, the trial by Jury would be useless. 2 *Hal. P. C.* 313.

Yet in many instances where, contrary to evidence, the Jury have found the prisoner *guilty*, their verdict hath been mercifully set aside, and a new trial granted by the Court of King's Bench: for in such case it cannot be set right by attaint. 1 *Lev.* 9: *T. Jones.* 163: 10 *St. Tr.* 416. As the party is found guilty in fact, by twenty-four; 1 *Rol.* 280. *l.* 2. 7. But the Court have never interfered even to grant a new trial where a prisoner is once *acquitted*; however contrary the verdict might be to the opinion of the Judge, or to what, in the eyes of all, but the Jury, might be deemed the real justice of the case. See 2 *Hawk. P. C. c.* 47. § 11, 12; where it is positively stated as *settled*, that the Court cannot set aside a verdict which *acquits* a defendant of a prosecution properly criminal. See this Dict. title *Trial*; (*New Trial.*)

2. The Question whether *Juries* are, or are not, *Judges of Law* as well as of *Fact*, has been long agitated with great zeal and energy; probably more through a spirit of party, than from a desire of establishing any undoubted determination on the subject. There cannot, after all, as it seems, be any great difficulty, to an unbiassed and unprejudiced mind, in determining the controversy.

We have already seen, that Juries may, by a general verdict of *acquittal* in criminal prosecutions, prevent the case from coming under the final consideration of the Court; who, in that event, have no opportunity of deciding on the question of law. But in cases of *conviction*, it is the established rule, that the Judges of the Court in which the prosecution is carried on, may arrest the judgment, or grant a new trial, where they are of opinion, that the offence is not such as is charged in the indictment; that the indictment is defective in charging it; or, that the verdict is against evidence. Thus much therefore appears indisputable, that in one event the Court are the acknowledged Judges of the law, as the Jury are of the fact: and that the latter have the *absolute* POWER of ACQUITTAL in criminal cases; but not of conviction. A provision, indeed, full of that wisdom and mercy which so eminently characterize the *English* laws.

This litigated question has principally arisen on prosecutions for *Libels*, and above all others on those for *State Libels*; in which it had for a long time been the usage for the Judge to direct the Jury, that if the fact of the publication of the paper charged to be a libel was proved, and if they believed the innuendoes in the indictment, they must find the defendant guilty; without adverting to any other circumstances, such as whether the paper were in their opinion a libel, or published with a malicious, seditious, traiterous, &c. intention.——The Counsel for the defendants in such prosecutions always maintained, that it was the province of the Jury to judge whether the paper was a libel; (undoubtedly a question of mere law); and also whether it were published with a malicious, seditious, &c. intention, as charged;—a complicated question of law and fact.

Mr. *Erskine* was the most strenuous asserter of this latter doctrine; and by the indefatigable exertions of him and Mr *Fox*, the following act of parliament was obtained with a view expressly of settling this question by legislative authority:

The *stat.* 32 *Geo.* 3. *c.* 60, after reciting that "doubts had arisen whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the King and the defendant, on the plea of *not guilty* pleaded, it be competent to the Jury, impanelled to try the same, to give their verdict *upon the whole matter in issue*;" enacts, that "on every such trial, the Jury, sworn to try *the issue*, may give a general verdict of guilty or not guilty, *upon the whole matter put in issue*, upon such indictment or information; and shall *not* be required or directed, by the

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the Court or Judge, before whom the indictment, &c. shall be tried, to find the defendant guilty, *merely* on the proof of the publication, by such defendant, of the paper charged to be a libel, and of the sense ascribed to the same in such indictment." § 1.

But it is provided by the said statute, that the Court or Judge shall, according to their discretion, give their opinion and directions to the Jury on the matter in issue, as in other criminal cases—that the Jury may also find a special verdict; and that in case the Jury shall find the defendant *guilty*, he may move in arrest of judgment, as *by law* he might have done before the passing of the act. §§ 2, 3, 4.

The above is the whole substance of the statute: the only case that appears on the subject of libels, in the books, subsequent to the passing that act, is *R.* v. *Holt*; 5 *Term Rep.* 436; which does not seem to bear upon the question, further than that Mr. *Erskine* incorrectly stated the statute, as *giving the Jury a right* to take into their consideration the intention of the defendant.

It is observable, however, that as the rule on this subject laid down by Lord *Coke*, 1 *Inst.* 155, *b*, is in a negative way; " ad quæstionem facti *non* respondent Judices, ad quæstionem juris *non* respondent Juratores—Judges are *not* to answer to the question of fact; Juries are *not* to answer to the question of law;" so this modern statute, in the same kind of language provides, that " the Jury shall *not* be required or directed to find a verdict of guilty, merely on the proof of publication, and the sense ascribed to the paper."—The statute does not proceed any further to state what matters may or may not be given or produced in evidence in such trials; nor does it say one word as to the contested point, the settling of which was the pretext for its being procured, as to the right or province of the Jury to decide the question of law. On the contrary, it is most remarkable that the doubt, expressed to have been entertained, is, whether it were competent to the Jury to give their verdict upon *the whole matter in issue*. Now this doubt certainly never existed; since, wherever the question of *Law* is in *issue*, it is always tried by the Court on a demurrer, and is never submitted at all to a Jury. On an issue of *Fact*, (such as that joined on all indictments is,) the law is never in dispute.

The provision in the act, " that in cases where the Jury shall find a verdict of *guilty*, the defendant may move in arrest of judgment, as *by law* he might have done before the passing of the act," seems as express a denial of the right of the Jury to determine the question of law, as could possibly be framed; since that question *can never arise* on a verdict of Not guilty. It was, doubtless, adopted *in majorem cautelam*; lest by any forced construction, the statute should have been interpreted as taking into consideration the question how far the Jury could act as Judges of law.

The whole fallacy of the controversy seems to have originated, first, from the complication of fact and law, which is more apparent in prosecutions for libel, than in other criminal cases: and, secondly, from confounding the terms POWER and RIGHT, as synonimous: faculties frequently so similar in their operations, that it requires the discrimination of a penetrating mind, to assign the effects arising from either to their proper source. The Jury, as the law at present stands, have the POWER *of acquittal*, absolute and uncontrouled; except may-be, by the tedious and now most uncertain process of *Attaint*; which, though it might punish the Jury for their verdict, yet could not convict the defendant, whom they had acquitted; and it is even doubted whether such attaint could be maintained, in a criminal case, against a Jury. *Vaugh.* 146. See 1 *Ro. Abr.* 281. *l.* 5: *F. N. B.* 107. *D.* cites 42 *E.* 3. 26, that it may; but which seems rather to apply to the circumstances of a civil action, In *Vaugh.* 164, *Bushell's Case*, the great case on the power of Juries, *Vaughan*, Chief Justice, cites 10 *Hen.* 4. *Attaint*, 60, 64, and says, that there is no case, in all the law, of such an attaint; nor any opinion but that of *Thirning's* in the case cited, for which there is no warrant in law; and thinks the law clear that an attaint did not lie. 3 *Vin. Abr.* tit. *Attaint* (A) pl. 17. See also the same title A. 2. pl. 12: O. pl. 3: A. 2. pl. 16: G. pl. 1, 12, 13: 1 *Inst.* 228. *a.* In 1 *Ld. Raym.* 469, it is observed, that in an attaint in a civil cause, a man's property is only brought into question a second time, and not his liberty or life. And *Hawkins* states, that it seems to be certain that no one is liable *to any prosecution whatsoever*, in respect of any verdict given by him in a criminal matter, either upon a grand or petty Jury. See 1 *Hawk. P. C. c.* 72. § 5: 2 *Hawk. P. C. c.* 22. § 20—23. —From all which authorities, it appears on the whole, that attaint in criminal cases is a very rare and doubtful proceeding; and that only instances of very undoubted and corrupt contumacy can justify even the laying a fine upon a Jury. See also this Dict. title *Attaint*.

Let it not, however, be thought invidious to remark, that there may have been verdicts in which none but the Jury themselves, or the party whose cause they espoused, were capable of conceiving that they had the RIGHT of acquittal, by constituting themselves Judges of the law. But these are cases over which it becomes a sincere lover of the Constitution, and of this most valuable branch of it, to draw a veil; in pity to the perhaps laudable and often irresistible prejudices, to which the frailty of human nature is liable.

There is no doubt that, before the passing of the above mentioned *stat.* 32 *Geo.* 3. *c.* 60, if a Jury were convinced, either that the paper alledged to be a libel was not such in law, or that the defendant published the same through an innocent negligence, or inadvertence, they had always the *power* of giving a verdict of acquittal, which could never be called in question. Whether that statute has conferred any further privilege on them is left for the Reader to determine; after considering the foregoing observations, and those which follow; extracted from two most learned, ingenious, and constitutional writers. Some repetition may, perhaps, appear in them of what has been already advanced from the pen of the Editor. He only has to say in excuse, that he committed his own thoughts to paper, before consulting those authorities.

On the trial of *John Lilburne* for treason, in 1649, high words passed between the Court and him, in consequence of his stating that the Jury were Judges both of law and fact, and citing passages in 1 *Inst.* 228, *a*, to prove it. 2 *St. Tr.* 4 *ed.* 69. In the case of *Penn* and *Meade*, who, in 1670, were indicted for unlawfully assembling the people, and preaching to them, the Jury gave

gave a verdict against the directions of the Court in point of law, and for this were committed to prison. But the commitment was questioned, and on a *habeas corpus* brought in the Court of Common Pleas, it was declared illegal, *Vaughan*, Chief Justice, distinguishing himself on the occasion by a most profound argument in favour of the rights of a Jury. *Bushell's Ca.* 1 *Freem.* 1: *Vaugh.* 135. However, the contest did not cease, as appears by Sir *John Hawles*'s famous 'Dialogue between a Barrister and a Juryman,' which was published in 1680, to assert the claims of the latter, against the then current doctrine, decrying their authority. Since the Revolution also, many cases have occurred, in which there has been much debate on the like topick, See *Hardw.* 23: *Franklyn's Ca.* 9 *St. Tr.* 275: *Peter Zenger's*, *ib*: *Owen's Ca.* 10 *St. Tr.* 196. *App*: *Woodfall's Ca.* 5 *Burr.* 261: [*R.* v. *Shipley, Dean of St. Asaph.*] By attending to the cases before referred to, it will be easy to trace the progress of this controversy on the limit of the Jury's province, 1 *Inst.* 155. *b. in n.*

Mr. *Hargrave*, the author of the above note, then proceeds to give his own ideas on the subject; which from the known learning and probity of the writer, are deserving very serious attention.

" On the one hand, says he, as the Jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable that they *so far* MAY *decide* upon the *law* as well as fact; such a verdict *necessarily involving* both. For this, there is the authority of *Littleton* himself, who writes, that, ' If the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally.' § 368; 228. *a.* But, on the other hand, it seems clear, that questions of law generally, and more properly, belong to the Judges, and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations.—*First*, If the parties litigating agree in their facts, the cause can never go to a Jury, but is tried on a demurrer; it being a rule, apparently without exception, that issues in law are ever determined by the Judges, and only issues of fact are tried by a Jury. 1 *Inst.* 71. *b.*—*Secondly*, Even when an issue of fact is joined, and comes before a Jury for trial, either party, by demurring to evidence, which includes an admission of the fact, to which the evidence applies, may so far draw the cause from the cognizance of the Jury; for in that case, the law is referred for the decision of the Court, from which the issue of fact comes; and the Jury is either discharged, or at the utmost, only ascertains the damages. 1 *Inst.* 72. *a*: *Cocksedge* v. *Fanshaw*, *Dougl.* 119—134: *Cort* v. *Birkbeck*, *Dougl.* 218—225: *Bull. N. P. 2d edit.* 313.—*Thirdly*, The Jury is supposed to be so inadequate to finding out the law, that it is *incumbent on the Judge* who presides at the trial, to inform them what the law is; and as a check to the Judge in the discharge of this duty, either party may, under *stat. Westm.* 2. c. 31, make his exception in writing to the Judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it. See 2 *Inst.* 426: *Trials per pais*, 8 *ed.* 222, 466: *Fabrigas* v. *Mostyn.* 11 *St. Tr.*: *Money* v. *Leach*, 3 *Burr.* 1742: *Bull. N. P. 2d ed.* 315: [This Dict. title *Bill of Exceptions.*]—*Fourthly*, The Jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large, and leave the conclusion of law to the Judges of the Court from which the issue comes. Formerly, indeed, it was doubted whether, in certain cases in which the issue was of a very limited and restrained kind, the Jury was not *bound* to find a *general* verdict: but the contrary was settled in *Dowman's Ca.* 9 *Co.* 11. *b*; and the rule now holds both in criminal and civil cases without exception. See 1 *Inst.* 227. *b*: *Staunf. P. C.* 165. *a*: 2 *Ld. Raym.* 1494.—*Fifthly*, Whilst attaints, which still subsist in law, [See *ante*,] were in use, it was hazardous in a Jury to find a general verdict where the case was doubtful, and they were apprised of it by the Judges; because if they mistook the law, [against the direction of the Judge,] they were in danger of an attaint. 1 *Inst.* 228. *a*: *Hob.* 227: *Vaugh.* 144: 2 *H. H. P. C.* 310: *Gilb. C. P. 2d edit.* 128.—*Sixthly*, If the Jury find the facts specially, and add their conclusion as to the law, it is not binding on the Judges; but they have a right to controul the verdict, and declare the law as they conceive it to be. At least this is the language of some most respectable authorities. *Staunf. P. C.* 165. *a*: *Plowd.* 114. *a*, *b*: 4 *Co.* 42. *b*: *Hal. H. P. C.* i. 471, 6, 7; ii. 302. See *ante* III.—*Lastly*, The Courts have long exercised the power of granting new trials in civil cases, where the Jury finds against that which the Judge, trying the cause, or the Court at large, holds to be law: or where the Jury finds a general verdict, and the Court conceives that on account of difficulty of law there ought to have been a special one. *Hardw.* 26. [And the Court will grant such new trial, even a second and a third time, till the Jury give a general verdict consonant to law; or a special verdict, on which the Court may pronounce the law. See *Tindal* v. *Brown*, 1 *Term Rep.* 167: and this Dict. title *Trial*; *(New Trial.)*] Though too in criminal and penal cases the Judges do not claim such a discretion against persons acquitted, the reason presumed is in respect of the rule, *nemo bis punitur aut vexatur pro eodem delicto*; or the hardship which would arise from allowing a person to be twice put in jeopardy for one offence: and if this be so, it only shows, that on that account an exception is made to a general rule. 4 *Comm.* 361: 2 *Ld. Raym.* 1585: 2 *Stra.* 899: 4 *Co.* 40. *a*: *Wingate's Maxims*, 695. Upon the whole, (says Mr. *Hargrave*,) the result is, that the *immediate* and *direct right* of deciding upon questions of law is entrusted to the Judges; that in a Jury it is only *incidental*: That in the exercise of this *incidental* RIGHT, the latter are not only placed under the superintendance of the former, but are *in some degree* controulable by them; and therefore, that in all points of law arising on a trial, Juries ought to show *the most respectful deference* to the advice and recommendation of Judges. Nor is it any small merit in this arrangement, that, in consequence of it, every person accused of a crime, is enabled by the general plea of *not guilty*, to have the benefit of a trial, in which the Judge and Jury are a check upon each other. 1 *Inst.* 155. *a.* &c. *in n.*"

The Student will perceive from the above extract, that Mr. *Hargrave* admits the *incidental* RIGHT of the Jury to determine questions of law; in which he goes further than the writer from whom the subsequent long quotation is introduced; who supports his reasonings by very ingenious, if not unanswerable arguments; and which will be found to coincide with those offered at the beginning

beginning of this division, by the present Editor of this Dictionary.

Mr. Wynne, in his *Eunomus*, or Dialogues concerning the Law and Constitution of England, *Dial.* 3. § 53, *& seqq.* examines the dispute, very elegantly, in the following manner:

"All that may here be said upon the subject of Juries is agreeable to the established maxim above recognised, *ad quæstionem facti*, &c. This is the fundamental maxim acknowledged by the Constitution; and yet this is the maxim, which those who have advanced doctrines against the Constitution have ever in their mouths.

"Fundamental maxims of Law or Government are so plain and intuitive, that every body understands them; those of the lowest capacity make them their standard in their own breasts to judge by. And therefore they who would lead a party in a wrong cause with success, must do it not by disputing fundamentals, but by avowing and afterwards perverting them. This seems to be much the case in the present contested question.

"It is undoubtedly true, that the Jury are judges, the only judges, of the *fact*: is it not equally within the spirit of the maxim, that *Judges only* have the competent cognisance of the *law*? Can it be contended that the Jury have, in reality, an adequate knowledge of law; or that the Constitution ever designed they should? Every country village has its Jurors, whom nobody will suppose to be lawyers; and it is from the generality that we are to form our notions of the nature of a Jury, as the law has prescribed it; not from the abilities of any particular man, or any particular Jury. But it is said, and it is an argument not a little insisted upon, that *the law and the fact are often complicated*. Then it is the province of the Judge to distinguish them; to tell the Jury that supposing they believe that such and such facts were done, what the law is in such circumstances. *This is an unbiassed direction*: this keeps the province of Judge and Jury distinct: the facts are left altogether to the Jury, and the law does not controul the fact, but arises from it. If the law is thought to be mistaken, the direction of the Judge that gave it may be considered in another Court; and if it *is* mistaken, the verdict in conformity to it will be of no effect. But a verdict cannot be complained of as contrary to the direction of law given; it can scarcely be concluded it is: and the reason is, because the law arises only from the fact; and the Jury previously find the fact in their own mind, before they couple it with the law pronounced from the Bench to make up their verdict. Every verdict is compounded of law and fact; but the law and the fact are always distinct in their nature. See *Vaugh.* 146, 152.

"Littleton and his Commentator have been made advocates on this occasion; and have been thought to say, though at the peril of contradicting themselves an hundred times, that Jurors are the judges of the law as well as the fact; in the passage already repeatedly cited and alluded to; 1 *Inst.* 228. *a*; "If they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge." See 2 *Ld. Raym.* 1494: *Hardw.* 16. But does not the Judge betray his trust in not telling them how the law is? If he does not tell them, it is true they may suppose it to be so, and find accordingly: if he does tell them how the law is, they are to compare the fact with the law; but cannot of their own head say what the law is. *The law is never submitted to them*, as part of their inquiry. *Vaugh.* 143. No finding can in general be complained of, as against a Judge's direction; but as against the weight of evidence, and in that case the remedy is well known. The warrant of commitment, as stated in the return in *Bushell's* Case, was nevertheless expresly granted against the Jury, *for finding contrary to the direction of the Judge in a matter of law.* Which part of the return, *Vaughan*, C. J. said, literally taken, was insignificant and not intelligible; and if it had any meaning, stript of the veil and colour of words, was a direct argument for the abolition of the form of trial by Jury; because the Judge in such case must resolve both the law and the fact. True it is, the Chief Justice does there put a particular case of a Jury finding against a Judge's direction, which in general, for the reason he has given, is impossible: and that case is, where a Judge asks the Jury previous to the verdict, How they find such a particular thing propounded to them? If on their giving an answer the Judge adds, Then, as you agree to find the fact so, the law is for the plaintiff or defendant: and if the finding is afterwards contrary to what he declares, they do in that case find contrary to the Judge's direction in matter of law. But in that case, the regular order of proceeding is directly inverted; the Judge makes them find a particular fact previous to his declaration of the law: whereas, what *Vaughan*, C. J. calls the discreet and lawful assistance of a Judge to a Jury, is always to give an hypothetical direction to the Jury; not by previously having their answer to the fact, and thereupon declaring the law to controul their verdict; but to leave their verdict free, by saying, *If you find the fact so and so*, then the law is for the plaintiff; or you are to find for the plaintiff; or *vice versâ*. See *Vaugh.* 136, 143, 4.

"All this reasoning shews, that the province of Judge and Jury, as to law and fact, are separate and exclusive: that in the general and regular form of proceeding, it is impossible for a verdict to be said to be against a direction in law; but if the case should happen, the verdict must be rectified; for this plain reason, that it appears in such a case the Jury have taken upon them the determination of the law, which is entirely out of their jurisdiction.

"Besides what has been already said, it seems undeniably to appear, that Juries are designed by the Constitution to be Judges of the fact only, and not of the law, for these reasons: *First*, Because the contrary supposition is against the plain tenor of their *Oath*. The form of every oath administered in a court of justice, is either according to common law, or as required by some act of parliament. 3 *Inst.* 165. An oath of office contains a summary description of duty; and the terms of a Jury's oath are so strictly applicable to fact only, that they do by the strongest implication exclude any cognizance of the law. Every Juror, in a cause, is enjoined by his oath "well and truly to try *the issue joined* between the parties, and a true verdict to give *according to the evidence*." Now to consider this by parts. 1. He is *well and truly to try*; How can one well and truly try any point but according to his knowledge? Either, as has been contended, according to his own previous knowledge, or according to the information he meets with at the

the time of the examination: A Juror may have knowledge of both kinds as to the fact; but it is not requisite he should have either as to the law.—2. The oath directs the Jury to try *the issue joined*; this issue is always a fact denied on one side, and affirmed on the other; where the law is directly in dispute, the issue (as has been already repeatedly observed in the remarks on the stat. 32 *Geo.* 3. *c.* 60,) goes before the Court, and not at all before a Jury. And though during the trial of an issue of fact, points of law do very often incidentally arise, it does not follow from thence that they are under the cognizance of the Jury; any more than disputes about practice, the competence of witnesses, or whether such and such evidence is admissible; which do as often arise in the course of a trial, and were never contended to belong to the Jury. The law, therefore, because it arises out of the fact, and because in the end it is to govern it, does not, on that account, appertain to the Jury, if from other considerations it appears to be improper.—3. What can be meant by a *true Verdict?*—Truth, both Philosophers and Lawyers will refer to fact, rather than opinion about law: when it is referred to opinion, we mean the agreement of a proposition with our own ideas, or the ideas of others. But how those who have such faint and imperfect ideas as Jurors have of law, can discern this agreement, or judge of the truth, in such a case, every reasoning man must be at a loss to determine.—4. But to exclude the possibility of a doubt in this question, their oath does not only direct them to find the truth, but tells them what rule or measure they are to go by in their enquiry. They are to find a *true verdict, according to the evidence.* This branch of the oath, which governs the whole, can be applied only to the fact. *The fact only is in evidence*, and consequently the law not being in evidence *is not before them.* See *Vaugh.* 143. Thus in the clearest terms does the oath limit and define their duty.

" But, *secondly*, in the course and management of a trial, other persons are likewise under an oath, and have duties incumbent on them also. Now without looking into the oath of a Judge, it will be easily understood to be inconsistent with his duty and his oath to be a mere cypher on the Bench. A Judge however will be little more than a cypher, either if he sits and says nothing, or if what he does say is to go for nothing. The Jury's ignorance of law makes it necessary for the Judge to tell them what the law is in the case before them; but he tells it them surely to very little purpose, if they think themselves afterwards at liberty to determine otherwise.

" Other arguments there are also which deserve to have weight on this question, drawn from the forms of pleading and the general frame of records; than which none perhaps be produced more worthy to be relied on.

" 1. It i known in constant experience, that by the mode o wing a *demurrer*, the matter in debate is referred gether to the decision of the Court, and in reality never does go before a Jury. By a demurrer, the bare law is in question; the fact being constantly admitted, if clearly expressed. The reason of admitting the fact in that case seems to be, that without such confession of the fact the Court have no ground to go upon; for the law in every case arises from the fact. The case then must really exist before the legality of it, as to circumstances, can be determined. But if a matter where *the law only* is in question, is never, nor can in its nature be, sent to a Jury, it proves almost to a demonstration, that the Jury have nothing to do with bare law.—2. Nor is the argument to be drawn from the nature of a *special verdict* of less force on this occasion. The *ignorance* of the Jury as to the law in the case, and their reference to the Court, is the constant language of a special verdict. Not that the Jury can in reality be supposed more ignorant of the law arising in such a case, than they are in a thousand others, where all is concluded under a general verdict. Indeed in that light, the common Juries are now much improved in their knowledge of the law, there being very few instances of their expressing their doubts in special verdicts at this day. The reason of having special verdicts was, at all times, in order to have the point of law solemnly determined, and remain on record; without which, in many cases, no writ of error could have been brought in former times, nor the point reserved for the consideration of the Court. The usage of *stating a case*, and having a *general* verdict, subject to the opinion of the Court afterwards on the circumstances of the case, is an invention of late times; and is found in practice to be less expensive, and to answer to the parties as well as a special verdict. But the case stated, and the special verdict, are equally proofs of what is here contended for, by expresly leaving the law to the Court for their determination. See *ante* III.

" The professed patrons of the right of the Jury to be judges of law have principally applied their doctrine, as has been already remarked, to the case of *libels*; but they were aware that the conclusion would be general, though the case was particular; because the right of the Juries to determine the law in the case of libels, could only be a consequence of their right to find the law in other cases. There seems to be this fatality that has in practice attended the case of libels, that the law and the fact have not been always accurately distinguished: and perhaps in feverish times, some particulars have been contended for as implications of law, which ought rather to have been considered as facts, and left to the Jury. [An evil, and perhaps the only one, in some measure guarded against, by the construction put on the *stat.* 32 *Geo.* 3. *c.* 60; mentioned at the beginning of this discussion.]

" It seems however universally, that any action, the *intention* of the agents, and every other circumstance under which that action was done, are equally *facts*, and as such cognizable by a Jury; but *whether* that action, under all the circumstances in which it has been admitted or proved to have been done, *is a crime or not*, is what *the law alone can determine*; and the Judges, whose breasts are the depositories of the law, alone can pronounce. Otherwise it is evident the quality of human actions, more especially of those that are in themselves indifferent, and have been defined by Society alone, would be referred not only to a *very variable standard*, but an *incompetent* one. Apply this particularly to the case of libels, and the least reflection will be sufficient to shew, that the power and province of Juries is the same in case of libels as in every other case. And that in no case whatever a Jury has, in its nature, a cognisance of law, though by accident the law may have been sometimes left to them."

To

To draw towards a conclusion of this long discussion; the very interesting nature of which must plead the Editor's excuse for the foregoing multiplied extracts and observations:—There are some arguments in favour of the Jury's right, as relates to criminal cases, which seem not answered by the remarks arising from the conduct of civil causes. In the first place, their *Oath* is, that they shall "well and truly *try*, and *a true deliverance* make, between our Sovereign Lord the King and the Prisoner whom they have in charge, and a true Verdict give according to the evidence."—Now it is not expressed *what* they shall try; it is therefore inferred, that the whole of the case is submitted to their determination. But we must recollect that in this, as in all cases, an *Issue* is joined, between the King and the Prisoner, of *Not guilty*; and *Guilty*: (See this Dict. tit. *Trial*.) The Verdict according to the Evidence must be therefore on the Issue, as in all other cases; and the Fact only, not the Law, is submitted to the consideration of the Jury.—Some doubt has arisen on the word *Deliverance*; whether it applies to delivering the verdict; to the deliverance of the culprit from his charge and imprisonment; or whether it does not simply mean a true *deliberation* on, and consideration of, the evidence produced to them: which latter is the sense most approved by legal writers and historians on the subject. If indeed it does apply to the deliverance of the prisoner, still it must be *a true deliverance*, on proof of his innocence, or rather on failure in the proof of his guilt.

Another argument, which at first bears the appearance of more weight than those just mentioned, though it has not been frequently relied on, is this; That, from the very nature and words of the verdict the Jury are constituted Judges of the law, as well as the fact, in criminal cases.—That the words Guilty or Not Guilty do not merely ascertain the commission or non-commission of any indifferent fact; but the commission of a *criminal* fact; or the being free from any crime, as the fact is not done, or as the fact though done were lawful, or performed without any illegal or criminal intention. That therefore the Jury *in terms* decide, by their verdict, not only on the perpetration of the fact, but on the criminality annexed to it; since if the fact be not criminal, no guilt is incurred; and therefore the verdict of *guilty* would be false, and of *not guilty* nonsensical; no guilt attaching to a praise-worthy, an indifferent, or an innocent act.—Two answers suggest themselves; one, that the language in which alone the Jury can deliver a general verdict, according to the rules positively prescribed to them by law, at all events allows the fact charged to be criminal as far as the judgment or discretion of the Jury on that question can be exercised, whatever may be the subsequent decision of the Court. The second, that the language of the verdict, interpreted according to the rules of law, of practice, and of common sense, is this—"Guilty—If the fact, with which the prisoner is charged be sufficiently stated, and is a crime in the eye of the law." And that this is the true interpretation of the verdict of *guilty*, the right of the Court to arrest the judgment, in case, on inspection of the record, they are of opinion that the fact charged is no crime, or, if a crime, is defectively charged, is undeniable proof. This right of the Court to decide the law in the event of a verdict of guilty is recognised by *stat*. 32 *Geo*. 3. *c*. 60. already so often cited.

Still it may be objected that the Jury by a verdict of Not guilty have *a right* to decide the law. But the fallacy of confounding the terms *right* and *power* has already been noticed: and it may be added that though *nineteen* Juries were successively to acquit *nineteen* defendants on a charge of publishing the same libel, their verdicts could never be produced as precedents in law, that a *twentieth* person might not be indicted for the same libel, and found guilty by a twentieth Jury.—To put the case still stronger; it is by no means an uncommon circumstance, that where several criminals are included in the same indictment, they sever in their challenges, and are therefore tried separately: but it was never imagined that the conviction or acquittal of one, had the least effect upon the question of the guilt or innocence of the others.—Whereas the decision of the Court, on an indictment, that the fact charged in it as a crime was not such, or was defectively charged, would quash the whole indictment against all; and be a precedent for arresting the judgment on any subsequent conviction, or indictment under the same circumstances—Why? Clearly because in one case the mere fact is decided, as relates to the Individual accused; in the other the question of law, as relates to the Crime charged.

In fine, it will doubtless be granted that this dispute on the power, province, and rights of Juries has arisen from a jealousy, on their parts, of the predilection supposed to be entertained by Judges of the Courts of Law, in favour of the King's prerogative; and, on the other hand, from the opinion those courts entertain that Juries may be too much inclined to screen popular offenders from the punishment of the law.—It may not be unjust to imagine, that as Judges are now independent of the Crown, they are, from their educations, habits, and characters, full as likely to act from unbiassed principles of justice, as any Jury selected from the defendant's equals: and who, from what may well be considered as a praise-worthy anxiety in behalf of a fellow-citizen, must unavoidably feel every cause as in some measure affecting themselves no less than the party accused.

For further matter incidental to the duty and office of a Jury, see this Dict. titles *Trial*; *Verdict*.

JURROCK, A kind of cork; see *stat*. 1 *R*. 3. *c*. 8.

JUS, Law or right, authority and rule. *Lit. Dict.*

Jus accrescendi, Is the right of survivorship between joint-tenants. *Lit*. 280: 1 *Inst*. 180. See title *Joint-tenants*.

Jus ad rem, An inchoate and imperfect right, such as a parson promoted to a living acquires by nomination and institution. 2 *Comm*. 312.

Jus Anglorum. The laws and customs of the *West Saxons*, in the time of the *Heptarchy*: by which the people were for a long time governed, and which were preferred before all others, were termed *Jus Anglorum*.

Jus Coronæ, The right of the Crown; and it is part of the law of *England*, though it differs in many things from the general law relating to the Subject. 1 *Inst*. 15. The King may purchase lands to him and his heirs, but he is seised thereof in *Jure Coronæ*; and all the lands and possessions whereof the King is thus seised, shall follow the crown in descents, &c. See title *King*.

Jus curialitatis Angliæ. See this Dict. title *Curtesy of England*.

Jus duplicatum, Is where a man hath the possession as well as property of any thing. *Bract. lib.* 4. *tract.* 4. *c.* 4: 2 *Comm.* 189.

Jus Gentium, The Law of Nations. The law by which kingdoms and societies in general are governed. *Selden.* See title *Ambassador.*

Jus Habendi & Retinendi, Right to have and retain the profits, tithes, and offerings, &c. of a rectory or parsonage. *Hughes's Parsons Law,* 188.

Jus Hæreditatis, The right or law of inheritance. See title *Descent.*

Jus in re, Complete and full right. Such as a parson acquires, on promotion to a living, who, after nomination and institution, hath corporal possession delivered to him; for till such delivery of corporal possession he had only *Jus in rem.* 2 *Comm.* 312.

Jus Patronatûs, A Commission granted by the bishop to some persons, usually his Chancellor, and others of competent learning, to inquire who is the rightful *patron* of a *church.* If two patrons present their clerks, the bishop shall determine who shall be admitted by *right of patronage,* &c. on commission of inquiry of six clergymen, and six laymen, living near to the church; who are to inquire on articles as a jury, Whether the church is void? Who presented last? Who is the rightful patron? &c. But if coparceners severally present their clerks, the bishop is not obliged to award a *Jus Patronatûs,* because they present under one title; and are not in like case where two patrons present under several titles. 5 *Rep.* 102: 2 *Inst.* 116.

The awarding a *Jus Patronatûs* is not of necessity, but at the pleasure of the Ordinary, for his better information who hath the right of patronage, for if he will at his peril take notice of the right, he may admit the clerk of either of the patrons, without a *Jus Patronatûs.* 1 *Leon.* 168. A bishop may award a *Jus Patronatûs* with a solemn premonition to all persons, *quorum interest,* &c. where he knows not who is the patron, to give notice of an avoidance by deprivation, &c. *Hob.* 318. This inquiry by *Jus Patronatûs* is to excuse the Ordinary from being a disturber. See 3 *Comm.* 246. *Jus Patronatûs* is not within the statute of limitations, 1 *M. Sess.* 2. *c.* 5. In whose name, and under what *teste* a *Jus Patronatûs* is to issue, see *stat.* 1 *Ed.* 6. *c.* 2. *sect.* 3.

Jus Possessionis, A right of seisin or possession; and a parson hath a right to the possession of the church and glebe, *for he hath the freehold*; and is to receive the profits to his own use. *Pars. Law* 188. See title *Parson.*

Jus Presentationis, The right of the patron of presenting his clerk unto the Ordinary to be admitted, instituted, and inducted into a church. See this Dict. title *Advowson.*

Jus Recuperandi, Intrandi, &c. A right of recovering and entering lands, &c. All these *rights* following the relation of their objects, are the effects of the *Civil law.* *Co. Lit.* 266.

JUSTA, A certain measure of liquor, *quasi* Justa *mensura*; being as much as was sufficient to drink at once. *Mon. Ang. Tom.* 1. *pag.* 149.

JUSTICE, *justitia*] Is defined to be a constant, righteous inclination to give every one his due; or the act of doing what is right and just. *Chamb. Johnson. Locke, Instit.* The delaying *Justice* is an obstruction to and kind of denial thereof; but this is understood of unnecessary and unjust delay, for sometimes it is convenient for the better finding out the truth, and preparation of parties, that they may not be surprized.

Justice and right shall not be sold, denied, or delayed. *Mag. Chart.* 9 *Hen.* 3. *c.* 29. Right shall be done to all without respect. *Stat. West.* 1. 3 *Ed.* 1. *c.* 1. *Justice* shall not be delayed for any command under the Great Seal, &c. 2 *Ed.* 3. *c.* 8: 14 *Ed.* 3. *stat.* 1. *c.* 14: 11 *R.* 2. *c.* 10. See titles *Habeas Corpus*; *Liberties.*

JUSTICEMENTS, from *justitia,* All things belonging to *justice.* *Co.* on *Westm.* 1. *fol.* 225. Also the effects or execution of *justice* or of jurisdiction.

JUSTICES; *Justiciarii.*

Officers deputed by the King to administer Justice, and *do right by way of judgment.* They are called Justices because in ancient time the Latin word for a Judge was *justitia,* and for that he hath his authority by deputation, and not *jure magistratûs.* *Glanvil. lib.* 2. *c.* 6. See title *Judges.*

Of these *Justices* there are various sorts, with various powers and duties, as hereafter shortly set forth under the subsequent titles *Justices of Assise,* &c.; and see this Dict. titles *Courts*; *Chancery*; *Equity*; *King's Bench*; *Common Pleas,* &c.

Justices of Assise, *Justiciarii ad capiendas assisas.*] Such as were wont by special commission to be sent (as occasion was offered) into this or that county, to take assises for the ease of the Subjects; for, as these actions pass always by Jury, many men could not, without damage and charge, be brought to *London,* therefore Justices for this purpose, by commission particularly authorized, were sent to them. For it seems, that the Justices of the *Common Pleas* had no power to take assises till the stat. of 8 *R.* 2. *c.* 2, by which they were enabled to do it, and to deliver gaols. And the Justices of the *King's Bench* have by that statute such power affirmed unto them, as they had one hundred years before.

These commissions *ad capiendas assisas,* have of late years been settled and executed only in *Lent,* and the *long vacation,* (called now the *Lent* and *Summer* Assises,) when the Justices, and other learned lawyers, may be at leisure to attend those controversies; whereupon it also falls out, that the matters that were wont to be heard by more general commissions of *Justices in Eyre,* are heard all at one time with these assises, which was not so of old, as appears by *Bracton, lib.* 3. *cap.* 7. *num.* 2. And by this means the Justices of both Benches being worthily accounted the fittest of all others, and their assistants, were employed in these affairs. That Justices of Assise and Justices in Eyre did anciently differ, appeareth by *stat.* 27 *Ed.* 3. *c.* 5. And that Justices of Assise and Justices of Gaol-delivery were different, is evident by *stat.* 4 *Ed.* 3. *c.* 3. The oath taken by the Justices of Assise is all one with that taken by the Justices of the *King's Bench.* Old Abridgment of Statutes, tit. *Sacramentum Justiciariorum.* *Cowell.* See further title *Assise.*

To what is said under this Dict. title *Assise,* may be added, that

The Courts of *Assise* and *Nisi Prius* are composed of two or more commissioners, who are sent twice in every year, by the King's special commission, all round the kingdom, (except *London* and *Middlesex,* where Courts of

of *Nisi Prius* are holden in and after every Term, before the Chief or other Judge of the several superior Courts; and except the four Northern Counties, where the assises are only holden twice a-year,) to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in *Westminster-Hall*. These Judges of Assise came into use in the room of Justices in Eyre, *justiciarii in itinere* (or *itinerantes*); who were regularly established, if not first appointed by the parliament of *Northampton*, A. D. 1176, 22 *Hen.* 2, with a delegated power from the King's Great Court, or *aula regia*, being looked upon as members thereof: and they afterwards made their circuit round the kingdom once in seven years for the purpose of trying causes. *Co. Lit.* 293. They were afterwards directed by *Magna Charta*, *c.* 12, to be sent into every county twice a-year, to take (or receive the verdict of the jurors, or recognitors in certain actions then called) recognitions in assises; the most difficult of which they are directed to adjourn into the Court of *Common Pleas*, to be there determined. The Itinerant Justices were sometimes mere Justices of Assise, or of Dower, or of Gaol-delivery, and the like; and they had sometimes a more general commission, to determine all manner of causes, being constituted *Justiciarii ad omnia placita*. *Bract. l.* 3. *tr.* 1. *c.* 11. But the present Justices of Assise and *Nisi Prius* are more immediately derived from the *stat. Westm.* 2. 13 *E.* 1. *c.* 30, which directs them to be assigned out of the King's sworn Justices, associating to themselves one or two discreet knights of each county. By *stat.* 27 *E.* 1. *c.* 4, (explained by 12 *E.* 2. *c.* 3,) assises and inquests were allowed to be taken before any one Justice of the court in which the plea was brought; associating to him one knight, or other approved man of the county. And, lastly, by *stat.* 14 *E.* 3. *c.* 16, Inquests of *Nisi Prius* may be taken before any Justice of either Bench, (though the plea be not depending in his own court,) or before the Chief Baron of the *Exchequer*, if he be a man of the law; or otherwise before the Justices of Assise, so that one of such Justices be a Judge of the *King's Bench* or *Common Pleas*, or the King's Serjeant sworn. They usually make their circuits in the respective vacations after *Hilary* and *Trinity* Terms; assises being allowed to be taken in the holy time of *Lent* by consent of the Bishops at the request of the King, as expressed in *stat. Westm.* 1. 3 *Ed.* 1. *c.* 51. And it was also usual, during the times of popery, for the prelates to grant annual licences to the Justices of Assise to administer oaths in holy times: for oaths being of a sacred nature, the logic of those ages concluded that they must be of ecclesiastical cognizance. Instances hereof may be met with in the Appendix to *Spelman*'s Original of the Terms, and in *Parker*'s Antiquities, 209. The prudent jealousy of our ancestors ordained, that no man of law should be Judge of Assise in his own county wherein he was born or doth inhabit. *Statutes* 4 *E.* 3. *c.* 2: 8 *Rich.* 2. *c.* 2: 33 *Hen.* 8. *c.* 24. But this restraint is now taken off, as to *Justices of Oyer* and *Terminer*, by *stat.* 12 *Geo.* 2. *c.* 27. See post that title; and for further information on this head, this Dict. tit. *Assise*.

The Courts of *Nisi Prius* in *London* and *Middlesex* are called *Sittings*; and those for *Middlesex* were established by the Legislature in the reign of Queen *Elizabeth*. In ancient times all issues in actions brought in that county were tried at *Westminster* in the Terms, at the bar of the Court in which the action was instituted: but when the business of the Courts increased, these trials were found so great an inconvenience, that it was enacted by *stat.* 18 *Eliz. c.* 12, that the Chief Justice of the *King's Bench* should be empowered to try within the term, or within four days after the end of the term, all the issues joined in the Courts of *Chancery* and *King's Bench*; and that the Chief Justice of the *Common Pleas*, and the Chief Baron of the *Exchequer*, should in like manner try the issues joined in their respective Courts.—In the absence of any one of the Chiefs, the same authority was given to two of the Judges or Barons of his Court.—The *stat.* 12 *Geo.* 1. *c.* 31, extended the time to eight days after term; and impowered *one* Judge or Baron to sit in the absence of the Chief.—*Stat.* 24 *Geo.* 2. *c.* 18, extended the time after Term still further to 14 days.

JUSTICES OF BOTH BENCHES, Shall decide pleas commenced before other matters be arraigned. *Stat. Westm.* 1. 3 *Ed.* 1. *c.* 46. See this Dict. titles *King's Bench*; *Common Pleas*.

JUSTICES IN EYRE, *Justiciarii itinerantes*. So termed of the old *French* word *erre*, as *a grand erre*, *i. e. magnis itineribus*, proverbially spoken.] These, in ancient time, were sent with commission into divers counties to hear such causes especially, as were termed *Pleas of the Crown*. And this was done for the ease of the people, who must else have been hurried to the King's Bench, if the case were too high for the county-court: They differed from the *Justices of Oyer and Terminer*, who were sent upon one or a few special causes, and to one place; whereas the *Justices in Eyre* were sent through the provinces and counties of the land, with more indefinite and general commission, as appeareth by *Bracton*, *lib.* 3. *cc.* 11, 12, 13. and *Britton*, *cap.* 2.

And again, because the Justices of Oyer and Terminer were sent uncertainly upon any uproar, or other occasion in the country; but these in *Eyre* (as Mr. *Gwin* sets down in the *Preface to his Reading*) were sent but once in every seven years; with whom agrees *Horne* in his *Mirror of Justices*, *l.* 2. *c. Queux poient estre attourn*, &c. & *l.* 2. *cap. Des peches criminals*, &c. *al suit del Roy*, &c. And *lib.* 3. *cap. De Justices in Eyre*: Where he also declares what belongs to their office. But according to *Orig. Juridiciales*, they went oftener. These were instituted by King *Henry* the Second, as *Camden* in his *Brit.* witnesseth, *pag.* 104.—*Hoveden par. post. suor. Annal. fol.* 113, hath of them these words, *Justiciarii itinerantes, constituti per* Henricum *secundum*, *qui divisit Regnum suum in sex partis, per quarum singulas tres* Justiciarios *itinerantes constituit*, &c. In some respect they resembled our *Justices of Assise* at present, though their authority and manner of proceeding much differ. 1 *Inst.* 293: *Cowell*. See ante tit. *Justices of Assise*.

JUSTICE OF THE FOREST, *Justiciarius forestæ*;] Is a Lord by his office, and hears and determines all offences within the forest, committed against vert or venison: Of these there are two, whereof one hath jurisdiction over all *forests* on this side *Trent*, the other of all beyond it. The chief point of their jurisdiction consisteth upon the articles of the King's charter, called *Charta de foresta*, made *anno* 9 *Hen.* 3. concerning which see *Camd. Brit.* *p.* 214.

p. 214. The court where this Justice sits and determines, is called *The justice-seat of the forest*, held once every three years. *Manwood's Forest Laws, cap.* 24. He is also called *Justice in Eyre of the Forest*; and is the only *Justice* that may appoint a deputy by the statute of 32 *Hen.* 8. *c.* 35. See title *Forest*.

JUSTICES OF GAOL-DELIVERY, *Justiciarii ad Gaolas deliberandas*.] Are those who are sent with commission, to hear and determine all causes appertaining to such, who for any offence are cast into gaol: part of their authority is to punish such as let to mainprize those prisoners who are not bailable by law, nor by the statute *De Finibus, cap.* 3. *F. N. B. fol.* 151. These seem in ancient time to have been sent into the country upon several occasions; but afterwards *Justices of Assise* were likewise authorized to the like purposes. *Anno* 4 *Ed.* 3. *c.* 3. Their oath is all one with others of the King's *Justices* of either Bench. See *stat.* 2 *E.* 3. *c.* 2: *Old Abridgment of the Statutes*, tit. *Sacramentum Justiciariorum*: *Cowell*. Justices of Assise, if laymen, shall deliver the gaols. *Stat.* 27 *Ed.* 1. *st.* 1. *c.* 3.—The Justices of Peace shall deliver over their indictments to the Justices of Gaol-delivery. *Stat.* 4 *Ed.* 3. *c.* 2.—See *post*, *Justices of Oyer and Terminer*.

JUSTICE OF THE HUNDRED, *Justiciarius Hundredi*.] *Erat ipse* hundredi Dominus, *qui et centurio et centenarius*, hundredique *aldermannus appellatus est. Praeerat omnibus* hundredi *friborgis, cognovitque de causis majusculis, quae in eisdem finiri non potuerunt. Spelm.* See title *Hundred*.

JUSTICES OF THE JEWS, *Justiciarii ad custodiam Judaeorum assignati*.] King *Richard* I. after his return out of the Holy Land, *anno* 1194, appointed particular Justices, laws, and orders, for preventing the frauds, and regulating the contracts and usury of the *Jews*. *Hoveden, parte post. p.* 745: *Claus.* 3 *Ed.* 1. *m.* 19.

JUSTICES OF LABOURERS. Justices heretofore appointed to redress the frowardness of *labouring men*, who would either be idle, or have unreasonable wages. See the old *Statutes* 21 *Ed.* 3. *c.* 1: 25 *Ed.* 3. *c.* 8: 31 *Ed.* 1. *c.* 6.

JUSTICES OF NISI PRIUS, Are all one at this time with *Justices of Assise*, for it is a common adjournment of a cause in the Common Pleas, to put it off to such a day, *Nisi Prius Justiciarii venerint ad eas partes ad capiendas assisas*; *unless* the Justices shall *first* come to a place named to take the assises; which they are sure to do; and upon this clause of adjournment they are called *Justices of Nisi Prius*, as well as Justices of Assise. Their commission you may see in *Cromp. Juris. fol.* 204; yet with this difference between them, that *Justices of Assise* have power to give judgment in a cause, but *Justices of Nisi Prius* only to take the verdict. But in the nature of both their functions, this seems to be the greatest difference, that *Justices of Nisi Prius* have to deal in causes personal as well as real; whereas *Justices of Assise*, in strict acceptation, meddle only with the possessory writs called *Assise*. *Cowell*. See title *Justices of Assise*; and titles *Jury*; *Judges*; *Assise*.

JUSTICES OF OYER AND TERMINER, *Justiciarii ad audiendum & terminandum*.] Were Justices deputed upon some special or extraordinary occasions. *Fitzherbert* in his *Nat. Brev.* saith, That the commission *d'Oyer and Terminer* is directed to certain persons upon any great riot, insurrection, heinous misdemeanors, or trespasses committed. And because the occasion of granting this commission should be maturely weighed, it is provided by the statute made 2 *Ed.* 3. *c.* 2, That no such commission ought to be granted, but that they shall be dispatched before the Justices of the one Bench or other, or *Justices errant*, except for horrible trespasses, and that by the special favour of the King. The form of this commission, see *F. N. B. f.* 110.

The Courts of *Oyer and Terminer*, and general *Gaol-delivery*, are of a general nature, and universally diffused over the kingdom; but yet are of a local jurisdiction, and confined to particular districts. These are held before the King's Commissioners, among whom are usually two Judges of the Courts at *Westminster*, twice in every year, in every county of the kingdom; except the four northern ones, where they are held only once, and *London* and *Middlesex*, wherein they are held eight times. These were slightly mentioned under the foregoing article, *Justices of Assise*; and under title *Assise*, it is observed, that, at what is usually called the Assises, the Judges sit by virtue of five several authorities: two of which, the Commission of *Assise* and its attendant jurisdiction of *Nisi Prius*, being principally of a civil nature, are there explained: to which may here be added, that these Justices have, by virtue of several statutes, a criminal jurisdiction also, in certain special cases. 2 *Hal. P. C.* 39: 2 *Hawk. P. C. c.* 7. As to another authority, the Commission of the *Peace*; See *post*, title *Justices of the Peace*. It may here be mentioned, that all the Justices of the Peace of any county wherein the assises are held, are bound by law to attend them, or else are liable to a fine, in order to return recognizances, &c. and to assist the Judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the authority now to be explained is the commission of *Oyer and Terminer*, to hear and determine all treasons, felonies, and misdemeanors. This is directed to the Judges and several others, or any two of them; but the Judges or Serjeants at Law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear, and determine:" so that by virtue of this commission they can only proceed upon an indictment found at the same assises; for they must first inquire, by means of the Grand Jury or Inquest, before they are empowered to hear and determine by the help of the Petit Jury. Therefore they have besides all these a commission of general *Gaol-delivery*, which empowers them to try and deliver every prisoner, who shall be in the gaol when the Judges arrive at the circuit town, whenever, or before whomsoever indicted, or for whatever crime committed. It was anciently the course to issue special writs of gaol-delivery for each particular prisoner, which were called the Writs *de bono et malo*; 2 *Inst.* 43: but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead. So that, one way or the other, the gaols are in general cleared, and all offenders tried, punished, or delivered, twice in every year: a constitution of singular use and excellence.

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Sometimes also, upon urgent occasions, the King issues a special and extraordinary commission of *Oyer* and *Terminer*, and *Gaol-delivery*, confined to those offences which stand in need of immediate inquiry and punishment, upon which the course of proceeding is much the same as upon general and ordinary commissions.

Formerly it was held, in pursuance of the statutes 8 *R.* 2. *c.* 2: 33 *H.* 8. *c.* 4, that no Judge or other lawyer could act in the commission of *Oyer* and *Terminer*, or in that of Gaol-delivery, within his own county where he was born or inhabited; in like manner as they are prohibited from being Judges of Assise, and determining civil causes. But that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors, than in matters of property and disputes between party and party, it was thought proper by the *stat.* 12 *Geo.* 2. *c.* 27, to allow any man to be a Justice of *Oyer and Terminer* and general Gaol-delivery within any county of *England*. 4 *Comm.* 269—271. In fine, as the Justices of *Assise* and *Nisi Prius* are appointed to try civil causes, so are the Justices of *Oyer and Terminer* and *Gaol-delivery* to try indictments for crimes all over the kingdom, at what are generally denominated the Circuits or Assises; and the towns where they come to execute their commissions are called the Assise towns, and generally the County towns.

JUSTICES OF THE PAVILION, *Justiciarii Pavilionis*] Are certain Judges of a *Pie-powder Court*, of a most transcendent jurisdiction, held under the Bishop of *Winchester* at a fair on *St. Giles's Hill* near that city, by virtue of letters patent granted by *Richard* II. and *Edw.* IV. *Episcopus* Wynton, & *successores suos, à tempore quo*, &c., Justiciarios *suos, qui vocantur* Justiciarii Pavilionis, *cognitiones placitorum & aliorum negotiorum eâdem feriâ durante, necnon claves portarum & custodiam prædictæ civitatis nostræ* Wynton, *pro certo tempore feriæ illius, & nonnullas alias libertates, immunitates & consuetudines habuisse*, &c. See the patent at large in *Prynne's Animad.* on 4 *Inst. fol.* 191.

JUSTICES OF THE PEACE;

Judges of Record, appointed by the King's commission to be Justices within certain limits; generally within the counties where they are resident; for the conservation of the peace, and for the execution of divers things comprehended within their commission, and within divers statutes committed to their charge. *Dalt. c.* 2. See *Burn's J.* tit. *Justices of the Peace.* The principal of these is the *Custos Rotulorum*, or Keeper of the Records of the County. 1 *Comm.* 349.

I. *Of the Origin of these Officers.*
II. *Of their Commission, and its Determination.*
III. *Of their Qualifications.*
IV. *Of their Power, Duty, and Office.*

I. The Common Law hath ever had a special care and regard for the conservation of the peace: for peace is the very end and foundation of Civil Society. And therefore before the present constitution of Justices was invented, there were peculiar officers apointed by the common law for the maintenance of the public peace. Of these, some had and still have this power annexed to other offices which they hold; others had it merely by itself, and were thence named *Custodes* or *Conservatores Pacis.* Those that were so *virtute officii* still continue: but the latter sort are superseded by the modern Justices.

The King's Majesty is, by his office and dignity royal, the principal Conservator of the peace within all his dominions, and may give authority to any other to see the peace kept, and to punish such as break it: hence it is usually called the King's Peace. *Lamb. Eirenarch.* 12.—The Lord Chancellor or Keeper, the Lord Treasurer, the Lord High Steward of *England*, (when any such officers are in being,) and all the Justices of the Court of King's Bench (by virtue of their offices), and the Master of the Rolls (by prescription), are general Conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it. *Lamb.* 12. The other Judges are so, only in their own courts. The Coroner is also a Conservator of the peace within his own county; as is also the Sheriff; and both of them may take a recognizance or security of the peace. *Britt.* 3: *F. N. B.* 81. Constables, tythingmen, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace, and commit them, till they find sureties for their keeping it. *Lamb.* 14. See title *Constable.*

Those that were, without any office, simply and merely Conservators of the peace, either claimed that power by prescription, or were bound to exercise it by the tenure of their lands; or, lastly, were chosen by the freeholders in full county-court before the Sheriff; the writ for their election directing them to be chosen *de probioribus et potentioribus comitatûs sui in custodes pacis.* Lamb. 15—17. But when Queen *Isabel*, the wife of *Edward* II. had contrived to depose her husband, by a forced resignation of the crown, and had set up his son *Edward* III. in his place, this being a thing then without example in *England*, it was feared would much alarm the people: especially as the old King was living, though hurried about from castle to castle, till at last he met with an untimely death. To prevent therefore any risings, or other disturbances of the peace, the new King sent writs to all the Sheriffs in *England*, the form of which is preserved by *Thomas Walsingham, Hist. A. D.* 1327; giving a plausible account of the manner of his obtaining the crown; to wit, that it was done *ipsius patris bene placito*; and withal commanded each Sheriff, that the peace be kept throughout his bailiwick, on pain and peril of disinheritance and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament, by *stat.* 1 *E.* 3. *c.* 16, that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors in the county, should be *assigned* to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people and given to the King, *Lamb.* 20; this assignment being construed to be by the King's commission, *stats.* 4 *E.* 3. *c.* 2: 18 *E.* 3. *st.* 2. *c.* 2. But still they were only called Conservators, Wardens, or Keepers of the Peace; till the *stat.* 34 *E.* 3. *c.* 1, gave them the power of trying felonies; and then they acquired the more honourable appellation of Justices. *Lamb.* 23.

Polidore Virgil says, that Justices of the Peace had their beginning in the reign of *William* I. called the Conqueror; but Sir *Edward Coke* was of opinion, that in the sixth year of K. *Ed.* I., *Prima fuit institutio Justiciariorum*

pro pace conservandâ. Mr. *Prynne* affirms, that in the reign of King *Hen.* III. after the agreement made between that King and his barons, Guardians *ad pacem conservandam* were constituted: And Sir *Henry Spelman* differs from both these, being of opinion that they were not made until the beginning of the reign of King *Ed.* III. when they were thought necessary for suppressing commotions, which might happen upon dethroning of K. *Ed.* II. It is certain the general commission of the peace, by statute, began 1 *Ed.* III; though before that time there were particular commissions of peace to certain men, in certain places; but not throughout *England.* 2 *Nelf. Ab.* 1063.

To explain further what has been said above, as to the election of the Conservators of the peace being taken from the people and given to the King, it should be remarked, that such election, when made, was by force of the King's writ; after which election so made and returned, the King directed a writ to the party so elected, to take upon him and execute the office, until the King should order otherwise. 2 *Inst.* 558, 9.

Justices of Peace were formerly to be allowed 4*s.* a-day during their attendance at the quarter sessions, to be paid by the Sheriffs of counties. 12 *R.* 3: 2 *H.* 5: 18 *H.* 6.

II. These Justices are appointed by the King's special commission under the Great Seal, the form of which was settled by all the Judges, *A. D.* 1590: *Lamb.* 43. 35. The power of constituting them is only in the King; though they are generally made at the discretion of the Lord Chancellor or Lord Keeper, by the King's leave; and the King may now appoint in every county in *England* and *Wales* as many as he shall think fit. 1 *Inst.* 174. 175. See *post.* III. Their commission appoints them all, jointly and severally, to keep the peace; and any two more of them to inquire of and determine felonies and other misdemeanors: in which number some particular Justices, or one of them, are directed to be always included, and no business to be done without their presence; the words of the commission running thus, "*Quorum* (Of whom) *aliquem vestrum*, A. B. C. D. &c. *unum esse volumus*, any one of you the aforesaid *A. B. C. D.* &c. we will shall be one;" whence the persons so named are usually called Justices of the *Quorum*. And formerly it was customary to appoint only a select number of Justices, eminent for their skill and discretion, to be of the *Quorum*; but now the practice is to advance almost all of them to that dignity, naming them all over again in the *Quorum* clause, except perhaps only some one person for the sake of propriety: and no exception is now allowable for not expressing in the form of warrants, orders, &c. that the Justice who issued them is of the *Quorum*. *Stat.* 26 *Geo.* 2. *c.* 27. See also *stat.* 7 *Geo.* 3. *c.* 21. When any Justice intends to act under this commission, he sues out a writ of *Dedimus potestatem*, from the Clerk of the Crown in Chancery, empowering certain persons therein named to administer the usual oaths to him; which done, he is at liberty to act.

As the office of these Justices is conferred by the King, so it subsists only during his pleasure; and is *determinable*, 1. By the demise of the Crown; that is, in six months after. *Stat.* 1 *Ann. c.* 8. But if the same Justice is put in commission by the Successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh, *stat.* 1 *Geo.* 3. *c.* 13: nor, by reason of any new commission, to take the oaths more than once in the same reign. *Stat.* 7 *Geo.* 3. *c.* 9.—2. By express writ under the Great Seal, discharging any particular person from being any longer Justice. *Lamb.* 67.—3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the Justices, but does not totally destroy it, seeing it may be revived again by another writ called a *procedendo*.—4. By a new commission, which virtually, though silently, discharges all the former Justices that are not included therein; for two commissions cannot subsist at once.—5. By accession of the office of Sheriff or Coroner. *Stat.* 1 *Mar. st.* 1. *c.* 8. [A Sheriff cannot act as Justice during the year of his office: but it has been observed, that neither this statute referred to by *Blackstone*, nor any other, disqualifies a Coroner from acting as a Justice of the Peace; nor do the two offices in their nature seem incompatible. 1 *Comm. c.* 9. *n.* 14.] Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission; but now by *stat.* 1 *E.* 6. *c.* 7, it is provided, that, notwithstanding a new title of dignity, the Justice on whom it is conferred shall still continue a Justice. If a new commission is made and granted for *Justices of Peace*, out of which some of the Justices in the old commission are omitted, yet what acts they do as Justices are lawful till the next sessions, at which the new commission is published; and when the new commission is published, they are to take notice of it, and not act further. *Moor.* 187. Though by granting a new commission, discharge under the Great Seal, accession of another office, and by the demise of the King, the power and offices of Justices of Peace determine, 4 *Inst.* 165; yet till then they are empowered to act in a great many *particular cases* by statute.

On renewing the commission of the peace, (which generally happeneth as any person is newly brought into the same,) there cometh a writ of *Dedimus potestatem* directed out of Chancery, to some antient Justice (or other) to take the oath of him which is newly inserted, which is usually in a schedule annexed: and to certify the same into that court, at such a day as the writ commandeth. Unto which oath are usually annexed the oaths of allegiance and supremacy. *Lamb.* 53.

The form of which oath of office at this day is as followeth:

"YE shall swear, that as Justice of the Peace in the county of *W.* in all articles in the King's commission to you directed, you shall do equal right to the poor and to the rich, after your cunning, wit, and power, and after the laws and customs of the realm, and statutes thereof made: And ye shall not be of counsel of any quarrel hanging before you: And that ye hold your sessions after the form of the statutes thereof made: And the issues, fines, and amerciaments that shall happen to be made, and all forfeitures which shall fall before you, ye shall cause to be entered without any concealment (or embezzling), and truly send them to the King's Exchequer. Ye shall not let, for gift or other cause, but well and truly ye shall do your office of Justice of the Peace in that behalf: And that you take nothing for your office of Justice of the Peace to be done, but of the King and fees accustomed,

accustomed, and costs limited by statute. And ye shall not direct, nor cause to be directed, any warrant (by you to be made) to the parties, but ye shall direct them to the bailiff of the said county, or others the King's officers or ministers, or other indifferent persons, to do execution thereof. So help you GOD." *Burn. J.* tit. *Justices of the Peace* III.

III. Touching the *Number* and *Qualifications* of these Justices; it was ordained by *stat.* 18 *E.* 3. *c.* 2, that *two* or *three* of the best reputation in each county should be assigned to keep the peace. But these being found rather too few for that purpose, it was provided by *stat.* 34 *E.* 3. *c.* 1, that one lord, and three or four of the most worthy men in the county, with some learned in the law, shall be made Justices in every county. But afterwards the number of Justices, through the ambition of private persons, became so large, that it was thought necessary, by *stats.* 12 *Ric.* 2. *c.* 10. and 14 *Ric.* 2. *c.* 11, to restrain them at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be (as *Lambard* observed long ago) that the growing number of statute laws, committed from time to time to the charge of Justices of the Peace, have occasioned also (and very reasonably) their increase to a larger number. And as to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county; and *stat.* 13 *Ric.* 2. *c.* 7, orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also, by *stat.* 2 *Hen.* 5. *st.* 1. *c.* 4; and *st.* 2. *c.* 1, they must be resident in their several counties. And because contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by *stat.* 18 *Hen.* 6. *c.* 11, that no Justice should be put in commission, if he had not lands to the value of 20*l.* *per annum*. And the rate of money being greatly altered since that time, it was enacted by *statutes* 5 *Geo.* 2. *c.* 18: 18 *Geo.* 2. *c.* 20, that every Justice, except as is therein excepted, shall have 100*l.* *per annum* clear of all deductions; and, if he acts without such qualification, he shall forfeit 100*l.* This qualification is almost an equivalent to the 20*l.* *per annum* required in *Henry* the Sixth's time; and of this the Justice must now make oath. *Stat.* 18 *Geo.* 2. *c.* 20. Also, it is provided by the *stat.* 5 *Geo.* 2. *c.* 18, that no practising attorney, solicitor, or proctor, shall be capable of acting as a Justice of the Peace for any county.

The said *stat.* 18 *Geo.* 2. *c.* 20, provides that no person shall be capable of being a Justice of Peace, or acting as such, who shall not have in law or equity, *for his own use in possession*, a freehold, copyhold, or customary estate for life, or some greater estate, or for years determinable upon a life or lives, or 21 years, in lands, &c. of the clear yearly value of 100*l.* over and above all incumbrances, rents, and charges; or entitled to the immediate reversion or remainder in lands, &c. of 300*l.* *per ann.* and who shall not take the oath in this act mentioned, under the penalty of 100*l.* to be recovered by action of debt, and the proof of the qualification to lie on the defendant; and if he insists on any lands not mentioned in the oath, he is to give notice of them; and lands, not mentioned in the oath or notice, are not to be allowed. This act not to extend to Corporation Justices, or to the eldest sons of peers, and of gentlemen qualified to be knights of shires, the officers of the Board of Green Cloth, principal Officers of the Navy, Under Secretaries of State, Heads of Colleges, or to the Mayors of *Oxford* and *Cambridge*; all of whom may act without any qualification by estate.

IV. The *Power*, *Office*, and *Duty* of a Justice of the Peace depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the antient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons, and other inferior criminals. It also empowers any two or more to determine all felonies, and other offences; which is the ground of their jurisdiction at the Sessions. And as to the powers given to one, two, or more Justices by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such, and of so great importance to the public, that the country is greatly obliged to any worthy magistrate that, without sinister views of his own, will engage in this troublesome service. 1 *Comm.* *c.* 9: and see 4 *Comm.* *c.* 20. If therefore a well-meaning Justice makes any undesigned slip in his practice, great lenity and indulgence are shewn to him in the Courts of Law; and there are many statutes made to protect him in the upright discharge of his office; which, among other privileges, prohibit such Justices from being sued for any oversights without notice before-hand; and stop all suits begun, on tender made of sufficient amends. See *stats.* 7 *Jac.* 1. *c.* 5: 21 *Jac.* 1. *c.* 12: 24 *Geo.* 2. *c.* 44. But, on the other hand, any malicious or tyrannical abuse of their office is usually severely punished; and all persons who recover a verdict against a Justice, for any wilful or malicious injury, are entitled to double costs. See 1 *Comm.* 350—4.

Justices of Peace are to hold their sessions four times a year, *i. e.* the first week after *Michaelmas*, the *Epiphany*, *Easter*, and St. *Thomas* called *Becket*, being the 7th of *July*. *Stats.* 36 *Ed.* 3. *c.* 12: 12 *R.* 2. *c.* 10. They are Justices of Record, for none but Justices of Record can take a recognizance of the peace. Every Justice of Peace hath a separate power, and may do all acts concerning his office apart and by himself; and even may commit a fellow Justice upon treason, felony, or breach of the peace: and this is the ancient power which Conservators of the peace had at common law. But it has been held, that one Justice of the Peace cannot commit another Justice, for breach of the peace; though the Justices in sessions may do it. *Lamb. Just.* 385: *Jenk. Cent.* 174. By several statutes Justices may act in many cases where their commission doth not reach; the statutes themselves being a sufficient commission. *Lamb. lib.* 4: *Wood's Inst.* 79, 80.

The statute 4 *H.* 7. *c.* 12, (and *statutes* 33 *H.* 8. *c.* 10: 37 *H.* 8. *c.* 7,) give them a farther general power than is expressed either in their commission, or in any particular statute. The particular statutes are to be executed as they direct; wherein if no express power is given to any one Justice, he can admonish only, and if not obeyed, may make presentment of the offence upon the statute, and with his fellow Justices hear and determine it in Sessions; or he may bind the offender to the peace,

peace, or the good behaviour: some statutes empower one Justice of Peace alone to act; some require two, three, four Justices, *&c.* And where a special authority is given to Justices of Peace, it must be exactly pursued; or the acts of the Justices will not be good. 2 *Salk.* 475.

If a Justice of Peace does not observe the form of proceeding directed by statute, it is *coram non judice*, and void; but if he acts according to the direction of the statutes, neither the Justices in sessions nor *B. R.* can reverse what he has done. *Jones* 170.

The power of Justices is *ministerial* when they are commanded to do any thing by a superior authority, as by the court of *B. R. &c.* In all other cases they act as *judges*: but they must proceed according to their commission, *&c.* Where a statute requires any act to be done by two Justices, it is an established rule, that if the act is of a judicial nature, or is the result of discretion, the two Justices must be present to concur and join in it, otherwise it will be void; as in orders of removal and filiation, the appointment of overseers, and the allowance of the indenture of a parish apprentice: but where the act is merely ministerial, they may act separately, as in the allowance of a poor rate. This is the only act of two Justices which has yet been construed to be ministerial; and the propriety of this construction has been justly questioned. 4 *Term Rep.* 386. A Justice is to exercise his authority *only within the county where he is appointed by his commission*; not in any city which is a county of itself, or town corporate, having their proper Justices, *&c.* though in other towns and liberties he may. *Dalt.*

From the general rule, that a Justice is to act only within his own county, two considerations arise: One, how far a Justice can act when he is out of the county; the other, when he is in the county, how far his power extends to other counties.

As to the former case, when he is out of the county, it is said that the Justices have no *coercive* power when out of the county; and therefore that an order of bastardy, or for payment of labourers' wages, made by them out of the county, is not binding. Yet it is said, that recognizances and informations *voluntarily* taken before them in any place are good. 2 *Hawk. P. C.* And *Hale* says, that a Justice of the Peace may do a ministerial act out of his county, as examining a party robbed whether he knows the felons: but that he cannot do a compulsory act, as committing a person for not giving a recognizance.

When a Justice of Peace acts to compel another to perform any thing required by law, as where he imprisons or commands any one to be imprisoned, *&c.* he cannot act out of the jurisdiction of his county; but he may take informations any where to prove offences in the county where committed, and he principally resides; or take a recognizance to prosecute. *Cro. Car.* 213. Now, however, by *stat.* 28 *Geo.* 3. *c.* 49, any Justice acting as such for *any two or more counties*, being adjoining counties, may act in all matters concerning any or either of the said counties; and all acts of any such Justice, and of any officer in obedience thereto, shall be as valid as if done in the county to which they relate. Provided that such Justice be personally resident in one of the said counties at the time of doing such act, and that his warrants, *&c.* be directed, in the first instance, to the constable, *&c.* of the county to which the same relate.

As to the latter case, wherein it is supposed that the Justice's power is limited to that county only, the *stat.* 24 *Geo.* 2. *c.* 55, enacts, That where a Justice shall grant a warrant against a person escaping or residing out of his jurisdiction, a Justice of the county, *&c.* where such person shall reside, shall indorse his name on the warrant, which shall be a sufficient authority to the person to whom the warrant was originally directed, to execute the warrant, and carry the person before the Justice who indorsed the warrant, or any other Justice of the same county, who, if the offence be bailable, shall take bail for the person's appearing at the next sessions for the county, *&c.* where the offence was committed, and deliver the recognizance and all proceedings to the constable, *&c.* who apprehended the party, to be by him delivered to the clerk of the peace of the county, *&c.* where the fact was committed; if the fact be not bailable, or the party shall not give bail, the constable may carry the party before a Justice of the county where the fact was committed. No action lies against the Justice who indorses such warrant, but only against the Justice who granted it, if cause.

Justices either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their respective counties.—Unless facts are stated to make the contrary appear, the court always presumes in favour of the acts of inferior jurisdictions. *R.* v. *Morgan*, *Cald. ca.* 156.—Also, by *stat.* 9 *Geo.* 1. *c.* 7, a Justice dwelling in a city or precinct, that is a county of itself within the county at large, may act at his own dwelling-house for such county at large. This statute is explained by *stat.* 28 *Geo.* 3. *c.* 49. § 7, which provides, that any Justice acting for any county at large, may act as such at any place within any city, *&c.* being a county of itself, and situate within, or adjoining to such county at large; but not to extend to give such Justices of the county, not being Justices of the city, *&c.* power to act in any matters relating to such city, *&c.*

A man may be a Justice of Peace in one part of *Yorkshire*, and yet not be a Justice of Peace in every part of the county; this county being divided into separate ridings. *Hill.* 22 *Car. B. R.*

By *stat.* 16 *Geo.* 2. *c.* 18, Justices of Peace may do all things relating to the laws for relief of the poor, the passing and punishing vagrants, the repairs of the highways, or concerning parochial taxes or rates, although such Justices are rated to the taxes, within any place where they execute their office: but no Justice shall act in determining any appeal to the quarter-sessions, from any order that relates to the parish where he is so charged. In the case of *R.* v. *Yarpole*, it was determined, that on an appeal to the sessions, against an order of removal, those Justices who are rated to the relief of the poor in either of the contending parishes have not a right to vote. 4 *Term Rep.* 71.

By *stat.* 5 *Geo* 2. *c.* 19, on appeals to Justices of Peace in the sessions, they are to cause defects in form in orders, *&c.* to be rectified *without charge*, and then determine the matters according to the merits of the case; and their proceedings shall not be removed into *B. R.* without entering into recognizance of 50*l.* to prosecute with effect, and pay costs if affirmed.

By *stat.* 13 *Geo.* 2. *c.* 18, no *certiorari* shall issue to remove any order, made by Justices of Peace of any county, *&c.*

&c. or at the quarter-sessions, unless it be applied for within six months, and proved on oath that six days' notice in writing was given to the Justices, by whom the order was made, that they or the parties concerned may shew cause against it. See tit. *Certiorari*.

If a commission of *oyer* and *terminer* issues to hear and determine felonies, that determines the commissions of Justices of Peace as to felonies, though not as to the peace, &c. The stat. 1 & 2 *P. & M. c.* 13, directs Justices of Peace to take examinations in cases of felony and murder, and to certify them to the Justices of gaol-delivery, &c. since which they forbear to try great felonies. *H. P. C.* 166.

Justices of Peace may take an information against persons committing treason; issue warrants for their apprehension, and commit them to prison, &c. They commit all felons in order to trial; and bind over the prosecutors to the Assises: and if they do not certify examinations and informations to the next gaol-delivery, or do not bind over prosecutors, &c. they shall be fined. *Dalt. c.* 11.

For petit larceny and small felonies, the Justices in their Quarter Sessions may try offenders; other felonies being of course tried at the Assises: and in case of felonies, and pleas upon penal statutes, they cannot hold cognizance without an express power given them by the statutes. Justices of Peace in their sessions cannot try a cause the same sessions, without consent of parties, &c. for the party ought to have convenient time, or it will be error. *Cro. Car.* 317: S[illegible] 34. Nor can the sessions of Justices refer a matter which ought to be tried, to be determined by another session; yet they may refer a thing to another to examine, and make report to them for their determination. 2 *Salk.* 477. The Sessions is all as one day, and the Justices may alter their judgments at any time while it continues. *Ibid.* 494. See tit. *Sessions*.

It is incident to the office of a Justice of Peace to commit offenders: and a Justice may commit a person that doth a felony in his own view, without warrant; but if it be on the information of another, he must make a warrant under hand and seal for that purpose. If a Justice issues a warrant to arrest a felon, and the accusation be false, the Justice is excused, where a felony is committed: if there be no accusation, action will lie against the Justice. 1 *Leon.* 187. A Justice makes a warrant to apprehend a felon, though he is not indicted, he who executes the warrant shall not be punished. 13 *Rep.* 76: *Cro. Jac.* 432. If complaint and oath be made before a Justice of Peace, by one, of goods stolen, and that he suspects they are in such a house, and shews the cause of his suspicion; the Justice may grant a warrant to the constable, &c. to search in the place suspected; and seize the goods and person in whose custody they are found, and bring them before him, or some other Justice, to give an account how he came by them; and farther to abide such order, as to law shall appertain. 2 *Hale's Hist. P. C.* 114. The search on these warrants ought to be in the day-time, and doors may be broken open by constables to take the goods; which are to be deposited in the hands of the sheriff, &c. till the party robbed hath prosecuted the offender, to have restitution. *Ibid.* 150, 151.

A Justice of Peace may make a warrant to bring a person before himself only, and it will be good; though it is usual to make warrants to bring the offenders before him or any other Justice of the county, &c. And if a Justice directs his warrant to a private person, he may execute it. 5 *Rep.* 60: 1 *Salk.* 347.

It seems now to be indisputable, that in all cases where Justices of Peace have a jurisdiction over the offence, they may grant a warrant in order to compel the person accused to appear before them; for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend and submit to such examination. 2 *Hawk. P. C. c.* 13. § 15. And this extends undoubtedly to all treasons, felonies, and breaches of the peace, and also to all such offences as they have power to punish by statute. Sir *E. Coke* indeed hath laid it down, that a Justice of the Peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found; 4 *Inst.* 176: and the contrary practice is by others held to be grounded rather upon connivance, than the express rule of law, though now by long custom established. 2 *Hawk. P. C. c.* 13. § 16. A doctrine which would in most cases give a loose to felons to escape without punishment; and therefore Sir *Matthew Hale* hath combated it with invincible authority and strength of reason: maintaining, 1. That a Justice of Peace hath power to issue a warrant to apprehend a person *accused* of felony though not yet *indicted*; 2 *Hal. P. C.* 108; and, 2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant, because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed. *Ibid.* 110. This warrant ought to be under the hand and seal of the Justice, should set forth the time and place of making, and the cause for which it is made; and should be directed to the constable, or other peace-officer, (or, it may be, to any private person by name;) *Salk.* 176: requiring him to bring the party either generally before *any* Justice of the Peace for the county, or only before the Justice who granted it; the warrant in the latter case being called a *special* warrant. 2 *Hawk. P. C. c.* 13. § 26. A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty, 1 *Hal. P. C.* 580: 2 *Hawk. P. C. c.* 13: for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point, upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is therefore in fact *no* warrant at all; for it will not justify the officer who acts under it; whereas a warrant properly penned, (even though the magistrate who issues it should exceed his jurisdiction,) will, by *stat.* 24 *Geo.* 2. *c.* 44, at all events indemnify the officer who executes the same ministerially. And, when a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the Chief or other Justice of the Court of King's Bench extends all over the kingdom; and is *tested*, or *dated*, *England*;

England; not *Oxfordshire*, *Berks*, or any other particular county. But the warrant of a Justice of the Peace in one county, as *Yorkshire*, must be backed, that is, signed, by a Justice of the Peace in another, as *Middlesex*, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county; but the practice of backing warrants had long prevailed without law, and was at last authorised by *stats.* 23 *Geo.* 2. *c.* 26: 24 *Geo.* 2. *c.* 55. And now, by *stat.* 13 *Geo.* 3. *c.* 31, any warrant for apprehending an *English* offender, who may have escaped into *Scotland*, and *vice versâ*, may be indorsed and executed by the local magistrates, and the offender conveyed back to that part of the united kingdoms in which such offence was committed. 4 *Comm.* 290—2. See *ante*.

Justices of Peace may make and persuade an agreement in petty quarrels and breaches of the peace, where the King is not entitled to a fine: though they may not compound offences, or take money for making agreements. *Noy*, 103. Justices may not intermeddle with property; if they do, action lies against them and the officers who execute their orders. 3 *Salk.* 217. But see title *Forcible Entry*.

A Justice of Peace hath a discretionary power of binding to the good behaviour; and may require a recognizance with a great penalty of one for his keeping of the peace, where the party bound is a dangerous person, and likely to break the peace, and do much mischief. *Pasch.* 1652: 2 *Lill. Abr.* 131. And where a person is to be bound to the good behaviour, for default of sureties he may be committed to gaol. But a man giving security for keeping the peace in *B. R.* or the Chancery, may have a *supersedeas* to the Justices in the country not to take security; and so where a person hears of a warrant out against him, and gives surety of the peace to any other Justice, &c. See title *Peace, Surety of*.

If one make an assault upon a Justice of Peace, he may apprehend the offender, and send him to gaol till he finds sureties for the peace; and a Justice may record a forcible entry upon his own possession: in other cases he cannot judge in his own cause. *Wood's Inst.* 81. Where a man abuseth a Justice by words, before his face or behind his back, in relation to his office, he may be bound to his good behaviour; and if a Justice of Peace be abused in the execution of his office, the offender may be also indicted and fined. *Cromp.* 145: 4 *Rep.* 16. To say of a Justice of Peace he doth not understand law, &c. is indictable; and contempts against Justices are punishable by indictment and fine at the Sessions. 3 *Mod.* 139: 1 *Sid.* 144. But abusing a Justice out of his office, by words that do not relate to his office, seems to stand only as in the case of other persons.

If a magistrate abuses the authority reposed in him by the law, in order to gratify his malice, or promote his private interests or ambition, he may be punished also criminally by indictment or information. But the Court of K. B. have frequently declared, that though a Justice of Peace should act illegally, yet if he has acted candidly without any bad view or ill intention whatsoever, the Court will never punish him by the extraordinary mode of an information, but will leave the party complaining to the ordinary method of prosecution by action or indictment. *Burr.* 556, 785, 1162: 1 *Term Rep.* 653, 692. And in no case will the Court grant an information, unless an application for it is made within the second Term after the offence is committed; and unless notice of the application be previously given to the Justice, and the party injured will undertake to bring no action.* And if the party proceeds both by action and indictment, the Attorney General will grant a *nolo prosequi* to the indictment. Indeed where a Justice has committed an involuntary error, without any corrupt motive or intention, it may be questioned, whether it is an indictable offence. 1 *Comm.* 354. *c.* 9: and Mr. *Christian's note* there.

Justices shall not be regularly punished for any thing done by them in Sessions as Judges; and if a Justice of Peace be sued for any thing done in his office, he may plead the general issue, and give the special matter in evidence; and if a verdict goes for him, or the plaintiff be nonsuit, he shall have double costs. *Stat.* 21 *Jac.* 1. *c.* 12. Though if a Justice of Peace is guilty of any misdemeanor in his office, Information lies against him in *B. R.* where he shall be punished by fine and imprisonment. *Sid.* 192. If a person be never summoned by Justices of Peace, to be heard and make his defence, before the Justices make any order against him, it is a misbehaviour for which an information will lie against them. See title *Conviction*.

The Court of *B. R.* will grant an information against a Justice of Peace on motion for sending a servant to the House of Correction without sufficient cause; if the Justice do not shew good cause, &c. *Mod. Cas. in L. and E.* 45, 46. And for contempt of laws, &c. attachment may be had against Justices of Peace in *B. R.* on motion of the Attorney General, &c. A Justice of Peace fined a thousand marks, for corrupt practices. See 1 *Keb.* 727.

The *stat.* 24 *Geo.* 2. *c.* 44, particularly provides, that no writ shall be sued out against any Justice of Peace, for any thing done by him in the execution of his office, until a notice in writing shall be delivered to him one month before the suing out the same, containing the cause of action, &c. within which month he may tender amends, and if the tender be found sufficient, he shall have a verdict. No such plaintiff shall recover against the Justice, unless such notice shall be proved at the trial. If the Justice shall neglect to make such tender, or shall make an insufficient tender, he may, before issue joined, pay into Court such sum as he shall think fit. Where an action is against a Justice and constable, if there be a verdict against the Justice, and the constable be acquitted, the plaintiff shall recover such costs against the Justice, as to include the costs the plaintiff shall be obliged to pay to the constable. And this statute enacts, that if the plaintiff in any such action shall recover against a Justice, *and the Judge shall certify that the injury was wilfully and maliciously done*, the plaintiff shall recover double costs. No action shall be brought against a Justice for any thing done in the execution of his office, unless commenced within six months after the act committed.

By the *stat.* 27 *Geo.* 2. *c.* 20, in all cases of a warrant of distress for levying any penalty inflicted, or money directed to be paid, the Justice or Justices granting such warrant, may therein order the goods distrained to be sold within a certain time limited in the warrant, to be not less than four days, nor more than eight days, unless the

the penalty or money, with the reasonable charges of taking and keeping such distress, be sooner paid. The officer may deduct the reasonable charges of taking, keeping, and selling the distress; and if required, shall shew the party his warrant, and permit him to take a copy of it. This not to extend to *stats.* 7 & 8 *W.* 3. *c* 34: 1 *Geo.* 1. *c.* 6; as to levying tithes, *&c.* on Quakers.—The *stat.* 18 *Geo.* 3. *c.* 19, enables Justices to award costs on determination of complaints before them, and to levy them by distress and sale of the parties goods, or commit the offender to the House of Correction. General rules as to costs may be settled in Sessions, and allowed by the Judges on their circuits.

The *stat.* 26 *Geo.* 2. *c.* 14, was made for the regulation of fees of Justices' clerks; a table of which is to be made at sessions, and allowed by the Judges on their circuits; and in *Middlesex*, by *stat.* 27 *Geo.* 2. *c.* 16, by the Chief Justices at *Westminster*, or any two of them.

For further matter relative to this extensive and useful office, see *Burn's Justice*, title *Justices of the Peace*; and that book, and this Dictionary, *passim*; the latter, particularly under titles *Commitment*; *Conviction*; and other apposite titles.

Justices of Peace within Liberties; *Justiciarii ad pacem infra libertates.*] Are such in cities, and other corporate towns, as the others are of the county; and their authority is all one within the several territories and precincts, having besides the assise of ale and beer, wood, victuals, *&c.* See *stat.* 27 *H.* 8. *c.* 5. But if the King grant to a Corporation, that the Mayor and Recorder, *&c.* shall be Justices of Peace within the city; if there be no words of exclusion, Justices of the county have concurrent jurisdiction with them; and the King, notwithstanding his charter, may grant a commission of the peace specially in that city or county. 2 *Hale's Hist. P. C.* 47. Also where the Justices of any corporate town, deny doing right, Justices of the Peace of the county may inquire into it. *Mod. Cas.* 164. The Justices of Peace in cities, or towns corporate, may commit persons apprehended within their liberties to the House of Correction of the county, *&c.* which persons shall be liable to the like correction and punishment, as if committed there by any Justice of the same county. *Stat.* 15 *Geo.* 2. *c.* 24. Justices of cities and corporations are not within the qualification act, 5 *Geo.* 2. *c.* 18. See titles *Mayors*; *Corporations*; *Justices of the Peace.*

Justices of Trail-baston, Were Justices appointed by King *Ed.* I. during his absence in the *Scotch* and *French* wars. They were so stiled, says *Hollingshed*, of trailing or drawing the staff of justice; or for their summary proceeding, according to Sir *Edward Coke*, who tells us, they were in a manner Justices in Eyre; and it is said, they had a baston, or staff, delivered to them as the badge of their office, so that whoever was brought before them was *traile ad baston, traditus ad baculum*: whereupon they had the name of Justices *de trail baston*, or *Justiciarii ad trahendum offendentes ad baculum vel baston.* Their office was to make inquisition through the kingdom on all officers and others, touching extortion, bribery, and such like grievances; of intruders into other men's lands, barretors, robbers, and breakers of the peace, and divers other offenders; by means of which inquisitions, some were punished with death, many by ransom, and the rest flying the realm, the land was quieted, and the King gained riches towards the support of his wars. *Mat. Westm. anno* 1305. A commission of *trail-baston* was granted to *Roger de Grey*, and others his associates, in the reign of King *Ed.* III. *Spelm. Gloss.*

Justice-Seat, Is the highest Court that is held in a Forest, and is always held before the Lord Chief Justice in Eyre of the forest, upon warning forty days before; and there fines are set for offences, and judgments given, *&c. Manwood's Forest Law, cap.* 24. The fine and amercement of the Justices in Eyre, for false judgment, or other trespass, shall be assessed by the said Justices upon the oaths of Knights, and other honest men, and be estreated into the Exchequer. *Stat.* 3 *Ed.* 1. *c.* 18. And Justices in Eyre shall appoint a time for delivering in all writs by the Sheriff, *&c. Stat.* 13 *Ed.* 1. *c.* 10. See this Dictionary, title *Forest.*

JUSTICIAR, or JUSTICIER, Fr. *Justicier.*] A Judge, Justice, or as he was sometimes termed, Justiciary: *Shakspeare* uses the term *Justicer* for Judge. The Lord *Bermingham*, Justicier of *Ireland*. *Baker's Chron. Angl. fol.* 118.

The whole jurisdiction which is now distributed among the several Courts of *Westminster-Hall*, seems in the first reigns after the Conquest to have been lodged in one Court, commonly called the King's Court, where justice is said to have been administered sometimes by the King himself in person, and sometimes by the High Justicier, who was an officer of very great authority, and used in the King's absence beyond sea to govern the realm as Vice-Roy. 2 *Hawk. P. C. c.* 3.

The first Justiciaries after the Conquest were *Odo* bishop of *Baieux* in *Normandy*, half brother by the mother to the conqueror, and *William Fitz Osborn*, who was viceroy, and had the same power in the north that *Odo* had in the south, and was the chief in the Conqueror's army. The next Justiciaries were *William* Earl of *Warren* in *Normandy*, a great commander in the battle against *Harold*, and *Richard de Benefacta*, alias *Richard de Tonebridge*, son to *Gilbert* Earl of *Brion* in *Normandy*, and were constituted in 1073. In a great plea between *Lanfrank* and the said *Odo*, *Goisfrid* Bishop of *Constance* in *Normandy*, was Justiciary. In the beginning of *William Rufus*, *Odo* was again Justiciary. *William de Carileso*, bishop of *Durham*, a *Norman*, succeeded *Odo*, and then followed *Ranulph Flambard* in 1099. Afterwards, in the reign of *Hen.* I. in 1100, *Hugo de Bocland*, a *Norman*, was Justiciary, and after him his son *Richard Basset*; then *Roger* Bishop of *Salisbury*, was Justiciary, and Chancellor. The next, in the time of King *Stephen*, was *Henry* Duke of *Normandy*, afterwards King *Henry* II. And in *Henry* the Second's time was *Robert de Bello Monte* Earl of *Leicester* in 1168, but *Alberic de Vere* Earl of *Guisnes*, is said to have been Justiciary before him; and after Earl of *Leicester*, *Richard de Lucie* was made Justiciary; after him in 1180, *Ranulph de Glanville*, that famous lawyer, was made Justiciary; after him, *Hugo de Putacio*, commonly called *Pusat*, *Pusac*, or *Pudsey*, nephew to King *Stephen* by his sister, was made Justiciary in the north parts beyond *Trent*; and *William de Longo-Campo*, or *Long-Champ*, Bishop of *Ely*,

was

was at the same time, by *Richard* the First, made Justiciary on the south parts of this side *Trent*. Then, after the deprivation of *William* Bishop of *Ely*, *Walter* Archbishop of *Rouen* in *Normandy*, was made Justiciary of all *England*. *Brady's Preface, &c.* 151. (D) (E) (F); 152. (A) (B) (C); See *Dugd. Chron. Series*, 1, 2, 3, 4, 5.

William Long-Champ Bishop of *Ely*, Chief Justiciar and Lord Chancellor to *Ric.* I. *Speed.* 473. *Fitz Peter*, Chief Justiciar in the first of *John*. *Ib.* 487. *Hubert de Burgh* Earl of *Kent*, Chief Justiciar. 1 *Hen.* 3: *Ib.* 513. And after him, *Stephen Segrave*. *Ib.* 521. The Chief Justiciar was the Minister of regal command in the absence of the King. *Ib.* 513.

Towards the latter end of the *Norman* period, the power of the Grand Justiciar was broken, so that the *Aula Regis*, which before was one great Court where the Justiciar presided, was divided into four distinct Courts, *viz.* Chancery, Exchequer, King's Bench, and Common Pleas. *Gilb. Hist. View of the Court of Exchequer* 7, cites *Madd.* 2, 4. It determined about the 45 *H.* 3. *Brady's Preface*, &c. 154. *b.*

The Chancellor was the first in order on the left hand of the Justiciary, and as he was a great person in Court, so he was in the Exchequer; for no great thing passed but with his consent and advice; nothing could be sealed without his allowance and privity. But the Justiciary surmounted him and all others in authority; and he alone was endowed with and exercised all the power which afterwards was executed by the four chief Judges, *viz.* the Chief Justice of *B. R.* the Chief Justice of *C. B.* the Chief Baron of the Exchequer, and the Master of the Court of Wards. *Brady's Preface to the Roman History*, 153. (B). As long as the power of the Justiciar continued, the *Aula Regis* was one Court, and only distinguished by the several officers; for all the officers were united under the Justiciar, and he was the governor and superintendant of the Courts. *Gilb. Hist. View of the Exchequer*, 10. See titles *Judge*; *Justices*; *Court*; *King's Bench*; &c.

JUSTICIATUS, Judicature, Prerogative. *Cowell.*

JUSTICIES, is a writ directed to the Sheriff in some special cases, by virtue of which he may hold plea of debt in his County Court for a large sum; whereas, otherwise, by his ordinary power, he is limited to sums under 40*s.* *F. N. B.* 117: *Kitch.* 74. It is called *Justicies*, because it is a commission to the Sheriff to do a man justice and right, beginning with the word *Justicies*, &c. *Bract. lib.* 4, makes mention of a *Justicies* to the Sheriff of *London*, in a case of dower: and it lies in account, annuity, customs, and services, &c. *New Nat. Br.* In debt, the writ runs thus: *The King to the Sheriff of S. greeting: We command you, that* You Justice A. B. *that justly and without delay he render to* C. D. *five pounds, which to him he oweth, as it is said, and as reasonably he can shew, that he ought to render him, that no more clamour thereof we may hear, for default of justice*, &c.

This writ of *Justicies* impowers the Sheriff, for the sake of dispatch, to do the same justice in his County Court as might otherwise be had at *Westminster*. *Finch.* 318: *F. N. B.* 152. The Freeholders of the county are the real Judges in this Court, and the Sheriff is the ministerial officer. 3 *Comm.* 36. *c.* 4. See this Dictionary, title *County Court*.

JUSTIFIABLE HOMICIDE. See title *Homicide*.

JUSTIFICATION, *justificatio*] A maintaining or shewing good reason in Court why one did such a thing which he is called to answer. *Broke.* Pleas in Justification are to set forth some special matter whereby the party justifies what he hath done concerning lands or goods; as that he did it by authority: and this may be by the law, or from another person; wherein, to make it right, there must be good authority, which is to be exactly pursued. *Shep. Epit.* 1041. Justification may be in trespass, and under writs, processes, &c. But a person cannot justify a trespass, unless he confesseth it; for he ought to plead the special matter, and confess and justify what he hath done. 3 *Salk.* 218. Where a defendant justifies in trespass on his possession, by virtue of any estate, he must shew his title; but when the matter is collateral to the title to the land, it is otherwise. 2 *Mod.* 70. *Sed Qu.* If he should not give colour? or probably such plea may amount to the general issue. If a sheriff, or other officer, justifies by virtue of any returnable writ, he is to shew that the writ was returned; though he need not if the writs are not returnable writs. 1 *Salk.* 409. And it must be shewn from what Courts the writs issued. *Ibid.* 517.

When the action concerns a transitory thing, if the defendant justify the taking or doing in one place; it is a Justification in all places: if the action concern a local thing, a Justification in one place is not a Justification in another place; for in the former case the place is not material, but the mere doing or taking of the thing is the substance; and in the latter, the place is material, as the defendant may be able to justify as to one place, and not in another. 2 *Lil. Abr.* 134. If the matter of Justification is local, there the defendant ought to shew the cause specially, and traverse the place; but not where it is transitory. *Cro. Eliz.* 667. If one have corn upon the lands of another, and he take it, and the owner of the ground sues him, he must justify, and not plead the general issue. 5 *Rep.* 85. In actions for entering a close, and taking corn; the defendants may justify they did it as servants to the parson; and that the corn was tithe, severed from the nine parts, &c. 2 *Keb.* 44. A man may plead in Justification, that land is his freehold, on making an entry thereon, &c. That one entered a house to apprehend a felon; or by warrant to levy a forfeiture; to take a distress, &c. And in assault that he did it in his own defence, &c. *Lib. Ent.* Words spoken may be justified, because spoken in a legal way: for words the defendant may justify in an action; but not in an indictment, &c. 1 *Danv.* 162: 3 *Salk.* 326. See titles *Action*; *Words*; *Libel*.

A Justification (in other words) is a special plea in bar; as in actions of assault and battery, *son assault demesne*, *viz.* that the plaintiff first, with force and arms, assaulted the defendant, and he defended himself, and therefore, if any damage happened to plaintiff, it was owing to the assault he made on defendant, and in his necessary defence;—in other actions of trespass, that the defendant did the thing complained of in right of some office which warranted him so to do;—or in an action of slander, that the plaintiff was guilty of such or such a crime, and therefore he, the defendant, spoke the words. See titles *Pleading*; *Trespass*, &c.

JUSTIFI-

JUSTIFICATORS, *justificatores.*] A kind of compurgators, or those that by oath justified the innocence, or oaths of others; as in the case of waging of law. See *Wager of Law*.

JUSTIFYING BAIL. See title *Bail*, I.

JUSTITIA, A statute, law, or ordinance. *Hoveden*, p. 666.

Justitia, Is often taken for jurisdiction, or the office of a Judge. *Leg. Edw. Conf. cap.* 26.

He who is now called *Justitiarius* was formerly called *Justitia*, *i. e.* a Judge. *Leg. Hen.* 1. *c.* 42.

JUSTITIAM FACERE, To hold plea of any thing. See *Selden* in his *Notes* upon *Eadmerus*.

JUSTITIUM, A ceasing from the prosecution of law, and exercising justice in places judicial. *Cowell.*

JUSTS, Fr. *Jousta*, i. e. *decursus.*] Were exercises between martial men and persons of honour, with spears on horseback; and different from *tournaments*, which were military contentions, and consisted of many men in troops; whereas *Jousts* were usually between two men singly. They are mentioned in *stat.* 24 *Hen.* 8. *c.* 13, and are now disused.

K.

KAIA, A Key or Wharf. *Spelm.*

KAIAGIUM, Keyage; which see.

KALENDÆ, Rural Chapters or conventions of the rural deans and parochial clergy; so called because formerly held on the Kalends, or first day of every month. *Paroch. Antiq.* 640.

KALENDAR and KALENDS. See *Calendar* and *Calends*.

KANTREF. See *Cantred*.

KARITE. See *Caritas*.

KARLE, *Sax.*] A man; and with any addition a servant or clown; as the *Saxons* called a domestic servant, a *buskarle*; from whence comes the modern word *churl*. *Domesday*.

KARRATA FŒNI, A cart-load of hay. *Mon. Ang.* tom. 1. *p.* 548. See *Carecta*.

KAY. See *Key*.

KEBBARS, or *Cullers.*] The refuse of sheep drawn out of a flock; *oves rejiculæ*. *Cooper's Thesaur.*

KEELAGE, *killagium.*] A privilege to demand money for the bottom of ships resting in a port or harbour. *Rot. Parl.* 21 *Ed.* 1.

KEELMEN, Are mentioned among mariners, seamen, &c. in various statutes. See title *Coals*.

KEELS. This word is applied to vessels used in the carriage of coals, &c. See *Keyles*.

KEEP. A strong tower or hold in the middle of any castle or fortification, wherein the besieged made their last efforts of defence, was formerly in *England* called a Keep: and the inner pile within the castle of *Dover*, erected by King *Hen.* II, about the year 1153, was termed the King's Keep: so at *Windsor*, &c. It seems to be something of the nature of that which is called abroad a *Citadel*.

KEEPER OF THE FOREST, *Custos Forestæ.*] Or Chief-warden of the Forest, hath the principal government over all officers within the forest; and warns them to appear at the Court of Justice-seat, on a general summons from the Lord-Chief Justice in Eyre. *Manwood*, *part* 1. *p.* 156. See title *Forest*.

KEEPER OF THE GREAT SEAL, *Custos magni sigilli.*] Is a Lord by his office, stiled Lord Keeper of the Great Seal of *England*, and is of the King's Privy Council: through his hands pass all charters, commissions and grants of the King, under the Great Seal; without which seal many of those grants and commissions are of no force in law; for the King is by interpretation of law a corporation, and passeth nothing but by the Great Seal, which is as the public faith of the kingdom, in the high esteem and reputation justly attributed thereto.

The Great Seal consists of two impressions, one being the very seal itself with the effigies of the King stamped on it; the other has an impression of the King's arms in the figure of a target, for matters of a smaller moment, as certificates, &c. that are usually pleaded *sub pede sigilli*. And anciently, when the King travelled into *France* or other foreign kingdoms, there were two *Great Seals*; one went with the King, and another was left with the *Custos Regni*, or the Chancellor, &c.

If the Great Seal be altered; the same is notified in the Court of Chancery, and public proclamations made thereof by the Sheriffs, &c. 1 *Hale's Hist. P. C.* 171, 4.

The Lord Keeper of the Great Seal, by statute 5 *Eliz. c.* 18, hath the same place, authority, pre-eminence, jurisdiction, and execution of laws, as the Lord Chancellor of *England* hath; and he is constituted by the delivery of the Great Seal, and by taking his oath, 4 *Inst.* 87. See *Lamb. Archeion.* 65: 1 *Rol. Abr.* 385. and this Dictionary, title *Chancellor*.

KEEPER OF THE PRIVY SEAL, *Custos privati sigilli.*] That officer, through whose hands all charters, pardons, &c. pass, signed by the King, before they come to the Great Seal: and some things which do not pass that seal at all: he is also of the Privy Council, but was anciently called only Clerk of the Privy Seal; after which he was named Guardian *del* Privy Seal; and lastly, Lord Privy Seal, and made one of the great officers of the kingdom. See *stat.* 12 *R.* 2. *c.* 11: *Rot. Parl.* 11 *H.* 4: and *stat.* 34 *H.* 8. *c.* 4.

The

The Lord Privy Seal is to put the seal to no grant without good warrant; nor with warrant, if it be against law, or inconvenient, but that he first acquaint the King therewith. 4 *Inst.* 55. As to the fees of the clerks under the Lord Privy Seal, for warrants, &c. See *stat.* 27 *H.* 8. *c.* 11. See further this Dictionary, titles *Grant of the King*; *Privy Seal.*

Keeper of the Touch, mentioned in the ancient statute 12 *H.* 6. *c.* 14, seems to be that officer in the King's mint, at this day called the Master of the Assay. See *Mint.*

Keepers of the Liberties of England, By authority of Parliament. Vide *Custodes Libertatis.*

KENDAL, *Contagium.* An ancient barony, MS.

KENNETS, A coarse *Welsh* cloth. See *stat.* 33 *H.* 8. *c.* 3.

KERHERE, A custom to have a cart-way; or a commutation for the customary duty for carriage of the Lord's goods. *Cowell.*

KERNELLARE DOMUM, from Lat. *Crena,* a notch.] To build a house formerly with a wall or tower, kernelled with crannies or notches, for the better convenience of shooting arrows, and making other defence. *Du Fresne* derives this word from *quarnellus,* or *quadranellus,* a four-square hole or notch; *ubicunque patent quarnelli sive fenestræ:* and this form of walls and battlements for military uses might possibly have its name from *quadrellus,* a four-square dart. It was a common favour granted by our Kings in ancient times, after castles were demolished for prevention of rebellion, to give their chief Subjects leave to fortify their mansion-houses with kernelled walls. *Paroch. Antiq.* 533.

KERNELLATUS, Fortified or embatteled, according to the old fashion; *Plac.* 31 *Ed.* 3.

KERNES, Idle persons, vagabonds. *Ordin. Hibern.* 31 *Ed.* 3. *m.* 11, 12.

KEVERE, A cover or vessel used in a dairy house for milk or whey. *Paroch. Antiq. p.* 386.

KEY, *Kaia & caya,* Sax. *Leg.* Teut. *Kay.*] A wharf to land or ship goods or wares at. The verb *caiare,* in old writers, signifies (according to *Scaliger*) to keep in, or restrain; and so is the earth or ground where Keys are made, with planks and posts. *Cowell.*

The lawful Keys and wharfs for lading or landing of goods belonging to the port of *London,* are *Chester's Key, Brewer's-Key, Galley-Key, Wool-Dock, Custom-house-Key, Bear-Key, Porter's-Key, Sab's-Key, Wiggan's-Key, Young's-Key, Ralph's-Key, Dice-Key, Smart's-Key, Somers's-Key, Hammond's-Key, Lyon's-Key, Botolph-Wharf, Grant's-Key, Cock's-Key,* and *Fresh-Wharf;* besides *Billingsgate,* for landing of fish and fruit; and *Bridgehouse* in *Southwark* for corn and other provision, &c. but for no other goods or merchandise. Deal boards, masts, and timber, may be landed at any place between *Limehouse* and *Westminster;* the owner first paying or compounding for the customs, and declaring at what place he will land them. *Lex Mercat.* 132, 133. *Stat.* 13 & 14 *Car.* 2. *c.* 11. *Ab.* 14: *Rot. Scac.* 19 *Car.* 2. It is sometimes spelt Quay, from the French *quai.* See this Dictionary, title *London.*

KEYAGE, *Kaiagium.*] The money or toll paid for lading or unlading wares at a key or wharf. *Rot. Par.* 1. *Edw.* 3. *m.* 10: 20 *Edw.* 3. *m.* 1.

KEYLES or KEELS, *Ciuli* or *Ciules.*] A kind of long-boats of great antiquity, mentioned in *stat.* 23 *H.* 8. *c.* 18. *Spelm.*

KEYING, Five fells, or pelts, or sheep-skins with their wool on them. *Cowell.*

KEYUS, KEYS, A guardian, warden, or keeper. *Mon. Ang. tom.* 2. *p.* 71. In the *Isle of Man,* the twenty-four chief commoners, who are, as it were, conservators of the liberties of the people, are called Keys of the island. See title *Man, Isle of.*

KICHELL, A cake: it was an old custom for godfathers and godmothers, every time their god-children asked them blessing, to give them a cake; which was called a God's Kichell. *Cowell.*

KIDDER, Signified one that badges, or carries corn, dead victual, or other merchandize, up and down to sell. *Stat.* 5 *Eliz. c.* 12. They are also called Kiddiers, in *stat.* 13 *El. c.* 25.

KIDDLE, KIDEL, or KEDEL, *Kidellus.*] A dam, or open wear in a river, with a loop or narrow cut in it, accommodated for the laying of wheels or other engines to catch fish. 2 *Inst. fol.* 38. The word is ancient, for we meet with it in *Magna Charta, c.* 24. And in a charter made by King John, to the city of *London.* By *stat.* 1 *H.* 4. *c.* 12, it was accorded, *inter alia,* That a survey should be made of the wears, mills, stanks, stakes, and Kidels, in the great rivers of *England.* They are now called Kettles, or Kettle-nets, and are much used on the sea-coasts of *Kent* and *Wales. Cowell.*

KIDNAPPING, The forcible abduction and conveying away of a man, woman, or child from their own country, and sending them to another; it is an offence at common law. *Raym.* 474.

This is unquestionably a very heinous crime, as it robs the King of his Subjects, banishes a man from his country, and may in its consequences, be productive of the most cruel and disagreeable hardships; and therefore the common law of *England* has punished it with fine, imprisonment, and pillory. 2 *Show.* 221: *Skin.* 47: *Comb.* 10.

The *stat.* 11 & 12 *W.* 3. *c.* 7, though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad, as are thus kidnapped or spirited away; by enacting, that if any captain of a merchant vessel shall (during his being abroad) force any person on shore, and wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer (what seems no very adequate punishment) *three months' imprisonment.* There is no doubt, however, that the party thus injured may maintain an action against the party offending for damages sustained by occasion of such treatment. See title *Imprisonment.*

KILDERKIN, A vessel of ale, &c. containing the eighth part of an hogshead.

KILKETH, An ancient servile payment made by tenants in husbandry. *Cowell.*

KILLAGIUM, Keelage. *Cowell.*

KILLYTHSTALLION, A custom by which lords of manors were bound by custom to provide a stallion for the use of their tenants' mares. *Spelm. Gloss.*

KILTH, *Ac omnes annuales redditus de quadam consuetudine in, &c. vocat' Kilth. Pat.* 7 *Eliz.*

KINDRED,

KINDRED, Are a certain body of persons of kin or related to each other. There are three degrees of Kindred in our law; one in the right line descending, another in the right line ascending, and the third in the collateral line.

The right line descending, wherein the Kindred of the male line are called *Agnati*, and of the female line *Cognati*, is from the father to the son, and so on to his children in the male and female line; and if no son, then to the daughter, and to her children in the male and female line; if neither son nor daughter, or any of their children, to the nephew and his children, and if none of them, to the niece and her children; if neither nephew nor niece, nor any of their children, then to the grandson or granddaughter of the nephew; and if neither of them, to the grandson or granddaughter of the niece; and if none of them, then to the great grandson or great granddaughter of the nephew and of the niece, *&c. et sic ad infinitum.*

The right line ascending is directly upwards; as from the son to the father or mother; and if neither father nor mother, to the grandfather or grandmother; if no grandfather or grandmother, to the great grandfather or great grandmother; if neither great grandfather or great grandmother, to the father of the great grandfather, or the mother of the great grandmother; and if neither of them, then to the great grandfather's grandfather, or the great grandmother's grandmother; and if none of them, to the great grandfather's great grandfather, or great grandmother's great grandmother, *et sic in infinitum.*

The collateral line is either descending by the brother and his children downwards, or by the uncle upwards: it is between brothers and sisters, and to uncles and aunts, and the rest of the Kindred, upwards and downwards, across and amongst themselves. 2 *Nelf. Abr.* 1077, 1078.

If there are no Kindred in the right descending line, the inheritance of lands goes to the collateral line; but it never ascends in the right line upwards, if there are any Kindred of the collateral line, though it may ascend in that line: and there is this difference between the right line descending and the collateral line; that the right of representation of Kindred in the right descending line reaches beyond the great grandchildren of the same parents; but in the collateral line, it doth not reach beyond brothers and sisters children; for after them there is no representation among collaterals.

In the right ascending line the father or mother are always in the first degree of Kindred; and by the civil law, if the son died without issue, his father or mother succeeded, and after them his brother or sister, uncle, aunt, *&c.* But in case of purchase by the son, if he died without issue, his father or mother could not inherit, but his brothers and sisters, *&c.* by which it appears, that the father cannot succeed the son immediately, though he is the next of kin. If a man purchase lands and dies without issue, it shall never go to the half blood in the collateral line; though it is otherwise in case of a descent from a common ancestor.

The children of the brothers and sisters of the half blood, shall exclude all other collateral ascendants, as uncles and aunts, and all remoter Kindred of the whole blood in the collateral line. 2 *Nelf. Abr.*

There are several rules to know the degrees of Kindred; in the ascending line, take the son and add the father, and it is one degree ascending, then add the grandfather, and it is a second degree, a person added to a person in the line of consanguinity making a degree; and if there are many persons, take away one, and you have the number of degrees; as if there are four persons, it is the third degree, if five, the fourth, *&c.* so that the father, son, and grandchild, in the descending line, though three persons make but two degrees: To know in what degree of Kindred the sons of two brothers stand, begin from the grandfather and descend to one brother, the father of one of the sons, which is one degree, then descend to his son the ancestor's grandson, which is a second degree; and then descend again from the grandfather to the other brother, father of the other of the sons, which is one degree, and descend to his son, *&c.* and it is a second degree; thus reckoning the person from whom the computation is made, it appears there are two degrees, and that the sons of two brothers are distant from each other two degrees: for in what degree either of them is distant from the common stock, the person from whom the computation is made, they are distant between themselves in the same degree; and in every line the person must be reckoned from whom the computation is made. If the Kindred are not equally distant from the common stock; then in what degree the most remote is distant, in the same degree they are distant between themselves, and so the kin of the most remote maketh the degree; by which rule, I, and the grandchild of my uncle, are distant in the third degree, such grandchild being distant three degrees from my grandfather, the nearest common stock. See further at length, 2 *Comm.* c. 14: and this Dictionary, titles *Descent*; *Executor*, III; V. 8. The common law agrees in its computation with the civil and canon law, as to the right line; and only with the canon law as to the collateral line. *Wood's Inst.* 48, 9.

KING,

REX; from Lat. *Rego* to rule:—Sax. *Cyning* or *Coning*.] A Monarch or Potentate, who rules singly and sovereignly over a People; or he that has the highest power and rule in the land. The King is the head of the State. See *Bract. lib.* 1. c. 8.

THE SUPREME EXECUTIVE POWER of these Kingdoms is vested by the English laws in a single person, the *King* or *Queen*; for it matters not to which sex the Crown descends; but the Person entitled to it, whether Male or Female, is immediately invested with all the ensigns, rights, and prerogatives of Sovereign Power: as is declared by *stat.* 1 *Mary, stat.* 3. c. 1.

The Editor has endeavoured to digest and bring together much information on this head, which in former Dictionaries was either omitted or scattered through various unconnected titles. For this purpose he has, in the first place, had recourse to the valuable *Commentaries*; to which he has found it his duty to make continual application, through the whole of this work. The outline there furnished is here attempted to be, in some measure, filled up with various matter from other sources. It seemed, on the whole, most convenient to follow nearly the arrangement of *Blackstone*. The Student will, therefore, find the matter of this title thus disposed.

I. *Of the Title, and Succession to the Throne.*
II. *Of the Royal Family.—As to* the Queen, *see this Dict. under that title.*
III. *Briefly and incidentally of the King's Councils.*
IV. *Of the King's Duties; and his Coronation Oath.*
V. *Of the King's Prerogative.*
1. *Generally.*
2. *As relates to his Royal Character; wherein of his Sovereignty; Perfection; and Perpetuity.*
3. *With respect to his Authority, foreign and domestic;—in sending Ambassadors; making Treaties; War and Peace:—As One of the Estates of the Realm; Commander of our Armies and Navies; the Fountain of Justice; and of Honour: Arbiter of Domestic Commerce; Supreme Head of the Church.*
4. *As regards his Revenues; ordinary and extraordinary; and, in the latter, of his Civil List.*
VI. *Of the King's Prerogative in relation to his Debts; and see this Dict. titles* Execution; Extent; Judgment; &c.
VII. *The former and present state of the Prerogative in general.*

The Executive Power of the English Nation being vested in a single person, by the general consent of the People, the evidence of which general consent is long and immemorial usage, it became necessary to the freedom and peace of the State, that a rule should be laid down uniform, universal, and permanent; in order to mark out with precision *who* is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom in return the duty and allegiance of every individual are due.

When the succession to the Crown was formerly interrupted by the state of Society and the Constitution, which had not then arrived to the state of perfection it attained in later ages, and even more recently since the Revolution, distinctions have been frequently made between a King *de facto* and *de jure*. Though it is to be hoped that no contest of this nature is likely again to rise in these kingdoms, what is just shortly hinted on this subject will doubtless be agreeable to the Student; see further on this subject, title *Treason*.

If there be a King regnant in possession of the Crown, although he be but *Rex de facto*, and not *de jure*, yet he is *Seignior le Roy*: and another that hath right, if he be out of possession, he is not within the meaning of the *stat.* 11 *Hen.* 7. *c.* 1. for the Subjects to serve and defend him in his wars, &c. And a pardon, &c. granted by a King *de jure*, that is not likewise *de facto*, is void. 3 *Inst.* 7. If a King that usurps the Crown, grants licences of alienation or escheats, they will be good against the rightful King; so of pardons, and any thing that doth not concern the King's ancient patrimony, or the government of the People: judicial acts in the time of such a one, bind the right King and all who submitted to his judicature. The Crown was toss between the two families of *York* and *Lancaster* many years; and yet the acts of royalty done in the reign of the several competitors, were confirmed by the Parliament: and those resolutions were made, because the common people cannot judge of the King's title; and to avoid anarchy and confusion. *Jenk. Cent.* 130, 1.

All judicial acts done by *Henry* VI. while he was King, and also all pardons of felony and charters of denization granted by him, were deemed valid; but a pardon made by *Edw.* IV. before he was actually King, was declared void even after he came to the Crown. See 1 *Hawk. P.C. c.* 17.

Hale says, the right Heir of the Crown, during such time as the Usurper is in plenary possession of it, and no possession thereof in the heir, is *not* a King within this act; as was the case of the house of *York*, during the plenary possession of the Crown in *Hen.* IV., *Hen.* V., *Hen.* VI. But if the right Heir had once the possession of the Crown, as King, though an Usurper had got the possession thereof, yet the other continues his stile, title, and claim thereto, and afterwards re-obtains the full possession thereof; a compassing the death of the rightful heir, during that interval, is compassing of the King's death within this act, for he continued a King still, *quasi* in possession of his kingdom; which was the case of *Ed.* IV. in that small interval wherein *Hen.* VI. re-obtained the Crown; and the case of *Ed.* V. notwithstanding the usurpation of his uncle *Rich.* III. 1 *Hal. Hist. P.C.* 104.

The grand fundamental maxim upon which the *Jus Coronæ*, or right of succession to the Throne of these kingdoms depends, seems to be this: "That the *Crown* is by common law and constitutional custom *hereditary*; and this *in a manner peculiar* to itself; but that the right of inheritance may from time to time be *changed* or *limited* by *Parliament*; under which limitations the Crown still continues hereditary."

First, it is in general *hereditary*, or descendible to the next heir, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective; and as no instance can be found wherein the Crown of *England* has ever been asserted to be elective, by any authority but that of the Regicides at the infamous and unparalleled *trial* of K. *Charles* I., it must of consequence be hereditary. Yet an hereditary, by no means intends a *jure-divino*, right to the Throne; save only so far as Kingdoms, like other human fabricks, are subject to the general and ordinary dispensations of Providence. Nor indeed have a *jure-divino* and an *hereditary* right any necessary connexion with each other, as some have very weakly imagined. The hereditary right which the laws of *England* acknowledge, owes its origin to the founders of our Constitution, and to them only. The founders of our *English* Monarchy might perhaps, if they had thought proper, have made it elective; but they rather chose, and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent; and ripened by degrees into common law; the very same title that every private man has to his own estate. Lands are not *naturally* descendible any more than Thrones; but the Law has thought proper, for the benefit and peace of the Public, to establish hereditary succession in the one, as well as the other.

Secondly, as to the *particular mode* of inheritance; it in general corresponds with the feodal path of descents, chalked out by the Common Law in the succession to landed Estates; yet with one or two material exceptions. Like Estates, the Crown will descend lineally to the issue

of

of the reigning Monarch; as it did from King *John* to *Richard* II, through a regular degree of six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. But among the females, the Crown descends by right of primogeniture to the Eldest Daughter only, and her issue; and not as in common inheritances, to all the Daughters at once: the evident necessity of a sole succession to the Throne having occasioned the royal law of descents to depart from the common law in this respect. The doctrine of representation also prevails in the descent of the Crown, as it does in other inheritances, whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Lastly, on failure of lineal descendants, the Crown goes to the next collateral relations of the late King, provided they are lineally descended from the blood-royal; that is, from that royal stock which originally acquired the Crown. But herein there is no objection (as in the case of common descents) to the succession of a Brother, an Uncle, or other collateral relation of the *half* blood; provided only, that the one Ancestor from whom both are descended, be that from whose veins the blood-royal is communicated to each. The reason of which diversity, between royal and common descents, may be better understood by recurring to the general rules of *Descent*. See that title; *Canon* VI. *ad fin.*

If the King hath issue a son and a daughter by one venter, and a son by another venter, and purchases lands and dies, and the eldest son enters, and dies without issue the daughter shall not inherit those lands, nor any other fee-simple lands of the Crown, but the younger brother shall have them together with the Crown. *Co. Lit.* 15. *b.*

Thirdly; the doctrine of *hereditary* right does by no means imply an *indefeasible* right to the Throne. No man will surely assert this who has considered our Laws, Constitution, and History without prejudice, and with any degree of attention. It is unquestionably in the breast of the Supreme *Legislative Authority* of this Kingdom, *The King and both Houses of Parliament*, to defeat this hereditary right; and by particular entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution, as may be gathered from the expression so frequently used in our statute-book of "the King's Majesty, his heirs and successors." In which we may observe, that as the word *Heirs* necessarily implies an inheritance or hereditary right generally subsisting in the royal person; so the word *Successors*, distinctly taken, must imply that this inheritance may sometimes be broken through; or that there may be a successor without being the heir of the King.

Fourthly; However the Crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. And hence in our law the King is said never to die in his political capacity; because immediately upon the natural death of *Henry*, *William*, or *Edward*, the King survives in his Successor. For the right of the Crown vests *eo instanti* upon his heir; either the *hæres natus*, if the course of descent remains unimpeached, or the *hæres factus*, if the inheritance be under any particular settlement. So that there can be no *interregnum*; but as *Hale* observes, the right of sovereignty is fully invested in the Successor by the very descent of the Crown. 1 *Hist. P. C.* 61. Hence the statutes passed in the first year after the Restoration of *Car.* II. are always called the Acts in the 12th year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

On this principle, that the King commences his reign from the day of the death of his ancestor, it hath been held, that compassing his death before coronation, or even before proclamation, is compassing of the King's death within the statute of 25 *Ed.* 3. *stat.* 5. *c.* 2; he being King presently, and the proclamation and coronation only honourable ceremonies for the further notification thereof. 3 *Inst.* 7: 1 *Hale's Hist. P. C.* 101. See title *Treason*.

However acquired therefore, the Crown becomes in the Successor absolutely hereditary; unless by the rules of the limitation it should be otherwise ordered and determined.

In these four points consists the *constitutional notion* of hereditary right to the Throne; which is still further elucidated and made clear beyond all dispute, by the learned Commentator, from whom much of the foregoing and following abstract is abridged, in a short historical view which he gives, of the Succession to the Crown of *England*, from *Egbert* to the present time; of the doctrines of our ancient Lawyers; and of the several statutes that have from time to time been made, to create, to declare, to confirm, to limit, or to bar, the hereditary title to the Throne. In the pursuit of this Inquiry he clearly shews, that from the days of *Egbert*, the first sole Monarch of this kingdom, to the present, the four cardinal maxims above mentioned have ever been held the constitutional canons of Succession to the Crown. It is true this succession, through fraud or force, or sometimes through necessity, when in hostile times the Crown descended on a Minor, or the like, has been very frequently suspended: but has generally at last returned back, into the old hereditary channel; though sometimes a very considerable period has intervened. And even in those instances where the succession has been violated, the Crown has ever been looked upon as hereditary in the wearer of it. Of which the Usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble show of a title by descent, in order to amuse the People, while they gained the possession of the kingdom. And when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance, and transmitted, or endeavoured to transmit, it to their own posterity, by a kind of hereditary right of Usurpation. See 1 *Comm. c.* 3. *p.* 190—7.

If the Throne be at any time vacant, (which may happen by other means besides that of abdication; as if all the blood-royal should fail, without any successor appointed by Parliament,) the right of disposing of this vacancy seems naturally to result to the Houses of Lords and Commons, the trustees and representatives of the Nation. For there are no other hands in which it can so properly be entrusted; and there is a necessity of its being entrusted somewhere, else the whole frame of Government must be dissolved and perish.

The Preamble to the Bill of Rights expresfly declares, that "the Lords Spiritual and Temporal, and Commons, assembled at *Westminster*, lawfully, fully, and freely represent all the Estates *of the People* of this realm." The Lords are not less the trustees and guardians of their country than the Members of the House of Commons. It was justly said, when the royal prerogatives were suspended during his Majesty's illness, in 1788, that the two Houses of Parliament were the organs by which the People expressed their will. And in the House of Commons, on the 16th of *December* in that year, two Declaratory Resolutions were accordingly passed, importing: 1. The Interruption of the Royal Authority; 2. That it was the duty of the two Houses of Parliament to provide the means of supplying that defect. On the 23d of the same month a third resolution passed, empowering the Lord Chancellor of *Great Britain* to affix the Great Seal to such *Bill of Limitations* as might be necessary to restrict the power of the future Regent to be named by Parliament: this Bill was accordingly brought forward, not without considerable opposition to its provisions, as well from private motives as on forcible political grounds; and at length, happily for the Public, arrested in its progress by the providential recovery of his Majesty in *March* 1789. It is observable, however, that no Bill was ever afterwards introduced to guard against a future emergency of a similar nature: on the grounds undoubtedly of delicacy to a Monarch universally beloved; in the hope of the improbability that such a circumstance should recur in future; and in the confidence of the omnipotence of Parliament if necessarily called upon again. See *Belsham's Memoirs* of Geo. III. *sub. an.* 1788-9: and the *Journals* of the *Lords* and *Commons*.

Towards the end of King *William's* reign, *the King and Parliament* thought it necessary to exert their power of limiting and appointing the succession, in order to prevent the vacancy of the Throne; which must have ensued upon their deaths, as no farther provision was made at the Revolution than for the issue of Queen *Mary*, Queen *Anne*, and King *William*. It had been previously, by the *stat.* 1 *W.* and *M. stat.* 2. *c.* 2, enacted, that every person who should be reconciled to, or hold communion with, the See of *Rome*, who should profess the Popish religion, or who should marry a Papist, should be excluded, and for ever incapable to inherit, possess, or enjoy the Crown; and that in such case the people should be absolved from their allegiance [to such person], and the Crown should descend to such persons, being *Protestants*, as would have inherited the same, in case the person so reconciled, holding communion, professing, or marrying, were naturally dead. To act therefore consistently with themselves, and at the same time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the Princess *Sophia*, Electress and Dutchess Dowager of *Hanover*. For, upon the impending extinction of the Protestant posterity of *Charles* I. the old law of regal descent directed them to recur to the descendants of *James* I. and the Princess *Sophia* being the youngest daughter of *Elizabeth*, Queen of *Bohemia*, who was the daughter of *James* I. was the nearest of the antient blood-royal, who was not incapacitated by professing the Popish religion. On her, therefore, and the heirs of her body, being Protestants, the remainder of the Crown, expectant on the death of King *William* and Queen *Anne*, without issue, was settled, by *stat.* 12 & 13 *W.* 3. *c.* 2. And at the same time it was enacted, that whosoever should hereafter come to the possession of the Crown, should join in the communion of the church of *England* as by law established.

This is the last limitation of the Crown that has been made by Parliament, and all the several actual limitations, from the time of *Henry* IV. to the present, (stated at large in 1 *Comm. c.* 3,) do clearly prove the power of *The King and Parliament* to new model or alter the succession. And indeed it is now again made highly penal to dispute it; for by *stat.* 6 *Ann. c* 7, it is enacted, that if any person maliciously, advisedly, and directly, shall maintain by writing, or printing, that the *Kings* of this realm, *with the authority of Parliament*, are not able to make laws to bind the Crown and the descent thereof, he shall be guilty of high treason; or if he maintains the same only by preaching, teaching, or advised speaking, he shall incur the penalties of a *præmunire*.

The Princess *Sophia* dying before Queen *Anne*, the inheritance thus limited descended on her son King *George* I. and having taken effect in his person, from him, it descended to his late Majesty King *George* II. and from him to his grandson and heir, our present Gracious Sovereign King *George* III.

The *Title to the Crown* therefore, though at present hereditary, is not quite so absolutely hereditary as formerly; and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was King *Egbert*, then *William* the Conqueror: afterwards in *James* I.'s time the two common stocks united, and so continued till the vacancy of the throne, occasioned by the abdication of *James* II. in 1688: now it is the Princess *Sophia*, in whom the inheritance was vested by the King and Parliament. Formerly the descent was absolute, and the Crown went to the next heir without any restriction; but now, upon the new settlement, the inheritance is conditional; being limited to such heirs only of the body of the Princess *Sophia*, as are *Protestant Members of the Church of* England; and are married to none but Protestants.

In this due medium appears to consist the true *constitutional notion* of the right of succession to the Imperial Crown of these Kingdoms. The extremes, between which it steers, are each of them equally destructive of those ends for which Societies were formed, and are kept on foot. Where the Magistrate, upon every succession, is elected by the people, and may, by the express provision of the laws, be deposed (if not punished) by his Subjects; this may *sound like the perfection of Liberty*, and look well enough when delineated on paper; but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine, indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely, of all constitutions, the most thoroughly slavish and dreadful. But when such an hereditary right, as our laws have created and vested in the royal stock, is closely interwoven with those liberties, which are equally the inheritance of the Subject; this union will form a constitution, in theory, the most beautiful of any; in practice the most approved; and, in duration, it is to be hoped, the most permanent. It is the duty of every expounder of our Laws to lay this

this Constitution before the Student in its true and genuine light; it is the duty of every good *Englishman* to understand, to revere, and to defend it.

II. THE first and most considerable branch of the King's Royal Family, regarded by the laws of *England*, is the *Queen*; as to whom see this Dictionary, title *Queen*.

The *Prince of Wales*, or Heir-apparent to the Crown, and also his royal consort; and the Princess Royal, or eldest daughter of the King, are likewise peculiarly regarded by the laws. For, by *stat.* 25 *E.* 3, to compass, or conspire the death of the former, or to violate the chastity of the latter, is as much high treason as to conspire the death of the King, or violate the chastity of the Queen. See this Dictionary, title *Treason*. The Heir-apparent to the Crown is usually made Prince of *Wales* and Earl of *Chester* by special creation and investiture; but being the King's *eldest son*, he is by inheritance Duke of *Cornwall*, without any new creation. 8 *Rep.* 1: *Seld.* title *Hon.* 2, 5.

The observations in *Coke*'s reports, however, as well as the words of the statute, it has been remarked, limit the dukedom of *Cornwall* to the *first begotten* [rather *first born*] *son* of a King of *England*, and to him only. But although from this it is manifest, that a Duke of *Cornwall* must be the first begotten son of a King, yet it is not necessary that he should be born after his father's accession to the Throne.

This is, on the whole, a strange species of inheritance, and perhaps is the only mode of descent which depends upon the authority of a statute. In the Prince's case, reported by Lord *Coke*, the question was, whether the original grant to *Edward* the Black Prince, who was created in the 11th of *Ed.* III. Duke of *Cornwall*, and who was the first Duke in *England* after the Duke of *Normandy*, had the authority of Parliament; or was an honour conferred by the King's charter alone? If the latter, the limitation would have been void, as nothing less than the power of Parliament can alter the established rules of descent. But notwithstanding it is in the form of a charter, it was held to be an act of the Legislature. It concludes, *per ipsum regem et totum concilium in parliamento.—Christian's Note* on 1 *Comm. c.* 4.

The rest of *The Royal Family* may be considered in two different lights, according to the different senses in which the term *Royal Family* is used. The larger sense includes all those, who are by any possibility *inheritable to the Crown*. Such, before the Revolution, were all the descendants of *William* the Conqueror, who had branched into an amazing extent, by intermarriages with the ancient nobility. Since the Revolution and act of Settlement, it means *the Protestant issue of the Princess* Sophia, now comparatively few in number, but which in process of time may possibly be as largely diffused. The more confined sense includes only those who are within a certain degree of propinquity to the reigning Prince, and to whom therefore the laws pay an extraordinary regard and respect.

At the time of passing the Regency-Act, *stat.* 5 *Geo.* 3. *c.* 27, (see *Post* V. 2.) the bill, which was framed on the plan of the Regency Act in the preceding reign, empowered his Majesty to appoint either the Queen, *or any other person of his Royal Family* usually resident in *Great Britain*, to be Regent until the successor to the Crown should attain eighteen years of age. A doubt arising on the question *who were the Royal Family*, it was explained by the Law Lords to be the descendants of King *George* II. It was, therefore, found necessary expressly to insert in the act the name of her Royal Highness the *Princess Dowager of* Wales, widow of the King's eldest son deceased, and mother of his present Majesty; as she was not held to be comprehended under the general description of the *Royal Family*. See *Belsham's Memoirs of King Geo.* III.

The younger sons and daughters of the King, and other branches of the royal family, who are not in the immediate line of succession, were therefore little farther regarded by the antient law, than to give them a certain degree of precedence before all persons and public officers, as well ecclesiastical as temporal. This is done by *stat.* 31 *Hen.* 8. *c.* 10; which enacts, that no person, except the King's children, shall presume to sit or have place at the side of the cloth of estate in the Parliament chamber; and that certain great officers therein named shall have precedence above all dukes, except only such as shall happen to be the King's son, brother, uncle, nephew, (which latter Sir *E. Coke*, 4 *Inst.* 362, explains to signify grandson or *nepos*,) or brother's or sister's son.

Indeed, under the description of the King's *children*, his grandsons are held to be included, without having recourse to Sir *E. Coke*'s interpretation of *nephew*; and, therefore, when his late Majesty King *George* II. created his grandson *Edward*, (the second son of *Frederick* Prince of *Wales* deceased,) Duke of *York*, and referred it to the House of Lords to settle his place and precedence, they certified that he ought to have place next to the late Duke of *Cumberland*, the then King's youngest son; and that he might have a seat on the left hand of the cloth of estate. *Ld.'s Journ. Ap.* 24, 1760. But when, on the accession of his present Majesty, those royal personages ceased to take place as the *children*, and ranked only as the *Brother* and *Uncle* of the King, they also left their seats on the side of the cloth of estate: so that when the Duke of *Gloucester*, his Majesty's second brother, took his seat in the House of Peers, he was placed on the upper end of the Earl's bench (on which the Dukes usually sit) next to his Royal Highness the Duke of *York*. *Ld.'s Journ.* 10 *January* 1765. And in 1718, upon a question referred to all the Judges by King *Geo.* I. it was resolved by ten against the other two, that the education and care of all the King's grandchildren, while minors, did belong of right to his Majesty as King of this realm, even during their father's life. *Fortesc. Al.* 401—440. And they all agreed, that the care and approbation of their marriages, when grown up, belonged to the King their grandfather. And the Judges have more recently concurred in opinion, that this care and approbation extend also to the *Presumptive Heir* of the Crown; though to what other branches of the royal family the same did extend, they did not find precisely determined. *Ld.'s Journ.* 28 *Feb.* 1772. The most frequent instances of the Crown's interposition go no farther than nephews and nieces, but examples are not wanting of its reaching to distant collaterals. Therefore by *stat.* 28 *Hen.* 8. *c.* 18. (repealed among other statutes of treasons by 1 *Ed.* 6. *c.* 12,) it was made high treason for any man to contract marriage with the

King's children, or reputed children, his sisters or aunts, *ex parte paternâ*, or the children of his brethren or sisters; being exactly the same degrees to which precedence is allowed by the *stat.* 31 *Hen.* 8, before mentioned. And now by *stat.* 12 *Geo.* 3. c. 11, no descendant of the body of King *Geo.* II. (other than the issue of Princesses married into foreign countries) is capable of contracting matrimony, without the previous consent of the King signified under the Great Seal; and any marriage contracted without such consent is void: [a marriage accordingly, which had, in fact, taken place abroad against the provisions of this act, between one of the sons of *Geo.* III. and an *English* lady, was dissolved in 1794 by sentence of the Ecclesiastical Court here;] but it is provided by the act, that such of the said descendants as are above the age of twenty-five, may, after a twelvemonth's notice given to the King's Privy Council, contract and solemnize marriage without the consent of the Crown; *unless* both houses of parliament shall, before the expiration of the said year, expresly declare their disapprobation of such intended marriage.—All persons solemnizing, assisting, or being present at, any such prohibited marriage shall incur the penalties of *præmunire*.

III. In order to assist the King in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath assigned him a diversity of councils to advise with. These are, his *Parliament*; his *Peers*; and his *Privy Council*. See this Dictionary under those titles.

For law matters the *Judges* of the Courts of law are held to be the King's Council; as appears frequently in our statutes, particularly *stat.* 14 *Ed.* 3. c. 5: and in other books of law. So that when the King's Council is mentioned generally, it must be defined, particularized, and understood, *secundum subjectam materiam*: and if the subject be of a legal nature, then by the King's Council is understood, his Council for matters of law; namely, his Judges. Therefore, when by *stat.* 16 *R.* 2. c. 5, it was made a high offence to import into this kingdom any papal bulles, or other processes from Rome; and it was enacted, that the offenders should be attached by their bodies, and brought before the King and his Council to answer for such their offence, here, by the expression of the King's Council were understood, the King's Judges of his Courts of Justice, the subject matter being legal; this being the general way of interpreting the word Council, 3 *Inst.* 125. See further this Dictionary, title *Judges*.

Upon the same principle, in cases where fine and ransom is imposed for any offence at the King's *pleasure*, this does not signify any extra-judicial will of the Sovereign, but such as is declared by his representatives, the Judges in his Courts of Justice, *voluntas regis in curia, non in camerâ*. 1 *Hal. P. C.* 375.

IV. It is in consideration of the *Duties* incumbent on the King by our Constitution, that his dignity and prerogative are established by the laws of the land: it being a maxim in the law, that protection and subjection are reciprocal, 7 *Rep.* 5. And these reciprocal duties are most probably what was meant by the Convention Parliament in 1688, when they declared that King *James* II. had broken the *original contract* between King and People. But however, as the terms of that original contract were in some measure disputed, being alledged to exist principally in theory, and to be only deduceable by reason and the rules of natural law; in which deduction, different understandings might very considerably differ; it was, after the Revolution, judged proper to declare these duties expresly, and to reduce that contract to a plain certainty. So that whatever doubts might be formerly raised about the existence of such an original contract, they must now entirely cease; especially with regard to every Prince who hath reigned since the year 1688.

The principal duty of the King is *to govern his people according to law*. And this is not only consonant to the principles of nature, reason, liberty, and society, but has always been esteemed an express part of the common law of *England*, even when prerogative was at the highest. See our ancient authors, *Bract. l.* 1. c. 8; *l.* 2. c 16. § 3: *Fortesc. cc.*2, 34. But to obviate all doubts and difficulties concerning this matter, it is expresly declared by *stat.* 12 & 13 *W.* 3. c. 2, "That the Laws of *England* are the *Birth-right* of the People thereof; and all the Kings and Queens who shall ascend the throne of this realm, ought to administer the government of the same according to the said laws: and all their Officers and Ministers ought to serve them respectively, according to the same: and therefore all the laws and statutes of this realm for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same, now in force, are ratified and confirmed accordingly." See further this Dictionary, title *Liberties*.

As to the terms of the original contract between King and People; these it seems are now couched in the Coronation Oath, which, by *stat.* 1 *W. & M. st.* 1. c. 6, is to be administered to every King and Queen, who shall succeed to the Imperial Crown of these realms, by one of the Archbishops or Bishops in the presence of all the People; who, on their parts, do reciprocally take the oath of allegiance to the Crown.

This Coronation Oath is conceived in the following terms.

"The *Archbishop* or *Bishop* shall say, Will you solemnly promise and swear to govern the people of this Kingdom of *England*, [*Quere? Great Britain*. See *stat.* 5 *Ann.* c. 8. § 1: and this Dictionary, title *Scotland*:] and the dominions thereto belonging, according to the statutes in Parliament agreed on; and the laws and customs of the same? The *King* or *Queen* shall say, I solemnly promise so to do.—*Abp.* or *Bp.* Will you to your power cause law and justice, in mercy, to be executed in all your judgements?—*K.* or *Q.* I will.—*Abp.* or *Bp.* Will you to the utmost of your power maintain the laws of God, the true profession of the Gospel, and the Protestant reformed religion established by the law? And will you preserve unto the Bishops and the Clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them or any of them?—*K.* or *Q.* All this I promise to do.—After this the King or Queen laying his or her hand upon the Holy Gospels shall say, The things which I have here before promised, I will perform and keep, so help me God.—And then shall kiss the book."

It is also required, both by the Bill of Rights, *stat.* 1 *W. & M. st.* 2. c. 2, and the Act of Settlement,

stat. 12 & 13 *W.* 3. c. 2, that every King and Queen of the age of twelve years, either at their coronation, or on the first day of the first Parliament, upon the throne in the House of Peers (which shall first happen) shall repeat and subscribe the declaration against Popery, according to *stat.* 30 *Car.* 2. *st.* 2. *c.* 1.

The above is the form of the Coronation oath, as it is now prescribed by our laws; the principal articles of which appear to be at least as antient as the Mirror of Justices (*c.* 1. § 2); and even as the time of *Bracton*. See *l.* 3. *tr.* 1. *c.* 9. But the wording of it was changed at the Revolution, because (as the statute alleges) the oath itself had been framed in doubtful words and expressions with relation to ancient laws and constitutions at this time unknown. For these old Coronation Oaths, see 1 *Comm. c.* 6. *p.* 235, *in n.*

However, in what form soever this Oath be conceived, it is most indisputably a fundamental and express original contract; though doubtless the duty of protection is impliedly as much incumbent on the Sovereign before Coronation, as after; in the same manner as allegiance to the King becomes the duty of the Subject immediately on the descent of the Crown, before he has taken the oath of allegiance, or whether he ever takes it all. In the King's part of this original contract are expressed all the duties that a monarch can owe to his people, *viz.* to govern according to law; to execute judgment in mercy; and to maintain the established religion. And with respect to the latter of these three branches, the Act of Union, *stat.* 5 *Ann. c.* 8, recites and confirms two preceding statutes; the one of the Parliament of *Scotland*, the other of the Parliament of *England*; which enact, the former that every King at his accession, shall take and subscribe an oath, to preserve the Protestant religion, and Presbyterian church government in *Scotland*; the latter, that at his coronation he shall take and subscribe a similar oath to preserve the settlement of the church of *England*, within *England*, *Ireland*, *Wales*, and *Berwick*, and the territories thereunto belonging.

V. 1. It has been observed, that one of the principal bulwarks of Civil Liberty, or in other words, of the *British* Constitution, is the limitation of *the King's Prerogative*, by bounds so certain and notorious, that it is impossible he should ever exceed them, without either the consent of the people, or a violation of that contract which we have seen expresly subsists between the Prince and the Subject. When we more particularly consider this prerogative minutely, in order to mark out, in the most important instances, its particular extent and restrictions, one conclusion will evidently follow; that the powers which are vested in the Crown by the laws of *England*, are necessary for the support of Society; and do not intrench any farther on our *natural*, than is expedient for the maintenance of our *civil*, *liberties*.

There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining with decency and respect the *limits* of the King's prerogative. This was formerly considered as a high contempt in a Subject, and the glorious Queen *Elizabeth* herself directed her Parliament to abstain from judging of or meddling with her prerogative. It is no wonder, therefore, that her successor, *James* I. should consider such a presumption as little less than blasphemy and impiety. But whatever might be the sentiments of some of our Princes, this was never the language of our ancient constitution and laws. The sentiments of *Bracton* and *Fortescue*, at the distance of two centuries from each other, may be seen by a reference to the place cited in the preceding division, IV. And Sir *Hen. Finch*, under *Charles* I. after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction in regard to the liberties of the people. The King, says he, has a prerogative in all things that are not injurious to the Subject; for in them all it must be remembered, that the King's prerogative stretcheth not to the doing of any wrong. *Finch. l.* 84, 5. *Nihil enim aliud potest Rex, nisi id solum quod de jure potest. Bract. l.* 3. *tr.* 1. *c.* 9.

The nature of our constitution is that of a limited monarchy, in which the legislative power is lodged in the King, Lords, and Commons; but the King is intrusted with the executive part, and from him all justice is said to flow; hence he is stiled the head of the Commonwealth, supreme governor, *parens patriæ*, *&c.* but still he is to make the law of the land the rule of his government; that being the measure as well of his power, as of the Subjects obedience: for as the law asserts, maintains and provides for the safety of the King's royal person, crown, and dignity, and all his just rights, revenues, powers, and prerogatives; so it likewise declares and asserts the rights and liberties of the Subject. 1 *And.* 153: *Co. Lit.* 19, 75: 4 *Co.* 124.

Hence it hath been established as a rule, that all prerogatives must be for the advantage of the people, otherwise they ought not to be allowed by law. *Moor* 672: *Show. P. C.* 75.

Although the King is the fountain of justice, and intrusted with the whole executive power of the law, yet he hath no power to alter the laws which have been established, and are the birthright of every subject; for by those very laws he is to govern; and as they prescribe the extent and bounds of his prerogative, in like manner they declare and ascertain the rights and liberties of the people, therefore admit of no innovation or change but by act of parliament. 4 *Inst.* 164: 2 *Inst.* 54, 478: 2 *Hal. Hist. P. C.* 131, 282: *Vaugh.* 418: 2 *Salk.* 510.

The rights and prerogatives of the Crown are in most things as ancient as the law itself; for though the statute 17 *Ed.* 2. *c.* 1, commonly called the statute *De prærogativa Regis*, seems to be introductive of something new, yet for the most part it is but a collection of certain prerogatives that were known law long before. *Bendl.* 117: 2 *Inst.* 263, 496: 10 *Co.* 64. And this statute does not contain the King's whole prerogative, but only so much thereof as concerns the profits of his coffers. *Plowd.* 314.

The nature of the government of our King, says *Fortescue*, is not only regal, but political: if it were merely the former, regal, he would have power to make what alterations he pleased in our law, and impose taxes and other hardships upon the Subject, whether they would or no: but his government being political, he cannot change the laws of the realm, without the People consent thereto, nor burthen them against their wills. It is also said by the same writer, that the King is appointed

to protect his Subjects in their lives, properties, and laws; for which end and purpose he has the delegation of power from the people: likewise our King is such by the fundamental law of our land; by which law the meanest Subject enjoys the liberty of his person and property in his estate; and it is every man's concern to defend these, as well as the King in his lawful rights. *Fortescue, de Laud. leg. Angl.* 17, &c.

If a King hath a kingdom by title of descent, where the laws have taken good effect and rooting, or if a King conquers a *Christian* kingdom, after the people have laws given them for the government of the country, to which they submit, no succeeding King can alter the same without the Parliament. 7 *Rep.* 17. It has nevertheless been held, that conquered countries may be governed by what laws the King thinks fit, and that the laws of *England* do not take place in such countries, until declared so by the conqueror, or his successor; here, in case of infidels, their laws do not cease, but only such as are against the law of God; and where the laws are rejected or silent, they shall be governed according to the rule of natural equity. 2 *Salk.* 411, 412. 666.

If the King makes a new conquest of any country, the persons there born are his subjects; for by saving the lives of the people conquered he gains a right and property in such people, and may impose on them what laws he pleases. *Dyer* 224: *Vaugh.* 281.

But until such laws given by the conquering prince, the laws of the conquered country hold place; (unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent;) for in all such cases the laws of the conquering country prevail. 2 *P. Wms.* 75, 76.

If there be a new and uninhabited country found out by *English* subjects, as the law is the birthright of every Subject, so wherever they go carry their laws with them, therefore such new found country is to be governed by the laws of *England*; though after such country is inhabited by the *English*, acts of parliament made in *England*, without naming the foreign plantations, will not bind them. 2 *P. Wms.* 75: 2 *Salk.* 411. And see *Campbell* v. *Hall*, *Cowp.* 204: *Spragge* v. *Stone*, cited *Dougl.* 35, 37, 38.

Questions of this nature are not at present likely often to arise, since (as in the instance of annexing the Crown of *Corsica* to the *British* Crown in 1794) all such transactions are now regulated by express stipulations; which neither leave to the prerogative of the conquering monarch, nor the laws of his kingdom, any power to interfere.

By the word *Prerogative* is usually understood, that special pre-eminence, which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology from *præ* and *rogo*, something that is required or demanded before, or in preference to all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities, which the King enjoys alone in contradistinction to others; and not to those which he enjoys in common with any of his Subjects: for if once any prerogative of the Crown could be held in common with the Subject, it would cease to be prerogative any longer. *Finch*, therefore, lays it down as a maxim, that the prerogative is that law in case of the King, which is law in no case of the Subject. *Finch, L.* 85.

Prerogatives are either *direct* or *incidental*. The *direct* are such positive substantial parts of the royal character and authority, as are rooted in, and spring from, the King's political person, and of which we are about to state the law at some length. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the King's person, and are indeed only exceptions in favour of the Crown, to the general rules established for the rest of the community; such as that no costs shall be recovered against the King; that he can never be a joint-tenant; and that his debt shall be preferred before that of a Subject. These, and an infinite number of other instances, will better be understood by referring to the Subjects themselves, to which these incidental prerogatives are exceptions. As to his prerogative relating to his debts, however, here reckoned among those considered as incidental, See *post* VI, at some length; and this Dictionary, titles *Execution*; *Extent*; *Judgment*, &c. Other incidental prerogatives are, that where the title of the King and a common person concur, the King's title shall be preferred. 1 *Inst.* 30.—No distress can be made upon the King's possession, but he may distrain out of his fee in other lands, &c. and may take distresses in the highway. 2 *Inst.* 131.—An heir shall pay the King's debt, though he is not named in the bond: and the King's debt shall be satisfied before that of a Subject, for which there is a prerogative writ. 1 *Inst.* 130, 386.—But this is where the debt is in equal degree with that of the Subject. See *stat.* 33 *Hen.* 8. *c.* 39, at large: *post* VI.: and *Cro. Car.* 283: *Hardr.* 23.—Goods and chattels may go in succession to the King, though they may not to any other sole corporation. 1 *Inst.* 90.—In the hands of whomsoever the goods of the King came, their lands are chargeable, and may be seized for the same: and the King is not bound by sale of his goods in open market. 2 *Inst.* 713.—No entry will bar the King, and no judgment is final against him, but with a *salvo jure regis*, *Litt.* 178: *Finch* 46: but see *post* 2. as to the *nullum tempus*-act 9 *Geo.* 3. *c.* 9.—The King may plead several matters without being guilty of double pleading, and the party shall answer them all. *Bro. Dougl. pl.* 57.—In his pleading he need not plead an act of parliament as a Subject is bound to do. 4 *Rep.* 75.—He is not bound to join in demurrer on evidence, and the Court may direct the Jury to find the matter specially. *Finch* 82: 5 *Rep.* 104.—The King's own testimony of any thing done in his presence is of as high a nature and credit as any record, whence, in all original writs or precepts, he useth no other witness than himself, as *teste meipso*. 1 *Inst.* 41, 57.

It is also held, that the King is by his prerogative *Universal Occupant*, as all property is presumed to have been originally in the Crown; and that he partitioned it out in large districts to the great men who deserved well of him in the wars, and were able to advise him in time of peace. Hence the King hath the direct dominion; and all lands are holden mediately or immediately from the Crown. *Co. Lit.* 1: *Dyer* 154: 1 *Bend.* 237: *Seld. Mare Claus.*

If the sea leaves any shore by the water suddenly falling off, such derelict lands belong to the King; but if a man's

man's lands lying to the sea are increased by insensible degrees, they belong to the soil adjoining. *Dyer* 326: 2 *Rol. Abr.* 170.

So, if a river, so far as there is a flux of the sea, leaves its channel, it belongs to the King; for the *English* sea and channels belong to the King; and, having never distributed them out to Subjects, he hath a property in the soil. 2 *Rol. Abr.* 170.

But if a river, in which there is no tide, should leave its bed, it belongs to the owners on both sides; for they have in that case the property of the soil; this being no original part or appendix to the sea, but distributed out as other lands. 2 *Rol. Abr.* 170.

If land be drowned, and so continue for years; if it be after regained, every owner shall have his interest again, if it can be known by the boundaries. 8 *Co.* Sir *Francis Barrington*'s case.

It is said, that there is a custom in *Lincolnshire*, That the lord of the manors shall have derelict lands; and that as such it is a reasonable custom; for if the sea wash away the lands of the Subject, he can have no recompence, unless he should be entitled to what he regains from the sea. *Dict.*

The King hath the *Sovereign dominion in all seas* and great rivers, which is plain from *Selden*'s account of the ancient *Saxons*, who dealt very successfully in all naval affairs; therefore the territories of the *English* seas and rivers always resided in the King. *Seld. Mar. Cl.* 251, *&c.* 1 *Rol. Abr.* 168, 169: 1 *Co.* 141: 5 *Co.* 106.

And as the King hath a prerogative in the seas, so hath he likewise a right to the fishery and to the soil; so that if a river as far as there is a flux of the sea leaves its channel, it belongs to the King. *Dyer* 326: 2 *Rol. Abr.* 170.

Hence the Admiralty Court, which is a Court for all maritime causes or matters arising on the high seas, is deemed the King's Court, and its jurisdiction derived from him who protects his Subjects from pirates, and provides for the security of trade and navigation. 4 *Inst.* 142: *Molloy* 66.

From the King's dominion over the sea it was holden, that the King, as protector and guardian of the seas, might before any statute made for commissions of sewers, provide against inundations by lands, banks, *&c.* and that he had a prerogative herein as well as in defending his Subjects from pirates, *&c.* 10 *Co.* 141.

But notwithstanding the King's prerogative in seas and navigable rivers, yet it hath been always held, that a Subject may fish in the sea; which being a matter of common right, and the means of livelihood, and for the good of the commonwealth, cannot be restrained by grant or prescription. 8 *Ed.* 4. 18. 19: *Bro. Custom*, 46: *Fitz. Bar.* 1 *Mod.* 105: 2 *Salk.* 637.

Also it is held, that every Subject of common right may fish with lawful nets, *&c.* in a navigable river as well as in the sea; and the King's grant cannot bar them thereof; but the Crown only has a right to royal fish, and that the King only may grant. 6 *Mod.* 73: 1 *Salk.* 357. *S. C. & S. P.* See title *Fish*, &c.

It is also said, that the King, as a perpetual sign and acknowledgment of his dominion of the seas, hath several creatures reserved to him under the denomination of royal creatures, as swans, sturgeons, and whales; all which are natives of seas and rivers. 7 *Co.* 16. See *post* 4.

2. The law ascribes to the King the attribute of *Sovereignty* or pre-eminence. See *Bract. l.* 1. *c.* 8.—He is said to *have imperial dignity*; and in charters, before the Conquest, is frequently stiled *Basileus* and *Imperator*; the titles respectively assumed by the Emperors of the *East* and *West*. His realm is declared to be an *empire*, and his Crown *imperial*, by many acts of parliament; particularly *stats.* 24 *Hen.* 8. *c.* 12: 25 *Hen.* 8. *c.* 28; which at the same time declare the King to be the supreme head of the realm in matters both civil and ecclesiastical; and, of consequence, inferior to no man upon earth, dependant on no man, accountable to no man. See also *stats.* 24 *Geo.* 2. *c.* 24: 5 *Geo.* 3. *c.* 27.

No King of *England* used any seal of arms till the reign of *Rich.* I. Before that time, the seal was the King sitting in a chair of state on one side of the seal, and on horseback on the other side; but this King sealed with a seal of two lions: and King *John* was the first that bare three lions; and afterwards *Edward* III. quartered the arms of *France*, which has been continued to this time. King *Henry* VIII. was the first to whom Majesty was attributed; before which, our Kings were called Highness, &c. *Lex Constitut.* 47, 48.

The meaning of the Legislature when it uses these terms of *empire* and *imperial*, and applies them to the realm and Crown of *England*, is only to assert that our King is equally sovereign and independent within these his dominions, as any Emperor is in his empire, and owes no kind of subjection to any other Potentate upon earth.

Hence it is, that no suit or action can be brought against the King, even in civil matters, because no Court can have jurisdiction over him. All jurisdiction implies superiority of power: authority to try would be vain and idle without authority to redress; and the sentence of a Court would be contemptible, unless that Court had power to command the execution of it: but who, says *Finch*, shall command the King? *Finch, l.* 83.—Hence it is likewise, that *by law, the* PERSON *of the* KING *is* SACRED, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way, much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the Pope, the independence of the kingdom would be no more; and, if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign Legislative Power.

Are then, it may be asked, the Subjects of *England* totally destitute of remedy, in case the Crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

As to private injuries; if any person has, in point of property, a just demand upon the King, he must petition him in his Court of Chancery, where his Chancellor will administer right as a matter of grace, though not upon compulsion. *Finch, l.* 255. See this Dictionary, title *Chancery*; and *post* as to the *Perfection* ascribed to the King.

As to cases of *ordinary public oppression*, where the vitals of the constitution are not attacked, the law has also

also assigned a remedy. For as a King cannot misuse his powers without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The Constitution has therefore provided, by means of indictments and parliamentary impeachments, that no man shall dare to assist the Crown in contradiction to the law of the land. But at the same time it is a maxim in those laws, that the King himself can do no wrong; since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

As to such *public oppressions* as tend to *dissolve the Constitution*, and subvert the fundamentals of Government, these are cases which the law will not, out of decency, suppose; being incapable of distrusting those whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable. For, wherever the law expresses its distrust or abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of Sovereignty. If therefore (for example) the Two Houses of Parliament, or either of them, had avowedly a right to animadvert on the King, or each other, or if the King had a right to animadvert on either of the Houses, that branch of the Legislature, so subject to animadversion, would instantly cease to be part of the Supreme Power; the balance of the Constitution would be overturned; and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of *Law* therefore is, that neither the King, nor either House of Parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppressions, which may happen to spring from any branch of the Sovereign Power, must necessarily be out of the reach of any *stated rule* or *express legal* provision: but if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

Indeed, it is found by experience, that whenever the unconstitutional oppressions, even of the Sovereign Power, advance with gigantic strides, and threaten desolation to a State, mankind will not be *reasoned* out of the feelings of humanity, nor will sacrifice their liberty by a scrupulous adherence to those political maxims which were originally established to preserve it. And, therefore, though the positive laws are silent, experience furnishes us with a very remarkable case, wherein nature and reason prevailed. When King *James* II. invaded the fundamental constitution of the realm, the Convention-Parliament declared an abdication, whereby the throne was considered vacant, which induced a new settlement of the Crown. And so far as this precedent leads, *and no farther*, we may now be allowed to lay down the *Law* of redress against public oppression. If therefore any future Prince should endeavour to subvert the constitution by breaking the original contract between King and People, should violate the fundamental laws, *and* should withdraw himself out of the kingdom, we are now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both Law and History are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of Society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

It may not be amiss to conclude this part of the subject with observing that, All persons born in any part of the King's dominions and within his protection are his Subjects; thus are those born in *Ireland*, *Scotland*, *Wales*, the King's plantations, or on the *English* seas; who by their birth owe such an inseparable allegiance to the King, that they cannot by any act of theirs renounce or transfer their subjection to any foreign prince. 7 *Co.* 1, *&c.*: *Calvin*'s Case: *Molloy*, 370: *Co. Lit.* 129: *Dyer*, 300. See titles *Aliens*; *Allegiance*; *Treason*.

Besides the attribute of Sovereignty, the law also ascribes to the King, in his political capacity, absolute *Perfection*. The King can do no wrong. Which antient and fundamental maxim is not to be understood, as if every thing transacted by the Government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to his people. And, secondly, it means that the prerogative of the Crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice. *Plowd.* 487.

Or perhaps it means that, although the King is subject to the passions and infirmities of other men, the constitution has prescribed no mode by which he can be made personally amenable for any wrong that he may actually commit. The law will therefore presume no wrong, where it has provided no remedy. The *Inviolability of the King* is essentially necessary to the free exercise of those high prerogatives, which are vested in him, not for his own private splendor and gratification, as the vulgar and ignorant are too apt to imagine, but for the security and preservation of the real happiness and liberty of his Subjects.

The King moreover is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing; in him is no folly or weakness. If therefore the Crown should be induced to grant any franchise or privilege to a subject, contrary to reason, or any way prejudicial to the commonwealth, or a private person, the law will not suppose the King to have meant either an unwise or an injurious action; but declares that the King *was deceived* in his grant: and therefore such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents, whom the Crown has thought proper to employ. See title *Grant of the King*.—But a latitude of supposing a possibility of some failure of this personal perfection is allowed in the case of enquiries frequently instituted by *Parliament*, even as to those acts of royalty which are most properly and personally the King's own; but which are to be conducted in those assemblies with the decency and respect due to the kingly character. See further this Dict. tit. *Parliament*.

It may not be amiss in this place very concisely to mention the remedies for the various injuries which may proceed from, and also for those which may affect the rights of the Crown.

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The distance between the Sovereign and his Subjects is such, that it can rarely happen that any *personal* injury can immediately and directly proceed from the Prince to any private man; and as it can so seldom happen, the Law in decency supposes that it never can or will happen at all. But injuries to the rights of *property* can scarcely be committed by the Crown, without the intervention of its officers, against whom the law furnishes various methods of detecting their errors or misconduct.

The common-law methods of obtaining possession or restitution from the Crown of either real or personal property are, by *Petition of Right* (already alluded to above) or *Monstrans de Droit*, Manifestation or Plea of Right; as to both which see title *Monstrans de Droit*.

The methods of redressing such injuries as the Crown may receive from a Subject are; either by such usual common-law actions as are consistent with the royal prerogative and dignity; or by such prerogative modes of process as are peculiarly confined to the Crown. As the King, by reason of his legal ubiquity, cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff, such as an *Assise* or *Ejectment*. *Bro. Ab.* 1. *Prerogative* 89. But he may bring a *Quare Impedit*, which always supposes the plaintiff to be seised or possessed of the advowson; and he may prosecute this writ like every other by him brought, as well in the court of K. B. as of C. P. or in whatever court he pleases. *F. N. B.* 32: 3 *Comm. c.* 17. So too he may bring an action of *Trespass* for taking away his goods; but such actions (of Trespass) are not usual, though in strictness maintainable for breaking his close, or other injury done upon his soil or possession. *Bro. Ab.* 1. *Prerogative* 130: *F. N. B.* 90: *Y. B.* 4 *H.* 4. 4.

Much easier and more effectual remedies are however usually obtained by prerogative modes of process. Such is that of *Inquisition* or Inquest of Office; as to which see this Dictionary, title *Inquest*.—Where the Crown hath unadvisedly granted any thing by letters patent which ought not to be granted, or where the patentee hath done any act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of *Scire Facias* in Chancery. See *Dy.* 198: 3 *Lev.* 220: 4 *Inst.* 88.—So also, if upon office untruly found for the King, he grants the land over to another, he who is grieved thereby, and traverses the office itself, is entitled, before issue joined, to a *Scire Facias* against the patentee in order to avoid the grant. *Bro. Ab.* 1. *Scire Facias* 69, 185. See this Dict. tit. *Scire Facias*.—An *Information* on behalf of the Crown is a method of suit for recovering money, or obtaining damages for any personal wrong to the lands or possessions of the Crown; as to which see this Dict. title *Information*.—A Writ of *Quo Warranto* is in the nature of a Writ of Right for the King against any person claiming or usurping any office, franchise, or liberty, to inquire *by what authority* he supports his claim, in order to determine the right. *Finch. L.* 322: 2 *Inst.* 282. See this Dict. tit. *Quo Warranto*. And something of the same nature is the Writ of *Mandamus*, as to which see this Dict. titles *Corporation*; *Mandamus*.

The Law also determines that in the King can be no negligence or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit Regi* has been the standing maxim upon all occasions: for the law intends that the King is always busied for the public good, and therefore has not leisure to assert his right within the times limited to his subjects. *Finch. L.* 82: *Co. Litt.* 90.—This maxim applies also to criminal prosecutions which are brought in the name of the King; and therefore by the Common Law there is no limitation in treasons, felonies, or misdemeanors.—By *stat.* 7 *W.* 3. *c.* 7, an indictment for treason, except for an attempt to assassinate the King, must be found within three years after the commission of the treasonable act. See this Dict. title *Treason*.—But where the legislature has affixed no limit, *nullum tempus occurrit regi* holds true: thus a man may be convicted of murder at any distance of time within his life after the commission of the crime. This maxim obtains still in full force in *Ireland*. 1 *Ld. Mountm.* 365. In civil actions relating to landed property, by *stat.* 9 *Geo.* 3. *c.* 16, commonly called the *Nullum Tempus* Act, the King, like a subject, is limited to 60 years. For the occasion of passing this act, see *Belsham's Memoirs of Geo.* III. *sub an.* 1768. See also the stats. 21 *Jac.* 1. *c.* 2; 11 *Geo.* 3. *c.* 4.

In the King also can be no *stain* or *corruption of blood*; for if the Heir to the Crown were attainted of treason or felony, and afterwards the Crown should descend to him, this would purge the attainder *ipso facto*. *Finch. L.* 82.

Neither can the King, in judgment of law as King, ever be a *minor* or under age; and therefore his royal grants, and assents to acts of parliament are good, though he has not in his natural capacity attained the age of 21. *Co. Lit.* 43: 2 *Inst. Proëm* 3. Indeed by *stat.* 28 *H.* 8. *c.* 17, power was given to future Kings to rescind and revoke all acts of parliament that should be made while they were under the age of 24: but this was repealed by *stat.* 1 *E.* 6. *c.* 11, so far as related to that Prince; and both statutes are declared by *stat.* 24 *Geo.* 2. *c.* 24, to be determined. It hath also been usually thought prudent, when the Heir-apparent has been very young, to appoint a Protector, Guardian, or Regent for a limited time; but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the Common Law, that in the King is no Minority; and therefore he hath no legal guardian.

The methods of appointing a guardian or regent in case of an Infant-heir to the Crown, have been so various, and the duration of his power so uncertain, that from hence alone it may be collected that his office is unknown to the Common Law; and therefore the surest way is to have him made by authority of the great Council in Parliament. 4 *Inst.* 58. The *statutes* 25 *H.* 8. *c.* 12: 28 *H.* 8. *c.* 7, [*q.* 17?] provided, that the successor, if a male and under 18, or a female and under 16, should be till such age in the government of his or her natural mother, (if approved by the King,) and such other counsellors as his Majesty should by will or otherwise appoint: and he accordingly appointed his sixteen executors to have the government of his son *Edward* VI. and the kingdom; which executors elected the Earl of *Hertford* Protector. The *stat.* 24 *Geo.* 2. *c.* 24, in case the Crown should descend to any of the children of *Frederick* then late Prince of *Wales* under the age of 18, appointed the Princess Dowager; and the *stat.* 5 *Geo.* 3. *c.* 27, in case of a like descent to any of the children of K. *Geo.* III. empowered the King to name either the Queen, the Princess Dowager, or any descendant of K. *Geo.* II. residing in this kingdom, to be Guardian and Regent, till the

the successor attained such age, assisted by a Council of Regency: the powers of them all being expressly defined and set down in the several Acts. See *ante* II.

From the maxim that the King, as King, cannot be a Minor, grants, leases, &c. made by him, though under age, bind presently, and cannot be avoided by him either during his minority, or when he comes of age: for it is a maxim of politics, that he who is to govern the kingdom should never be considered as incapable from minority of governing his own affairs. *Dy.* 209, *pl.* 22: *Plowd.* 209: *Co. Litt.* 43: 5 *Co.* 27: *Raym.* 90.

The law ascribes to the King's Majesty in his political capacity an absolute *Immortality*. The King never dies. *Henry*, *Edward*, or *George*, may die; but the King survives them all. For immediately upon the decease of the reigning Prince in his natural capacity, his Kingship or Imperial Dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir, who is *eo instanti* King to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise*; *demissus regis vel coronæ*: an expression signifying merely a transfer of property. By the term, Demise of the Crown, therefore, is understood, that, in consequence of the disunion of the King's natural body from the body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. *Plowd.* 177. 234. Thus too, when *Ed.* IV. in the 10th year of his reign, was driven from his throne for a few months by the house of *Lancaster*, this temporary transfer of his dignity was denominated his *demise*; and all process was held to be discontinued, as it then was upon the natural death of the King. *M.* 49 *H.* 6. *pl.* 1—8.

K. *Henry* II. took his son into a kind of subordinate regality with him, so that there were *Rex Pater* and *Rex Filius*; but he did not divest himself of his sovereignty, but reserved to himself the homage of his subjects. And notwithstanding this King, by consent of Parliament, created his son *John King of Ireland*; and K. *Rich.* II. made *Robert de Vere* Duke of *Ireland*, and *Ed.* III. made his eldest son Lord of *Ireland*, with royal dominion; yet it has been expressly held, that the King cannot regularly make a King within his own *kingdom*. 4 *Inst.* 357. 360. *Hen. de Beauchamp*, Earl of *Warwick*, was by King *Hen* VI. crowned *King of Wight Island*; but it was resolved, that this could not be done without consent of Parliament; and even then our greatest men have been of opinion, that the King could not by law create a King in his own kingdom, because there cannot be two Kings of the same place. And afterwards the same K. *Henry* made the same Earl of *Warwick Primus Comes totius Angliæ*. *Hal Hist. Coron.*

A King cannot resign or dismiss himself of his office of King without consent of Parliament; nor could *Hen.* II. without such consent, divide the sovereignty: there is a sacred bond between the King and his kingdom that cannot be dissolved without the free and mutual consent of both in Parliament; and though in foreign kingdoms there have been instances of voluntary cessions and resignations, which possibly may be warranted by their several constitutions, yet, by the laws of *England*, the King cannot resign his sovereignty without his Parliament. *Hale's H. Cor.*

3. In the exercise of those branches of the Royal Prerogative which invest this our Sovereign Lord, thus all-perfect and immortal in his Kingly capacity, with a number of authorities and powers, consists the Executive Part of the Government. This is wisely placed in a single hand by the *British* Constitution, for the sake of unanimity, strength, and dispatch. The King of *England* is therefore not only the *Chief*, but properly the *Sole Magistrate* of the nation; all others acting by commission from, and in due subordination to him.

In the exertion of lawful prerogative, the King is and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases; unless where the Constitution hath expressly, or by evident consequence, laid down some exception or boundary, declaring that thus far the prerogative shall go, and no farther. For otherwise the power of the Crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed, any man, or body of men, were permitted to disobey it in the ordinary course of law. It is not now meant to speak of those *extraordinary* resources to first principles which are necessary when the contracts of Society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression. And yet the want of attending to this obvious distinction has occasioned these doctrines, of absolute power in the Prince, and of national resistance by the People, to be much misunderstood and perverted by the advocates for slavery on the one hand, and the demagogues of faction on the other. Civil Liberty, rightly understood, consists in protecting the rights of individuals by the united force of Society. Society cannot be maintained, and of course can exert no protection, without obedience to some Sovereign Power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.

In the exertion therefore of these prerogatives which the law has given him, the King is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the Parliament will call his advisers to a just and severe account. Thus the King may make a treaty with a Foreign State, which shall irrevocably bind the nation; and yet, when such treaties have been judged pernicious, impeachments have pursued those ministers by whose agency or advice they were concluded.

With regard to *Foreign Concerns*, the King is the Delegate or Representative of his people. It is impossible that the individuals of a State, in their collective capacity, can transact the affairs of that State with any other community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the King, therefore, as in a center, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign Potentates; who would scruple to enter into any engagement, that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with

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with regard to foreign powers, is the act of the whole nation: what is done without the King's concurrence is the act only of private men. And so far is this point carried by our law, that it hath been held, that should all the Subjects of *England* make war with a king in league with the King of *England*, without the Royal assent, such war is no breach of the league. 4 *Inst.* 152. And by the *stat.* 2 *Hen* 5. *c.* 6, any Subject committing acts of hostility upon any nation in league with the King, was declared to be guilty of high treason: and though that act was repealed by the *stat.* 20 *Hen.* 6. *c.* 11, so far as relates to making this offence high treason, yet still it remains a very great offence against the Law of Nations; and punishable by our laws, either capitally or otherwise, according to the circumstances of the case.

The King therefore, considered as the representative of his people, has the sole power of sending *Ambassadors* to foreign States, and receiving Ambassadors at home. How far the municipal laws of *England* intermeddle with or protect the right of these messengers from one potentate to another, may be seen in this Dict. tit. *Ambassadors*; and more fully, 1 *Comm. c.* 7.

It is also the King's prerogative to make *Treaties, Leagues*, and *Alliances* with foreign States and Princes. For it is by the Law of Nations essential to the goodness of a league, that it be made by the Sovereign power; and then it is binding upon the whole community: and in *England* the Sovereign power, *quoad hoc*, is vested in the person of the King. Whatever contracts therefore he engages in, no power in the kingdom can legally delay, resist, or annul. Although, lest this plenitude of authority should be abused to the detriment of the public, the Constitution (as has been already hinted) hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.

Upon the same principle, the King has also the sole prerogative of making *War* and *Peace*. For it is held by all the writers on the Law of Nature and Nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into Society, and is vested in the Sovereign power. *Puff. b.* 8. *c.* 9. § 6. This right is given up not only by individuals, but even by the entire body of people, that are under the dominion of a Sovereign. It would indeed be extremely improper, that any number of Subjects should have the power of binding the Supreme Magistrate, and putting him against his will in a state of war. Whatever hostilities therefore may be committed by private citizens, the State ought not to be affected thereby; unless that should justify their proceeding, and thereby become partner in the guilt. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers. In order to make a war completely effectual, it is necessary with us in *England* that it be publicly, [actually or virtually,] declared and duly proclaimed by the King's authority; and, then all parts of both contending nations, from the highest to the lowest, are bound by it. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of Parliamentary Impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the Ministers of the Crown from a wanton or injurious exertion of this great Prerogative.

The power of making war or peace is enumerated by Lord *Hale inter jura summi imperii*, and in *England* is lodged *singly* in the King; though, says he, it ever succeeds best when done by parliamentary advice. 1 *Hal. Hist. P. C.* 159: 7 *Co* 25.

A general war, according to the same Writer, is of two kinds, 1. *Bellum solenniter denunciatum*. 2. *Bellum non solenniter denunciatum*. The *first* is, When war is solemnly declared or proclaimed by our King against another Prince or State, which is the most formal solemnity of a war now in use. 2dly, When a nation slips suddenly into a war without any solemnity, which happens by granting letters of marque, by a foreign prince invading our coasts, or setting on the King's navy at sea; and hereupon a real, though not a solemn, war may arise and hath formerly arisen; therefore to prove a nation to be at enmity with *England*, or to prove a person to be an alien enemy, there is no necessity of shewing any war proclaimed; but it may be averred, and so put upon the trial of the country, whether there was a war or not. 1 *Hal. Hist. P. C.* 163. See further also as connected with this subject, titles *Letters of Marque*; and *of Safe Conduct*.

In all these prerogatives of the King respecting this nation's intercourse with foreign nations, he is considered as the Delegate or Representative of his people. But in domestic affairs, he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

First. He is *A Constituent Part of the Supreme Legislative Power*; and, as such, has the prerogative of rejecting such provisions in Parliament, as he judges improper to be passed. The expediency of which Constitution is evinced at large under tit. *Parliament*. It may here be added, that the King is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised (any person or persons, bodies-politic or corporate, &c.) affect not him in the least, if they may tend to restrain or diminish any of his rights or interests. 11 *Rep.* 74. Yet, where an act of Parliament is expresly made for the preservation of public rights and suppression of public wrongs, and does not interfere with the established rights of the Crown, it is said to be binding as well upon the King as the Subject. 11 *Rep.* 71. The King may likewise take the benefit of any particular act, though he be not especially named. 7 *Rep.* 32.

The King is considered, in the next place, as the *Generalissimo*, or the first in military command, within the kingdom.

In this capacity, of *General of the Kingdom*, the King has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated, more is said in other places. We are now only to consider the Prerogative of enlisting and governing them, which indeed was disputed and claimed, contrary to all reason and precedent, by the long Parliament of King *Charles* I.: but, upon the restoration of his son, was solemnly declared by the *stat.* 13 *Car.* 2. *c.* 6, to be in the King alone; for that the sole supreme government and command of the *Militia* within all his Majesty's

 realms

realms and dominions, and of all *Forces by sea and land*, and of all forts and places of strength, ever was, and is, the undoubted right of his Majesty, and his royal predecessors, Kings and Queens of *England*; and that both or either house of parliament cannot, nor ought to, pretend to the same. See this Dictionary, title *Militia*.

This statute, it is obvious to observe, extends not only to fleets and armies, but also to *Forts* and other places of strength, within the realm, the sole prerogative as well of erecting, as manning and governing of which belongs to the King in his capacity of general of the kingdom. 2 *Inst*. 30.—And all lands were formerly subject to a tax for building of castles wherever the King thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore called by our *Saxon* ancestors the *trinoda necessitas*; viz. *pontis reparatio, arcis constructio, & expeditio contra hostem*. *Cowell's Inter*. title *Castellorum operatio*: *Seld. Jan. Angl*. 1. 42. See title *Castles, Forts*, &c.

It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that the King has the prerogative of appointing *Ports* and *Havens*, or such places only, for persons and merchandize to pass into and out of the realm, as he in his wisdom sees proper. See title *Harbours and Havens*. And to this head may be referred also, the prerogative as to the erection of *Beacons* and *Lighthouses*; as to which, see 4 *Inst*. 148: 12 *Co*. 13: *Carter* 90: 2 *Keb*. 114: 3 *Inst*. 204; and this Dictionary, title *Beacons*.

To this branch of the prerogative may also be referred the power vested in his Majesty, by *stats*. 12 *Car*. 2. *c*. 4: 29 *Geo*. 2. *c*. 16, of prohibiting the exportation of arms or ammunition out of this kingdom, under severe penalties: and likewise the right which the King has, whenever he sees proper, of confining his Subjects to stay within the realm, or of recalling them when beyond the seas.

By the common law every Subject may go out of the kingdom for merchandize or travel, or other cause, as he pleases, without any licence for that purpose; this appears from the statute 5 *R*. 2. *c*. 2, made to restrain persons passing out of the realm, but excepts lords, great men and notable merchants; as also by the statute 26 *Hen*. 8. *c*. 10, which gave power to the King during his life to restrain persons from trading to certain countries; which acts had been vain and idle, if the King by his prerogative might have done it. *F. N. B*. 85: *Dyer* 165, 296: 2 *Rol. Rep*. 12: 3 *Mod*. 131: *Stil*. 442.

But notwithstanding this general liberty allowed by the common law, it appears plainly that the King by his prerogative, and without any help of an act of parliament, may prohibit his Subjects from going out of the realm; but this must be by some express prohibition; as by laying on embargoes, which can be only done in time of danger, or by writ of *Ne exeat Regno*, which, from the words *Quamplurima nobis & coronæ nostræ prajudicialia ibidem prosequi intendis*, appears to be a State writ, though it is never granted universally, but to restrain a particular person, on oath made that he intends to go out of the realm; indeed *Fitzherbert* says, that the King may restrain his Subjects by proclamations; and assigns as a reason for it, that the King may not know where to find his Subject, so as to direct a writ to him. 12 *Co*. 33: 11 *Co*. 92: *Fitz. N. B*. 89: 2 *Inst*. 54. See title *Imbargo*.

As the King may restrain any of his Subjects from going abroad, in like manner he may command them to return home; and disobeying a privy seal for this purpose is the highest contempt. 1st, It is a disobedience to the command of the King himself directed to the party. 2dly, The command is, that he shall return upon his faith and allegiance, which is the strongest compulsion that can be used. 3dly, The thing required by the King is the principal duty of a Subject, *viz*. to be at the service of his King and country. *Dyer* 128. *b*; *Lane* 44: *Moor* 109: 3 *Inst*. 179.

The punishment for this offence is, seizing the party's estate till he return; and of this there are many instances in our books. And when he does return he shall be fined. 1 *Hawk. P. C. c*. 22. § 4.

William de Brittain in the 19 of *Ed*. 2, refusing to return on the King's writ, his goods and chattels, lands and tenements, were seised into the King's hands; so in the case of *Edward* of *Woodstock*, Earl of *Kent*, in the same reign. *Dyer* 128. *b*.

So in the case of one *Bartue*, who married the Duchess of *Suffolk*, they obtained a licence from Q. *Mary* to go out of the realm, under pretence of recovering debts as executors to the Duke; when in reality it was on account of the religion established by Queen *Mary*, and living with other fugitives under the protection of the Palsgrave of the *Rhine* in *Germany*, who was an eminent *Calvinist*, were sent to by privy seal; but the messenger, in endeavouring to serve them with his letters, being obstructed and abused by their attendants, a certificate was made of this, and their lands and tenements seized. *Dyer* 176; *Jenk. Cent*. 220.

So in the case of Sir *Francis Englefield*, who departed the kingdom on a licence obtained for three years; but not returning at the expiration of the three years, a privy seal was sent to him by Queen *Elizabeth*, which he not obeying, and this matter being certified into Chancery by the Queen, under her sign manual, his lands and tenements were seised in the fifth year of her reign by virtue of a commission under the great seal. 1 *Leon*. 9: *Moor* 109: 1 *And*. 95, S. C. See also 7 *Co*. 18: *Poph*. 18: 4 *Leon*. 135.

So in the case of Sir *Robert Dudley*, who, intending to travel, obtained a licence from *James* the First to go to *Venice*; but before his departure he by indenture inrolled for valuable consideration, as was expressed in the deed, (but none paid,) conveyed the manor of *Killingworth* with other lands to the Earl of *Nottingham* and others in fee, with a proviso, that, on tender of an angel of gold, all should be void; and with a covenant on the part of the bargainees that they should make all such estates as the said Sir *Robert* should appoint; the bargainees were not parties to the deed, nor had they notice of it till sometime after: but afterwards they made a lease to Sir *Robert Lee*, to the intent that Lady *Dudley* should take the profits of part of the premisses for ten years, if their estate continued so long unrevoked. The King, hearing that Sir *Robert* had been guilty of some bad practices beyond sea, in the fifth year of his reign sent his privy seal to him, which he not obeying, the great question in this case was, Whether those lands thus

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thus conveyed were forfeited: and adjudged that they were, the conveyance being fraudulent as to the King. *Lane* 42, &c.

In these cases it hath been held, that the King hath only an interest in the offender's lands till he return; and that his restoring them is not a matter of grace but of right. *Lane* 48.

See further, on this part of the subject, this Dictionary, title *Ne exeat Regno*.

The King is also considered as the *Fountain of Justice*, and general Conservator of the peace of the Kingdom.—All jurisdiction exercised in these kingdoms that are in obedience to our King, is derived from the Crown; and the laws, whether of a temporal, ecclesiastical, or military nature, are called his laws: and it is his prerogative to take care of the due execution of them. Hence it is that all Judges derive their authority from the Crown, by some commission warranted by law. *Fleta*, c. 17: *Co. Lit*. 99. *a*. 144. See title *Judges*.

From the inherent right inseparable from the King to distribute justice among his Subjects, it hath been held, that an appeal from the *Isle of Man* lies to the King in council, without any reservation in the grant of the *Isle of Man* of any such right; and though there had been exclusive words, yet the grant must have been construed to be void on the King's being deceived, rather than the Subject should be deprived of a right inseparable to him as a Subject, of applying to the Crown for justice. 1 *P. Wms*. 329.

A consequence of this prerogative is the legal *Ubiquity* of the King; his Majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice. *Fortesc*. c. 8: 2 *Inst* 186.—His Judges are the mirror by which the King's image is reflected. It is the regal office, and not the royal person, that is always present in Court, always ready to undertake prosecutions, or pronounce judgment for the benefit and protection of the Subject. And from this *ubiquity* it follows, that the King can never be nonsuit; for a nonsuit is the desertion of the suit or action by the non appearance of the plaintiff in Court. But the Attorney General may enter a *non vult prosequi*, which has the effect of a *nonsuit*. *Co. Lit*. 139. For the same reason also, in the forms of legal proceedings, the King is not said to appear *by his Attorney*, as other men do; for in contemplation of law he is always present in Court. *Finch*, *L*. 81.

From the same original, of the King's being the fountain of justice, may also be deduced the prerogative of issuing *Proclamations*, which is vested in the King alone. These proclamations have then a binding force, when they are grounded upon and enforce the laws of the realm 3 *Inst*. 162. For though the making of laws is entirely the work of a distinct part, the legislative branch of the sovereign power, yet the manner, time, and circumstances of putting these laws in execution, must frequently be left to the discretion of the Executive Magistrate. And, therefore, his constitutions or edicts concerning these points, which we call proclamations, are binding upon the Subject where they do not either contradict the old laws, or tend to establish new ones, but only enforce the execution of such laws as are already in being, in such manner as the King shall judge necessary. Thus the established law is, that the King may prohibit any of his Subjects from leaving the realm: a proclamation therefore, forbidding this in general for three weeks, by laying an embargo upon all shipping in time of war, will be equally binding as an act of parliament, because founded upon a prior law. 4 *Mod*. 177, 179.

But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in time of a public scarcity) being contrary to law, and particularly to *stat*. 22 *Car*. 2. c. 13, the advisers of such a proclamation, and all persons acting under it, have been always found necessary to be indemnified by special acts of parliaments. See *stat*. 7 *Geo*. 3. c. 7: 30 *Geo*. 3. c. 1. and this Dictionary, title *Imbargo*.—A proclamation for disarming Papists is also binding, being only in execution of what the Legislature has first ordained; but a proclamation for allowing arms to Papists, or for disarming any Protestant Subjects, will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of which, in any single person, the laws of *England* are absolutely strangers. Indeed, by the *stat*. 31 *Hen*. 8. c. 8, it was enacted, that the King's proclamations should have the force of acts of parliament: a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after, by *stat*. 1 *Ed*. 6. c. 12.—It was anciently held, though that is not now law, that the King might suspend, *dispense* with, or alter any particular law that he deemed hurtful to the public; and it has been said that he may dispense with a penal statute wherein his Subjects have not any interest. 4 *Inst*. 7: 4 *Rep*. 36. But by *stat*. 1 *W*. & *M*. *stat*. 2. c. 2, It is declared and enacted, "that no dispensation by *non obstante* of or to any statute, or any part thereof, be allowed, but that the same shall be held void, and of none effect, except a dispensation be allowed in such statute." It is plain, however, that the King by his prerogative may, in certain cases, and special occasions, issue out proclamations for prevention of offences, to ratify and confirm an antient law, or, as some books express it, *quoad terrorem populi*, to admonish them that they keep the laws on pain of his displeasure; and such proclamations being grounded on the laws of the realm, are of great force. *Fortesc. de Laud*. c. 9: 11 *Co*. 87: 12 *Co*. 74, 75: *Dal*. 20. *pl*. 10: 2 *Rol. Abr*. 209: 3 *Inst*. 162.

It is likewise clear, that the Subject is obliged on pain of fine and imprisonment to obey every proclamation legally made, and though the thing prohibited were an offence before, that yet the proclamation is a circumstance which highly aggravates it; and on which alone the party disobeying may be punished. 12 *Co*. 74: *Hob*. 251. It is clearly agreed, that no private person can make any proclamation of a public nature, except by custom, as is usual in some cities and boroughs; this being a prerogative act, with which alone the King is intrusted. *Bro. Procl. pl*. 1: 12 *Co*. 75: *Crom. Jurisf*. 41.

But, according to the principles already laid down, the King by his proclamation cannot change any part of the common law, statutes, or customs of this realm; nor can he by his proclamation create any offence which was not an offence before. 11 *Co*. 87, *b*: 12 *Co*. 75.

On

On this foundation it hath been held, that the King's proclamation prohibiting the importation of wines from *France* on pain of forfeiture, was against law and void; there being at that time no war subsisting between the nations. 2 *Inst*. 63.

So where an act was made by which foreigners were licensed to merchandize within *London*, and *Hen*. IV. by proclamation prohibited the execution of it, and ordered it should be in suspense, *usque ad proximum parliamentum*; and this was held to be against law. 12 *Co*. 75.

On a conference between some Lords of the Privy Council, and the two Chief Justices (of which Lord *Coke* was one) and Chief Baron and Baron *Altham*, the question was,

1st, Whether the King by proclamation might prohibit new buildings in and about *London*?

2d, If the King might prohibit the making starch of wheat?

And the Judges were of opinion that the Subject could not be restrained in these particulars by the King's Proclamation. 12 *Co*. 74.

The King by proclamation may call or dissolve parliament, and declare war or peace; for these are prerogative acts, with which he is intrusted, as the executive part of the law; but if there be an actual war, it is not necessary in pleading to shew that such war was proclaimed. 3 *Inst*. 162: 1 *Hal. H. P. C*. 163: *Owen* 45: *Rast. Ent*. 605. See *ante*.

The King by proclamation may legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation; he may legitimate base coin, or mixed below the standard of sterling; he may enhance coin to a higher denomination or value, and may decry money that is current in use and payment; and in all these cases a proclamation, with a *proclamation writ* under the Great Seal, is necessary. *Co. Lit*. 207, *b*: 5 *Co*. 114, *b*: *Dav*. 21: 1 *Hal. H. P. C*. 192, 197. See title *Coin*.

The King by proclamation may appoint Fasts and days of thanksgiving and humiliation, and issue proclamations for preventing and punishing immorality and prosaneness; and enjoin reading the same in churches and chapels. *Comp. Incumb*. 354.

A proclamation must be under the Great Seal, and if denied, is to be tried by the Record thereof; but if a man pleads he was prevented doing a thing by proclamation, it seems the better opinion, that he need not aver that such proclamation was under the Great Seal; for alledging that such Proclamation was made, it shall be intended to have been duly made. *Cro. Car*. 180: See 1 *Rol. Rep*. 172: *Vide Cro. Car*. 130.

The King is likewise the *Fountain of Honour*, of *Office*, and of *Privilege*; and this in a different sense from that wherein he is stiled the fountain of justice; for here he is really the parent of them. It is impossible that Government can be maintained without a due subordination of rank, that the people may know and distinguish such as are set over them, in order to yield them their due respect and obedience; and also, that the officers themselves being encouraged by emulation, and the hopes of superiority, may the better discharge their functions: and the law supposes that no one can be so good a judge of their several merits and services, as the King himself who employs them. It has, therefore, intrusted with him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. And, therefore, all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the Crown; either expressed in writing by writs or letters patent, as in the creation of peers and baronets, or by corporeal investiture, as in the creation of a simple Knight. See titles *Precedency*; *Peer*.

From the same principle also arises the prerogative of *erecting* and *disposing* of *Offices*; for honours and offices are in their nature convertible and synonymous. All officers under the Crown carry in the eye of the law an honour along with them; because they imply a superiority of parts and abilities, being supposed to be always filled with those that are most able to execute them. And, on the other hand, all honours in their original had duties or offices annexed to them: an Earl, *Comes*, was the Conservator or Governor of a county; and a Knight, *Miles*, was bound to attend the King in his wars. For the same reason, therefore, that honours are in the disposal of the King, offices ought to be so likewise; and as the King may create new titles, so may he create new offices; but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices, for this would be a tax upon the Subject, which cannot be imposed but by act of parliament. 2 *Inst*. 533. Wherefore, in 13 *Hen*. 4, a new office being created by the King's letters patent for measuring cloths, with a new fee for the same, the letters patent were, on account of the new fee, revoked and declared void in Parliament.

On this subject it hath been further said, that the King, as the fountain of justice, hath an undoubted prerogative in creating officers, and all officers are said to derive their authority mediately or immediately from him; those who derive their authority from him are called the officers of the Crown, and are created by letters patent; such as the great officers of State, Judges, *&c*. and there needs no stronger evidence of a right in the Crown herein, than that the King hath created all such officers time immemorial. *Dyer* 176: 2 *Roll. Abr*. 152: 4 *Co*. 32: 2 *Inst*. 425, 540: 12 *Co*. 116: 1 *Roll. Rep*. 205: *Show. Par. Ca*. 111: 1 *Lev*. 219.

But though all such officers derive their authority from the Crown, and from whence the King is termed the universal officer and disposer of justice, yet it hath been held, that he hath not the office in him to execute it himself, but is only to grant or nominate; nor can the King grant any new powers to such officers, but they must execute their offices according to the rules prescribed by law. *Co. Lit*. 3, 114: 2 *Vent*. 270: 4 *Inst*. 125: 6 *Co*. 11, 12.

Neither can the King create any new office inconsistent with our constitution or prejudicial to the Subject. 2 *Inst*. 540: 2 *Sid*. 141: *Moor* 808: 4 *Inst*. 200.

And on this foundation an office created by letters patents for the sole making of all bills, informations and letters missive in the council of *York*, was unreasonable and void. 1 *Jon*. 231. See further this Dictionary, title *Office*.

Upon the same, or a like reason, the King has also the prerogative of conferring privileges upon private persons, such as granting place or precedence to any of his Subjects

Subjects as shall seem good to his royal wisdom. 4 *Inst.* 361. See title *Precedence*. Or such as converting aliens, or persons born out of the King's dominions, into denizens, whereby some very considerable privileges of natural-born Subjects are conferred upon them. See title *Aliens*. Such also is the prerogative of erecting Corporations; which is grounded upon this foundation, that the King, having the sole administration of the Government in his hands, is the best and the only Judge, in what capacities, with what privileges, and under what distinctions, his people are the best qualified to serve and act under him.

Another light in which the laws of *England* consider the King, with regard to domestic concerns, is as the Arbiter of domestic commerce, by the establishment of *Markets*, the regulating of *Weights and Measures*, and of the *Coin*. See this Dictionary under those titles.

The King is, lastly, considered by the laws of *England* as the *Head* and *Supreme Governor* of the national *Church*.

To enter into the reasons upon which this prerogative is founded is matter rather of divinity than law. It shall only, therefore, be observed, that, by *stat.* 26 *H.* 8. *c.* 1, (reciting that the King's Majesty justly and rightfully is and ought to be the supreme head of the church of *England*, and so had been recognized by the Clergy of this kingdom in their convocation,) it is enacted, that the King shall be reputed the only Supreme Head in earth of the Church of *England*, and shall have annexed to the Imperial Crown of this realm, as well the title and stile thereof, as all jurisdictions, authorities, and commodities, to the said dignity of Supreme Head of the Church appertaining. And another statute to the same purport was made 1 *Eliz. c.* 1.

In virtue of this authority the King convenes, prorogues, restrains, regulates, and dissolves, all ecclesiastical synods or convocations. This was an inherent prerogative of the Crown long before the time of *Hen.* VIII, as appears by the *stat.* 8 *Hen.* 6. *c.* 1; and the many authors, both lawyers and historians, vouched by Sir *E. Coke*. 3 *Inst.* 322, 3. So that the *stat.* 25 *Hen.* 8. *c.* 19, which restrains the convocation from making or putting in execution any canons repugnant to the King's prerogative, or the laws, customs, and statutes of the realm, was merely declaratory of the old common law. 12 *Rep.* 72: that part of it only being new, which makes the King's royal assent actually necessary to the validity of every canon. See further title *Convocation*; *Bishop*.—As Head of the Church, the King is likewise the *dernier resort* in all ecclesiastical causes; an appeal lying ultimately to him in Chancery from the sentence of every ecclesiastical Judge; which right was restored to the Crown by *stat.* 25 *Hen.* 8. *c.* 19. See title *Courts Ecclesiastical*.

The Kings of *England* not having the whole legislative power, if the King and clergy make a canon, though it bind the clergy in *re ecclesiasticâ*, it does not bind laymen; for they are not represented in the convocation, but in Parliament. In the primitive church, the laity were present at all synods; and when the empire became Christian, no canon was made without the Emperor's consent, and indeed the Emperor's consent included that of the people, he having in himself the whole legislative power; but the Kings of this kingdom have it not. 2 *Salk.* 412, 673. See title *Canon Law*.

4. The King's *Fiscal Prerogatives*, or those which regard his *Revenue*, are such as the *British* Constitution hath vested in the Royal Person, in order to support his dignity and maintain his power; being a portion which each Subject contributes of his property, in order to secure the remainder.

This revenue is either ordinary, or extraordinary. The King's ordinary revenue is such, as has either subsisted time out of mind in the Crown, or else has been granted by Parliament, by way of purchase or exchange, for such of the King's inherent hereditary revenues, as were found inconvenient to the Subject.

It is not, however, to be understood, that the King is at present in the actual possession of the whole of this revenue. Much (nay, the greatest part) of it is at this day in the hands of Subjects; to whom it has been granted out from time to time by the Kings of *England*, which has rendered the Crown, in some measure, dependent on the People for its ordinary support and subsistence. So that among the royal revenues are now recounted, what Lords of manors and other Subjects frequently look upon to be their own absolute inherent rights, because they are, and have been, vested in them and their ancestors for ages, though in reality originally derived from the grants of our ancient princes. See 1 *Comm. c.* 8.

The King's *Ordinary Revenues* are stated by the learned Commentator to arise from: 1, The custody of the temporalties of *Bishops*. 2, A corody from each Bishoprick. 3, The *Tithes* in extraparochial places. 4, *First-fruit* and *Tenths* of all spiritual preferments. 5, The *Demesne-lands* of the Crown. (See *stats.* 26 *Geo.* 3. *c.* 87: 30 *Geo.* 3. *c.* 50). 6, Military *Tenures*, *Purveyance*, and Pre-emption. 7, *Wine-licences*. 8, *Forest Courts*. 9, *Fines* and *fees* in Courts of justice. 10, *Royal Fish*. 11, *Shipwrecks*. 12, *Mines*. 13, *Treasure Trove*. 14, *Waifs*. 15, *Estrays*. 16, *Forfeitures* of lands and goods for offences: in which are included *Deodands*. 17, *Escheats* of lands. 18, The custody of *Idiots*. As to all which, see this Dictionary under title *Taxes*; and the several other appropriate titles.

The *Ordinary Revenue*, or proper patrimony of the Crown was very large formerly, and capable of being increased to a magnitude truly formidable; for there are very few estates in the kingdom that have not, at some period of time or other since the *Norman* Conquest, been vested in the hands of the King by forfeiture, escheat, or otherwise. But, fortunately for the liberty of the Subject, this hereditary landed revenue, by a series of improvident management, is sunk almost to nothing; and the casual profits arising from the other branches of the *census regalis*, are likewise almost all of them alienated from the Crown. In order to supply the deficiencies of which, we are now obliged to have recourse to new methods of raising money, unknown to our early ancestors; which methods constitute the King's *extraordinary* revenue. For the public patrimony being got into the hands of private Subjects, it is but reasonable that private contributions should supply the public service. And, perhaps, if every gentleman in the kingdom was to be stripped of such of his lands as were formerly the property of the Crown, was to be again subject to the inconveniences of purveyance and pre-emption, the oppression of forest laws, and the slavery of feudal tenures, and was to resign into the King's hands all his royal franchises of waifs,

waifs, wrecks, estrays, treasure-trove, mines, deodands, forfeitures, and the like; he would find himself a greater loser than by paying his *quota* to such taxes as are necessary to the support of government. The thing, therefore, to be wished and aimed at in a land of liberty, is *by no means the total abolition of taxes*, which would draw after it very pernicious consequences, and the very supposition of which is the height of political absurdity; but wisdom and moderation, not only in granting, but also in the method of raising the necessary supplies; by contriving to do both in such a manner as may be most conducive to the national welfare, and at the same time most consistent with œconomy and the liberty of the Subject; who, when properly taxed, contributes only some part of his property, in order to enjoy the rest. See further, titles *Taxes*; *National Debt*; *Excise*; *Customs*, &c.

By these taxes a vast sum of money is annually raised; but *the Civil List* is properly the whole of the King's revenue in his own distinct capacity; the rest being rather the revenue of the Publick or its creditors, though collected and distributed again in the name and by the officers of the Crown; it now standing in the same place as the hereditary income did formerly; and as that has gradually diminished, the parliamentary appointments have increased.

The expences defrayed by the Civil List are those that in any shape relate to civil government: as the expences of the royal household; the revenues allotted to the Judges previous to the year 1758; all salaries to Officers of State, and every of the King's servants; the appointments to foreign ambassadors; the maintenance of the Queen and Royal Family; the King's private expences, or privy purse; and other very numerous outgoings, as secret-service money, pensions, and other bounties; which sometimes have so far exceeded the revenues appointed for that purpose, that application has been made to parliament to discharge the debts contracted on the Civil List.

The whole revenue of Queen *Elizabeth* did not amount to more than 600,000*l.* a year; that of King *Charles* I. was 800,000*l.*; and the revenue voted for King *Charles* II. was 1,200,000*l.* though complaints were made (in the first years at least) that it did not amount to so much. The revenue of the Commonwealth between the time of *Charles* I. and *Charles* II. was upwards of 1,500,000*l.* A striking instance (says Mr. *Christian* in his Note on this passage in the Commentaries) to prove that the burthens of the people are not necessarily lightened by a change in the Government. A remark, which applies with tenfold force to the democratick government of *France*, raised by blood and slaughter on the ruins of monarchy; one pretext of the destruction of which was the *enormous expence of it*; an argument which has been, with equal falsehood and malice, applied also to the *British* Monarchy.

Under the revenue of the Civil Lists above-mentioned were included all manner of public expences; among which Lord *Clarendon* in his speech to the Parliament computed, that the charge of the navy and land forces amounted annually to 800,000*l.* which was ten times more than before the former troubles. The same revenue, subject to the same charges, was settled on King *James* II. by *stat.* 1 *Jac.* 2. *c.* 1; but by the increase of trade, and more frugal management, it amounted on an average to a million and a half *per annum*; besides other additional customs granted by Parliament, *stat.* 1 *Jac.* 2. *cc.* 3, 4, which produced an annual revenue of 400,000*l.* out of which his fleet and army were maintained at the yearly expence of 1,100,000*l.* After the Revolution, when the Parliament took into its hands the annual support of the forces, both maritime and military, a civil list revenue was settled on the new King and Queen, amounting, with the hereditary duties, to 700,000*l.* *per annum*; and the same was continued to Queen *Anne* and King *George* I. That of King *George* II. was nominally augmented to 800,000*l.* by *stat.* 1 *Geo.* 2. *c.* 2; and in fact was considerably more: and that of his present Majesty is avowedly increased to the limited sum of 900,000*l.*

Upon the whole, it is doubtless much better for the Crown, and also for the People, to have the revenue settled upon the modern footing rather than the ancient. For the Crown, because it is more certain, and collected with greater ease; for the People, because they are now delivered from the feodal hardships, and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, yet, if we consider the sums that have been formerly granted; the limited extent under which it is now established, the expences defrayed by it, the revenues and prerogatives given up in lieu of it by the Crown, the numerous branches of the present Royal Family, and, above all, the diminution of the value of money compared with what it was worth in the last century, we must acknowledge these complaints to be void of any rational foundation; and that it is impossible to support that dignity, which a King of *Great Britain* should maintain, with an income in any degree less than what is now established by Parliament.

VI. By *Magna Charta*, 9 *Hen.* 3. *c.* 8, "The King nor his bailiffs shall levy any debts upon lands or rents so long as the debtor hath goods and chattels to satisfy, neither shall the pledges be distrained so long as the principal is sufficient; but if he fail, then shall the pledges answer the debt; howbeit they shall have the debtor's lands and rents until they be satisfied, unless he can acquit himself against the pledges."

Goods and chattels] By order of the common law, the King for his debt had execution of the body, lands, and goods of his debtor; this is an act of grace, and restrains the power the King had before. 2 *Inst.* 19.

Pledges be distrained] This act does not extend, nor was ever taken to extend to sureties in a bond or recognizance, if they may be so called, being bound themselves equally with the principal, as sureties to perform covenants and agreements are in like manner; but to pledges and manucaptors only, who by express words are not responsible, unless their principals become insolvent, and so are conditional debtors only. And so the act has always been construed, and the words themselves imply as much. *Hard.* 378.

By *Magna Charta*, *c.* 18, "The King's debtor dying, the King shall be served before the executor."

By this statute, the King by his prerogative shall be preferred in satisfaction of his debt by the executors before

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fore any other. And if the executors have sufficient to pay the King's debt, the heir nor any purchaser of his lands shall not be charged. 2 *Inst.* 32.

Stat. West. 1; 3 *Ed.* 1. *c.* 19, enacts, "That the Sheriff having received the King's debt, upon his next account shall discharge the debtor thereof, in pain to forfeit three times so much to the debtor, and to make fine at the King's will. And the sheriff and his heirs shall answer all monies that they whom he employed receive; and if any other that is answerable to the Exchequer by his own hands do so, he shall render thrice so much to the plaintiff, and make fine as before. And on payment of the King's debt, the Sheriff shall give a talley to the debtor, and the process for levying the same shall be shewed him on demand without fee, on pain to be grievously punished."

The King's debt.] Under this word, debt, all things due to the King are comprehended, and not only debt in the proper sense, but duties on things due, as rents, fines, issues, amercements, and other duties to the King received or levied by the Sheriff; for debt in its large sense signifies whatever a man doth owe; and *debere dicitur quia deest habere; debitori enim deest quod habet, cum sit creditoris, maxime in casu domini regis.* 2 *Inst.* 198.

The Sheriff and his heirs shall answer.] This is to be understood, *quoad restitutionem*, but not *quoad pœnam*; that is for the civil but not for the criminal part; for this is a maxim in law. 2 *Inst.* 198.

The *stat.* 28 *Ed.* 1. *st.* 3. *c.* 12, enacts, "That beasts of the plough shall not be distrained for the King's debts so long as others may be found, on such pain as is elsewhere ordained by statute: (*viz.* by the statute *de districtione scaccarii*, 51 *Hen.* 3. *stat.* 4.) And the great distresses shall not be taken for his debts, nor driven too far; and if the debtor can find convenient surety, the distress shall in the mean time be released; and he that does otherwise shall be grievously punished."

This is an act of grace, and on this act there lies a writ directed to the Sheriff, commanding him to receive surety according to this act, which if he refuses, an attachment lies against him, or the party offering surety according to this act, if it be refused, may have an action against the Sheriff, &c. 2 *Inst.* 565.

The *stat.* 25 *Ed.* 3. *st.* 5. *c.* 19, enables a common person to sue a debtor of his (who is likewise a debtor to the King) to judgment, but he cannot proceed to execution, unless the plaintiff gives security to pay the King's debt first, and then he may take execution for his own and the King's debt too.—For otherwise, if without giving such security, the party takes forth execution upon his judgment, and levies the money, the same money may be seized upon to satisfy the King's debt.

The *stat.* 33 *Hen.* 8. c. 39. *s.* 2, enacts, "That all obligations and specialties concerning the King and his heirs, or made to his or their use, shall be made to his Highness and to his heirs, Kings, in his or their name or names, by these words, *domino regi*, and to no other person to his use, and to be paid to his Highness, by these words, *solvend' eidem domino regi hæred' vel executoribus suis*, with other words used in common obligations, which obligations and specialties shall be in the nature of a statute staple."

None other are to be charged, but such as were liable to the bond when it was made. *Sav.* 10.

An obligation for performance of covenants is within this act, after the covenants are broken. 7 *Rep.* 20. *b*: *Hard.* 368, 442.

By § 3 of the said act 33 *Hen.* 8. *c.* 39, All such obligations, the debt not being paid, shall come, remain, and be to the heirs or executors of the King as he shall appoint; and if any person take any obligation to the use of the King or his heirs, otherwise than as aforesaid, he shall suffer such imprisonment as shall be adjudged by the King or his honourable Council.

Costs and damages are given to the King. § 6.

~~Debts to be sued for in proper Courts.~~ § 7.

And every of the Courts are empowered to set such fines, &c. on persons for their defaults, &c. as to the Court seem expedient. And all trials shall be by due examination of witnesses, writings, proofs, or such other way as by the Courts shall be thought expedient. § 13.

And in all actions in any of the Courts for any debt due to the King by reason of any attainder, outlawry, forfeiture, gift of the party, or by any other collateral ways or means, it shall be sufficient in law to shew and allege generally, that the party to whom the said debt did belong, such a year and day did give the same to the King, or was attainted, outlawed, &c. whereby the said debt did accrue to the King; and the same shall be of the same effect, as if the whole matter had been declared at large according to the order of the common law. § 25.

If any suit be commenced, or any process awarded for the King, for the recovery of any debt, then the same suit and process shall be preferred before any person. And that the Lord, his heirs and successors, shall have first execution against any defendant for his debt, before any person: so always that the King's suit be commenced, or process awarded for the debt, at the suit of the King, his heirs or successors, before judgment given for the other person. § 26.

This statute abridges the prerogative, and controuls the common law; and here is a negative implied, though the statute sounds in the affirmative; for it enacts a new thing, and the *ita quod* makes a condition precedent and a limitation: and the words are introductive. *Hard.* 27.

Strange arg. said, That on this act he took it, the suit must be said to be then taken or commenced when the first step is made towards the proceeding to execution, and the first step to be taken is to procure a *fiat* of a Baron, and then it is in fact that the process is awarded. *Gilb. Eq. R.* 222.

All manors, lands, tenements, possessions, and hereditaments, which be, or that hereafter shall be, in the hands, possession, occupation, or seisin of any person, to whom the manors, &c. have heretofore or hereafter shall descend, revert, or remain in fee-simple, or in fee-tail, general or special, by, from, or after the death of any ancestor as heir, or by gift of his ancestors whose heir he is, which ancestor was, is, or shall be indebted to the King, or to any person to his use, by judgment, recognizance, obligation, or other specialty, the debt whereof is or shall not be paid; then in every such case the same manors, &c. shall be chargeable for payment of the debt. *Stat.* 33 *Hen.* 8. *c.* 39, § 27.

All manors.] *A.* seised of the manor of *F.* in consideration of a marriage to be had between *B.* his son, and

M. daughter of *J. S.* covenanted to levy a fine to the use of himself and wife for their lives, remainder to the use of *B.* and *M.* and the heirs of their bodies with remainders over; afterwards *A.* acknowledged a recognizance to the Queen and died. His wife died; the manor is extended for the Queen's debt, by force of the statute. It was argued by *Coke,* that the manor is not chargeable by the statute; but it was made for the King's benefit in two points. To make lands intailed liable for the King's debts, where they were not so before, against the issue. 2. To make bonds taken by the officers of the King to the use of the King, as effectual as statutes; that the words (was or shall be indebted) shall not be intended after the gift made; that (shall be) is to be intended of future debts after the statute, whereas at the time of the settlement *A.* was not receiver or other officer to the Queen; the words are (by gift after the debt acknowledged to the Queen); that this case is not within the statute; for the words are (of the gift of his ancestor), but here *B.* has not the manor of the gift of *A.* but rather by the statute of uses, and so he is in the *post,* and not in the *per,* by his ancestor; for the fine was levied to divers persons to the uses aforesaid, nor was the gift a mere gratuity, but in consideration that he should marry the daughter of *J. S.* and the debt accrued not till after the gift. He admitted, that had there been any fraud in the case, or any purpose in *A.* when he made the conveyance, to become the King's debtor or officer, it would be within the statute, and the gift had been a meer gratuity, &c. and afterwards (as *Coke* reported) *B.* and his lands were discharged. 2 *Leon,* 90, 91.

Shall be indebted.] This is intended an immediate debt, and not such debts as are due to the subject and accrue to the King by any collateral means; for which this statute has a clause for the writ and general manner and form of pleading in such cases, of the part of the King for the recovery of them, that the party such a year and day, &c. (which see at § 25 above). So that the several manners of penning these two branches manifest the intention of the makers of the act to prefer immediate debts due to the King by judgment, &c. before debts of the Subject which accrue to the King by assignment, attainder, outlawry, &c. and the reason was, because debts due immediately to the King by judgment, recognizance, obligation, or other specialty, are in their nature more high, and may be better known, and upon search found, than debts due to Subjects. 7 *Rep.* 21 *Jenk.* 226. *pl.* 99. S. P. But for such debts the King is left at common law. If the King's debtor, officer, or accomptant has leases for years or goods; these leases and goods are not liable if the debtor sold them *bona fide*; but if he sold them by covin it is otherwise. If land be purchased with the King's money, it is liable to satisfy the King.

The debt ought to be immediately to the King himself, or if it be to any other than to the King, it ought to be originally to the use of the King. 7 *Rep.* 22. *a.*

If tenant in tail becomes indebted to the King, unless it be by judgment, recognizance, obligation, or other specialty, and dies, the lands in the seisin of the issue in tail by force of this act shall not be extended by this act for such debt; for the statute extends only to the said four cases, and all other debts remain at common law. 7 *Rep.* 21. *b.*

The issue in tail (the land being in his hands) is also liable in either of the said four cases, but not the *bona fide* alienee of the issue; for the words of the statute do not extend to this alienee; the common law did not help the King in these cases; the statute helps the King in the case against the issue in tail. *Jenk.* 226. *pl.* 99. 285. *pl.* 19.

The issue in tail shall not be charged by this statute for the penalty on a conviction of recusancy of the tenant in tail by proclamation, under *stat.* 29 *Eliz. c.* 6, but otherwise it had been if he had been convicted under *stat.* 23 *El. c.* 1. 1 *Rol. Rep.* 94.

In every such case.] By the express purview of this act, the land shall be solely extended as long as it is in the possession or seisin of the heir in tail; for this act says, That in every such case the land shall be charged. And as the land against the issue in tail was not extendable before this act, the King has benefit to extend it in the possession of the heir in tail, which he could not do before; but the King cannot extend the lands of the alienee: for the statute does not extend to this, and the makers of the act have reason to favour the purchasers, farmers, &c. of the heir in tail more than the heir himself; for they are strangers to the debts of tenant in tail, and they come to the land on good consideration. 7 *Rep.* 21. *b.*

The same manors.] If the goods and chattels of the King's debtors be sufficient, and so can be made appear to the Sheriff, whereupon he may levy the King's debt, then the Sheriff ought to extend the lands of the debtor or his heir, or of any purchaser or tenant. 2 *Inst.* 19.

The King shall not be excluded to demand his debts against any of his Subjects, as heir to any person indebted to his Highness or to his use, albeit this word heir be not comprised in such recognizance or specialty, or that such person shall say, that they have not any hereditaments to them descended, but only such as be intailed or given to them by their ancestors. *Stat.* 33 *H.* 8. *c.* 39. § 28.

By this clause the intent of the makers of the act appears, that the heir in tail shall be only charged with the debt of the King; but lands in fee-simple were extendable at the common law in whatever hands they came, therefore as to them this statute was only *declarativum antiqui juris:* but as to the estates in tail, it was *introductivum novi juris* against the issue in tail. 7 *Rep.* 21. *b.*

One *P.* was indebted to the Queen, and one *W.* was bound to *P.* in 100*l.* in which obligation *W.* did not mention his heirs; *P.* assigned the obligation in which *W.* was bound to him, to the Queen; and, on this, process was made against the heir of *W.* And it was held by the Court, that as *W.* did not oblige himself and his heirs, that the heir by the death of the father was discharged. And if the assignment had been made in the life-time of the father, and then the father had died, the heir should be discharged, but the son may be charged as executor or administrator. &c. *Sav.* 2.

Provided, That the King may at his liberty demand his debts of any executors or administrators of any person indebted, if the executors, &c. have assets. *Stat.* 33 *H.* 8. *c.* 39. § 29.

J. S. was obliged to Sir *Richard Cavendish,* Treasurer of the Chamber to *Henry* VIII. in 100*l.* who was indebted

indebted to the King, on which process was made against those who were tertenants of *J. S. tempori confectionis scripti præd'* made to the said Sir *Richard*. *Per Manwood*, Ch. B. The tertenants are not chargeable in this case, but the heirs and executors. *Per Shute*, second Baron, If an obligation be made to the King, it shall be of the same nature as a statute staple to all intents, by this statute; but obligations made to other persons to the use of the King, shall be executory against the obligor, his heirs, executors, or administrators, and not against other persons; but if *J. N.* be bound to *J. S.* and *J. S.* assigns this to Sir *Richard Cavendish*, and he over to the King, no process shall be made thereon; to which the Court and all the clerks agreed. And it was held, that if obligor, after the obligation made, voluntarily make feoffment of lands, such feoffees shall be charged; otherwise it is of purchasers before the obligation made in case of the King. *Sav.* 12.

If the hereditaments be evicted out of the possession of such person by just title without fraud, whose hereditaments shall be chargeable as is abovesaid, then such hereditaments shall be acquitted of the debts. *Stat.* 33 *Hen.* 8. *c.* 39. § 30.

B. was indebted to the Queen, for the payment of which debt certain lands of *B.* at the time of the debt, were purchased by one *W.* against whom and one *C.* and *D.* the said *B.* exhibited his bill in the Exchequer-chamber, praying that the equity of the case might there be examined. Before any answer made, *W.* paid the debt, and then demanded judgment if the Court would hold further plea, as the cause of privilege was determined, which is the debt due to the Queen. And it was held, that on this reason the Court ought to dismiss the cause, and so it was done. *Sav.* 15.

If any person of whom any such debt shall be demanded, shew sufficient matter, in law, reason, or good conscience, why such persons ought not to be charged with the same, and it be sufficiently proved, the Courts have power to allow the proof, and acquit all persons so impleaded. *Stat.* 33 *Hen.* 8. *c.* 39. § 31.

Sufficient matter in law.] This proviso gives benefit not only to him who has matter in good conscience, but also to him who has good and sufficient cause, and matter in law, reason, (and then comes) good conscience; and without question the first words, *viz.* cause and matter in law, shall extend to all the debts of the King, and process thereupon, as well at common law as on this act. And the conclusion of the branch does not make against it. For the sense thereof was, that he should plead matter in law or good conscience, and that nothing contained in the act should be an impediment thereto. 7 *Rep.* 19. *b.*

Scire facias issued against Sir *W. H.* as heir to *M. H.* his father, on a recognizance acknowledged to *Edw.* VI. by the said *M. H.* the Sheriff returned *scire feci*, and on his default judgment was given. And because in truth he never was summoned, and had good matter, if he had notice thereof, to plead in discharge of the recognizance acknowledged, all which he shewed in certain in a bill in the Exchequer; upon which, on conference had by *Manwood* and the other Barons, with the two Ch. J. he was discharged of the recognizance. 7 *Rep.* 20. *a.* As 3 *Rep.* *Trin.* 37 *Eliz.* Sir *William Herbert's* case.

In law, reason, or good conscience.] *A.* obtained of the King a privy seal, whereby the forfeiture of certain recognizances for appearing at the sessions, amounting in the whole to 800*l.* was granted her. And it was made a question, Whether the Court might compound those forfeitures by their privy seal which was granted before the privy seal and grant to *A.*? And it was doubted whether the privy seal did not take away and revoke the power given to the Court in this particular? But it was held clearly, that the Court might upon good matter in equity discharge these debts by virtue of this statute. And the case in question seemed a hard case to the Court, because the party himself was the cause why there was no appearance, by beating the party so heinously the very day before they ought to have appeared, that they were disabled thereby to appear. *Hard.* 334.

W. put 100*l.* out at interest to defendant, and took bond in the name of one *J.* who became *felo de se*, and the plaintiff was relieved against the King on this trust, in equity upon this statute. *Sed quære*, Whether this statute extends to any equity against the King, otherwise than in case of pleas by way of discharge? But it was likewise decreed in this cause that the plaintiff should be saved harmless from all others. *Hard.* 176.

And the matter so shewed be sufficiently proved.] *Scire facias* issued against *T.* the father and *T.* the son, to shew cause wherefore they did not pay the King 1000 *l.* for the mesne profits of certain lands holden by them from his Majesty, for which land judgment was given for him in the Exchequer, and the mesne rates were found by inquisition, which returned that the said mesne profits came to 1000*l.* upon which inquisition this *scire facias* issued; whereupon the Sheriff returned that *T.* the father was dead, and *T.* the son appeared, and pleaded that he took the profits but as a servant to his father, and by his command, and rendered an account to his father for the profits, and also that judgment for the lands was given against his father and him for default of sufficient pleading, and not for the truth of the fact; and he shewed this statute, which he pretended aided him for his equity; whereupon the King demurred. *Tanfield*, Ch. B. said, that the matter in equity ought to be sufficiently proved, and here is nothing but the allegation of the party, and the demurrer for the King; and if the demurrer be in law an admittance of the allegation, and so a sufficient proof within the statute, is to be advised on; and for that point the case is but this: A *scire facias* issues to have execution of a recognizance, which, within this act, ought, by pretence and allegation of the defendant, to be discharged for matter in equity, and the defendant pleads his matter in equity, and the King, supposing this not to be equity within this statute, demurs in law, whether that demurrer be an insufficient proof of the allegation within the statute or not? *Adjornatur*. *Lane* 51.

By § 33 of the said *stat.* 33 *Hen.* 8. *c.* 39, it is provided, that the said act shall not take away any liberties belonging to the duchy and county palatine of *Lancaster*.

Process and executions for debts in the Court of Exchequer shall be made in the Exchequer by such officer as hath been used, as by this act is limited. § 34.

The *stat.* 13 *Eliz.* *c.* 4, enacts, That all the lands, &c. which any accomptant of the Queen, her heirs and suc-

cessors,

cessors, hath while he remains accountable, shall for the payment of the debts of the Queen, her heirs and successors, be liable, and put in execution in like manner, as if such accountant had stood bound by writ obligatory (having the effect of the statute staple) to her Majesty, her heirs and successors, for payment of the same. § 1.

The Queen, by her letters patent, granted *catalla utlugatorum & felonum de se*, within such a precinct; one who was indebted to the Queen is *felo de se* within the precinct. It was ruled, that notwithstanding the grant by the letters patents, the Queen shall have the goods for satisfying her debt. 3 *Leo.* 113: *Mo.* 126, 127. S. C. between the Queen of the first part, the Bishop of *Sarum* of the second part, and *Oliver Coxhead* of the third part; and there *per Manwood*, Ch. B. the patent does not extend to have the goods of *felo de se* against the Queen for her debt, because it wanted the words *(licet tangat nos)*; but he agreed, that if the lands of the felon be liable to [*sufficient to answer*] all the debt of the queen, the Court may in discretion take all the lands in extent, and leave the goods to the patentee. And as to a petition of *Coxhead* praying a discharge of the lands, &c. by him purchased of the officer debtor to the Queen, it was answered, that the land was subject to the Queen's extent for all arrears of receipts by his office, received before the conveyance thereof, though the receipt be after the conveyance, and that by reason of the statute; but as to another office accepted after the conveyance of the land, the arrears of that shall not charge the land so conveyed.

B. L. having purchased a long term for years in houses, afterwards purchased the inheritance; afterwards he became receiver of *North Wales*, and having occasion for 500*l.* assigned over the term by way of mortgage to *J. S.* Afterwards on the marriage of *E. L.* his son, he settled the houses in *St. Clement's* (*inter alia*) on himself for life, remainder to *E. L.* his son, and the heirs of his body. There was issue of the marriage a daughter, the wife of *P.* after this *B. L.* mortgages these houses to *N.* for 1800*l.* The King extends these houses for the debt of *B. L. N.* gets an assignment of the extent, and a privy seal for the debt. Resolved, 1st, That by the statute of *Elizabeth*, the land and the real estate of *B. L.* was bound and stood liable to answer the King's debt, although he was not actually a debtor to the King, nor any extent against him in several years after. 2dly, That where a term is attendant on the inheritance, he shall have a right to the term; but if it be a term in gross, and assigned before any actual extent, the assignment will stand good, and the term not liable to the King's debt. 2 *Vern.* 389, 390.

If either of the Queen's officers, on rendering of his account, shall be found in arrear, and such arrears shall not be paid within six months after the account past, the Queen, &c. may sell so much of his estate as will answer the debt, and the overplus of the sale is to be rendered to the accomptant or his heirs, by the officer that receives the purchase money, without further warrant. *Stat.* 13 *Eliz. c.* 4. § 2, 3.

Upon this statute many questions were moved. 1st, If the debtor died, whether the land might be sold? 2dly, When the account is determined after his death? 3dly, When the accountant, after becoming debtor, and in arrear makes feoffment, or other estate over, or charges or incumbers the land, either to his issue, or others of his blood, to prevent the Queen's selling, or on other consideration, whether she may sell the land, the words of the act being make sale, &c. of so much of the lands, &c. of every such accountant or debtor so found in arrear, &c. and that the sale shall be good and available in law against the party accountant, and his heirs claiming as heirs. 4thly, If the accountant was seised of land in tail, whether this land may be sold to be good against the issue; for the ousting of which doubts the statute of 27 *Eliz. c.* 3, was made; but this gives remedy only, that the land shall be sold after the death of the debtor, and when the account is made after his death; therefore to remedy the other mischiefs, the statute 29 *Eliz. c.* 7, was made (but the same being only a temporary act is expired). *Mo.* 646, &c. *pl.* 895: (where part of the last-mentioned act is set forth and explained.)

If such accountant or debtor purchase lands in others names in trust for their use, that being found by office or inquisition, those lands also shall be liable to satisfy the debt in such manner as before is expressed. *Stat.* 13 *Eliz. c.* 4. § 5.

Lands purchased by accountants since the beginning of the Queen's reign, either in their own names, or in the names of others in trust for their use, shall be also liable to be sold for the discharge of their debts as aforesaid, rendering the overplus to the accountant. § 6.

Provided, That bishops' lands shall be only chargeable for subsidies or tenths, as they were before making this act, and not otherwise. § 9.

Neither shall this act extend to charge any accountant whose yearly receipt exceeds not 300*l.* otherwise than as he was lawfully chargeable before this act. § 10.

Neither shall this act extend to such accountants, as by order of their offices, and charge, immediately after their accounts past, are to lay out money again; such as are treasurers of war, garrisons, navy, provision of victuals, or for fortifications or buildings, and the master of the wardrobe; unless the Queen, &c. command present pay. § 11, 12.

Neither does this act extend to Sheriffs, escheators, or bailiffs of liberties, concerning whose accounts the course remains the same as before. § 13.

Lands bought of an accountant *bona fide*, and without notice of any fraudulent intent in the accountant shall be discharged; and if they be bound by office, yet shall they, on traverse, be discharged without livery, *ouster le main*, or other suit. § 14.

If a man is receiver to the King, and not indebted, but is clear and sells his land, and ceases to be receiver, and afterwards is appointed receiver again, and then a debt is contracted with the King, the former sale is good. 2 *Mod.* 247.

The Queen, &c. being satisfied by sale of lands, the sureties shall be discharged for so much, and if any yet remain unpaid, the sureties shall pay the residue rateably according to their abilities. *Stat.* 13 *Eliz. c.* 4. § 15.

By *stat.* 27 *Eliz. c.* 3, the Queen, &c. may make sale of the accountant's lands, &c. as well after his death as in his lifetime, and as well where the account is made, and the debt known within eight years after his death, as where the account is made, and the debt known in his lifetime. § 2.

By

By § 3, it is provided, that after the accountant's death, and before the lands be sold, a *scire facias* shall be awarded to garnish the heirs, to shew cause why lands, &c. should not be sold, &c. whereupon, if the heir, upon such garnishment or two *nihils* returned, do not prove that the executors or administrators of the accountant have sufficient, then ten months after such two *nihils* or garnishment returned, the land, &c. shall be sold and disposed according to the statute of 13 *Eliz.* c. 4.

Nevertheless, the heir's sale *bona fide* upon good consideration before the *scire facias* awarded, shall be good to him who is not consenting to defraud the Queen, &c. *Stat.* 27 *Eliz.* c. 3. § 4.

This statute shall extend to all officers of receipts and accounts to her Majesty, and to no other. § 5.

If the debt grow in the Courts of the duchy of wards, a privy seal shall issue out against the heir to appear at a certain day, to shew cause, &c. when, if he appear not, on affidavit made that it was duly served, an attachment with proclamation shall issue against him, to be proclaimed in some open market in the county where he dwelt twenty days (at least) before the return thereof, whereupon, if he appear not, the lands, &c. shall be sold and disposed as aforesaid. § 6.

The heir's lands shall not be sold during his minority; but at any time within eight years after his full age they shall be liable as aforesaid. § 7.

VII. In King *John's Magna Charta* of Liberties, there was a clause making it lawful for the barons of the realm to choose twenty-five barons to see the charter observed by the King; with power, on any Justice or other minister of the King's failing to do right, and acting contrary thereto, for four of the said barons to address the King, and pray that the same might be remedied; and if the same were not amended in forty days, upon the report of the four barons to the rest of the twenty-five, those twenty-five barons, *with the commonalty of the whole land*, were at liberty to distress the King, take his castles, lands, &c. until the evils complained of should be remedied, according to their judgment; *saving the person of the King, Queen, and their children.* And when the evils were redressed, the people were to obey the King as before. King *John's Magna Chart.* c. 73. But this clause was omitted in King *Henry* IIId's *Magna Charta*; though in a statute made at *Oxford, anno* 42 *Hen.* III. to reform misgovernment, it was enacted, that twenty-four great men should be named, twelve by the King, and twelve by the Parliament, to appoint Justices, Chancellors, and other officers, to see *Magna Charta* observed.— These regulations seem (like the constitution, framed by an assembly in a neighbouring nation, before they had directly discarded a monarchical form of government) too laboured and unnatural to succeed in practice: the checks now formed, by the law, on the power of the Crown are of a nature in reality more forcible, though in appearance more loyal, than a measure which placed the Sovereign in subjection to a dangerous *Aristocracy*.

The Barons' wars seem to have proceeded in some measure from a like power granted to them as by the charter of King *John*; and probably the Parliament's wars in the time of King *Charles* I. from their examples.

But, whatever attempts might have been previously made, it cannot but be observed, that most of the laws for ascertaining, limiting, and restraining the prerogative of the Crown, have been made within the compass of little more than a century past, from the *Petition of Right* in 3 *Car.* I. to the present time: so that the powers of the Crown are now to all appearance greatly curtailed and diminished since the reign of King *James* I. particularly by the abolition of the Star Chamber, and High Commission Courts in the reign of *Charles* I; and by the disclaiming of martial law, and the power of levying taxes on the Subject, by the same Prince; by the disuse of forest laws for a century past; and by the many excellent provisions enacted under *Charles* II; especially by the abolition of military tenures, purveyance, and preemption, the *Habeas Corpus* act, and the act to prevent the discontinuance of parliaments for above three years; and, since the Revolution, by the strong and emphatical words in which our liberties are asserted, in the Bill of Rights, and Act of Settlement; by the act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the House of Commons; by rendering the seats of the Judges permanent, and their salaries liberal and independant; and by restraining the King's pardon from obstructing parliamentary impeachments. Besides all this, if we consider how the Crown is impoverished and stripped of all its antient revenues, so that it must greatly rely on the liberality of Parliament for its necessary support and maintenance, we may, perhaps, be led to think, that the balance is inclined, pretty strongly, to the popular scale; and that the executive magistrate has neither independance nor power enough left, to form that check upon the Lords and Commons which the Founders of our Constitution intended.

On the other hand, however, it is to be considered, that every prince in the first parliament after his accession, has by long usage a truly royal addition to his hereditary revenue settled upon him for his life; and has never any occasion to apply to Parliament for supplies, but upon some public necessity of the whole realm. This restores to him that constitutional independance, which at his first accession seems, it must be owned, to be wanting. And then, with regard to power, we may find perhaps, that the hands of Government are at least sufficiently strengthened, and that an *English* Monarch is now in no danger of being overborne either by the Nobility or the People. The instruments of power are not, perhaps, so open and avowed, as they formerly were, and therefore are the less liable to jealous and invidious reflections; but they are not the weaker upon that account. In short, our national debt and taxes have, in their natural consequences, thrown such a weight of power into the executive scale of government, as we cannot think was intended by our patriot ancestors; who gloriously struggled for the abolition of the then formidable parts of the prerogative, and by an unaccountable want of foresight established this system in their stead. The entire collection and management of so vast a revenue, being placed in the hands of the Crown, have given rise to such a multitude of new officers created by, and removable at, the royal pleasure, that they have extended the influence of Government to every corner of the nation. To this may be added, the frequent opportunities of conferring particular obligations, by preference in loans, subscriptions, tickets, remittances, and other money transactions, which will greatly increase this influence, and that over

those persons whose attachment, on account of their wealth, is frequently the most desirable. And the same may be said with regard to the officers in our numerous army, and the places which the army has created. All which, put together, give the Executive Power so persuasive an energy, with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative.

Upon the whole, therefore, it seems clear, that whatever may have become of the *nominal*, the *real* power of the Crown has not been too far weakened by any transactions in the last century. Much is, indeed, given up; but much is also acquired. The stern commands of prerogative have yielded to the milder voice of influence; the slavish and exploded doctrine of non-resistance has given way to a military establishment by law; and to the disuse of parliaments has succeeded a parliamentary trust of an immense perpetual revenue. When, indeed, by the free operation of the *Sinking Fund*, our national debts shall be lessened, when the posture of foreign affairs, and the universal introduction of a well-planned and national militia, will suffer our formidable army to be thinned and regulated; and when, in consequence of all, our taxes shall be gradually reduced; this adventitious power of the Crown will slowly and imperceptibly diminish, as it slowly and imperceptibly rose; but, till that shall happen, it will be our special duty, as good Subjects and good *Englishmen*, to reverence the Crown, and yet guard against corrupt and servile influence from those who are intrusted with its authority; *to be* LOYAL, *yet* FREE; OBEDIENT, *and yet* INDEPENDENT; and, above every thing, to hope, that we may long, very long, continue to be governed by a Sovereign, who, in all those public acts that have personally proceeded from himself, hath manifested the highest veneration for the free Constitution of *Britain*; hath already, in more than one instance, remarkably strengthened its outworks, and therefore will never harbour a thought, or adopt a persuasion, in any the remotest degree, detrimental to public liberty. 1 *Comm. c.* 8.

For further matters relative to the *King*, see titles *Parliament*; *Government*; *Grant of the King*; *Lease of the King*.

KING OF HERALDS, or *King at Arms*, *Rex Heraldorum*. A principal officer at Arms, that hath the pre-eminence of the Society. Among the *Romans* he was called *pater patratus*. See titles *Herald*; *Garter*.

KING OF THE MINSTRELS, *at Tutbury in com. Staff.* His power and privilege appears by a charter of *Rich.* II. confirmed by *Hen.* VI. in the 21st year of his reign. *Cowell.*

KING'S BENCH,

BANCUS REGIUS, from the *Saxon*, *Banca*, a bench or form.] The Supreme Court of Common Law in the Kingdom. 4 *Inst.* 73.

I. *Of the Court itself, generally.*
II. *Of its criminal Jurisdiction.*
III. *Of its civil Jurisdiction*, &c.
IV. *Of the Officers of the Court*; *and the mode of Proceeding there.*

I. THE Court of King's Bench, is so called because the King used formerly to sit there in person, the stile of the Court still being *coram ipso rege*. During the reign of a Queen it is called the Queen's Bench; and under the usurpation in *Cromwell*'s time, it was stiled the Upper Bench.

This Court consists of a Chief Justice, and three *puisne* Judges, formerly, according to *Fortescue*, *c.* 51, four or five. See *Raym.* 475: 3 *Comm.* 41, *in. n.* These Judges are, by their office, the sovereign Conservators of the peace, and supreme Coroners of the land. Yet, though the King used himself to sit in this Court, and still is supposed so to do; he did not, neither by law is he empowered to, determine any cause or motion, but by the mouth of his Judges, to whom he has committed his whole judicial authority. 4 *Inst.* 71: See 4 *Burr.* 851: 2 *Inst.* 46.

It has been said, that King *Hen.* III. sate in person with the Justices in *Banco Regis* several times, being seated on a high bench, and the Judges in a lower one at his feet. This, however, is a doubtful point. King *Edward* IV. sate three days in the second year of his reign, wholely to see, as he was young, the form of administring justice. King *James* I. it is also said, sate there for a similar reason. See 3 *Comm. c.* 4. *in n.*

This Court, which is the remnant of the ancient *Aula Regia*, is not, nor can it be, from the very nature and constitution of it, fixed to any certain place, but may follow the King's person wherever he goes. See *stat.* 28 *Eliz.* 1. *stat.* 3. *c.* 5. For which reason all process issuing out of this Court in the King's name is returnable, "*ubicunque fuerimus in Anglia*;—wheresoever We shall then be in *England*." See titles *Courts*; *Common Pleas*. It hath, indeed, for some centuries past, usually sate at *Westminster*, being an antient palace of the Crown; but might remove with the King to *York* or *Exeter*, if he thought proper to command it. And we find, that after *Edw.* I. had conquered *Scotland*, it actually sate at *Roxburgh*. *M.* 20, 21 *E.* 1: *Hale, H. C. L.* 200. And this moveable quality, as well as its dignity and power, are fully expressed by *Bracton*, when he says, that the Justices of this Court are "*capitales, generales, perpetui, et majores*; *à latere regis residentes*: *qui omnium aliorum corrigere tenentur injurias et errores. Bract. l.* 3. *c.* 10." And it is moreover especially provided in the *Articula super cartas*, 28 *E.* 1. *c.* 5, that the King's Chancellor, and the Justices of his Bench, shall follow him; so that he may have at all times near unto him some that be learned in the laws.

After the division of the Courts, and the establishment of the Court of Common Pleas, for the express purpose of determining civil suits, the Court of King's Bench was accustomed, in ancient times, to be especially exercised in all criminal matters and pleas of the Crown, leaving the judging of private contracts and civil actions to the Common Pleas and other courts. *Glanvil. lib.* 1. *c.* 2, 3, 4; *lib.* 10. *c.* 18: *Smith de Rep. Ang. lib.* 2. *c.* 11: 4 *Inst. fol.* 70.

Toward the latter end of the *Norman* period, the *Aula Regis*, which was before one great Court where the *Justiciar* presided, was divided into four distinct Courts, *i. e.* the Court of Chancery, King's Bench, Common Pleas, and Exchequer. *Madox*, *c.* 19: *Bract. lib.* 3. *c.* 7. *fol.* 105: see titles *Courts*; *Common Pleas*, &c.

The Court of King's Bench retained the greater similitude with the ancient *Curia*, or *Aula Regis*, and was always ambulatory, and removed with the King where-

wherever he went. It hath always retained a supreme original jurisdiction in all criminal matters; for in these the process both issued from, and was returnable into, this Court; but in trespass it might be made returnable into either the King's Bench or Common Pleas, because the plea was criminal as well as civil, 2 *Inst.* 24: 4 *Inst.* 70: *Co. Lit.* 71: *Dyer* 187: *Cromp. of Courts* 78: 1 *Rol. Abr.* 94.

II. The jurisdiction of this Court is very high and transcendant. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the Subject by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former, in what is called the Crown side or Crown-office; the latter in the plea-side of the Court. 3 *Comm. c.* 4.

On the Crown-side, that is, in the *Crown-Office*, this Court takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. Into this Court also indictments from all inferior Courts may be removed by writ of *certiorari*, and tried either at bar, or at *nisi prius*, by a Jury of the county out of which the indictment is brought. The Judges of this Court are the supreme Coroners of the kingdom. And the Court itself is the principal Court of criminal jurisdiction known to the laws of *England*. For which reason, by the coming of the Court of King's Bench into any county, (as it was removed to *Oxford* on account of the sickness in 1665,) all former commissions of *oyer* and *terminer*, and general gaol-delivery, are at once absorbed and determined *ipso facto*.

But this is now altered, with respect to the Session of Gaol-delivery for *Middlesex*, by *stat.* 25 *Geo.* 3. *c.* 18; which enacts, that when any session of *oyer* and *terminer*, and gaol-delivery of the gaol of *Newgate*, for the county of *Middlesex*, shall have been begun to be holden before the essoign day of any term, that the same sessions shall be continued to be holden, and the business thereof finally concluded, notwithstanding the happening of such essoign day of any term, or the sitting of his Majesty's Court of King's Bench at *Westminster*, or elsewhere in the county of *Middlesex*; and that all trials, &c. had at such session so continued to be holden, shall be good and effectual to all intents and purposes. See this Dictionary, title *Justices of Oyer*, &c.

Into this Court of King's Bench hath reverted all that was good and salutary of the jurisdiction of the Court of *Star-Chamber* (*Camera Stellata*), which was a Court of very ancient original, finally abolished, on account of the abuse of its jurisdiction, by *stat.* 16 *C.* 1. *c.* 10. See this Dictionary, title *Star-Chamber*. 4 *Comm. c.* 19.

To state its powers more particularly, this Court is termed the *Custos Morum* of all the realm, and by the plenitude of its power, wherever it meets with an offence contrary to the first principles of justice, and of dangerous consequence if not restrained, adapts a proper punishment to it. 1 *Sid.* 168: 2 *Hawk. P. C. c.* 3. § 4.

The Justices of *B. R.* are the sovereign Justices of *oyer* and *terminer*, gaol-delivery, and of eyre, and coroners of the land; and their jurisdiction is general all over *England*: by their presence the power of all other Justices in the county, during the time of this Court's sitting in it, is suspended as has already been noticed; for *in præsentia majoris cessat potestas minoris*; but such Justices may proceed by virtue of a special commission, &c. *H. P. C.* 156: 4 *Inst.* 73: 2 *Hawk. P. C. c.* 3.

If an indictment in a foreign county be removed before commissioners of *oyer* and *terminer* into the county where the King's Bench sits, they may proceed; for the King's Bench not having the indictment before them cannot proceed for this offence. But if an indictment is found in the vacation-time in the same county in which the King's Bench sits, and in term time the King's Bench is adjourned, there may be a special commission to hear it. 4 *Inst.* 73.

Justices of this Court have a sovereign jurisdiction over all matters of a criminal and public nature, judicially brought before them, to give remedy either by the common law or statute: and their power is original and ordinary: when the King hath appointed them, they have their jurisdiction from the law. 4 *Inst.* 74.

This Court has a particular jurisdiction, not only over all capital offences, but also over all other misdemeanors of a public nature, tending either to a breach of the peace, or to oppression or faction, or any manner of misgovernment; and it is not material whether such offences, being manifestly against the public good, directly injure any particular person or not. 4 *Inst.* 71: 11 *Co.* 98: 2 *H. P. C. c.* 3. § 3.

And for the better restraining such offences, it has a discretionary power of inflicting exemplary punishment on offenders, either by fine, imprisonment, or other infamous punishment, as the nature of the crime, considered in all its circumstances, shall require; and it may make use of any prison which shall seem most proper; and it is said, that no other Court can remove or bail persons condemned to imprisonment by this Court. 2 *Hawk. P. C. c.* 3. § 5.—*Newgate* is as much the prison of this Court as the King's Bench prison is: every prison in the kingdom is the prison of this Court. 1 *Burr.* 541.

This Court hath so sovereign a jurisdiction in all criminal matters that an act of parliament appointing that all crimes of a certain denomination shall be tried before certain Judges, doth not exclude the jurisdiction of this Court, without express negative words; and therefore it hath been resolved, that *stat.* 33 *Hen.* 8. *c.* 12, which enacts, That all treasons, &c. within the King's house, shall be determined before the Lord Steward of the King's house, &c. doth not restrain this Court from proceeding against such offences. 2 *Inst.* 549: 2 *Jones* 53.

But where a statute creates a new offence which was not taken notice of by the common law, and erects a new jurisdiction for the punishment of it, and prescribes a certain method of proceeding, it seems questionable how far this Court has an implied jurisdiction in such a case. 1 *Sid.* 296: 2 *Hawk. P. C. c.* 3. § 6.

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This Court, by the plenitude of its power, may as well proceed on indictments removed by *certiorari*, out of inferior Courts, as on those originally commenced here, whether the Court below be determined, or still *in esse*, and whether the proceedings be grounded on the common law, or on a statute making a new law concerning an old offence. *Dalt.* 25: 44 *Ed.* 3. 31. *b*: *Cromp. Jurisd.* 131.

But the Court of King's Bench will not give judgment on a conviction in the inferior Court, where the proceedings are removed by *certiorari*, but will allow the party to waive the issue below, and to plead *de novo*, and to go to trial upon an issue joined in *B. R. Carth.* 6.

Nor can a record, removed into the King's Bench from an inferior Court, regularly be remanded after the term in which it came in; yet if the Court perceives any practice in endeavouring to remove such record, or that it is intended for delay, they may in discretion refuse to receive it, and remand it back before it is filed. 2 *Hawk. P. C. c.* 3. § 7, and several authorities there cited.

Also by the construction of the statutes, which give a trial by *nisi prius*, the King's Bench may grant such a trial in cases of treason or felony, as well as in common cases, because for such trial, not the record, but only a transcript is sent down. 4 *Inst.* 74: *Raym.* 364: 2 *Hawk. P. C. c.* 3. § 7.

And by *stat.* 6 *Hen.* 8. *c.* 6, it is enacted, "That the King's Bench have full authority by discretion, to remand as well the bodies of all felons removed thither, as their indictments, into the counties where the felonies were done; and to command the Justices of gaol-delivery, Justices of the peace, and all other Justices, to proceed thereon after the course of the common law, as the said Justices might have done, if the said indictments and prisoners had not been brought into the said King's Bench." This act extends not to high treason. *Raym.* 367: 2 *Hawk. P. C. c.* 3. § 8, 9.

As the Judges of this Court are the sovereign Justices of *oyer* and *terminer*, gaol-delivery, Conservators of the peace, &c. as also the sovereign Coroners, therefore, where the Sheriff and Coroners may receive appeals by bill, *à fortiori* the Judges may; also this Court may admit persons to bail in all cases according to their discretion. 4 *Inst.* 73: 9 *Co.* 118. *b*: 4 *Inst.* 74: *Vaugh.* 157.

In the county where the King's Bench sits, there is every term a grand inquest, who are to present all criminal matters arising within that county, and then the same Court proceeds upon indictments so taken; or if, in vacation, there be any indictment of felony before the Justices of peace of *oyer* and *terminer* or gaol delivery there sitting, it may be removed by *certiorari* into *B. R.* and there they proceed *de die in diem*, &c. 2 *Hale's Hist. P. C.* 3.

It may award execution, against persons attainted in parliament, or any other Court; when the record of their attainder or a transcript is removed, and their persons brought thither by *habeas corpus*. *Cro. Car.* 176: *Cro. Jac.* 495. Pardons of persons condemned by former Justices of gaol-delivery, ought to be allowed in *B. R.* the record and prisoner being removed thither by *certiorari* and *habeas corpus*. 2 *Hawk. P. C. c.* 6. § 19.

Into the Court of *B. R.* indictments from all inferior Courts and orders of sessions, &c. may be removed by *certiorari*; and inquisitions of murder are certified of course into this Court, as it is the supreme Court of criminal jurisdiction: hence also issue attachments, for disobeying rules or orders, &c. 4 *Inst.* 71, 72.

III. On the plea-side, or civil branch, this Court hath an original jurisdiction and cognizance of all actions of trespass, or other injury alleged to be committed *vi et armis*; of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud: all of which savour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the King, as well as damages to the injured party. The same doctrine is also now extended to all actions on the case whatsoever. *F. N. B.* 86, 92: 1 *Lil. Prac. Reg.* 503. But no action of debt or detinue, or other mere civil action, can by the *common law* be prosecuted by any Subject in this Court, by original writ out of Chancery. 4 *Inst.* 76: *Trye's Jus. Filezar*, 101. Though an action of debt, given by *statute*, may be brought in the King's Bench as well as in the Common Pleas. *Carth.* 234. And yet this Court might always have held plea of any civil action, (other than actions real,) provided the defendant was an Officer of the Court, or in the custody of the Marshal, or prison-keeper of this Court, for a breach of the peace or any other offence. 4 *Inst.* 71. And in process of time, it began, by a fiction, to hold plea of all personal actions whatsoever, and has continued to do so, for ages; it being surmised that the defendant is arrested for a supposed trespass, which he never has in reality committed; and being thus in the custody of the Marshal of this Court, the plaintiff is at liberty to proceed against him for any other personal injury; which surmise, of being in the Marshal's custody, the defendant is not at liberty to dispute. See 4 *Inst.* 72.

These fictions of law, though at first they may startle the Student, he will find upon farther consideration to be highly beneficial and useful: especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, tnat might result from the general rule of law. 3 *Rep.* 30: 2 *Roll. Rep.* 502. So true it is, that *in fictione juris semper subsistit æquitas*. 11 *Rep.* 51: *Co Litt.* 150. In the present case, it gives the Suitor his choice of more than one tribunal, before which he may institute his action; and prevents the circuity and delay of justice, by allowing that suit to be originally, and in the first instance, commenced in this Court, which after a determination in another, might ultimately be brought before it on a writ of error. 3 *Comm. c.* 4.

On the first division of the Courts, it was intended to confine the jurisdiction of the Court of King's Bench to matters merely criminal; and accordingly soon afterwards it was enacted by *Magna Charta*, *c.* 11, That common pleas should not follow the King's Court, but be held in a certain place; hence it is, that the Court of King's Bench cannot determine a mere real action. 17 *Ed.* 3. 50: 1 *Rol. Abr.* 536, 537.

But notwithstanding common pleas cannot be immediately holden in *Banco Regis*, yet where there is a defect in the Court, where by law they be holden originally, they may be holden in *B. R*; as if a record come out of the

the Common Pleas by writ of error, there they may hold plea to the end; so where the plea in a writ of right is removed out of the county by a *pone* in *B. R.* on a writ of *mesne replevin*, &c. 2 *Inst.* 23: 4 *Inst.* 72, 113; and see *Saund.* 256: *Show. P. C.* 57.

So any action *vi & armis*, where the King is to have fine, as ejectment, trespass, forcible entry, *&c.* being of a mixed nature, may be commenced in *B. R.* 2 *Inst.* 23.

Also any officer or minister of the Court entitled to the privilege thereof may be there sued by bill in debt, covenant, or other personal action; for the act takes not away the privilege of the Court. 2 *Inst.* 23: 4 *Inst.* 71: 2 *Bulst.* 123.

From hence, as was hinted before, the notion arose, that if a man was taken up as a trespasser in the King's Bench, and there in custody, they might declare against him in debt, covenant, or account; for this likewise was a case of privilege, since the Common Pleas could not procure the prisoners of the King's Bench to appear in their Court; and therefore it was an exception out of *Magna Carta.* 4 *Inst.* 71: *Cro. Car.* 330.

By the statute of *Gloucester*, 6 *E.* 1. *c.* 8, none shall have writs of trespass before Justices, unless he swear by his faith that the goods taken away were worth forty shillings. This oath is now disused; yet if the damages laid in the declaration (in cases cognizable in inferior Courts) do not amount to 40*s.* the Court will not hold plea of the matter. If laid to the amount of 40*s.* and there is not any set-off, and the plaintiff recovers under 40*s.* defendant may suggest it on the roll, and plaintiff shall not have more costs than damages. See 2 *Inst.* 311. The *stat.* 43 *Eliz. c.* 6, directs, that if in personal actions in the Courts at *Westminster* (not being for any title or interest of lands, nor concerning the freehold or inheritance of lands, nor for any battery,) the debt or damages is under 40*s.* the plaintiff shall recover no more costs than damages. See this Dictionary, title *Costs*.

If upon a nonsuit in an inferior Court 16*s.* is given for costs, by *stat.* 23 *Hen.* 8. *c.* 15, debt lies for it in this Court of King's Bench, because given by a statute subsequent to the statute of *Gloucester*. *Cro. Eliz.* 96: *Leon.* 316.

This Court is likewise a Court of Appeal, into which may be removed, by writ of error, all determinations of the Court of Common Pleas, and of all inferior Courts of record in *England*; and to which a writ of error also lay from the Court of King's Bench in *Ireland*, previous to the *stat.* 23 *Geo.* 3. *c.* 28. See this Dictionary, title *Ireland*. Yet even this, so high and honourable, Court is not the *dernier resort* of the Subject: for if he be not satisfied with any determination here, he may remove it, by writ of error, into the House of Lords, or Court of Exchequer Chamber, as the case may happen, according to the nature of the suit, and the manner in which it has been prosecuted. See 3 *Comm. c.* 4.

To this Court it regularly belongs to examine errors of all Judges and Justices in their judgments and proceedings; the Court of Exchequer excepted. *F. N. B.* 20, 21. It hath been held, that a writ of error lies in *B. R.* of an attainder before the Lord High Steward. 1 *Sid.* 208. And upon judgment given in the Chancery, (*i. e.* in the petty bag side,) as well as other Courts, writ of error in many cases will lie returnable in the Court of King's Bench. But on proceedings in *B. R.* by original writ, error lies not, but to the parliament. The Court of *B. R.* being the highest Court of common law, hath power to reform inferior Courts, reverse erroneous judgments given therein, and punish the magistrates and officers for corruption, *&c.* 2 *Hawk. P. C. c.* 3. § 10.

The Court of King's Bench, as it is the highest Court of common law, hath not only power to reverse erroneous judgments for such errors as appear the defect of the understanding; but also to punish all inferior magistrates and all officers of justice, for wilful and corrupt abuses of their authority against the obvious principles of natural justice; the instances of which are so numerous, and so various in their kinds, that it seems needless to attempt to insert them. 2 *Hawk. P. C. c.* 3. § 10: *Vaugh.* 157: 1 *Salk.* 201.

This Court grants writs of *Habeas Corpus* to relieve persons wrongfully imprisoned; and may bail any person whatsoever. See titles *Bail*; *Habeas Corpus*. Writs of *Mandamus* are granted by this Court, to restore officers in corporations, colleges, *&c.* unjustly turned out; and freemen wrongfully disfranchised: also writs and informations in the nature of *quo warranto* against persons, or corporations, usurping franchises and liberties against the King; and on misuser of privileges to seize the liberties, *&c.* In this Court also the King's letters patent may be repealed by *scire facias*, &c. *Prohibitions* are also issued from this Court to keep inferior Courts within their proper jurisdiction. See all these several titles in this Dictionary.

This Court in ancient times was, (as already observed,) ordinarily exercised only in criminal matters, and pleas of the Crown; leaving private contracts and civil actions to the Common Pleas, and other Courts. 4 *Inst.* 70.

IV. The officers on the Crown-side are; the King's Coroner and Attorney, commonly called the Clerk of the Crown, or Master of the Crown-office, who taxes costs, nominates all special Juries on the Crown-side, takes recognizances, inquisitions upon the death of any prisoner dying in the King's Bench prison, *&c.*—The Secondary, who draws up the paper books, and makes up an escheat of all fines, *&c.* forfeited to the Crown. The Clerk of the Rules; the Examiner; and Calendar-keeper; Clerks in Court.

The officers on the Plea-side are, the Chief Clerks; Secondary or Master; their Deputy, Marshal, Clerk of the Rules, Clerk of the Papers, Clerk of the Day-rules, Clerk of the Dockets, Clerk of the Declarations, Clerk of the Bail, *Posteas*, and Escheats, Signer of Writs, Signer of the Bills of *Middlesex*, *Custos Brevium*, Clerk of the Upper Treasury, Clerk of the Outer Treasury, Filacer, Exigenter and Clerk of the Outlawries, Clerk of the Errors, Deputy Marshal, Marshal and Associate to the Chief Justice, Train-bearer, Clerk of the *Nisi Prius* in *London* and *Middlesex*, Clerks of the *Nisi Prius* to the different counties appointed by the *Custos Brevium*, Crier at *Nisi Prius* in *London* and *Middlesex*, Receiver General of the Seal Office, Criers, Ushers, Tipstaffs.

The *Secondary* or *Master* constantly attends the fitting of the Court, to receive matters referred to him by the Judges, to be examined and reported to the Court; he signs all judgments, and taxes costs, *&c.* And he also informs the Court in point of practice. The Deputy of him and of the Chief Clerks has the custody of the stamp, for signing all writs, *&c.* and keeps remembrances of

all records; writs returned are filed in his office, and common bails, &c. The *Custos Brevium* files originals, and other writs whereon proceedings are had to outlawry, examines and seals all records of *Nisi Prius* for trials at the assises, and has several Clerks under him for making up records throughout *England*. The Clerk of the Papers makes up the paper books of all special pleadings and demurrers, which the plaintiff's attorney commonly speaks for, and afterwards gives a rule for the defendant's attorney to bring to him again to be entered, &c. The Clerk of the Declarations files all declarations, and continues them on the back from the term of declaring till issue is joined. The Signer and Sealer of bills keeps a book of entry of the names of the plaintiffs and the defendants in all such writs and processes; and the defendants enter their appearances with him. The Clerk of the Rules takes notice of all rules and orders made in Court, and afterwards draws them up and enters them in a book at large, and attends the Court to take minutes thereof; with him also are given all rules of course on a *cepi corpus, habeas corpus*, writs of inquiry, &c. and he files all affidavits used in Court, and makes copies of them. The Clerk of the Errors allows all writs of error, and makes *supersedeas* thereupon into any county, and transcribes and certifies records. The Clerk of the *Bails* and *Posteas* files the bail pieces, and marks the *Posteas*, &c. The Filacers or *Filizers* of counties make the mesne process after the original, in suing to the outlawry; and have the benefit of all process and entries, thereupon. The Marshal, by himself or deputy always attends the Court, to receive into his custody such prisoners as shall be committed. The Cryer makes proclamations of summoning and adjourning the Court, calls nonsuits, and swears jurymen, witnesses, &c.

The style of the Court is, "PLEAS before our Lord the King at *Westminster*, of the Term of Saint *Michael*, in the thirty-second year of the reign of our Sovereign Lord *George* the Third, by the Grace of God of *Great Britain, France*, and *Ireland* King, Defender of the Faith, and in the Year of our Lord 1791."

In this Court there are two ways of proceeding; *viz.* by *Original Writ*, or by *Bill*. The former is generally used in case the debt is large, because the defendant, if he means to delay execution of the judgment, must bring his writ of error returnable in Parliament, which greatly enhances the expence; but the latter is more expeditious. See this Dictionary, titles *Error*; *Bill*.

If the party is privileged as an attorney or other person entitled to privilege, this Court holds plea on a writ of privilege which is the first process issued against the defendant to compel him to appear and make his defence. If attornies, officers, or ministers of this Court are sued by persons not entitled to privilege, they must be sued by bill, which expresses either the grievance or wrong which the Plaintiff hath suffered by the Defendant, or some faults by him committed against some law or statute of the realm. See titles *Attorney*; *Privilege*.

Also a Peer (*Comp.* 184,) Knight, Citizen, or Burgess, or other person entitled to privilege of Parliament may be sued in this Court by original writ, or by original bill, in manner as directed by *stat.* 12 & 13 *W.* 3. *c.* 3, upon which a bill of summons and *distringas* may issue to compel his appearance. But no writ of *summons* will lie against a person, not entitled to privilege, on a bill filed against him in this Court; though many have attempted that mode of proceeding, which has been set aside with costs. *Impey, K. B.*

It has been held, that action upon the statute of *Winchester*, of robbery, does not lie by original in the Court of *B. R.* because it is a common plea; but it has been adjudged otherwise, and allowed on bill. 2 *Danv. Abr.* 279, 282.

An appeal in *B. R.* must be arraigned on the Plea-side; except it come in by *certiorari*, when it is said it ought to be arraigned on the Crown-side. 2 *Hawk. P. C. c.* 28. § 4. Where the Court of *B. R.* proceeds on an offence committed in the same county wherein it sits, the process may be made returnable immediately; but when it proceeds on an offence removed by *certiorari* from another county, there must be fifteen days between the teste and return of every process, &c. 9 *Rep.* 118: 1 *Inst.* 134: 1 *Sid.* 72.

KINGELD; (rather *King-geld.*) Escuage, or royal aid. As in a charter of King *Henry* II. to the abbot and monks of *Mireval. Mon. Angl.* i. 380.

KING'S HOUSHOLD, or *Civil List*. See title *King* V.

KING'S PALACE. The limits of the King's Palace at *Westminster*, extend from *Charing Cross* to *Westminster Hall*, and shall have such privileges as the ancient palaces. *Stat.* 28 *Hen.* 8. *c.* 12. If any person shall strike another in the King's Palace, he shall have his right hand cut off, be imprisoned during life, and also be fined. *Stat.* 33 *H.* 8. *c.* 12. See titles *Palaces*; *Striking*.

KING'S PREROGATIVE. See title *King* V. &c.

KING'S SILVER, The money which is paid to the King in the Court of Common Pleas, for a licence granted to a man to levy a fine of lands, tenements, or hereditaments to another person; and this must be compounded according to the value of the land, in the alienation office, before the fine will pass. 2 *Inst.* 511: 6 *Rep.* 39, 43. See title *Fines of Lands*.

KING'S SWAN-HERD. See *Swan-herd*.

KINTAL. See *Quintal*.

KINTLIDGE, A term used among merchants and sea-faring persons, for a ship's ballast. *Merch. Dict.*

KIPE, from Sax. *Cypa.*] A basket or engine made of osiers, broad at one end, and narrower by degrees, used in *Oxfordshire* and other parts of *England* for the taking of fish; and fishing with those engines is called *Kipping*. This manner of fishing with baskets of the same kind and shape, is practised by the barbarous inhabitants of *Ceylon* in the *East Indies*, as appears in the relation and figure of it given by Mr. *Knox* in his travels, *p.* 28.

KIPPER-TIME. No salmon shall be taken between *Gravesend* and *Henley upon Thames* in Kipper-time, *viz.* between the *Invention of the Cross* (3 *May*) and the *Epiphany*. *Rot. Parl.* 50 *Edw.* 3. *Cowell.* See title *Fish*.

KIRBY's QUEST, An ancient record remaining with the Remembrancer of the Exchequer; so called, from its being the inquest of *John de Kirby*, treasurer to King *Edw.* I.

KIRK-MOTE, See *Chirchgemot*.

KNAVE, An old *Saxon* word, which had at first a sense of simplicity and innocence, for it signified a boy; *Sax. cnapa*; whence a Knave-child, *i. e.* a boy, as distinguished from a girl, in several old writers; "a Knave-child between them two they gate." *Gower*, Poem, *p.* 52, 106; and *Wickliffe*, in his old translation; *Exod.* i. 16; if it be

be a Knave-child, *i. e.* a son or male child. After, it was taken for a servant boy, and at length for any servant man: also it was applied to a minister or officer that bore the weapon or shield of his superior, as *scild-knapa*, whom the *Latins* call *armiger*, and the *French escuyer*. See the old statute 14 *Ed.* 3. *c.* 3. And it was sometimes, of old, made use of as a titular addition; as *Johannes C. filius Willielmi C. de Derby*, Knave, *&c.* 22 *H.* 7. 36. In the vision of *Piers Plowman*, 'Cokes and her Knaves cryden hotes pyes, hote,' *i. e.* Cooks and their boys, or scullions. *Cowell.*—The present use of the word to denote a false, dishonest, or deceitful fellow, has arisen by long perversion.

KNIGHT, Sax. *Cnyt*, Lat. *Miles*; and *eques auratus*, from the gilt spurs he usually wore, and thence called anciently Knights of the spur: the *Italians* term them *Cavalieri*; the *French* Chevaliers; the *German Ruyters*; the *Spaniards Cavallaro's*, &c.

Blackstone remarks, that it is observable that almost all nations call their Knights by some appellation derived from an horse. 1 *Comm.* 404. *Christian* in his Note on this place adds, that it does not appear the *English* word Knight has any reference to a horse; for Knight, or *Cniht*, in the *Saxon*, signified *puer*, *Servus*, an attendant. See *Spelm.* in *vv. Knight*; *Miles*. There is now only one instance where it is taken in that sense, and that is Knight of a shire, who properly serves in parliament for such a county; but in all other instances it signifies one who bears arms, who, for his virtue and martial prowess, is by the King, or one having his authority, exalted above the rank of gentleman, to a higher degree of dignity. The manner of making them, *Camden* in his *Britannia*, thus shortly expresseth: *Nostris vero temporibus, qui equestrem dignitatem suscipit, flexis genibus leviter in humero percutitur, princeps his verbis Gallicè affatur; sus vel sois Chevalier au nom de Dieu*, i. e. *Surge aut sis eques in nomine Dei*. This is meant of Knights bachelors, which is the lowest, but most ancient degree of knighthood with us. As to the privilege belonging to a Knight, see in *Fern's Glory of Generosity*, p. 116.

Of Knights there are two sorts, one spiritual, so called by divines in regard of their spiritual warfare, the other temporal. *Cassaneus de Gloria Mundi, par* 9. *considerat.* 2. See *Selden's Titles of Honour*, *fol.* 770.

Chief Justice *Popham* affirmed, he had seen a commission granted to a Bishop, to Knight all the persons in his diocese. *Godb.* 398.

Of the several orders, both of spiritual and temporal Knights, see Mr. *Ashmole's Inst. of the Knights of the Garter*.

He who served the King in any civil or military office or dignity, was formerly called *miles*: it is often mentioned in the old charters of the *Anglo-Saxons*, which are subscribed by several of the nobility, *viz.* after Bishops, dukes, and earls, *per A. B. militem*, where *miles* signifies some officer of the Courts, as minister was an officer to men of quality. Thus we read in *Ingulphus*, *De dono F. quondam Militis Kenulfi Regis*, *fol.* 860.

Afterwards the word was restrained to him who served only upon some military expedition; or rather to him who by reason of his tenure was bound to serve in the wars; and in this sense the word *miles* was taken *pro vassallo*. Thus in the laws of *William the Conqueror*: *Manibus ei sese dedit, cuncta sua ab eo miles à Domino recepit.* And he who by his office or tenure was bound to perform any military service, was furnished by the chief lord with arms, and so *adoptabatur in militem*, which the *French* call *adouber*, and we *to dub* such a person a Knight. But before they went into the service, it was usual to go into a bath and wash themselves, and afterwards they were girt with a girdle; which custom of bathing was constantly observed, especially at the inauguration of our Kings, when those Knights were made, who for that reason were called Knights of the Bath, *Cowell.*

They were, says *Blackstone*, called *milites*, because they formed a part of the royal army, in virtue of their feudal tenures; (see title *Tenures* III. 2;) one condition of which was, that every one who held a Knight's fee immediately under the Crown, (which in *Edw.* II's time amounted to 20*l.* *per annum.* *Stat. de milit.* 1 *Ed.* 2,) was obliged to be knighted, and attend the King in his wars, or fine for his non-compliance. The execution of this prerogative, as an expedient to raise money in the reign of *Charles* I., gave great offence; though then warranted by law, and the recent example of Queen *Elizabeth*. It was therefore abolished by *stat.* 16 *Car.* 1. *c.* 20. Considerable fees used to accrue to the King on the performance of the ceremony. *Ed.* VI. and Queen *Elizabeth*, had appointed Commissioners to compound with the persons who had lands to the amount of 40*l.* a year, and who declined the honour and expence of knighthood. See 1 *Comm.* 404; and also 2 *Comm.* 62, 9: 1 *Inst.* 69, *b*: 2 *Inst.* 593, and the Notes on 1 *Inst.*

KNIGHTS BACHELORS, from *Bas Chevalier*, an inferior Knight. 1 *Comm.* 404, in *n.*] The most ancient, though the lowest order of knighthood amongst us; for we have an instance of King *Alfred*'s conferring this order on his son *Athelstan*. *Wil. Malmf. lib.* 2: 1 *Comm* 404. See *Knights of the Chamber*.

KNIGHTS BANERET, *Milites Vexillarii*.] Knights made only in the time of war; and though knighthood is commonly given for some personal merit, which therefore dies with the person, yet *John Coupland*, for his valiant service performed against the *Scots*, had the honour of *Baneret* conferred on him and his heirs for ever, by patent; 29 *Ed.* 3. See this Dictionary, title *Baneret*. These Knights rank in general next after Knights of the Garter. By *stats.* 5 *R.* 2. *st.* 2. *c.* 4: 14 *R.* 2. *c.* 11, they are ranked next after Barons; and their precedence before the younger sons of Viscounts, was confirmed by order of King *James* I. in the 10th year of his reign. But in order to be entitled to this rank, they must be created by the King in person in the field, under the royal banners in time of open war, else they rank after *Baronets*. 1 *Comm.* 403.

KNIGHTS OF THE BATH, *Milites Balnei*.] Have their name from their bathing the night before their creation. See *Knight*. This order of Knights was introduced by King *Hen.* IV. and revived by King *George* I. in the year 1725; who erected the same into a regular military order for ever, by the name and title of The Order of the Bath, to consist of thirty-seven Knights, besides the Sovereign. See the antiquity and ceremony of their creation in *Dugdale's Antiquities of Warwickshire*, *fol.* 531, 532. They have each three honorary Esquires; and they now wear a red ribbon

across their shoulders; have a prelate of the order, (the Bishop of *Rochester*) several heralds, and other officers, *&c.* See 1 *Comm.* 404.

KNIGHTS OF THE CHAMBER, *Milites Cameræ.*] Seem to be such Knights Bachelors as are made in time of peace, because knighted in the King's chamber, and not in the field: they are mentioned in *Rot. Parl.* 28 *Ed.* 3: 29 *E.* 3. *p.* 1. *m.* 39: 2 *Inst.* 666.

KNIGHTS OF THE GARTER, *Equites garterii; vel periscelidis*, otherwise called *Knights of the Order of St.* George.] An order of Knights, founded by King *Edw.* III. A.D 1344, who, after he had obtained many notable victories, for furnishing this honourable order, made choice in his own realm, and all *Europe*, of twenty-five the most excellent and renowned persons for virtue and honour, and ordained himself and his successors Kings of *England*, to be the Sovereign thereof, and the rest to be fellows and brethren, bestowing this dignity on them, and giving them a blue garter, decked with gold, pearl, and precious stones, and a buckle of gold, to wear daily upon the left leg only; a kirtle, crown, cloak, chaperon, a collar, and other magnificent apparel, both of stuff and fashion exquisite and heroical, to wear at high feasts, as to so high and princely an order was meet. *Smith's Repub. Angl. lib.* 1. *c.* 20. And, according to *Camden* and others, this order was instituted upon King *Edw.* III. having great success in a battle, wherein the King's garter was used for a token. See *Selden's Tit. of Hon.* 2, 5, 41.

But *Polydore Virgil* gives it another original, and says, that the King in the height of his glory, the Kings of *France* and *Scotland* being both prisoners in the Tower of *London* at one time, first erected this order, *anno* 1350, (see *infra*) from the Countess of *Salisbury*'s dropping her garter, in a dance before his Majesty, which the King taking up, and seeing some of his nobles smile, he said, *Honi soit qui mal y pense*; interpreted, 'Evil (or shame) be to him that evil thinketh;' which has ever since been the motto of the garter; declaring such veneration should be done to that silken tie, that the best of them should be proud of enjoying their honours that way.

Camden in his *Britannia* saith, that this order of Knights received great ornament from King *Edw.* IV. And King *Charles* I. as an addition to their splendor, ordered all the Knights companions to wear on their upper garment, the cross incircled with the garter and motto. The honourable society of this order is a college or corporation, having a Great Seal, *&c.*

The scite of the college is the royal castle of *Windsor*, with the chapel of St. *George*, and the chapter-house in the castle, for their solemnity on St. *George's* day, and at their feasts and installations.

Besides the King their Sovereign, and twenty-five companions, Knights of the Garter, (and also an increase in number of such of the *King's sons* as shall be admitted to this honour,) they have a Dean and Canons, *&c.* and twenty-six poor Knights, that have no other subsistence but the allowance of this house, which is given them in respect of their daily prayer to the honour of God and St. *George*; and these are vulgarly called Poor Knights of *Windsor*.

There are also certain officers belonging to the order; as Prelate of the Garter, which office is inherent to the Bishop of *Winchester*, for the time being; the Chancellor of the Garter, the Bishop of *Sarum*; Register, always Dean of *Windsor*; the principal King at Arms, called Garter, to manage and marshal their solemnities, and the Usher of the Garter, being likewise Usher of the Black Rod.

A Knight of the Garter wears daily abroad, a blue garter decked with gold, pearl, and precious stones on the left leg; and in all places of assembly, upon his coat on the left side of his breast, a star of silver embroidery; and the picture of St. *George* enamelled upon gold, and beset with diamonds, at the end of a blue ribbon that crosses the body from the left shoulder; and when dressed in his robes, a mantle, collar of *S S*, &c.

KNIGHTS OF THE ORDER OF ST. JOHN OF JERUSALEM, *Milites Sancti Johannis Hierosolymitani.*] Were an order of knighthood, that began about A. D. 1120, *Honorius* being Pope. They had their denomination from *John* the charitable patriarch of *Alexandria*, though vowed to St. *John the Baptist* their patron; *Fern's Glory of Generosity*, *p.* 127. They had their primary abode in *Jerusalem*, and then in the Isle of *Rhodes*, until they were expelled thence by the *Turks*, *anno* 1523. Since which time, their chief seat is in the *Isle of Malta*, where they did great exploits against the Infidels, but especially in the year 1595. They lived after the order of friars, under the rule of St. *Augustine*, of whom mention is made in the *stats.* 25 *Hen.* 8. *c.* 2: 26 *Hen.* 8. *c.* 2. They had in *England* one general prior that had the government of the whole order within *England* and *Scotland*; *Reg. Orig. fol.* 20; and was the first prior in *England*, and sat in the House of Lords. But towards the end of *Henry* VIII's days they in *England* and *Ireland*, being found to adhere to the Pope too much against the King, were suppressed, and their lands and goods given to the King, by *stat.* 32 *Hen.* 8. *c.* 24. For the occasion and propogation of this order more especially described, see the treatise, entitled, *The Book of Honour and Arms*, *lib.* 5. *c.* 18. See also this Dictionary, titles *Hospitallers*; *Templars*; and the succeeding articles.

KNIGHTS OF MALTA. These Knights took their name and original from the time of their expulsion from *Rhodes*, *anno* 1523. The island of *Malta* was then given them by the Emperor *Charles* V. whence they were therefore called Knights of *Malta*. See the preceding article.

KNIGHT MARSHALL, *Mareschallus Hospitii Regis.*] An officer of the King's house, having jurisdiction and cognizance of transgressions within the King's house, and verge of it; as also of contracts made within the same house, whereto one of the house is a party. *Reg. of Writs*, *fol.* 185. *a.* and 191. *b.* and *Spelm. Gloss.* in *voce Mareschallus*. See *Constable*; *Marshal*.

KNIGHTS OF RHODES. The Knights of St. *John* of *Jerusalem*, after they removed to *Rhode* island. See *stats.* 32 *Hen.* 8. *c.* 24. and *ante*, title *Knights of the Order of St. John*.

KNIGHTS OF THE SHIRE, *Milites Comitatûs.*] Otherwise called Knights of parliament; two Knights or gentlemen of worth, chosen on the King's writ, *in pleno comitatu*, by the freeholders of every county that can dispend 40*s.* a year; and these, when every man that had a Knight's fee was customarily constrained to be a Knight, were obliged to be *milites gladio cincti*, for so runs

runs the writ at this day; but now *notabiles armigeri* may be chosen. Their expences were formerly borne by the county, during their sitting in parliament, under *stat.* 35 *H.* 8. *c.* 11. They are to have 600*l.* *per annum* freehold estate, &c. See *stat.* 9 *Ann*, *c.* 5; and further this Dictionary, title *Parliament*.

KNIGHTS TEMPLARS, See *Templars*; *Hospitallers*; and *ante*, *Knights of St. John*, &c.

KNIGHTS OF THE THISTLE, The honourable the *Scotch* knighthood, the Knights whereof wear a green ribbon over their shoulders, and are otherwise honourably distinguished.

KNIGHTS OF ST. PATRICK. A new or revived order of knighthood in *Ireland*. These two last obtain no rank in *England*. See title *Precedency*.

KNIGHTEN-GYLD, Was a *gyld* in *London*, consisting of nineteen Knights, which King *Edgar* founded, giving them a portion of void ground lying without the walls of the city, now called *Portsoken Ward*. *Stow's Annals*, *p.* 151. This in *Mon. Angl. par.* 2. *fol.* 82. *a.* is written *cnittene-geld*.

KNIGHTS COURT, A Court Baron, or honour-court, held twice a year under the Bishop of *Hereford*, at his palace there; wherein those who are lords of manors, and their tenants, holding by Knight's service of the honour of that bishoprick, are suitors; which Court is mentioned in *Butterfield's Surv. fol.* 244. If the suitor appear not at it, he pays 2*s.* suit-silver for respite of homage. *Cowell*.

KNIGHTHOOD. See *Knight*.

KNIGHT SERVICE. See title *Tenure* III. 2.

KNIGHTS FEE, *Feodum militare.*] Is so much inheritance, as is sufficient yearly to maintain a Knight with convenient revenue; which in *Henry* III's days was 15*l.* *Camd. Brit. pag.* 111. In the time of *Edward* II. 20*l.* See *ante* title *Knight*. Sir *Thomas Smith* (in his *Repub. Ang. lib.* 1. *c.* 18,) rates it at 40*l.* *Stow*, in his *Annals*, *p.* 285, says, there were found in *England*, at the time of the Conqueror, 60,211 Knights fees, according to others 60,215; whereof the religious houses, before their suppression, were possessed of 28,015—*Octo carucatæ terræ faciunt feodum unius militis*. *Mon. Ang. p.* 2. *fol.* 825, *a.* Of this fee more in *Selden's Titles of Honour*, *fol.* 691; and *Bracton*, *lib.* 5. *tract.* 1. 4. 2. also 1 *Inst.* 69, *a.*—A Knight's fee contained twelve plow-lands, 2 *Inst. fol.* 596; or 480 acres. Thus *Virgata terræ continet* 24 *acras*, 4 *virgatæ terræ* make an hide, and five hides make a Knight's fee, whose relief is five pounds. *Cowell*. *Selden* insists that a Knight's fee was estimable neither by the value nor the quantity of the land, but by the services or numbers of the Knights reserved. *Tit. Hon. part.* 2. *c.* 5. § 26. See *ante Knight*.

KNOPA, A knob, nob, bosse, or knot.

KNOW-MEN. The Lollards in *England*, called Hereticks, for opposing the Church of *Rome* before the Reformation, went commonly under the name of Knowmen, and just-fast-men; which title was first given them in the diocese of *Lincoln*, by Bishop *Smith*, *anno* 1500.

KYDDIERS, Mentioned in *Stat.* 13 *Eliz.* *c.* 35. See *Kidder*.

KYLYW, Signifies some liquid thing, and in the North it is used for a kind of liquid victuals. It is mentioned as an exaction of foresters, &c. *Mon. Ang. tom.* 1. *p.* 722.

KYSTE, *Sax.* A coffin or chest for burial of the dead. *Ex. Reg. Episc. Lincoln. MS.*

KYTH, Kin or kindred; *Cognatus*.

L.

LAAS, *laqueus, à lax,* i. e. *Fraus.*] A net, gin, or snare. *Lit. Dict.*

LABEL, *appendix lemniscus.*] Is a narrow slip of paper or parchment, affixed to a deed, writing, or writ, hanging at or out of the same; and an appending seal is called a Label. See title *Deed.*

LABINA, Watery land: *in qua facilè labitur. Mon. Angl. tom.* 2. *p.* 372.

LABORARIIS, Is an ancient writ against persons refusing to serve and do labour, who have no means of living; or against such as, having served in the winter, refuse to serve in the summer. *Reg. Orig.* 189.

LABOUR, Is the foundation of property. Bodily Labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein. 2 *Comm.* 5.

LABOURERS, Conspiring together concerning their work or wages, shall forfeit 10*l.* for the first offence, 20*l.* for the second, &c. And if not paid, be set on the pillory. *Stat.* 2 & 3 *Ed.* 6. *c.* 15. See title *Conspiracy.*—Justices of peace and stewards of leets, &c. have power to hear and determine complaints relating to non-payment of Labourers' wages. *Stat.* 4 *Ed.* 4. 1. Labourers taking work by the great, and leaving the same unfinished, unless for non-payment of wages, or where they are employed in the King's service, &c. are to suffer one month's imprisonment, and forfeit 5*l.* The wages of Labourers are to be yearly assessed for every county by the Sheriff, and Justices of peace in the *Easter* sessions, and in corporations by the head officers, under penalties. *Stat.* 5 *Eliz. c.* 4. And the Sheriff is to cause the rates and assessments of wages to be proclaimed. 1 *Jac.* 1. *c.* 6.

All persons fit for labour, shall be compelled to serve by the day in the time of hay or corn harvest; and Labourers in the harvest time may go to other counties, having testimonials. From the middle of *March* to the middle of *September*, Labourers are to work from five o'clock in the morning till seven or eight at night, being allowed two hours for breakfast and dinner, and half an hour for sleeping the three hot months; and all the rest of the year from twilight to twilight, except an hour and an half for breakfast and dinner, on pain of forfeiting 1*d.* for every hour absent. If any Labourer shall make an assault upon his master, he shall suffer and be punished as a servant making such assault. See *stat.* 5 *Eliz. c.* 4.

By *stats.* 12 *Geo.* 1. *c.* 34: 22 *Geo.* 2. *c.* 27, All contracts of journeymen employed in any woollen, linen, silk, leather, or iron, &c. manufactures for raising wages, lessening the hours of work, &c. are illegal, and the offenders shall be sent to the House of Correction for three months. The wages, &c. of journeymen taylors are by *stat.* 8 *Geo.* 3. *c.* 17, to be regulated and settled at the Quarter Sessions in *London.*

Justices of peace may hear and determine disputes concerning the wages of servants and labourers, not exceeding 10*l.* *Stat.* 20 *Geo.* 2. *c.* 19.—Extended to the tinners in the stannaries, by *stat.* 27 *Geo.* 2. *c.* 6.

Justices may punish servants on complaint of the masters, *stat.* 20 *Geo.* 2. *c.* 19. § 2.—The *stat.* 20 *Geo.* 2. *c.* 19, shall extend to all servants employed in husbandry, though hired for less than a year, 31 *Geo.* 2. *c.* 11. § 3. —By *stat.* 6 *Geo.* 3. *c.* 25, artificers, labourers, *and other persons* absenting themselves from the service of their employers, before the expiration of the term contracted for, shall be punished by imprisonment for not less than one month, nor more than three. See further, titles *Manufacturers*; *Poor*; *Servants*; *Apprentices.*

LACE. See titles *Manufacturers*; *Hawkers,* &c.; *Navigation Acts.*

LACERTA, A fathom. *Domesday.*

LACHES, from the Fr. *lascher,* i. e. *laxare*; or *lasche, ignavus.*] Slackness or negligence; as it appears in *Littleton,* where Laches of entry means a neglect in the heir to enter. And probably it may be an old *English* word; for when we say there is Laches of entry; it is all one as if it were said, there is a Lack of entry; and in this signification it is used. *Lit.* 136. No Laches shall be adjudged in the heir within age; and, regularly, Laches shall not bar either infants or *feme-coverts,* in respect of entry or claim, to avoid descents; but Laches shall be accounted in them, for non-performance of a condition annexed to the state of the land. *Co. Lit.* 146. See titles *Infant*; *Heir,* &c.

LACTA, A defect in the weight of money; whence is derived the word Lack. *Du Fresne.*

LADA, Hath divers significations; 1st, from the Saxon *lathian,* to convene or assemble, it is taken for a Lath, or inferior court of justice. See title *Lathe*; *Trithing-reve.*—2dly, It is used for purgation by trial, from *ladian*: and hence the *lada simplex,* and *lada triplex* or *lada plena,* among the *Saxons,* mentioned in the laws of King *Ethelred* and K. *Henry* I.—3dly, Lada is applied to a lade or course of water; *Camden* uses water-lade or water-course: And *Spelman* says, that Lada is a canal to carry water from wet grounds; sometimes Lada signifies a broad way. *Spelm. Gloss. Mon. Ang. tom.* 1. *p.* 854.

LADE, Lode, *i. e.* The mouth of a river; from Sax. *ladian, purgare,* because the water is there clearer; from hence *Cricklade, Lechlade,* &c.

LADIES. For the order of trial of duchesses, countesses, and baronesses, for treason, when indicted thereof, see the ancient statute 2 *Hen.* 4. *c.* 14; and this Dictionary, titles *Peers*; *Treason.*

LÆDORIUM, Reproach. *Girald. Camb. c.* 14.

LÆSÆ MAJESTATIS, CRIMEN. The crime of high treason. So denominated by *Glanvil, l.* 1. *c.* 2. See *Treason.*

LÆSIONE FIDEI, Suits *pro.* The clergy, so early as the reign of King *Stephen*, attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro læsione fidei*, as a spiritual offence against conscience, in case of non-payment of debts, or any breach of civil contracts. But they were checked by the constitutions of *Clarendon*, 10 *Hen.* 2. *c.* 15. See this Dict. title *Courts Ecclesiastical.*

LÆTARE JERUSALEM. See *Quadragesimalia.*

LAFORDSWICK, Sax. *hlaford*, i. e. *dominus*, and *swic*, *proditio*; *infidelitas erga dominum.*] A betraying one's lord or master. This word is found in King *Canute*'s laws, *c.* 61. And in the laws of King *Hen.* 1. *Leg.* 1. *c.* 13.

LAGA, (*lex*) The Law. *Magna Charta.* Hence we deduce *Saxon-lage*, *Mercen-lage*, *Dane-lage*, &c.

LAGAN, Goods sunk in the sea, from Sax. *liggan cubare.*] When mariners in danger of shipwreck cast goods out of the ship, and because they know they are heavy and sink, fasten a buoy or cork to them, that they may find and have them again, if the ship be lost, these goods are called *lagan*; and so long as they continue upon the sea, belong to the Lord Admiral; but if they are cast away upon the land, they are then a wreck, and belong to the lord entitled to the same. 5 *Co. Rep.* 106. Lagan is used in old authorities to denote that right which the chief lord of the fee had to take goods cast on shore by the violence of the sea, &c. *Bract. lib.* 3. *cap.* 2. See this Dict. title *Wreck*; *Flotsam.*

LAGEDAYUM, *Laghday*, A law-day, or time of open court. *Cowel, edit.* 1727.

LAGEMAN, *Legamannus*; *Lagamannus*, Spelm. *Homo habens legem*; *homo legalis seu legitimus*; such as we call now good men of the jury.] The word is frequently used in *Domesday*, and the laws of *Edward the Confessor*, *c.* 38. Sir *Edw. Coke* says, A Lageman was he who had *socam* & *sacam super homines suos*, *i. e.* a jurisdiction over their persons and estates; of which opinion were *Somner* and *Lambard*, and that it signifies the *Thanes*, called afterwards Barons, who sat as judges to determine rights in courts of justice. *In senatus consult' de Monticolis Walliæ*, *c.* 3, it is said, Let twelve Laghmen, which *Lambard* renders Men of Law, *viz.* six *English* and six *Welch*, do right and justice, &c. *Blount.*

LAGEN, *lagena*, *Fleta, lib.* 2. *cap.* 8, 9.] In antient times it was a measure of six *sextarii*. Hence perhaps our flagon. The lieutenant of the Tower has the privilege to take *unam* lagenam *vini*, *ante malum* & *retro*, of all wine ships that come up to the *Thames*. Sir *Peter Leycester*, in his *Antiquities of Cheshire*, interprets *lagena vini*, a bottle of wine.

LAGHDAY, or *Lahday*. See *Lagedayum*, *Law-day*: *Laghman*, see *Lageman.*

LAGHSLITE, LAGSLITE, LAHSLITE. Sax. *lag*, lex & *slite*, ruptio.] A breaking or transgressing of the law; and sometimes the punishment inflicted for so doing. *Leg. H.* 1. *c.* 13.

LAGON. See *Lagan*, and 5 *Co.* 106.

LAIA, A broad way in a wood; the same with *lada*, which see *Mon. Ang. tom.* 1. *pag.* 483.

LAIRWITE; LECHERWITE; LEGERGELDUM. From Sax. *legan*, concumbere, & *wite*, mulcta.] *Pœna vel mulcta offendentium in adulterio* & *fornicatione*; and the privilege of punishing adultery and fornication did anciently belong to the lords of some manors, in reference to their tenants. *Fleta, lib.* 1. *c.* 47: 4 *Inst.* 206.

LAMMAS-DAY, The *first* of *August*, so called *quasi lamb mass*; on which day the tenants that held land of the cathedral church of *York* (which is dedicated to St. *Peter ad Vincula*) were bound by their tenure to bring a live lamb into the church at high-mass. It is otherwise said to come from the Sax. *hlaffmæsse*, viz. *loaf mass*, as on that day the *English* made an offering of bread made with new wheat.

LAMPRAYS, see *Fish*,

LAMPS. None but *British* oil to be used for lamps in private houses, under penalty of 40*s.* 8 *Ann. c.* 9. § 18. See title *Candles*. By *stat.* 11 *Geo.* 3. *c.* 29, for paving and lighting London, the wilfully breaking or extinguishing any lamp incurs the penalty of 20*s.* for each lamp or light destroyed or extinguished. See tit. *London.*

LANCASTER, was erected into a county palatine, *anno* 50 *Edw.* III. and granted by the King to his son *John* for life, that he should have *jura regalia*, and a King-like power to pardon treasons, outlawries, &c. and make justices of peace and justices of assise within the said county, and all processes and indictments to be in his name. See this Dict. title *Counties Palatine.*

There is a seal for the county palatine and another for the Duchy, *i. e.* such lands as lie out of the county palatine, and yet are part of the duchy: for such there are, and the Dukes of *Lancaster* hold them, but not as counties palatine, for they had not *jura regalia* over those lands. 2 *Lutw.* 1236: 3 *Salk.* 110, 111. See title *Chancellor of the Duchy*. The statute 37 *H.* 8. *c.* 16, annexed lands to the duchy of *Lancaster*, for the enlargement of it.—Fines levied before the justices of assise of *Lancaster*, of lands in the county palatine, shall be of equal force with those acknowledged before the justices in the Common Pleas. *Stat.* 37 *H.* 8. *c.* 19. Process against an outlawed person in the county palatine of *Lancaster*, is to be directed to the Chancellor of the duchy, who shall thereupon issue like writs to the sheriff, &c. *stat.* 5 & 6 *Edw.* 6. *c.* 26. The statute 17 *Car.* 2, concerning causes of replevin shall be of force in the court of Common Pleas for the county palatine of *Lancaster*, *stat.* 19 *Car.* 2. *c.* 5.—By *stat* 17 *Geo.* 2. *c.* 7, the Chancellor or Vice-Chancellor may by commission empower persons to take affidavits in any cause, &c. depending in the Chancery or Courts of Sessions, in any plea whatsoever, civil or criminal.—A quay to be made at *Lancaster*, *stat.* 23 *Geo.* 2. *c.* 12.—See the *statutes* 19 *Geo.* 3. *c.* 45: 27 *Geo.* 3. *c.* 34, enabling the Chancellor and Council of the Duchy to sell *fee-farm rents*. By *stat.* 34 *Geo.* 3. *c.* 46, the Chancellor or Vice Chancellor of the duchy and county may authorize persons to take special bail in actions depending in the Court of *Common Pleas* of the said county.—The Justices of the said court to make rules as to justifying bail, &c.—By *stat.* 34 *Geo.* 3. *c.* 58. to prevent the removal of suits from the inferiour Courts of the county into the said Court of Common Pleas, security is to be given by the defendants removing such suits for payment of the sum demanded, if recovered in the Court of Common Pleas.—See further, titles *Counties Palatine*; *Durham.*

LANCETI, *Agricolæ quidam, sed ignotæ speciei.*—A sort of servile tenants under the ancient feudal system. See *Spelm.* in *v. Lanceta.*

LAND, *terra.*] Signifies generally not only arable ground, meadow, pasture, woods, moors, waters, *&c.* but also messuages and houses; for in conveying the land, the buildings pass with it. *Co. Lit.* 4, 19. In a more restrained sense it is arable ground: and the land of every man is said in the law to be inclosed from that of others, though it lie in the open field; so that for any trespass therein, he shall have the writ *quare clausum fregit*, &c. *Doct. & Stud.* 8. In a grant land may extend to meadow, or pasture, *&c.* But in writs and pleadings, it signifies arable only. 1 *Vent.* 260.

Coke on Lit. lib. 1. *cap.* 2. *sect.* 14, says, *Terra est nomen generalissimum & comprehendit omnes species terræ*, but properly *terra dicitur à terendo, quia vomere teritur*; and anciently it was written with a single *r*, and in that sense includes whatever may be plowed. The earth hath in law a great extent upwards, for *cujus est solum ejus est usque ad cœlum. Co.* 9 *Rep. Alured's* case. See 2 *Comm.* cc. 1, 2: and this Dict. title *Hereditaments.*

Where land shall be taken as money, or money as land, see title *Chancery.*

LANDA, A lawn or open field without wood. *Cow ll.*

LANDBOC, (from the Saxon *Land* and *Boc*, Liber) Was a charter or deed whereby land was held. *Spelm. Gloss.*

LANDCHEAP, Saxon *Land-ceap*, from *Ceapan*, to buy and sell.] An ancient customary fine, paid at every alienation of land lying within some manor, or liberty of a borough. At *Malden* in *Essex*, there is to this day a custom called by the same name, that for certain houses and lands sold within that place, thirteen pence in every mark of the purchase-money shall be paid to the town; and this custom of *land-cheap*, they claim (*inter alia*) by a grant from the Bishop of *London*, made *anno* 5 *H.* 4.

LANDEA, A ditch in *marshy* lands to carry water into the sea. *Du Cange.*

LANDEFRICUS, *Lanfricus.*] The lord of the soil, or the landlord: from Saxon *land*, and *rica*, *rector*. *Leg. Ethelred*, *c* 6.

LANDEGANDMAN, One of the inferior tenants of a manor. See *Spelman.*

LAND-GABLE, A tax or rent issuing out of land, according to *Domesday*. *Spelman* says a penny for every house; the *Welsh* use *pridgavel* or *landgavel.*

This Landgavel or Landgabel, in the register of *Domesday*, was a quit-rent for the scite of a house, or the land whereon it stood, the same with what we now call ground-rent. *Domesday*; *in Lincoln.*

LANDIMERS, *Agrimensores*, Measurers of land, so called of old; from the Sax. *Gemæra*, i. e. *Terminus*; and hence we say *Meers.*

LANDIRECTA. In the *Saxon* times the duties which were laid upon all that held land, were termed *Trinoda necessitas*, *viz.* Expedition, *burghbote* and *brigbote*; which duties the *Saxons* did not call *servitia*: because they were not feodal, arising from the condition of the owners, but *landirecta*, rights that charged the very land, whoever did possess it. *Spelm of Feuds.* See *Trinoda Necessitas.*

LANDLORD, He of whom lands or tenements are holden; and a Landlord may distrain on the lands of common right, for rent, services, *&c.* *Co. Lit.* 57, 205. In *London*, if a tenant commit felony, *&c.* whereby his goods and chattels become forfeit; the Landlord shall be paid his rent for two years, before all other debts except to the King, out of the goods found in the house. *Priv. Lond.* 75. See title *London.*

LANDLORD and TENANT, For the law chiefly relating to, see titles *Distress*; *Lease*; *Rent*; *Replevin*; *Ejectment*, &c.

LAND-MAN. *Terricola*, The terre-tenant.

LAND-TAX. A tax imposed on land, (and personal property,) by statutes annually past for that purpose. This and the malt-tax are considered as annual taxes imposed on the Subject; the other taxes are permanent.

The assessment or valuation of estates hereafter mentioned, made in the year 1692, though by no means a perfect one, had this effect, that a supply of half a million sterling was equal to 1*s.* in the pound of the value of the estates given in. And according to this valuation, from the year 1693 to the present, the land-tax has continued an annual charge upon the Subject, above half the time at 4*s.* in the pound; sometimes at 3*s.*; sometimes at 2*s.*; twice at 1*s.* (A. D. 1732 and 3); but without any total intermission.

The method of raising it (shortly stated) is by charging a particular sum upon each county, according to the valuation in 1692: and this sum is assessed and raised upon individuals (their personal estates as well as real being liable thereto) by commissioners appointed in the act, being the principal landholders in the county, and their officers.

The commissioners are appointed annually in the renewed act, but they cannot execute the office in any county, except in Wales, under a penalty of 50*l.* unless they have some estate or interest in land within the county, of the clear yearly value of 100*l.* and which was taxed for that sum at least the year before. See the *statutes* 5 *Geo.* 3. *c.* 21: 28 *Geo.* 3. *c.* 2. § 49.—The assessors and collectors are principal inhabitants appointed by the commissioners. 1 *Comm. c.* 8.

The colleges in the two Universities, as also at Windsor, Eton, Winchester, and Westminster, are exempted from the Land-tax in respect to the scite of their colleges, and the salaries of the Master, Fellows, *&c.* and also the lands annexed to them and other hospitals before 1693, not leased to under-tenants.—The *stat.* 32 *Geo.* 3. *c.* 5, also exempted superannuated sea-officers and their widows.

Clerks appointed under the Land-tax Acts receive their allowance under an annual warrant, and their appointment is at least for a year. 1 *Term Rep.* 147.

For the particular provisions of the Land-tax Act, see *Burn's Justice*; and for the origin of the Land-tax, this Dict. title *Taxes.* What follows may not be unacceptable in this place.

The ancient method of taxation was by *escuage*, which was on land held by *knight service*; and by tallage on the cities and boroughs, and it was made in this manner: When the King wanted money for his wars, those tenants that did not attend him in person, paid him an aid, and the aid was assessed before the Justices itinerant. It was generally a gift of all the inhabitants as a body corporate; if they did not give according to the wants of the Crown, the Justiciar enquired into their behaviour, and if there were any forfeitures of their charters, *quo-warrantos*

quo warranto's came out, to seize their liberties into the King's hands. But *Edw.* I. found this way of taxing by escuage and talliage to be very incomplete; because wars were drawn out into great length and expence; and therefore he formed into distinct bodies the tenants *in capite* that held great baronies, and these were called the *barones majores*, (the now Peers of Parliament;) and the representatives of the *barones minores* and of several corporations, *viz.* the citizens and burgesses, of whom he made one body; which now composes the House of Commons. *Gilb. Treat. of the Excheq.* 192.

King *Edward* I. granted the people *Magna Charta*, which they had long contended for, and also the charter of the forests; and for *Magna Charta* they granted the King a fifteenth, by the name of *Quindecimum partem omnium bonorum*; so that instead of particular assessments in cities and boroughs, there was one universal assessment of the fifteenth of all their substance: this fifteenth seems to have been at first made out of the ecclesiastical tenth; for the Popes claimed the tenths of all benefices; it was therefore easy to know, by the Pope's collections of his tenths, what was the value of every ecclesiastical benefice, for the Pope's tenth was reckoned at 2*s. per* pound, and therefore the fifteenth must be 1*s.* 4*d.* The benefice consisted of the glebe and the tenth part of the township; therefore by the value of the benefice deducting the glebe, they knew the true value of the township, and how to set a fifteenth upon it: so that the fifteenth of the townships were certain sums, set by the King's taxors and collectors under the act of parliament; and commissions were granted to the taxors and collectors of them under the Great Seal; but in collecting of the fifteenths the sums only appeared in the books below. And the collectors of every township either returned their collection into the Exchequer, or else there were head collectors for the whole county, who returned it thither; there were likewise commissioners appointed, to supervise such taxation and collections. But about the time of *Edw.* III. there were certain established sums set upon every township; and so as the King's wants increased, they gave one, two, or three fifteenths. *Gilb.* 193, 194.

We find in the times of *Henry* VIII., Queen *Elizabeth*, and King *James* I., that they raised both subsidies and fifteenths; this was, because the value of things increased, and therefore the old fifteenths were not according to the then true value of townships. And therefore they contrived that the subsidy should be raised by a pound-rate upon lands, and likewise a pound-rate upon goods; and we find in the subsidy 4 *Car.* (which is said to be the greatest subsidy that ever was given, and which passed upon the Petition of right) there was 4*s.* in the pound laid upon land, and 2*s.* 8*d.* upon goods; now 4*s.* upon land amounts to three fifteenths, and 2*s.* 8*d.* which was upon goods, to two fifteenths; but in this they had no regard to the old rates made in the taxbook of the several townships, otherwise than to discover the value of the lands; but a method is chalked out by the act of parliament to appoint commissioners, assessors, and collectors, in order to rate and get in the said subsidy. *Ibid.*

This was found very inconvenient, because the commissioners used to be favourable to their own county, therefore it was found necessary to revive so far the ancient method, as to appoint a certain sum; and in the time of the civil war, the Long Parliament would not settle any persons to appoint commissioners, but the appointment of commissioners was made in the act itself: And in this new manner of taxing, they appointed the sum to be levied on each particular county, in the act itself; as well as the commissioners' names, and where to levy it; and the six associated counties, viz. *London*, *Middlesex*, *Kent*, *Sussex*, *Surrey*, and *Hertford*, being not spoiled and pillaged in the civil wars, and more hearty to the Parliament interest, were taxed higher than any other counties in *England*. *Gilb.* 194, 195, 196.

After the Revolution, to support King *William* in his wars with *France*, it was necessary to come into a land-tax; and from 1684 to 1693, the tax was made by a pound-rate, like the former subsidies; but when the people found that the war was like to hold, about 1693, the tax was mightily lessened, every body being willing to ease his neighbour; and then they came to lay a rate upon every county, and the associating counties, being very zealous for the government in the Revolution, and having taxed themselves higher than their neighbours in 1693, it was argued that those counties were better able to bear the tax, and therefore, in 1693, they laid the disproportioned sums, that are now the standard of the land-tax. *Ibid.*

On comparing the subsidy law, 4 *Car.* 1, with the present land-tax, and considering the manner of gathering them, the following observations arise:—In the old time, according to the way of making war then used, the tenants *per baroniam*, and by knight-service, were obliged to be in the camp 40 days, at their own expence, and the escuage was levied upon the defaulters; but when the art of war improved, and armies were brought into the field that continued a long time, they made their taxation by way of subsidy; which was so much in the pound upon the personal and real estate; and where there were different times of taxation and collecting, they were called so many different subsidies; and the Spiritualty gave their tax in convocation, and the Temporalty in Parliament; but the convocation-tax always passed both houses of Parliament, since it could not bind as a law till it had the consent of the legislature. Their tax was made according to the rate in the King's books, and since a tenth was paid yearly to the Crown, they only taxed the other nine parts as they stood in those books. The Temporalty and Spiritualty were taxed in the same manner as to their personal estate; but as to their real estate, what was given in convocation excused their tax *quoad* their spiritualties. The commissioners for executing the act were appointed by the Lord Chancellor, Lord Treasurer, or other great officers of the Crown, or any two of them, the Lord Chancellor being one. *Gilb.* 197, 198.

The present land-tax, though it follows the plan of the subsidies, *viz.* in taxing so much on the personal, and so much on the real estate, yet it differs in two material circumstances, *viz.* that there is a sum imposed on each particular county, and that the commissioners are named in the act itself; this came in, in the time of the civil war, in this manner; they at first taxed according to the pound-rate, but when the zeal of the people fell off, they found it necessary to set a sum upon each particular county; so that they taxed them according to the highest sum that had been levied in such county, and obliged them

them to make it up; and they being then in opposition to the Crown, they named the commissioners in the act itself, and this way of taxing was afterwards followed at the restoration, because they found it for the ease of the Crown to name particular sums in the act of Parliament, and then they named commissioners also, who were to assess and rate each particular inhabitant. *Gilb.* 198.

The commissioners by the subsidy, were duly to execute that act; but by the land-tax they were directed in a particular manner how they should do it: that is to say, by making the distribution of the particular sum upon each particular hundred, lathe and wapentake; but by both laws, they were to subdivide themselves, and the respective commissioners were not to act out of their district. The commissioners by the land-tax acts are to give a note to the receiver-general, of the names of the acting commissioners, and sums in each division. We do not find this clause in the old subsidy law, because it was not necessary, where there was not a particular sum imposed on each county. *Ibid.*

The commissioners, both in the subsidy and land-tax, were to issue their precepts to the constables and other inhabitants, and to appoint assessors; and by both laws, the commissioners are to give them in charge, to mark a just assessment, and to return such assessments to the commissioners; who by the land-tax were to return the names of collectors. And by both laws, the persons aggrieved might appeal from the assessors to the commissioners; and also stock upon land is excused from paying as personal estate. *Gilb.* 199, 200.

By the subsidy law, the commissioners appointed collectors; but by the land-tax, the assessors brought in the names of the collectors; because the place was answerable for the sums so assessed, until they were paid in to the receiver-general; and therefore it was necessary that the assessors should appoint collectors; but by the subsidy law, there was no particular sum locally fixed; and therefore the collectors were appointed by the commissioners, who acted in behalf of the crown; and the collectors names were returned in, by both laws, to the receiver-general or high collectors; and this disposition was that the receiver might know in whose hands the money was. In the subsidy, the commissioners appointed the high collectors in each shire and division, to whom the sub collectors were accountable, and the high collectors were accountants to the Exchequer; and one duplicate of the assessments was given to the high collector, and the other returned into the Exchequer, to be a charge upon the high collector's receipt: But according to the frame of the land-tax, the receiver is now appointed by the Lord Treasurer; and by this law a duplicate of each particular division is to be given to the receiver-general, and another to be returned into the Exchequer; the duplicate returned to the receiver, is to charge the collectors, and that returned into the Exchequer, to charge the receiver-general. *Ibid.* 200, 201.

The high collectors by the subsidy law, gave security to the commissioners by recognizance, to answer the money by them received; but now the receiver-general, by the constitution of the Treasury, gives security to the Crown. In the subsidy law and land-tax, the under-collector was to distrain the parties refusing to pay the sum assessed: and by the subsidy law, the under-collectors paid in the money collected to the high collector, who was an accountant at the Exchequer; but by the land-tax, the collectors are to pay in the money to the receiver, and he is the accountant at the Exchequer. If the collectors did not pay in the money they had collected to the receivers, the commissioners were to imprison them, and seize their effects; but if the proportion was not answered, the place itself was answerable, by a reassessment of the commissioners. By both laws, the collectors had precepts and assessments delivered; and, under such precepts, had authority to distrain the lands and goods of the persons so assessed, by virtue of the act. By both laws the parties were to be taxed for goods, in the place where they dwelt. By both laws the distress was to be sold, and the overplus paid to the owner; by the subsidy law, in eight days, by the land-tax, in four days: and for neglect or refusal to pay, and failure of distress, the party to be imprisoned. By the subsidy law, all the commissioners join in one certificate; but now the commissioners return their estates, which in each division are a charge upon the receiver-general; but in the land-tax, if a non-payment in any place be certified by the receiver under his hand, Exchequer-process is to issue against the acting commissioners. By the land-tax, if land doubly taxed comes into protestant hands, and they get a certificate from the commissioners, and prove the truth of the certificate before the barons, by two credible witnesses, the Court of Exchequer is empowered to discharge such sum from the parish or township in which the lands lie, and that discharge is carried to the House of Commons, in order to be discharged out of the general sum the next year. *Ibid.* 203, 204.

LAND-TENANT, He that possesses land let, or hath it in his manual occupation. 14 *Ed.* 3. *stat.* 1. *c.* 3. See *Tertenant.*

LANGEMANNI, Lords of manors; the word is thus interpreted by Sir *Edward Coke* 1 *Inst.* 5. They are mentioned in *Domesday.*

LANGEOLUM, An under garment made of wool, formerly worn by the monks, which reached down to their knees; so called because *larea ft. Mon. Angl. tom.* 1. *p.* 419.

LANIS DE CRESCENTIA WALLIÆ TRADUCENDIS ABSQUE CUSTUMA, &c. An ancient writ that lay to the Customer of a port, to permit one to pass wool without paying custom, he having paid it before in *Wales. Reg. Orig.* 279.

LANTERIUM, The lantern, cupola, or top of a steeple. *Cowell edit.* 1727. *Angl Sacr. p.* 1. *pag.* 775.

LANO NIGER, A sort of base coin, formerly current in this kingdom. *Mem. in Scac. Mich.* 22 *Ed.* 1.

LAPIS MARMORIUS, A marble stone about twelve feet long and three feet broad, placed at the upper end of *Westminster hall*, where was likewise a marble chair erected on the middle thereof, in which our Kings anciently sat at their coronation dinner, and at other times the Lord Chancellor. Over this marble table are now erected the Courts of Chancery and King's Bench. *Orig Jurisdical.*

LAPIS PACIS, The same with *Osculum pacis. Du Fresne.*

LAPSE, *Lapsus.*] A slip or omission of a Patron to present to a church, within six months after it becomes void. See title *Advowson* II.

LAPSED LEGACY. See title *Legacy.*

LARCENY.

Fr. *Larrecin*; Lat. *Latrocinium.*] A Theft or Felony of another's goods, in his absence: It is usually divided into *Grand Larceny*, and *Petty Larceny*.

Grand Larceny is a felonious taking and carrying away the personal goods of another, above the value of 12*d*. not from the person, or by night, in the house of the owner.

Petit Larceny is when the goods stolen do not exceed the value of 12*d*. It agrees with grand Larceny in all things except only the value of goods; so that wherever any offence would be grand Larceny, if the thing stolen was above 12*d*. value; it is petit Larceny, if it be but of that value, or under. *H. P. C.* 60, 69.

Blackstone, with more immediate reference to its derivation, *Latrocinium*, always spells the term thus, Larciny; and distinguishes the offence into two sorts; *simple Larciny*, or plain theft unaccompanied with any other atrocious circumstance; and *mixed or compound Larciny*; which also includes in it the aggravation of a taking from the house or person. 4 *Comm.* c. 17. As to that species of the latter which consists in an *open and violent* taking from the person, see this Dictionary, title *Robbery*.

The Offence of Larceny or Larciny then, (for either mode of spelling may be adopted) shall be considered according to the following arrangement:

I. 1. *Of Simple Larciny.*
   2. *Of its Punishment.*

II. *Of mixed or compound Larceny.*
   1. *From the House.*
   2. *Privately from the Person.*

I. 1. Simple Larceny is, "the felonious taking and carrying away of the personal goods of another."

First, It must be a *taking*. This implies the consent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender upon trust, can ground a Larceny. As if *A.* lends *B.* a horse, and he rides away with him; or if one sends goods by a carrier, and he carries them away, these are no Larcenies. 1 *Hal. P. C.* 504. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are Larcenies; for here the *animus furandi* is manifest, since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. 3 *Inst.* 107. But bare non-delivery shall not of course be intended to arise from a felonious design; since that may happen from a variety of other accidents. Neither by the common law was it Larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But by statute 33 *Hen.* 6. c. 1. the servants of persons deceased, accused of embezzling their master's goods, may, by writ out of Chancery (issued by the advice of the two Chief Justices and Chief Baron, or any two of them) and proclamation made thereupon, be summoned to appear personally in the Court of King's Bench, to answer their master's executors in any civil suit for such goods, and shall on default of appearance, be attainted of felony. And by *stat.* 21 *Hen.* 8. c. 7. if any servant embezzled his master's goods to the value of 40*s.* it is made felony; except in apprentices and servants under eighteen years old. See titles *Apprentice*; *Servant*. But if he had not the possession, but only the care and oversight of the goods, as the butler of plate, the shepherd of sheep, and the like, the embezzling of them is felony and Larceny at common law. 1 *Hal. P. C.* 506: 3 *Inst.* 108. So if a guest robs his inn or tavern of a piece of plate, it is Larceny; for he hath not the possession delivered to him, but merely the use. 1 *Hawk. P. C.* c. 33. § 6. And so it is declared to be by *stat.* 3 & 4 *W. & M.* c. 9. if a lodger runs away with the goods from his ready-furnished lodgings. A wife cannot be guilty with her husband upon this statute, for she is under his coercion. *O. B.* 1783. No. 30. Nor without her husband, if it should appear the lodgings were let to *him*. *O. B.* 1761. No. 17. Nor even if it should appear that the lodgings were let jointly to both the husband and wife; for it shall be construed to be the act of the husband only. *O. B.* 1758. No. 105. The offender must be a lodger at the time the Larceny is committed. *O. B.* 1785. No. 74. The indictment must also set forth the name of the person by whom the lodgings were let. *O. B.* 1784. No. 747. And the property stolen must be such as may reasonably be construed the furniture of the sort of lodging taken. *Leach's Hawk. P. C.* 1. c. 33. § 13, *in n.*

If the Clerk of a Banker or Merchant has the care of money, or if he has access to it; for special and particular purposes, and, is sent to the bag or drawer for money, for the purpose of paying a bill, or if he is sent for the purpose of bringing money generally out of the bag or drawer; and, at the time he brings that money, he clandestinely and secretly takes out other money for his own use, he is as much guilty of a felony as if he had no permission or access to it whatever. So if a servant be sent to a library for one particular book, and he takes another, or being sent for a hat and sword, and he steals a cane; in all these cases it has been said the offenders are guilty of felony, for though the property is delivered, the possession of it remains in the true owners. *O. B.* 1784. *p.* 1295, 1304. So also where a person being left in an apartment pawns the furniture or other property under his care, with a felonious design to steal it, it is felony. *O. B.* 1785. *p.* 717: *O. B.* 1786: *Leach's Hawk. P. C.* 1. c. 33. § 6, *in n.*

Under some circumstances also a man may be guilty of felony in taking his own goods; as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with intent to charge the Hundred with the loss according to the statute of *Winchester*. *Fost.* 123, 4.

So where the owner delivers goods to a carrier, and afterwards secretly steals them from him with an intent to charge him for them, &c. because the carrier had a special property, and the possession for a time. 3 *Inst.* 110: *Dalt.* 373: *Pult.* 126.

In further explanation of this part of the subject the following is deserving of attention:

To make the crime of Larceny, there must be a felonious taking; or an intent of stealing the thing, when it comes first to the hands of the offender, at the very time of the receiving. 3 *Inst.* 107: *Dalt.* 367. And if one intending to steal goods, gets possession of them by

ejectment,

ejectment, replevin, or other process at law unduly obtained, by false oath, *&c.* it is a felonious taking. 3 *Inst.* 64: *Kel. Rep.* 43, 44. If a man hath possession of goods once lawfully, though he afterwards carry them away with an ill intention, it is no Larceny: where a taylor embezzles cloth delivered to him, to make a suit of clothes, *&c.* it is not felony. *H. P. C.* 61: 5 *Rep.* 31. And if I lend a person my horse to go to a certain place, and he goes there, and then rides away with him, it is not Larceny; but remedy is to be had by action for the damage; though if one comes on pretence to buy a horse, and the owner gives the stranger leave to ride him, if he rides away with the horse, it is felony; for here an intention is implied. *Wood's Inst.* 364, 365. In the above cases, there is a lawful possession by delivery, to extenuate the offence: but persons having the possession of goods by delivery, may in some instances be guilty of felony, by taking away part thereof; as if a carrier open a pack, and take out a part of the goods; a miller, who has corn to grind, takes out part of the same, with an intent to steal it, *&c.* in which cases, the possession of part, distinct from the whole, was gained by wrong, and not delivered by the owner, *&c.* *H. P. C.* 62: *S. P. C.* 25: 1 *Hawk. P. C. c.* 33. § 5.

To constitute Larceny the property must also be taken from the *possession* of the owner; therefore, to state a case more at large which has already been repeatedly alluded to, where *A.* intending to go a distant journey, hires a horse fairly and *bona fide* for that purpose, and evidences the truth of such intention by actually proceeding on his way, and afterwards rides off with the horse, it is no theft; because the felonious design was hatched subsequent to the delivery; and the delivery having been obtained without fraud or design, the owner parted with his possession as well as his property. *O. B.* 1784. *p.* 1294; and thereby gave to *A.* dominion over the horse; upon trust, that he would return him when the journey was performed. *O. B.* 1786. *p.* 335. 4. But if the delivery of property be obtained with a preconcerted design to steal the thing delivered, although the owner, in this case, parts with the thing itself, he still retains in law the constructive possession of it; therefore, where a man, having feloniously obtained the delivery of a bill of exchange under the fraudulent and delusive pretence of discounting it, converted it to his own use, and it appearing upon the evidence that the owner never meant to part with possession, it was held to be felony. *O. B.* 1784. *p.* 292. So also where a horse was obtained with the same design, upon pretence of trying its paces. *O. B.* 1779. *p.* 463: *O. B.* 1784. *p.* 293. So also to obtain the delivery of money, with design feloniously to take it away, under the false pretence of having found a diamond ring of great value, has been determined by nine Judges to be a taking from the possession of the owner, and consequently felony. *O. B.* 1785. *p.* 160. So also to obtain the delivery of goods under the pretence of purchasing them, and then to run away with them. *Raym.* 276. And in general where the delivery of the property is made for a certain, special, and particular purpose, the possession is still supposed to reside, unparted with, in the first proprietor. Therefore, where a master delivers goods to his servant to carry to a customer, but instead of so doing he converts them on his way to his own use, it is a felonious taking; for the master had a right to countermand the delivery of them, and therefore the possession remained in him at the time of the conversion. *O. B.* 1782. No. 375: *O. B.* 1783. No. 28. So also if a watchmaker steals a watch, delivered to him to clean. *O. B.* 1779. No. 83. Or if one steal clothes delivered for the purpose of being washed. *O. B.* 1758. No. 18. Or goods in a chest delivered with a key for safe custody. *O. B.* 1770. No. 83. Or guineas delivered for the purpose of being changed into half guineas. *O. B.* 1778. No. 52. Or a watch delivered for the purpose of being pawned. *O. B.* 1784. No. 613. In all these instances the goods taken have been thought to remain in the possession of the proprietor, and the taking of them away held to be felony. *Leach's Hawk. P. C. c.* 33. § 5, *in n.*

If one servant delivers goods to another servant, this is a delivery by the master; yet if the master or another servant delivers a bond, or cattle to sell, and the servant goes away with the bond, and receives the money thereon due, or receives the money for the cattle sold, and goes away with the same, this is no felony or Larceny within the statute. 21 *Hen.* 8. *c.* 7: *Dalt.* 388: *H. P. C.* 62: 3 *Inst.* 105. So if a servant receives his master's rents; for the master did not deliver the money to the servant, and it must be of things delivered to keep: and if goods delivered to the servant to keep, are under 40*s.* value, and he goes away with them, this is only a breach of trust, by reason of the delivery; but if the goods were not delivered to him, it is felony and Larceny to go away with or embezzle them, though under the value of 40*s* *&c.* *Dalt.* 369.

A man puts a child of seven years old to take goods and bring them to him, and he carries them away; the child is not guilty by reason of his infancy, yet it is Larceny in the other. 1 *Hale, P. C.* 514.

If a man reduced to extreme necessity (not owing to his own unthriftiness) steals victuals merely to satisfy his present hunger, and keep him from starving, by our ancient books, this is neither felony nor Larceny. 1 *Hawk. P. C. c.* 33. § 20.

It is true a Judge ought to be tender in such cases, and use much discretion and moderation. 1 *Hale* 565. But it seems to be an unwarranted doctrine borrowed from the notions of Civilians; at least it is now antiquated, the law of *England* admitting no such excuse at present; it being in the power of the Crown to pardon the offenders; and the laws therefore not lying under the necessity of being explained away, as is the case in Democracies, where no such power of pardoning exists. See 4 *Comm.* 31: 1 *Hale* 54.

Secondly, There must not only be taking, but *a carrying away*; *cepit et asportavit*, was the old law Latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact, or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs, these have been adjudged sufficient carryings away to constitute a Larceny. 3 *Inst.* 108, 109. Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it, this is Larceny. 1 *Hawk. P. C. c.* 33. § 18.

A man

A man was detected in taking the contents of a bale of goods in a waggon. It appeared that the bale laid horizontally, and that he had set it on its end; but as it had not been removed from the *spot*, this was held upon a case reserved, not to be a sufficient carrying away. But where a man with a felonious intention had removed goods from the head to the tail of a waggon, it was held a sufficient removal to constitute a carrying away. *O. B.* 1784. *p.* 734. So a diamond ear-ring snatched from a lady's ear, but lodging in the curls of her hair, and not taken by the thief, was held to be a sufficient asportation. *O. B.* 1784. No 537: *Leach's Hawk. P. C. c.* 33. § 18, *in n.*

Thirdly, This taking and carrying away, must also be *felonious*; that is, done *animo furandi*. This requisite, besides excusing those who labour under incapacities of mind or will, indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse, without his knowledge and brings him home again; if a neighbour takes another's plough that is left in the field, and uses it upon his own land, and then returns it; if, under colour of arrear of rent where none is due, one distrain another's cattle or seize them; all these are misdemeanors and trespasses, but no felonies. 1 *Hal. P. C.* 509. The ordinary discovery of a felonious intent, is where the party doth it clandestinely; or, being charged with the fact, denies it; but this is by no means the only criterion of criminality, for in cases that may amount to Larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animum furandi*; wherefore they must be left to the due and attentive consideration of the Court and Jury.

Fourthly, This felonious taking and carrying away must be *of the personal goods of another*; for if they are things *real*, or savour of the realty, Larceny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot, in their nature, be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no Larceny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass; which depended on a subtlety in the legal notions of our ancestors. These things were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence so as to be changed into moveables, and at the same time by one and the same continued act, carried off by the person who severed them; they could never be said to be taken *from the proprietor* in this their newly acquired state of mobility, (which is essential to the nature of Larceny,) being never, as such, in the actual or constructive possession of any one but of him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief sever them at *one* time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid; and come again at *another* time, when they are so turned into personalty, and takes them away, it is Larceny; and so it is, if the owner, or any one else, has severed them. 3 *Inst.* 109: 1 *Hal. P. C.* 510. See 8 *Rep.* 33: *Dalt* 372.—This question is now, however, very much put at rest by the following statute. By *stat.* 4 *Geo.* 2. *c.* 32, to steal or rip, cut or break, with intent to steal, any *lead*, or *iron bar, rail, gate*, or *palisado*, fixed to a dwelling-house or out-house, or in any court or garden thereunto belonging, or to any other building, is made felony, liable to transportation for seven years;—to steal, damage, or destroy *underwood* or *hedges*, and the like; to rob *orchards* or *gardens* of *fruit* growing therein; to steal or otherwise destroy any *turnips, potatoes, cabbages, parsnips, pease*, or *carrots*, or the roots of *madder* when growing, are all punishable criminally by whipping, small fines, imprisonment, and satisfaction to the party wronged according to the nature of the offence. See *stats.* 43 *Eliz. c.* 7: 15 *Car.* 2. *c.* 2: 31 *Geo.* 2. *c.* 35: 6 *Geo.* 3. *c.* 48: 9 *Geo.* 3. *c.* 41: 13 *Geo.* 3. *c.* 32. Moreover, the stealing by night of any *trees*, or of any *roots, shrubs*, or *plants*, to the value of 5*s.* is, by *stat.* 6 *Geo.* 3. *c.* 36, made felony in the principals, aiders, and abettors, and in the purchasers thereof, knowing the same to be stolen:—By *stats.* 6 *Geo.* 3. *c.* 48: 13 *Geo.* 3. *c.* 33, the stealing any *timber trees* therein specified, (oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, birch, poplar, alder, larch, maple, and hornbeam,) and of any root, shrub, or plant, by day or night, is liable to pecuniary penalties for the two first offences, and for the third is constituted a felony, liable to transportation for seven years. Stealing *ore* also out of *mines* is no Larceny, upon the principle of adherence to the freehold, with an exception only to mines of *black lead*; the stealing of ore out of which, or entering the same with intent to steal, is felony, punishable with imprisonment and whipping, or transportation not exceeding seven years; and to escape from such imprisonment, or return from such transportation, is felony without benefit of clergy, by *stat.* 25 *Geo.* 2. *c.* 10.—Upon nearly the same principles the stealing of writings relating to a real estate is no felony, but a trespass, because they concern the land; or (according to the technical language of the law) *savour of the realty*; and are considered as part of it, so that they descend to the heir, together with the land which they concern. 1 *Hal. P. C.* 510: *Stra.* 1137.

Bonds, Bills, and *Notes*, which concern mere *choses in action*, were held also at the common law not to be such goods whereof Larceny might be committed; being of no intrinsic value, and not importing any property in *possession* of the person from whom they are taken. 8 *Rep.* 33. But by *stat.* 2 *Geo.* 2. *c.* 25, they are now put upon the same footing with respect to Larcenies, as the money they were meant to secure. See also the *stats.* 15 *Geo.* 2. *c.* 13: 24 *Geo.* 2. *c.* 11: 5 *Geo.* 3. *c.* 25: 7 *Geo.* 3. *c.* 50; which make embezzlements by the servants of the *Bank, South-Sea Company*, and *Post-Office*, capital felonies. See those titles.

Larceny also could not at common law be committed of treasure-trove, or wrecks, waifs, estrays, &c. till seized by the King, or him who hath the franchise: for till such seisure, no one hath a determinate property therein. See *Dalt.* 370: 3 *Inst.* 208: *H. P. C.* 67.—

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But by *stat.* 26 *Geo.* 2. *c.* 19, plundering or stealing from any ship in distress (whether wreck or no wreck) is felony without benefit of clergy.

Larceny cannot also be committed of such animals, in which there is no property either absolute or qualified, as of beasts that are *feræ naturæ*, and unreclaimed, such as deer, hares, and conies, in a forest, chace, or warren; fish in an open river or pond; or wild fowls at their natural liberty. 1 *Hal. P. C.* 511: *Fost.* 366. But if they are reclaimed and confined, and may serve for food, it is otherwise, even at common law: for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, Larceny may be committed. 1 *Hawk. P. C. c.* 33. § 26: 1 *Hal. P. C.* 511: And see the *stat.* 9 *Geo.* 1. *c.* 22, in this Dict. titles *Black-Act*; *Hunting*; as also *stat.* 16 *Geo.* 3. *c.* 30, under the title *Deer Stealers*: and *stat.* 5 *Geo.* 3. *c.* 14, under title *Fish*. Stealing *Hawks* in disobedience to the rules prescribed by the *stat.* 37 *Edw.* 3. *c.* 19, is also felony. 3 *Inst.* 98. It is also said that, if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond: otherwise it is only a trespass. *Dalt. Just. c.* 156. But, of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitæ naturæ*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool, Larceny may be committed. *Dalt.* 21: *Crompt.* 36: 1 *Hawk. P. C. c.* 33. § 28: 1 *Hal. P. C.* 507: The *King* v. *Martin* by all the Judges *P.* 17 *Geo.* 3. And also of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed. 1 *Hal. P. C.* 511. As to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value, as *dogs* of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation, as that the crime of stealing them amounts to Larceny. 1 *Hal. P. C.* 512. But by *stat.* 10 *Geo.* 3. *c.* 18, very high pecuniary penalties, or a long imprisonment and whipping in their stead, may be inflicted by two Justices of the peace, on such as steal, or knowingly harbour, a stolen *dog*, or have in their custody the skin of a dog that has been stolen.

Notwithstanding, however, that no Larceny can be committed unless there be some property in the thing taken, and an owner, yet, if the owner be unknown, provided there be a property, it is Larceny to steal it; and an indictment will lie for the Larceny of the goods of a person unknown, 1 *Hal. P. C.* 512. This is the case of stealing a shroud out of a grave, which is the property of those, whoever they were, that buried the deceased; but stealing the corpse itself, which has no owner, (though a matter of great indecency,) was no felony, unless some of the grave-clothes were stolen with it. It was however punishable by indictment as a misdemeanor, even though the body were taken for the improvement of the science of anatomy; it being a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind. See 2 *Term Rep.* 733; and further this Dictionary, title *Robbery*.

Where a person finds the goods of another that are lost, and converts them to his own use, it is no Larceny. *H. P. C.* 61. But it seems that in some extraordinary cases, the law will rather feign a property, where in strictness there is none, than suffer an offender to escape justice. 1 *Hawk. P. C. c.* 33. § 29.

It is said, that a property must be proved in somebody at the trial, or it shall be presumed in the prisoner from his plea of *not guilty*. 2 *Hale P. C.* 290: 8 *Mod.* 249. But in a case where one *Hickman* was indicted for stealing lead from *Hendon* church, which was laid to be the property, 1st of the Vicar; 2dly, of the Churchwardens; 3dly, of the Inhabitants and Parishioners. The property being fixed to the freehold, it was doubted whether it could be the subject of Larceny; and if it could, whether the property resided as laid in any of the counts in the indictment. The Judges were of opinion, 1st, that "a church" is included within these general words of the act, (4 *Geo.* 2. *c.* 32,) "or any other building whatsoever." 2dly, That the act having made the offence to consist in "*stealing from any* dwelling house or other building, &c." the charge in the indictment; that it was *stole from Hendon church* was alone a certain and sufficient description of the offence to support the indictment; that the residence of the property was immaterial, and that the conviction was proper upon the first count. *O. B.* 1785. *p.* 782: *Leach's Hawk. P. C.* 1. *c.* 58. *App.* 1. § 13. *in n.*

2. Many learned and scrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft. The natural punishment for injuries to property seems to be the loss of the offender's own property; and might be universally the case, were all men's fortunes equal. But as those who have no property themselves are generally the most ready to attack the property of others, it has been found necessary, instead of a pecuniary, to substitute a corporal punishment.

Our antient *Saxon* laws nominally punished theft with death, if above the value of twelvepence; but the criminal was permitted to redeem his life by a pecuniary ransom; but in the ninth year of *Henry* I. this power of redemption was taken away, and all persons guilty of Larceny above the value of 12*d.* were directed to be hanged; which law continues in force to this day. 1 *Hal. P. C.* 12: 3 *Inst.* 53. For though the inferior species of theft, or petit Larceny, is only punished by imprisonment or whipping at common law, 3 *Inst.* 218: or, by *stat.* 4 *Geo.* 1. *c.* 11, may be punished with transportation for seven years, (as was also expresly directed in the case of the Plate-glass Company, *stat.* 13 *Geo.* 3. *c.* 38,) yet the punishment of grand Larceny, or the stealing above the value of 12*d.* (which sum was the standard in the time of King *Athelstan*, eight hundred years ago), is at common law regularly death; which, considering the great intermediate alteration in the price or denomination of money, seems at present a very rigorous constitution.

It has been held, that if two persons steal goods to the amount of 13*d.* it is *Grand Larceny* in both; and if one, at different times, steals divers parcels of goods from the same person, which together exceed the value of 12*d.* they may be put together in one indictment, and the offender found guilty of grand Larceny. *H. P. C.* 70: *Pult.* 125: 3 *Inst.* 109: *Hutt. Rep.* 66. But this is

is very seldom done; on the contrary, the mercy of Juries will often make them bring in Larceny to be under the value of 12*d.* when it is really of much greater value: but this, though evidently justifiable and proper, when it only reduces the present nominal value of money to the antient standard, is otherwise a kind of pious perjury. 2 *Inst.* 189. And it is now settled that the value of the property stolen, must not only be in the whole of such an amount as the law requires to constitute a capital offence; but the stealing must be to that amount at one and the same particular time. For the law will not permit things stolen at different times, which are, in fact, different acts of stealing, to be added together; and as no number of petit Larcenies will amount to a grand Larceny, so no number of grand Larcenies will amount to a capital offence. *O. B.* 1784. *p.* 206. It is likewise true, that by the merciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple Larceny to the value of 13*d.* (or thirteen hundred Pounds), though guilty of a capital offence, shall be excused the pains of death; but this is only for the first offence. And in many cases of *simple* Larceny, the benefit of clergy is taken away by statute; as from horse-stealing, in the principals and accessories, both *before* and *after* the fact. *Stat.* 1 *Eliz.* 6. *c.* 12: 2 & 3 *Eliz.* 6. *c.* 33: 31 *Eliz. c.* 12. Theft by great and notorious thieves in *Northumberland* and *Cumberland*. *Stat.* 18 *Car.* 2. *c.* 3. Taking woollen cloth from off the tenters; or linens, fustians, callicoes, or cotton goods from the place of manufacture; which extends, in the last case, to aiders, assisters, procurers, buyers, and receivers. See *Stats.* 22 *C.* 2. *c.* 5: 15 *Geo.* 2. *c.* 27: 18 *Geo.* 2. *c.* 27. Feloniously driving away, or otherwise stealing one or more sheep or other cattle specified, or killing them with intent to steal the whole or any part of the carcase, or aiding or assisting therein. *Stats.* 14 *Geo.* 2. *c.* 6: 15 *Geo.* 2. *c.* 34. Thefts on navigable rivers above the value of 40*s.* or being present, aiding, or assisting thereat. *Stat.* 24 *Geo.* 2. *c.* 45.—Plundering vessels in distress, or that have suffered shipwreck. *Stats.* 12 *An. st.* 2. *c.* 18: 26. *Geo.* 2. *c.* 19. —Stealing letters sent by the post. *Stat.* 7 *Geo.* 3. *c.* 50. —Also stealing deer, fish, hares, and conies, under the peculiar circumstances mentioned in the *Waltham* Black Act. *Stat.* 9 *Geo.* 1. *c.* 22. Which additional severity, is owing to the great malice and mischief of the theft in some of these instances; and, in others, to the difficulties men would otherwise be under to preserve those goods, which are so easily carried off.—But in all these cases, where benefit of clergy is excluded, it seems that the Larceny must exceed the value of 12*d.* See 4 *Comm. c.* 17. *p.* 241. *in n.*

An acquittal of Larceny in one county, may be pleaded in bar of a subsequent prosecution for the same stealing in another county: and an averment that the offences in both indictments are the same, may be made out by witnesses, or inquest of office, without putting it to trial by jury; though that of later years hath been the usual method. 2 *Hawk. P. C. c.* 35. § 4. But it is no plea in appeal of Larceny, that the defendant hath been found not guilty in an action of trespass brought against him by the same plaintiff for the same goods; for Larceny and trespass are entirely different; and a bar in an action of an inferior nature, will not bar another of a superior. 2 *Hawk. P. C. c.* 35. § 5. If a person be indicted for felony or Larceny generally, and upon the evidence it appears that the fact is but a bare trespass, he cannot be found guilty, and have judgment on the trespass, but ought to be indicted anew; though it may be otherwise where the jury find a special verdict, or when the fact is specially laid, &c. In trespass where the taking is felonious, no verdict ought to be given, unless the defendant hath before been tried for the felony. 2 *Hawk P. C. c.* 47. § 6. All felony includes trespass, so that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony or Larceny in carrying them away; and in every indictment of Larceny, there must be the words *felonicè cepit & asportavit, &c. H. P. C.* 61. 1 *Hawk. P. C. c.* 33. § 2.

The *stats.* 4 *Geo.* 1. *c.* 11: 6 *Geo.* 1. *c.* 23, empower the Judges, on conviction for grand or petit Larceny, (except the case of buying or receiving of stolen goods knowing them to be such,) to transport the offenders, where they are entitled to benefit of clergy; or where being excluded clergy, they are pardoned on condition of transportation. See titles *Felony*; *Clergy*; *Transportation.*

There are no accessories in petit Larceny, therefore if two be indicted, one for privately stealing from the person a handkerchief value 12*d.* and another for receiving it, and the principal be found guilty value 10*d.* only, the accessory ought to be discharged. *Fost.* 73. See this Dictionary, title *Accessory*.

II. 1. Larceny from the *House*, though it seems to have a higher degree of guilt than simple Larceny, yet is not at all distinguished from the other at common law: unless where it is accompanied with the circumstance of breaking the house by night; and then it falls under another description, *viz.* that of *Burglary*. See that title. But now, by several acts of Parliament, the benefit of clergy is taken from Larcenies committed in an house in almost every instance. The multiplicity of the general acts is apt to create confusion; but upon comparing them diligently we may collect, that the benefit of clergy is denied upon the following domestic aggravations of Larceny, *viz.*—*First*, in Larcenies *above the value of* 12*d.* committed, 1st. In a church or chapel with or without violence or breaking the same. *Stats.* 23 *Hen.* 8. *c.* 1: 1 *Eliz.* 6. *c.* 12: 1 *Hal. P. C.* 518: and see *stats.* 25 *Hen.* 8. *c.* 3: 5 & 6 *Ed.* 6. *c.* 9, 10.—2d. In a booth or tent, in a market or fair, in the day time or in the night, by violence or breaking the same; the owner or some of his family being therein. *Stats.* 5 & 6 *E.* 6. *c.* 9: 1 *Hal. P. C.* 522.—3d. By robbing a dwelling-house in the day time (which *robbing* implies a *breaking*), any person being therein. *Stat.* 3 & 4 *W. & M. c.* 9:—4th, By the same statute, and *stat.* 23 *H.* 8. *c.* 1. In a dwelling-house by day or by night, without breaking the same, any person being therein and put in fear: which amounts in law to a robbery: and in both these last cases the accessory before the fact is also excluded his clergy.—*Secondly*, in Larcenies *to the value of* 5*s.* committed, 1st. By breaking any dwelling-house, or any out-house, shop, or warehouse thereunto belonging, in the day time, although no person be therein; which also now extends to aiders, abettors, and accessories, before the fact. *Stat.* 39 *Eliz. c.* 15: See also *stat.* 3 & 4 *W. & M. c.* 9: *Hale* 508, 522: *Kely.* 31.—2d. By privately stealing goods, wares, or merchandize in any shop, warehouse, coach-house,

house, or stable, by day or by night, though the same be not broken open, and though no person be therein; which likewise extends to such as assist, hire, or command the offence to be committed. *Stat.* 10 & 11 *W.* 3. *c.* 23: See *Fost.* 78.—*Lastly*, in Larcenies *to the value of* 40*s*, from a dwelling-house, or its out-houses, although the same be not broken, and whether any person be therein or no, unless committed against their masters by apprentices under the age of fifteen: This also extends to those who aid or assist in the commission of any such offence. *Stat.* 12 *Ann. stat.* 1. *c.* 7.

2d. The offence of *privately* stealing from a man's *person*, as by picking his pocket, or the like, privily without his knowledge, was debarred the benefit of clergy, so early as by *stat.* 8. *Eliz. c.* 4. But then it must be such a Larceny as stands in need of benefit of clergy, *viz.* of above the value of 12*d.* else the offender shall not have judgment of death: for the statute creates no new offence; but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the antient law. This severity seems to be owing to the ease with which such offences are committed, the difficulty of guarding against them; and the boldness with which they were practised (even in the Queen's court and presence) at the time when this statute was made: besides that it is an infringement of property, in the manual occupation or corporal possession of the owner, which was an offence even in a state of nature. 4 *Comm. c.* 17.

LARDARIUM, The larder, or place where the lard and meat were kept. *Paroch. Antiq. p.* 496.

LARDERARIUS REGIS, The King's larderer, or clerk of the kitchen. *Cowell.*

LARDING-MONEY. In the manor of *Bradford* in the county of *Wilts*, the tenants pay to their lord a small yearly rent by this name; which is said to be for liberty to feed their hogs with the mast of the lord's woods, the fat of a hog being called lard: Or it may be a commutation for some customary service of carrying salt or meat to the lord's larder. This was called *lardarium* in old charters; *& decimum lardarii de baga. Mon. Ang. tom.* 1. *p.* 321.

LARONS, *Fr.*] Thieves; mentioned in the statute 18 *Ed.* 2, for view of frank-pledge.

LASTATINUS, Often occurs in *Walsingham*, and signifies an assassin or murderer. *Anno* 1271.

LAST, Sax. *hlaestan*, i. e. *onus*, Fr. *lest*.] Denotes a burden in general, and particularly a certain weight or measure of fish, corn, wool, leather, pitch, &c. As a last of white herrings, is twelve barrels, of red herrings, twenty cades or thousand, and of pilchards, ten thousand; of corn, ten quarters, and in some parts of *England* twenty-one quarters; of wool, twelve sacks; of leather, twenty dickers, or ten score; of hides or skins, twelve dozen; of pitch, tar, or ashes, fourteen barrels; of gunpowder, twenty-four firkins, weighing a hundred pound each, &c. See *Stats.* 32 *Hen.* 8. *c.* 14: 1 *Jac.* 1. *c.* 33: 15 *Car.* 1. *c.* 7: and this Dictionary, title *Weights & Measures.*

LAST-COURT, In the Marshes of *Kent*, is a court held by the twenty-four jurats, and summoned by the bailiffs; wherein orders are made to lay and levy taxes, impose penalties, &c. for the preservation of the said marshes. *Hist. of Imbanking and Draining, f.* 54.

LASTAGE, *lastagium*] A custom exacted in some fairs and markets, to carry things bought where one will, by the interpretation of *Rastal:* But it is more accurately taken for the ballast or lading of a ship. Lastage is also defined to be that custom which is paid for wares sold by the last; as herrings, pitch, &c.

LASTAGE AND BALASTAGE, See *Ballast.*

LAST HEIR, *Ultimus haeres*] He to whom land comes by escheat for want of lawful heirs; that is, in some cases the Lord of whom they held, but in others the King. *Bract. lib.* 7. *c.* 17. See this Dictionary, titles *Descent*; *Escheat*; *Heir*; *Tenure.*

LATERA, Sides-men, companions, assistants. *Cowell.*

LATERARE, To lie side-ways in opposition to lying end ways; used in the description of lands. *Chart. Antiq.*

LATHE, LETHE, LEID, or LEITHEN, *Lastum*, *Leda*, Sax. *lathe.*] A great part of a county, containing three or four hundreds, or wapentakes; as it is used in *Kent* and *Sussex*, in the latter of which it is called a rape. 1 *Comm.* 116: *Leg. Ed. Confess. c.* 35: *Pat.* 1. *H.* 4. *par.* 8. *m.* 8: See *Trithing.*

LATHREVE, LEDOREVE or TRITHINGREVE, The Officer under the *Saxon* government who had authority over that division called a Lathe. See *Trithing-reeve.*

LATIMER, Is used by Sir *Edward Coke* for an interpreter, 2 *Inst.* 515. It seems that the word is mistaken, and should be *Latiner* because heretofore he that understood *Latin*, which in the time of the *Romans* was the prevailing language, might be a good interpreter. *Camden* agrees, that it signifies a *Frenchman* or interpreter, and says the word is used in an old inquisition. *Britan. fol.* 598. It may be derived or corrupted from the Fr. *latinier*, *q. d. latiner. Cowell.*

LATIN. There are three sorts of *Latin.* 1. Good *Latin*, allowed by grammarians and lawyers. 2. False or incongruous *Latin*, which in times past would abate original writs; though not make void any judicial writ, declaration, or plea, &c. And 3. Words of Art, known only to the Sages of the law, and not to grammarians, called Lawyers' *Latin.* 1 *Lil. Abr.* 146, 147: See *stat.* 36 *Ed.* 3. *c.* 15; which directed all pleas, &c. to be debated in *English* and recorded in *Latin*; but now, by *stats.* 4 *Geo.* 2. *c.* 26: 6 *Geo.* 2. *c.* 14, the records and proceedings are to be in *English.* Formerly the use of a word not *Latin* at all, or not so in the sense in which used, might in many cases be helped by an *Anglicè*; though where there was a proper *Latin* word for the thing intended to be expressed, nothing could help an improper one. And when there was no *Latin* for a thing, words made which had some countenance of *Latin*, were allowed good, as *Velvetum Anglicè* velvet, &c. 10 *Rep.* 135. See title *Process.*

LATINARIUS, An interpreter of *Latin*, or *Latiner*, from the Fr. *latinier.* 2 *Inst.* 515. See *Latimer.*

LATITAT, A writ whereby all men are originally called to answer in personal actions in the King's Bench; having its name upon a supposition that the defendant *doth lurk and lie hid*, and cannot be found in the county of *Middlesex* to be taken by bill, but is gone into some other county, to the sheriff of which this writ is directed, to apprehend him there. *F. N. B.* 78. *Termes de Ley.*

The origin of it is this; In antient time, while the King's Bench was moveable, when any man was sued, a

writ

writ was sent forth to the sheriff of *Middlesex*, or any other county where the court was resident, called a Bill of *Middlesex*, to take him; and if the sheriff returned *Non est inventus*, then a second writ was sued out, reciting, that *it was testified* that the defendant *lurked and lay hid* in another county, and thereby the sheriff of that county was commanded to attach the party in any other place, where he might be found: and when the tribunal of the King's Bench came to be settled at *Westminster*, the same course was observed for a long time; but afterwards, by the contrivance of clerks, it was devised to put both these writs into one, and so attach the defendant upon a fiction that he was not in the county of *Middlesex*, but lurking elsewhere; and that therefore he was to be apprehended by the sheriff of the county where he was suspected to be, and lie hid.

It is called a *testatum* writ, from the words "*Testatum est*, It is testified," issuing out of *B. R.* grounded upon a Bill of *Middlesex*, supposed to be sued out before, and returned *Non est inventus*; and is in nature of the original writ *Clausum fregit*, on which the practice is in the Common Pleas. 2 *Lil. Abr.* 147. See this Dict. titles *Capias*; *Common Pleas*. A *Latitat* cannot issue into the county of *Middlesex*, except the Court remove out of *Middlesex* into another county, for in the county where the Court of *B. R.* is, the process must be by Bill, and out of the county by *Latitat*. 2 *Lil. Abr.* 147.

If the writ of *Latitat* is issued during the vacation, it must be as of the last day of the term preceding: A process or note is to be made of it on paper for the officer by the plaintiff's attorney, together with a memorandum or minute of his warrant duly stamped, pursuant to *stat.* 25 *Geo.* 3. *c.* 80. § 13. The *Latitat* being filled up, is to be carried with the note to the King's Bench Office, and there the writ is signed; from whence it is carried to the Seal-Office, where it is sealed. See *Impey, K. B.*—If it is intended to hold the defendant to bail, an affidavit of the debt must be made, an *ac-etiam* introduced into the body of the writ, the sum sworn to indorsed on the back previous to the signing and sealing of the writ, after which a warrant is to be procured from the sheriff of the county to execute the writ. See titles *Arrest*; *Bail*.

Where the defendant is in the actual or supposed custody of the Marshal of K. B. upon a Bill of *Middlesex* or *Latitat*, &c. the *bill* exhibited against him as a prisoner of the Court, is considered as the *commencement of the suit*; and the Bill of *Middlesex* or *Latitat* merely as process to bring him into Court. 1 *Wils.* 40, 144: 2 *Burr.* 960. But see 3 *Burr.* 1244.—Such process, therefore, may be sued out, though the defendant ought not to be arrested upon it, before the cause of action. *Cro. Eliz.* 271: *Cro. Jac.* 561: 1 *Ventr.* 28: 8 *Mod.* 343: 1 *Wils.* 142: 2 *Burr.* 967: *Doug.* 62. And the plaintiff is allowed to give in evidence a cause of action, arising after it is sued out, and before the exhibiting of the bill. *Cowp.* 454.

It has been frequently ruled, however, that for certain purposes a Bill of *Middlesex* or *Latitat*, out of *B. R.*, may be taken to be in nature of an *Original Writ* in the Common Pleas, *Cowp.* 456. And a *Latitat*, even without a Bill of *Middlesex*, if properly issued and continued on the roll, has been holden to be a good commencement of the suit to avoid a plea of the statute of *limitations*; or a *tender* made after suing it out. As to the former, see *Sty.* 156, 178: 1 *Sid.* 53, 60: 2 *Lord Raym.* 880: 1 *Stra.* 550: 2 *Stra.* 736: 2 *Ld. Raym* 1441: 2 *Burr.* 961: and as to the latter, *Cro. Car.* 264: 1 *Wils.* 141. Lord *Holt* made a distinction between a civil and penal action; but upon a Writ of Error, all the Judges in the Exchequer Chamber held that a *Latitat* is a kind of *Original* in the King's Bench. See *Carth.* 233: 2 *Ld. Raym.* 883. And accordingly in two subsequent cases it was holden to be a good commencement of the suit in a penal action. *Bridges* v. *Knapton*: *Hardiman* v. *Whitaker*: cited 2 *Burr.* 950: 3 *Burr.* 1243: *Cowp.* 454.

Hence it appears that a *Latitat* may be considered either as the commencement of the action, or only as process to bring the defendant into Court; at the election of the plaintiff. *Bull. N. P.* 151: 1 *Wils.* 146. Though if it be stated as the commencement of the action to avoid a *tender*, the defendant may deny that the plaintiff had any cause of action at the time of suing it out. 1 *Wils.* 141. Or if it be replied to a plea of the statute of limitations, the defendant, in order to maintain his plea, may aver the real time of suing it out in opposition to the *Teste*. 2 *Burr.* 950. See *Tidd's Practice*, K. B. *c.* 14; and this Dictionary, title *Limitation of Actions*.

It was formerly holden that a writ of *Latitat* did not run into *Wales*; but the contrary has since been determined, and is now the common practice. See 1 *Wils.* 193: *Doug.* 202—3, (213.)

For other matters connected with and explanatory of the subject of this title, see this Dict. titles *Process*; *Practice*; *Ac-etiam*; *King's Bench*; *Common Pleas*; *Capias*, &c.

LATRO, *Latrocinium*.] He who had the sole jurisdiction *de latrone* in a particular place: it is mentioned in *Leg. Wil.* I. See *Infangthef*.

LATTA, A Lath. *Cowell*.

LAVATORIUM, A Laundry, or place to wash in: Applied to such a place in the porch or entrance of cathedral churches, where the priest and other officiating members were obliged to wash their hands before they proceeded to divine service. See *Liber Statut. Eccl. Paul. London*, MS. *f.* 59.

LAVERBREAD. In the county of *Glamorgan*, and some other parts of *Wales*, they make a sort of food of a sea plant, which seems to be the oyster-green, or sea liver-wort; and this they call Laverbread.

LAVINA, See *Labina*.

LAUDARE, To advise or persuade. *Leg. Edw Confess. c.* 39: *Hoveden, p.* 729. *Laudare* signifies also to arbitrate; and *laudator*, an arbitrator. *Knight, p.* 2526.

LAUDUM, An arbitrament, or award. *Walsingham, p.* 60.

LAUNCEGAYS, A kind of offensive weapons now disused, and prohibited by the *stat.* 7 *R.* 2. *c.* 13.

LAUND or LAWND, *landa*.] An open field, without wood. *Blount*.

LAURELS, Pieces of gold coined in the year 1619, with the King's head laureated, which gave them the name of Laurels; the twenty-shilling pieces whereof were marked with XX. The ten-shillings X., and the five-shilling piece with V. *Camd. Annal. Jac.* 1. *MS.*

LAW, Sax. *lag*; Lat. *lex*, from *lego*, or *legendo*, choosing; or rather *à ligando*, from binding.] The rule and bond of men's actions: or it is a rule for the well-governing of Civil Society, to give to every man that which doth belong to him.

Law, in its most general and comprehensive sense, is thus defined by *Blackstone*, in the Commentaries: A Rule of Action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational.—And it is that rule of action which is prescribed by some Superior, and which the Inferior is bound to obey. 1 *Comm. Introd.* § 2.

Laws in their more confined sense, and in which it is the business of works of this nature to consider them, denote the rules, not of action in general, but of *human action* or conduct. And this perhaps (it has been acutely observed) is the only sense in which the word *Law* can be strictly used; for in all cases where it is not applied to Human conduct, it may be considered as a metaphor, and in every instance a more appropriate term (as *quality* or *property*) may be found. When *Law* is applied to any other object than Man, it ceases to contain two of its essential ingredients, *disobedience* and *punishment*. 1 *Comm. Introd.* § 2: and Mr. *Christian*'s note there.

Municipal Law, is by the same great Commentator defined to be—"A rule of civil conduct prescribed by the Supreme Power in a State; commanding what is right, and prohibiting what is wrong."—The latter clause of this sentence seems to Mr. *Christian* to be either superfluous or defective. If we attend to the learned Judge's exposition, perhaps we may be inclined to use the words "*establishing* and *ascertaining* what is right or wrong;" and all cavil or difficulty will vanish. See 1 *Comm. pp.* 43—53.

Every Law may be said to consist of several parts—*Declaratory*; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: —*Directory*; whereby the Subject of a State is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs:—*Remedial*; whereby a method is pointed out to recover a man's private rights or redress his private wrongs:—*Vindicatory*; which imposes the *sanction* whereby it is signified what evil or penalty shall be incurred by such as commit any publick wrongs, and transgress or neglect their duty. See 1 *Comm.* 53.

According to *Bracton*, *Lex est sanctio justa, jubens honesta et prohibens contraria*: And the schoolman says, *Lex humana est quoddam dictamen rationis, quo diriguntur humani actus*. The Law is *rectum*, as it discovers that which is crooked or wrong; and these three qualities are incident to the Law, *viz*. It must be *justa, jubens honesta, prohibens contraria*: And *justa* requires five properties; *possibilis, necessaria, conveniens, manifesta, nullo privato commodo*. 2 Inst. 56, 587.

Laws are arbitrary or positive, and natural; the last of which are essentially just and good, and bind every where and in all places where they are observed: Arbitrary Laws are either concerning such matter as is in itself morally indifferent, in which case both the Law and the matter, and subject of it, is likewise indifferent, or concerning the natural Law itself, and the regulating thereof; and all arbitrary Laws are founded in convenience, and depend upon the authority of the legislative power which appoints and makes them, and are for maintaining public order: those which are natural Laws are from God; but those which are arbitrary, are properly human and positive institutions. *Selden on Fortescue*, *c.* 17.

The Laws of any country began, when there first began to be a State in the land: and we may consider the world as one universal society, and then that Law by which nations were governed, is called *jus gentium*; if we consider the world as made up of particular nations, the Law which regulates the public order and right of them, is termed *jus publicum*; and that Law which determines the private rights of men, is called *jus civile*. *Selden*, ubi supra. See *Montesquieu* on this subject.

No Law can oblige a people without their consent; this consent is either *verbis* or *factis*, *i. e.* it is expressed by writing, or implied by deeds and actions; and where a Law is grounded on an implied assent, *rebus & factis*, it is either Common Law or Custom; if it is universal, it is Common Law; and if particular to this or that place, then it is Custom. 3 *Salk.* 112.

The Law in this land hath been variable; the *Roman* Laws were in use anciently in *Britain*, when the *Romans* had several colonies here, each of which was governed by the *Roman* Laws: afterwards we had the Laws called *Merchenlage*, *West Saxonlage*, and *Danelage*; all reduced into a body, and made one by King *Edw. Confess. Magna Charta*, *c.* 1. & 14: *Camd. Britan.* 94.

At present the Laws of *England* are divided into three parts: 1. The Common Law, which is the most ancient and general Law of the realm, and common to the whole kingdom; being appropriate thereto, and having no dependence upon any foreign Law whatsoever. See title *Common Law*.

2. Statutes or Acts of Parliament, made and passed by the King, Lords, and Commons in Parliament; being a reserve for the Government to provide against new mischiefs arising through the corruption of the times: and by this the Common Law is amended where defective, for the suppression of public evils; though where the Common Law and Statute Law concur or interfere, the Common Law shall be preferred. See title *Statutes*.

3. Particular Customs; but they must be particular, for a general Custom is part of the Common Law of the land. *Co. Lit.* 15, 115. See title *Custom*.

Blackstone divides the Municipal Law of *England* into two kinds, *Lex non scripta*, the unwritten or *Common Law*; and the *Lex scripta*, the written, that is, the *Statute Law*.

The *Lex non scripta*, or unwritten Law, includes not only *general Customs*, or the Common Law properly so called; but also the *particular Customs* of certain parts of the kingdom; and likewise those *particular Laws*, that are by custom observed only in certain courts and jurisdictions. 1 *Comm. Introd.* § 3.

There is another division of our Laws; more large and particular; as into the Prerogative or Crown Law; the Law and Custom of Parliament; the Common Law; the Statute Law; Reasonable Customs; the Law of Arms, War, and Chivalry; Ecclesiastical or Canon Laws; Civil Law, in certain Courts and Cases; Forest Law; the Law of Marque and Reprisal; the Law of Merchants; the Law and Privilege of the Stannaries, &c. But this large division may be reduced to the common division; and all is founded on the Law of Nature and Reason, and the revealed Law of God, as all other Laws ought to be. 1 *Inst.* 11.

The

The Law of Nature is that which God at man's creation infused into him; for his preservation and direction; and this is *lex æterna*, and may not be changed: and no Laws shall be made or kept, that are expresly against the Law of God, written in his Scripture; as to forbid what he commandeth, &c. 2 *Shep. Abr.* 356.

All Laws derive their force *à lege naturæ*; and those which do not, are accounted as no Laws. *Fortescue.* No Law will make a construction to do wrong; and there are some things which the Law favours, and some it dislikes; it favoureth those things that come from the order of nature. 1 *Inst.* 183, 197. Also our Law hath much more respect to life, liberty, freehold, inheritance, matters of record, and of substance; than to chattels, things in the personalty, matters not of record, or circumstances. *Ibid.* 137: 4 *Rep.* 124.

As to the mode of interpreting Laws, see 1 *Comm.* § 2.—Of the general foundation of the Laws of *England, Id.* § 3.—And of the countries subject to the Laws of *England, Id.* § 4.—See also this Dict. titles *Ireland*; *Scotland*; *Plantations*; *Statutes*; *Common Law*; *Canon Law*; *Civil Law*, &c. &c.

Law hath also a special signification, wherein it is taken for that which is lawful with us, and not elsewhere; as tenant by the Curtesy of *England*, is called tenant by the Law of *England*.

LAW OF ARMS, *Lex armorum.*] Is that Law which gives precepts how to proclaim war, make and observe leagues and treaties, to assault and encounter an enemy, and punish offenders in the camp, &c. The Law and Judgment of Arms are necessary between two strange princes of equal power, who have no other method of determining their controversies, because they have no superior or ordinary Judge, but are supreme and public persons; and by the Law of Arms, Kings obtain their rights, rebels are reduced to obedience, and peace is established: but when the Law of Arms and war do rule, the civil Laws are of little or no force. *Treat. Laws* 57.

It is a kind of Law among all Nations, that in case of a solemn war, the Prince that conquers gains a right of dominion, as well as property over the things and persons he has subdued; and it is for this reason, because both parties have appealed to the highest tribunal that can be, *viz.* the trial by Arms and War; wherein the Great Judge and Sovereign of the World, in a more especial manner, seems to decide the controversy. *Hale's Hist. L.* 73, 74.

Common things concerning Arms and War, are under the cognizance of the Constable and Marshal of *England*, 13 *R.* 2. *st.* 1. *c.* 2. See titles *Constable*; *Court of Chivalry.*

*LAW-BOOKS. All books written in the Law are either historical, as the *Year-Books*; explanatory, such as *Staundforde*'s Treatise of the Royal Prerogative; miscellaneous, as the Abridgments of the Law; monological, being on one certain subject, such as *Lambard's* Justice of Peace, &c.—*Fulbeck's Parallel, c.* 3. The books of Reports have such great weight with the Judges, that many of them are as highly valued as the *Responsa Prudentum* among the *Romans*, which were authoritative. *Wood's Inst.* 10.

The decisions of Courts (says *Blackstone*) are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several Courts, but are handed out to public view in the numerous volumes of *Reports* which furnish the Lawyer's library. These Reports are histories of the several Cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides, and the reasons the Court gave for its judgment, taken down in short notes by persons present at the determinations. And these serve as indexes to and also to explain the Records, which always, in matters of consequence and nicety, the Judges direct to be searched.

These Reports are extant in a regular series, from the reign of King *Edward* II. inclusive; and from this time to that of King *Henry* VIII. were taken by the Prothonotaries or Chief Scribes of the Court at the expence of the Crown, and published annually; whence they are known under the denomination of the *Year-Books*. *Blackstone* proceeds to express his wish that this beneficial custom had been continued. He laments the deficiency and inaccuracy of the many Reports from that time to the period in which he wrote; and the neglect of the appointment which King *Jac.* I., at the instance of Lord *Bacon*, made of *two* reporters, with a stipend for that purpose. 1 *Comm. Introd.* § 3.

This evil has however been since, in a great measure, remedied, by a very excellent periodical publication at the end of each Term; now quoted and well known by the name of the *Term Reports*; which contain the determinations in the Court of *K. B.*, commencing with *Michaelmas* Term, 26 *Geo.* 3. *A. D.* 1785; conducted by two private gentlemen, then Students, now at the Bar, and one of them a Member of the Lower House of Legislature. This publication has been followed by others for the Courts of *Chancery* and *C. P.* The public encouragement given to these works, from the accuracy and ability with which they are conducted, seems a more adequate mode of reward than Royal munificence could devise; even in a reign distinguished for the patronage of learning and genius. And there is every reason to expect that a plan so well supported will continue to be adopted as long as it shall please Providence to preserve Law, and the Courts of Law, in *Great Britain*.

Some of the most valuable of the ancient Reports are those published by Lord Chief Justice *Coke*; and these are generally cited, by way of excellence, as *The Reports*; thus, 1 *Rep*: 2 *Rep.* &c. while other Reports are cited by the name of the Reporter, 1 *Ventr*: 1 *Salk.* &c.

Besides the Reporters, there are also other authorities to whom great veneration and respect is paid by the students of the Common Law. Such are *Glanvil*, *Bracton*, *Britton*, *Fleta*, *Hengham*, *Littleton*, *Statham*, *Brooke*, *Fitzherbert*, *Staundforde*, and others of ancient date.—[*Hale*, *Hawkins*, *Foster*, and others of modern date among whom the author of the Commentaries now holds an honourable rank.] Their treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers (according to *Blackstone*) in point of time, whose works are of any intrinsick authority in the Courts of Justice, is Sir *Edward Coke*; commonly called Lord *Coke*, from his having been, as was already mentioned, Lord Chief Justice.—He left four volumes of Institutes; the first being a very extensive comment upon a little excellent

treatise of *Tenures* compiled by Judge *Littleton*, in the reign of *Edward* IV. This is generally called *Coke-Littleton*, (meaning *Coke* upon *Littleton*,) and is so cited by lawyers; or still more usually as *First Institute*. This has been since enlarged by the very learned and laborious notes of Mr. *Hargrave* and Mr. *Butler*; and taken altogether, is a book of the greatest value and highest authority in the Law.

Of late also have appeared a vast variety of *Abridgements* of General Law; and *Systems* of particular branches of it; which, with the *Statutes at Large*, and other publications, swell Lawyers' libraries to a size which they perhaps, as well as their clients, would be glad to see lessened. But the delay imputed to, rather than suffered in, Courts of Justice, and the multiplication of cases and determinations, is a price which every free and opulent commercial nation must pay for the innumerable blessings it enjoys, under such a Government as that long established in this country. See *Montesquieu Spir. of Laws, lib.* vi. *c.* 2.

LAW-DAY, *Lagedayum*.] Called also View of Frankpledge, or Court-Leet; was any day of open court; and commonly used for the Courts of a county or hundred. *Chart.* 39 *Hen.* 3.

LAWING OF DOGS. The cutting off several claws of the fore-feet of dogs in the forest. *Chart. Forest. c.* 6. See *Expeditate*; *Forest*.

LAWLESS-COURT. A Court held on *King's-Hill* at *Rochford* in *Essex*, on *Wednesday* morning next after *Michaelmas*-Day yearly, at cock-crowing; at which Court they whisper and have no candle, nor any pen and ink, but a coal: and he that owes suit or service there, and appears not, forfeits double his rent. This Court is mentioned by *Camden*, who says, that this servile attendance was imposed on the tenants, for conspiring at the like unseasonable time to raise a commotion. *Camd. Britan.* It belongs to the honour of *Raleigh*, and is called Lawless, because held at an unlawful hour; or *quia dicta sine lege*. The title of it is in rhyme, and in the Court Rolls runs thus:

King's-hill *in* Rochford. } ss. *Curia de Domino Rege,*
Dicta sine lege,
Tenta est ibidem
Per ejusdem consuetudinem,
Ante ortum solis
Luceat nisi polus,
Senescallus solus
Nil scribit nisi colis
Toties voluerit
Gallus ut cantaverit,
Per cujus soli sonitus
Curia est summonitus:
Clamat clam pro rege
In curia sine lege,
Et nisi cito venerint
Citius pœnituerint,
Et nisi clam accedant
Curia non attendat,
Qui venerit cum lumine erat in regimine
Et dum sunt sine lumine, capti sunt in crimine,
Curia sine cura.
Jurata de injuria.

Tenta ibidem die Mercurii (ante diem) proximi post festum Sancti Michaelis *anno regni regis, &c.*

LAWLESS MAN, *Exlex*.] An outlaw. *Bract. lib.* 3. *c.* 11.

LAW OF MARQUE, from the Germ. *march*, i.e. *limes*.] Is where they that are driven to it, do take the shipping and goods of that people of whom they have received wrong, and cannot get ordinary justice in another territory, when they can take them within their own bounds and precincts. *Stat.* 27 *Ed.* 3. *st.* 2. *c.* 17.

LAW MARTIAL, See title *Courts Martial*.

LAW MERCHANT, *Lex mercatoria*.] A special law differing from the Common Law of *England*, proper to merchants, and part of the Law of the realm. And the *charta mercatoria*, 13 *Ed.* 1. *stat.* 3, grants this perpetual privilege to merchants coming into this kingdom. See also *Stat.* 27 *Ed.* 3. *st.* 2. *cc.* 2, 13, 17, 19, 20: *Co. Lit.* 182: and this Dict. title *Custom of Merchants*.

LAW PROCEEDINGS, Of all kinds, as writs, processes, pleadings, *&c.* are to be in the *English* language, by *stats.* 4 *Geo.* 2. *c.* 26: 5 *Geo.* 2. *c.* 27. Except known abbreviations and technical terms, *stat.* 6 *Geo.* 2. *c.* 14. See titles *Latin*; *Process*.

LAW SPIRITUAL, *Lex spiritualis*.] The Ecclesiastical Law, allowed by our laws where it is not against the Common Law, nor the statutes and customs of the kingdom: and regularly, according to such Ecclesiastical or Spiritual Laws, the Bishops and other Ecclesiastical Judges proceed in causes within their cognizance. *Co. Lit.* 344. It was also called Law Christian; and, in opposition to it, the Common Law was often called *Lex Terrena, &c.* See titles *Canon Law*; *Courts, Ecclesiastical*.

LAW OF THE STAPLE, (mentioned in *Stat.* 27 *Ed.* 3. *stat.* 2. *c.* 22,) Is the same with Law Merchant. See 4 *Inst.* 237, 238, and this Dict. tit. *Staple*.

LAWNS. See *Cambrick*.

LAWYER, *Legista, Legispiritus, Jurisconsultus*. By the Saxons called *lahman*;] A Counsellor, or one learned in the law. See titles *Barrister*; *Attorney*.

LAY-CORPORATIONS, Are of two sorts, civil and eleemosynary. The civil are such as are erected for a variety of temporal purposes. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he hath directed. See title *Corporation*.

LAY INVESTITURE of BISHOPS. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all Christendom; and this was promiscuously performed by the Laity as well as the Clergy: till at length, it becoming tumultuous, the Emperors and other Sovereigns of the respective kingdoms of *Europe* took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalties, which now began almost universally to be annexed to this spiritual dignity; without which Confirmation and Investiture, the elected Bishops could neither be consecrated nor receive any secular profits. This right was acknowledged in the Emperor *Charlemagne, A. D.* 773, by Pope *Hadrian* I. and the council of *Lateran*, and universally exercised by other Christian princes: but the policy of the Court of *Rome* at the same time began by degrees to exclude the Laity from

any share in these elections, to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the Crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to Bishopricks is said to have been in the Crown of *England*, (as well as other kingdoms in *Europe*,) even in the *Saxon* times; because the rights of Confimation and Investiture were in effect (though not in form) a right of complete donation. But when, by length of time, the custom of making elections by the clergy only was fully established, the Popes began to except to the usual method of granting those Investitures, which was *per annulum et baculum*, by the Prince's delivering to the Prelate a ring, and pastoral staff or crosier; pretending, that this was an encroachment on the Church's authority, and an attempt by these symbols to confer a spiritual jurisdiction: and Pope *Gregory* VII. towards the close of the eleventh century, published a bulle of excommunication against all Princes who should dare to confer Investitures, and all Prelates who should venture to receive them. This was a bold step towards effecting the plan then adopted by the *Roman* see, of rendering the Clergy entirely independent of the civil authority: and long and eager were the contests occasioned by this papal claim. But at length, when the Emperor *Henry* V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring Investitures for the future *per sceptrum*, and not *per annulum et baculum*; and when the Kings of *England* and *France* consented also to alter the form in their kingdoms, and receive only homage from the Bishops for their temporalties, instead of investing them by the ring and crosier; the Court of *Rome* found it prudent to suspend for a while its other pretensions

This concession was obtained from King *Henry* the First in *England*, by means of that obstinate and arrogant prelate Archbishop *Anselm*: but King *John* (about a century afterwards) in order to obtain the protection of the Pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their Prelates, whether Abbots or Bishops: reserving only to the Crown the custody of the temporalties during the vacancy; the form of granting a licence to elect, (which is the original of our *congé d'eslire*,) on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause. This grant was expresly recognized and confirmed in King *John's Magna Carta*, and was again established by statute 25 *Ed.* 3. *st.* 6. § 3.

But by statute 25 *H.* 8. *c.* 20. the ancient right of nomination was, in effect, restored to the Crown. See 1 *Comm.* 377: and this Dict. title *Bishop*.

LAY-FEE, *feodum laicum*.] Lands held in fee of a lay-lord, by the common services to which military tenure was subject; as distinguished from the ecclesiastical holding in *frankalmoign*, discharged from those burdens. *Kennet's Gloss.* See title *Tenures*.

LAYMAN, One that is not of the Clergy; the *Latin* word *Laicus* signifying as much as *popularis*, that which is common to the people, or belongs to the laity. *Lit. Dict.*

LAYSTALL, Sax.] A place to lay dung or soil in.

LAZARETS. Places where quarantine is to be performed, by persons coming from infected countries. Escaping from them, felony without benefit of clergy. See *stats.* 1 *Jac.* 1. *c.* 31: 26 *Geo.* 2. *c.* 6: 29 *Geo.* 2. *c.* 8: and this Dict. title *Plague*.

LAZZI. The *Saxons* divided the people of the land into three ranks; the first they called *Edilingi*, which were such as are now nobility; the second were termed *Frilingi*, from *friling*, signifying that he was born a freeman, or of parents not subject to any servitude, which are the present gentry: and the third and last were called *Lazzi*, as born to labour, and being of a more servile state than our servants, because they could not depart from their service without the leave of the lord; but were fixed to the land where born, and in the nature of slaves: hence the word *lazzi*, or lazy, signifies those of a servile condition. *Nithardus de Saxonibus, lib.* 24.—It is remarkable that the lower class of people, at *Naples*, are called *Lazaroni*.

LEA OF YARN, A quantity of yarn, so called; and at *Kidderminster* it is to contain 200 threads on a reel four yards about. See *stat.* 22 & 23 *Car.* 2. *c.* 8.

LEAD, Stealing of lead affixed to a house, &c. transportation for seven years. 4 *Geo.* 2. *c.* 32. And see *stat.* 29 *Geo.* 2. *c.* 30, and this Dict. titles *Felony*; *Larceny* II.

LEAGUE, An agreement between Princes, &c. Also a measure of way by sea, or an extent of land, containing most usually three miles. Breakers of leagues and truces, how punished for offences done upon the seas. See *stats.* 4 *H.* 5. *c.* 7: 31 *H.* 6. *c.* 4: See titles *Conservator of the Truce*; *Truce*.

LEAK, or LECHE, from Sax. *Leccian*, to let out water.] In the bishoprick of *Durham* is used for a gutter; so in *Yorkshire* any slough or watery hole upon the road is called by this name: and hence the water tub to put ashes in to make a lee for washing of clothes, is in some parts of *England* termed a Leche. *Cowell*.

LEAKAGE, An allowance of twelve *per cent.* to merchants importing wine, out of the Customs; and of two barrels in twenty-two of ale to brewers, &c. out of the duty of Excise. *Merch. Dict.*

LEAP, A net, engine or wheel, made of twigs, to catch fish in. *Stat.* 4 & 5 *W.* & *M.* *c.* 23. See *Lepa*.

LEAP-YEAR. See titles *Bissextile*; *Year*.

LEASE,

FROM *locatio*, letting; otherwise called a *Demise*, *dimissio*, from *dimittere* to depart with.] A letting of lands, tenements or hereditaments to another for term of life, years, or at will, for a rent reserved. *Co. Lit.* 43.

A Lease is properly a conveyance of any lands or tenements, usually in consideration of rent, or other annual recompence, made for life, for years, or at will; but always for a less time than the Lessor hath in the premises; for if it be for the whole interest it is more properly an assignment, than a Lease. He that letteth is called the *Lessor*, and he to whom the lands, &c. are let, is called the *Lessee*. *Shep. Touchst.* *c.* 14: 2 *Comm.* *c.* 20.

A Lease for years is also thus defined: A contract between Lessor and Lessee for the possession and profit of lands, &c. on the one side, and a recompence for rent or other income on the other. *Bac. Abr.* title *Leases*.

 This

This word is also sometimes, though improperly, applied to the estate, *i. e.* the title, time, or interest the Lessee hath in the thing demised; and then it is rather referred to the thing taken or had, and the interest of the taker therein; but it is more accurately applied rather to the manner or means of attaining or coming to the thing letten. See *Shep. Touchst. c.* 14.

The usual words of operation in a Lease are "Demise, grant, and to farm let,—*dimisi, concessi, & ad firmam tradidi.*"—*Farm* or *feorme*, is an old *Saxon* word signifying provisions. *Spelm. Gloss.* 229. And it came to be used instead of rent or render, because antiently the greater part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent; so that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*; though at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held, upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created either in corporeal or incorporeal hereditaments; though livery of seisin is indeed incident and necessary to one species of Leases, *viz.* Leases for life of corporeal hereditaments, but to no other.

Whatever restriction, by the severity of the feudal law, might in times of very high antiquity, be observed with regard to Leases; (see title *Tenures*;) yet by the Common Law, as it has stood for many centuries, all persons seised of any estate might let Leases to endure so long as their own interest lasted, but no longer. Therefore Tenant in fee-simple might let Leases of any duration, for he hath the whole interest; but tenant in tail, or tenant for life, could make no Leases which should bind the issue in tail or reversioner; nor could a husband, seised *jure uxoris*, make a firm or valid Lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make Leases of equal duration with those granted by tenants in fee-simple; such as parsons and vicars with consent of the patron and ordinary. *Co. Litt.* 44. So also bishops and deans, and such other sole ecclesiastical corporations as are seised of the fee-simple of land in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made Leases for years, or for life, estates in tail, or in fee, without any limitation or control. And corporations aggregate might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by several statutes, this power where it was unreasonable, and might be made an ill use of, is restrained; and, where in the other cases the restraint by the Common Law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*; the latter, the *enabling* statute. 2 *Comm. c.* 20. See *post* II.

Having premised thus much, the further information on this subject may be thus conveniently classed:

I. *Of Leases in general; by Persons enabled to make them at Common Law.*
   1. *Of the Nature of a Lease, and Leasehold Estate, and the Construction of Words in granting thereof.*
   2. *By whom Leases may be granted; and herein shortly of Leases made by virtue of* Powers.—[See also this Dictionary, title *Power.*]
   3. *Of Covenants in Leases, and how far Assignees are affected by them.*—[See also this Dictionary, titles *Covenant*; *Assignment.*]
   4. *Of the Expiration of Leasehold Tenures, and of Notice to Tenants to quit.*—[See also this Dictionary, title *Ejectment.*]

II. *Of Leases under the enabling and restraining Statutes.*

III. *Of Acceptance of Rent.*
   1. *Where it shall* } *confirm a Lease, &c.*
   2. *Where it shall not* }

For other matters relative to Leases, see particularly *Bac. Abr.* title "*Leases and Terms for Years,*" recommended by *Blackstone* to particular notice. See also *Shep. Touchst. c.* 14; and this Dictionary, titles *Rent*; *Deed*; and the other titles above referred to. See the *stats.* 4 *Geo.* 2. *c.* 28: 11 *Geo.* 2. *c.* 19, under title *Rent.*

I. 1. A Lease may be made either in writing or by word of mouth: it is sometimes made and done by record, as *Fine, Recovery*, &c. and sometimes and most frequently by writing, called a *Lease* by Indenture; albeit, it may be also made by deed-poll; and sometimes also it is (as it may be of land or any such like thing grantable without deed for life, or never so many years) by word of mouth, without any writing; and then it is called a *Lease-parol. Shep. Touchst. c.* 14.—But by the statute of frauds, *stat.* 29 *C.* 2. *c.* 3, Leases of lands must be in writing, and signed by the parties themselves, or their agents duly authorized, otherwise they will operate only as Leases at Will; *except* Leases not exceeding three years.

A parol agreement to lease lands for four years creates only a tenancy at will. 4 *Term Rep.* 680.

A Lease may be made by all the ways above mentioned, either for life, for years, or at will.—For life; as for life of the Lessee, or another, or both.—For years, *i. e.* for a certain number of years, as 10, 100, 1000, or 10,000 years, months, weeks, or days, as the Lessor and Lessee do agree. And then the estate is properly called a term for years; for this word *term* doth not only signify the limits and limitation of time, but also the estate and interest that doth pass for that time. These Leases for years do some of them commence *in præsenti*, and some *in futuro* at a day to come; and the Lease that is to begin *in futuro* is called an *interesse termini*, or future interest.—At will; *i. e.* when a lease is made of land to be held at the will and pleasure of the Lessor and Lessee together; and such a Lease may be made by word of mouth, as well as the former. *Sheph. Touchst. c.* 14.

If the Lease be but for half a year, or a quarter, or any less time, this Lessee is respected as a tenant for years, and is stiled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of. *Litt.* § 58.

These estates for years were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the Lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent

permanent interest granted them, not determinable at the will of the Lord; and yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the Lord, who were to receive and account for the profits at a settled price, than as having any property of their own; and, therefore, they were not allowed to have a freehold estate; but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the Lord and his other creditors, and were entitled to the stock upon the farm. The Lessee's estate might also, by the ancient law, be at any time defeated by a common recovery, suffered by the tenant of the freehold, which annihilated all Leases for years then subsisting; unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those Leases were granted. *Co. Litt.* 46.

While estates for years were thus precarious, it is no wonder that they were usually very short, like the modern Leases upon rack-rent; and, indeed, we are told, that by the ancient law no Leases for more than forty years were allowable; because any longer possession (especially when given without any livery, declaring the nature and duration of the estate) might tend to defeat the inheritance. *Mirr. c.* 2. § 27: *Co. Litt.* 45, 6. Yet this law, if ever it existed, was soon antiquated: for we may observe, in *Madox*'s collection of ancient instruments, some Leases for years of a pretty early date, which considerably exceed that period; and long terms for three hundred or one thousand years were certainly in use in the time of *Edward* III, and probably of *Edward* I. But certainly when by the *stat.* 21 *Hen.* 8. *c.* 5, the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages; continuing subject however to the same rules of succession, and with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord. 2 *Comm. c.* 9.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years, and therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined; for every such estate must have a certain beginning and certain end. *Co. Litt.* 45. But *id certum est, quod certum reddi potest*: therefore, if a man make a Lease to another, for so many years as *J. S.* shall name, it is a good Lease for years; for though it is at present uncertain, yet when *J. S.* hath named the years, it is then reduced to a certainty. 6 *Rep.* 35. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery of the Lease. *Co. Litt.* 46. A Lease for so many years as *J. S.* shall live, is void from the beginning; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the Lease. *Co. Lit.* 45. And the same doctrine holds if a parson make a Lease of his glebe, for so many years as he shall continue parson of *Dale*, for this is still more uncertain. But a Lease for twenty or more years if *J. S.* shall so long live, or if he should so long continue parson, is good; for there is a certain period fixed, beyond which it cannot last, though it may determine sooner on the death of *J. S.* or his ceasing to be parson there. *Co. Litt.* 45.

If a parson makes a Lease of his glebe for three years, and so from three years to three years, so long as he shall be parson, it is a good Lease for six years, if he continue parson so long. 6 *Rep.* 35: 3 *Cro.* 511.

The law reckons an estate for years inferior in interest, as compared to an estate for life, or an inheritance; an estate for life, even if it be *pur auter vie*, is a freehold; but an estate for a thousand years is only a chattel, and reckoned part of the personal estate. *Co. Litt.* 45. Hence it follows, that a Lease for years may be made to commence *in futuro*, though a Lease for life cannot. As if one grants lands to another to hold from *Michaelmas* next for twenty years, this is good; but to hold from *Michaelmas* next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*, because it cannot be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter. 5 *Rep.* 94. And because no livery of seisin is necessary to a Lease for years, such Lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare Lease vest any estate in the Lessee; but only gives him a right of entry on the tenement, which right is called, as has been already remarked, *his interest in the term*, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then and not before vested in him, and he is *possessed*, not properly of the land, but of the term of years; the possession or seisin of the land remaining still in him who hath the freehold. *Co. Litt.* 46. Thus the word *term* does not merely signify the time specified in the Lease, but the estate also and interest that passes by that Lease; and therefore the *term* may expire, during the continuance of the *time*, as by surrender, forfeiture, and the like. For which reason, if one grant a Lease to *A.* for the term of three years, and after the expiration of the said term, to *B.* for six years, and *A.* surrenders or forfeits his Lease at the end of *one year*, *B*'s interest shall immediately take effect; but if the remainder had been to *B.* from and after the expiration of the said *three years*, or from or after the expiration of the said *time*, in this case *B*'s interest will not commence till the time is fully elapsed, whatever may become of *A*'s term. *Co. Litt.* 45.

Generally, to the making of a good Lease several things necessarily concur; there must be a Lessor not restrained from making a Lease; a Lessee not disabled to receive; a thing demised which is demisable, and a sufficient description of the thing demised, &c. If it be for years, it must have a certain commencement and determination; it is to have all the usual ceremonies, as sealing, delivery, &c. and there must be an acceptance of the thing demised. *Litt.* § 56: 1 *Inst.* 46: *Plowd.* 273, 523. Whether any rent be reserved upon a Lease for life, years, or at will, or not, is not material, except only in the cases of Leases made by tenant in tail, husband and wife, and ecclesiastical persons under *stat.* 32 *H.* 8. *c.* 28. (See *post* II.) *Sheph. Touchst. c.* 14.

A freehold Lease for three lives, differs from a chattel Lease only in this, *viz.* That the *habendum* is to the Lessee,

Leſſee, his heirs and aſſigns, for and during the natural lives of him the ſaid *C. D. E.* his wife, and *T. D.* his ſon, and during the life natural of every and either of them longeſt living. And in every covenant, the Leſſee covenants for himſelf, his heirs and aſſigns; and the covenants are the ſame as in a chattel Leaſe; with the addition of a letter of attorney at the end, to deliver poſſeſſion and ſeiſin, as in a deed of feoffment. *Dict.*

A demiſe having no certain commencement is void; for every contract ſufficient to make a Leaſe ought to have certainty in commencement, in the continuance, and in the end. *Vaugh.* 85: 6 *Rep.* 35. A Leaſe at will, is at the will of the Leſſor or Leſſee; or regularly at the will of both parties. 1 *Inſt.* 55.

Leaſes exceeding three years muſt be made in writing; and if the ſubſtance of a Leaſe be put in writing, and ſigned by the parties, though it be not ſealed, it ſhall have the effect of a Leaſe for years, &c. *Wood's Inſt.* 266. But a Leaſe in writing, though not under ſeal, cannot be given in evidence, unleſs it be ſtamped. 1 *Term Rep.* 735 Articles with covenants to let and make a Leaſe of lands, for a certain term, at ſo much rent, hath been adjudged a Leaſe. *Cro. Eliz.* 486. In a covenant with the words 'have, poſſeſs and occupy lands, in conſideration of a yearly rent, without the word demiſe,' it was held a good Leaſe: and a licence to occupy, take the profits, &c. which paſſeth an intereſt, amounts to a Leaſe. 3 *Bulſt.* 204: 3 *Salk.* 223. An agreement of the parties, that the Leſſee ſhall enjoy the lands, will make a Leaſe; but if the agreement hath a reference to the Leaſe to be made, and implies an intent not to be perfected till then, it is not a perfect Leaſe until made afterwards. *Bridg.* 13: 2 *Shep. Abr.* 374. If a man, on promiſe of a Leaſe to be made to him, lays out money on the premiſes, he ſhall oblige the Leſſor afterwards to make the Leaſe; the agreement being executed on the Leſſee's part, where no ſuch expence hath been, a bare promiſe of the Leaſe for a term of years, though the Leſſee have poſſeſſion, ſhall not be good without ſome writing. *Preced. Can.* 561. See title *Agreement*.

A paper containing words of preſent contract, with an agreement that the Leſſee ſhould take poſſeſſion immediately, and that a Leaſe ſhould be executed in future, operates only as an agreement for a Leaſe, and not as a Leaſe itſelf. 1 *Term Rep.* 735.

An inſtrument on an agreement-ſtamp reciting that *A*, in caſe he ſhould be entitled to certain copyhold premiſes on the death of *B.* would immediately demiſe the ſame to *C*; declaring, that he did thereby agree to demiſe and let the ſame, with a ſubſequent covenant to procure a licence to let, from the Lord, operates as an agreement for a Leaſe, and not as an abſolute demiſe. 2 *Term Rep.* 739.

Words in an agreement that *A.* ſhall hold and enjoy, &c. if not accompanied with reſtraining words, operate as words of preſent demiſe; otherwiſe, if they be followed by others, which ſhow that the parties intended that there ſhould be a Leaſe in future. The whole muſt depend on the intention of the parties. 5 *Term Rep.* 163.

Theſe words in an inſtrument, "Be it remembered that *I. B.* hath let, and by theſe preſents doth demiſe, &c." held to operate as a preſent demiſe, although the inſtrument contained a further covenant for a future Leaſe. 5 *Term Rep.* 165.

Though a Leaſe for life cannot be made to commence *in futuro*, by the common law, becauſe livery cannot be made to a future eſtate, yet where a Leaſe is made for life, *habendum* at a day to come, and after the day the Leſſor makes livery, there it ſhall be good: and a Leaſe in reverſion may be made for life, which commences at a day that is future. 5 *Rep.* 94: *Hob.* 314: 1 *Inſt.* 5. A Leaſe for years may begin from a day paſt, or to come, at *Michaelmas* laſt, *Chriſtmas* next, three or four years after, or after the death of the Leſſor, &c. though a term cannot commence upon a contingency which depends on another contingency. 1 *Inſt.* 5: 1 *Rep.* 156. If one make a Leaſe for years, after the death of *A. B.* if he die within ten years, this is a good leaſe, in caſe he dies within that time, otherwiſe not. *Plowd.* 70. And where a man has a leaſe of lands for eighty years, and he grants it to another to hold for thirty years, to begin after his death, it will be good for the whole thirty years, provided there be ſo many of the eighty to come at the time of the death of the Leſſor. *Bro. Grant*, 54: 1 *Rep.* 155. A Leaſe made from the Leſſor's death, until a certain year, (*i. e.* A. D. 1800,) is good: and if a Leaſe be during the minority of *J. S.* or until he ſhall come to the age of twenty-one years, theſe are good Leaſes; and if he dies before his full age, the Leaſe is ended. *Hob.* 155. A perſon grants a rent of 20*l.* a year, till an hundred pounds be paid, it is a Leaſe of the rent for five years. *Co. Lit.* 42. If a man makes a Leaſe of land to another, until he ſhall levy out of the profits one hundred pounds, or he is paid that ſum, &c. this will be a Leaſe for life, determinable on the payment of the hundred pounds, if livery and ſeiſin be made; but if there is no livery, it will not be good for years, but void for incertainty. 21 *Aſſiſ.* 18: *Plowd.* 27: 6 *Rep.* 35. See *Livery of Seiſin*.

A Leaſe for years to ſuch perſon as *A. B.* ſhall name, is not good; though it may be for ſo many years as he ſhall name, not as ſhall be named by his executors, &c. for it muſt be in the life-time of the parties. *Hob.* 173: *Moor.* 911.

If one makes a Leaſe for a year, and ſo from year to year, it is a Leaſe for two years; and afterwards it is but an eſtate at will. 1 *Mod.* 4: 1 *Lutw.* 213. And if from three years to three years, it is a good Leaſe for ſix years; alſo if a man make a Leaſe for years, without ſaying for how many, it may be good for two years, to anſwer the plural number. *Wood's Inſt.* 265.

Leaſe for one year, and ſo for two or three years, or any further term of years, as Leſſor and Leſſee ſhall think fit and agree, after the expiration of the ſaid term of one year; this is a good Leaſe for two years; and after every ſubſequent year begun, is not determinable till that be ended. 1 *Wilſ. part* 1. *p.* 262. But if the original contract were only for a year, or if it were at ſo much *per ann.* rent, without mentioning any time certain, it would be a tenancy at will after the expiration of the year; unleſs there were ſome evidence by a regular payment of rent annually or half yearly, that the intent of the parties was that he ſhould be tenant for a year. *Bull. N. P.* 84. (2d edit.)

A Leaſe in 1785 for three, ſix, or nine years, determinable in 1788, 91, 94, is a Leaſe for nine years, determinable at the end of three or ſix years, by either of the parties on giving reaſonable notice to quit. 3 *Term Rep.* 463.

If

If a tenant from year to year hold for *four* or *five* years, either he or his landlord, at the expiration of that time, may declare on the demise as having been made for such a number of years. 1 *Term Rep.* 380: See *Salk.* 414.

In case of a tenancy from year to year, as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land which the Intestate had. 3 *Term Rep.* 13.

A Lessee hath a term for a year by parol, and so from year to year, so long as both parties please; if the Lessee enters on a second year, he is bound for that year, and so on: and if there is a Lease by deed for a year, and so from year to year as long as both parties agree, this is binding but for one year; though if the Lessee enters upon the second year, he is for that year bound: if it is for a year, and so from year to year, so long as both parties agree, till six years expire; this is a Lease for six years, but determinable every year at the will of either party: but if it is for a year, and so from year to year till six years determine, this is a certain Lease for six years. *Mod. Ca.* 215. If *A.* make a Lease of land to *B.* for ten years, and it is agreed between them, that he shall pay fifty pounds at the end of the said term, and if he do so, and pay fifty pounds at the end of every ten years, then the said *B.* shall have a perpetual demise and grant of the lands, from ten years to ten years continually following, *extra memoriam hominum*, &c. Though this be a good Lease for the first ten years, as for all the rest, it is incertain and void: by covenant a further Lease may be made for the like term of years. *Plowd.* 192: 2 *Shep Abr.* 376.

A. and *B.* covenant in a Lease for sixty-one years, "that at any time within one year after the expiration of twenty years of the said term of sixty-one years, upon the request of the Lessee, and his paying 6*l.* to the Lessors, they would execute another Lease of the premises unto the Lessee, for and during the further term of twenty years, to commence from and after the expiration of the said term of sixty-one years: and so in like manner, at the end and expiration of every twenty years, during the said term of sixty-one years, for the like consideration, and upon the like request, would execute another Lease for the further term of twenty years, to commence at and from the expiration of the term then last before granted." Under this covenant the Lessee cannot claim a further term of twenty years after the end of the Lease; if he has omitted to claim a further term at the end of the first and second twenty years in the Lease. 1 *Term Rep.* 229.

A Lease made to a man for seven years, if *D.* shall live so long, who is dead when the Lease is made; by this the Lessee hath an absolute Lease for seven years. 9 *Rep.* 63. Lease for life is granted, and says, that if the Lessee within one year do not pay 20*s.* then he shall have but a Lease for two years; here, if he pays not the money, he shall have only the two years, although livery of seisin be had thereon. 1 *Inst.* 218. If a Lease be made to *A. B* during his own life, and the lives of *C.* and *D.* it is one entire estate of freehold, and shall continue during the three lives, and the life of the survivor of them; and though the Lessee can have it no longer than his own life, yet his assignee shall have the benefit of it so long as the other two are living. 5 *Rep.* 13: *Moor.* 32. Where one grants land by Lease to *A. B.* and *C. D.* to hold to them during their lives, although the words 'and the longest liver of them' be omitted, they shall hold it during the life of the longest liver. 5 *Rep.* 9. A Lease is made to a person for sixty years, if *A. B.* and *C D.* so long live; and afterwards *A. B.* dies, by his death the Lease is determined. Though if the Lease be made to one for the lives of *A. B.* and *C. D.* the freehold doth not determine by the death of one of them; and if in the other case of a term, the words or 'either of them' be inserted in the Lease, it will be good for both their lives. 13 *Rep.* 66.

A Lease was made to a man for ninety-nine years, if he should so long live; and if he died within the term, the son to have it for the residue of the term: this was adjudged void as to the son, because there can be no limitation of the residue of a term which is determined. *Cro. Eliz.* 216. But if the words of the Lease be, to hold during the residue of the ninety-nine years, and not during the rest of the term, in this case it may be good to the son also. 1 *Rep.* 153: *Dyer* 253.

A Lease was made for twenty-one years, if the Lessee lived so long, and in the service of the Lessor; the Lessor died within the term, and yet it was held that the Lease continued, for it was by the act of God that the Lessee could serve no longer. *Cro. Eliz.* 643.

If a Lease be to a man, and to her whom he shall take to wife, it is void; because there ought to be such persons at the time of the commencement of the Lease which might take. 4 *Leon.* 158. When a Lease in reversion is granted as such after another Lease, and that Lease is void by rasure, &c. the reversionary Lease, expectant upon the Lease for years that is void, is void also. *Cro. Car.* 289. But where a man recites a Lease, when in truth there is no Lease; or a Lease which is void, and misrecites the same in a point material, and grants a further Lease to commence after the determination thereof; in such case the new Lease shall begin from the time of delivery. *Dyer* 93: 6 *Rep.* 36: *Vaugh.* 73, 80, &c.

A man makes a Lease for years to one, and afterwards makes a Lease for years to another, of the same land; the second Lease is not void; but shall be good for so many years thereof, as shall come after the first Lease ended. *Noy's Max.* 67. And if one make a Lease for years, and afterwards the Lessor enters upon the lands let, before the term is expired, and makes a Lease of these lands to another; this second Lease is a good Lease until the Lessee doth re-enter: and then the first Lease is revived, and he is in thereby. 2 *Lill. Abr.* 152. It hath been held, that a Lease may be void as to one, and stand good to another; and Leases voidable, or void for the present, may after become good again. 1 *Inst.* 46: 3 *Rep.* 51. If a Lease be made to two, to hold to them and two others, it is voidable as to the two other persons; and when the two first die, the Lease is at an end. 2 *Leon.* 1.

A Lease which is only voidable, and not absolutely void, must be made void by the Lessor by re-entry; but if a Lease be void absolutely there needs no re-entry; and as a voidable Lease is made void by re-entry, and putting out the Lessee; so it is affirmed by accepting and receiving the rent which acknowledges the Lessee to be tenant. 21 *Car. B. R*: 2 *Lil.* 149. And where a Lessee

for

for years accepts of a less term from the Lessor, even by word, it is said this is a surrender of the term which he had by deed. *Style* 448.

When a term for years in lease, and a fee-simple, meet in one person, the Lease is drowned in the inheritance; yet in some cases it may have continuance, to make good charges and payments, *&c. Poph.* 39: 2 *Nels. Abr.* 1100. If a Lease for years is made to a man and his heirs, it shall go to his executors. 1 *Inst.* 46, 388. And a Lease for years, notwithstanding it be a very long Lease, cannot be intailed by deed; but may be assigned in trust, to several uses. 2 *Lil. Abr.* 150. A Lease is sealed by the Lessor, and the Lessee hath not sealed the counterpart, action of covenant may be brought upon the Lease against the Lessor: but where the Lease is sealed by the Lessee, and not the Lessor, nothing operates. *Yelv.* 18. *Owen* 100.

A man out of possession cannot make a Lease of lands, without entering and sealing the Lease upon the land. *Dalis.* 81. The Lessee is to enter on the premises let; and such Lessee for years is not in possession, so as to bring trespass, *&c.* until actual entry; but he may grant over his term before entry. 1 *Inst.* 46: 2 *Lil.* 160. If a Lessee of a future interest never enters by virtue of his term, but enters before, and continues after the commencement of the term; and then the Lessor ousts him, the Lessee may assign over his term off the land. 1 *Lev.* 47. But a Lease to begin at *Michaelmas*, if the Lessee enters before *Michaelmas*, and continues the possession immediately, is a disseisin. *Ibid.* 46.

If a Lease be made of a close of land, by a certain name, in the parish of *A.* in the county of *B.* whereas the close is in another county, the said parish extending into both counties, such a Lease is good to pass such land: though where a house is leased without a name, and the parish is mistaken, it hath been held otherwise. *Dyer* 276, 292. Land and mines are leased to a tenant; this only extends to the open mines, and the Lessee shall not have any others, if there are such: and if land and timber are demised, the Lessee is not empowered to sell it. 2 *Lev.* 184: 2 *Mod* 193. A man makes a Lease of lands for life, or years, the Lessee hath but a special interest in the timber trees, as annexed to the land, to have the mast and shadow for his cattle; and when they are severed from the lands, or blown down with wind, the Lessor shall have them as parcel of his inheritance. 4 *Rep.* 62: 11 *Rep.* 81.

A demise of premises in *Westminster*, late in the occupation of *A.* particularly describing them, part of which was a yard, does not pass a cellar situate under that yard, which was then in the occupation of *B.* another tenant of the Lessor: and the Lessor in an ejectment brought to recover the cellar, is not estopped by his deed from going into evidence, to show that the cellar was not intended to be demised. Whether parcel or not of the thing demised is always matter of evidence. 1 *Term Rep.* 701.

Declarations by tenants are admissible evidence after their death, to show that a certain piece of land is parcel of the estate which they occupied; and proof that they exercised acts of ownership in it, not resisted by contrary evidence, is decisive. 2 *Term Rep.* 53.

If Lessee for years loses his Lease, if it can be proved that there was such a term let to him by Lease, and that is not determined, he shall not lose his term; so it is of any other estate in lands, if the deed that created it be lost, for the estate in the land is derived from the party that made it, and not from the deed otherwise than instrumentally and declarative of the mind and intent of the party, *&c.* 2 *Lill. Abr.* 152. If a person be in possession of the lands of another, and hath usually paid rent for them; the proof of a quarter or half year's rent paid, will be good evidence of a Lease at will; though it cannot be expresly proved that the lands were demised at will to him in possession, it shall be presumed the rent was received by the owner of the land upon some private contract. *Ibid.* 151.

2. He that is seised of an estate for life, may make a Lease for his life according as he is seised; also he may make a Lease for years of the estate, and it shall be good as long as the estate for life doth last: one possessed of lands for years, may make a Lease for all the years, except one day, or any short part of the term; and if Lessee for years makes a Lease for life, the Lessee may enjoy it for the Lessor's life, if the term of years lasts so long; but if he gives livery and seisin upon it, this is a forfeiture of the estate for years. *Wood's Inst.* 267. If tenant in tail or for life make a Lease generally, it shall be construed for his own life. 1 *Inst.* 42.

By various acts of parliament, and also by private settlements, a power is granted of making Leases *in possession*, but not in reversion for a certain time; the object being that the estate may not be incumbered, by the act of the party, beyond a specific time. Yet persons who had this limited power of making in possession only, had frequently demised the premises to hold *from the day of the date*; and the Courts in several instances had determined, that the words 'from the day of the date,' excluded the day of making the deed: and that in consequence these were Leases in reversion, and void; but this question having been brought again before the Court of *B. R.* it was determined, that the words 'from the day' might either be inclusive or exclusive; and therefore that they ought to be construed so as to effectuate these important deeds, and not to destroy them. *Pugh* v. *Leeds*, (*Duke*,) *Cowp.* 714: and see *Dougl.* 53, 185, *in notis.*

The Lease of a tenant for life who has power of leasing under certain conditions, must strictly comply with the conditions; and if it vary from them in the interest demised, or the rent reserved, it cannot be supported against the remainder-man. 5 *Term Rep.* 567.

Of all kinds of powers the most frequent is that to make Leases. In the making such Leases all the requisites particularly specified in the power, must be strictly observed; and such Leases must contain all such beneficial clauses and reservations as ought to be, for the benefit of the remainder-man; the principle being, that the estate must come to him in as beneficial a manner as the ancient owners held it. See 1 *Burr.* 120, and this Dictionary, title *Power*.—If a man hath power to Lease for ten years and he leaseth for *twenty*, the Lease shall be good in equity for ten years. 1 *Ch. Ca.* 23. See further *Shep. Touchst. c.* 14, *in n.*

A Lease executed by the tenant for life, in which the reversioner who was then under age is named, but who does not execute the Lease, is void on the death of the tenant for life; and an execution by the reversioner only after-

afterwards is no confirmation of it, so as to bind the Lessee in an action of covenant. 1 *Term Rep.* 86.

Under the settlement of an estate with a power to the tenant in possession to let all or any part of the premises, so as the usual rents be reserved, a Lease of tithes which had not been let before was held void. In these cases the intention of the parties is to govern the Court in construing the power. 3 *Term Rep.* 665.

Where tenant for life has a power "to grant Leases in possession, but not by way of reversion or future interest," a Lease *per verba de presenti* is not contrary to the power; though the estate at the time of making the Lease was held by tenants at will, or from year to year; if, at the time, they received directions from the grantor of the Lease to pay their rent to the Lessee. *Dougl.* 565, *Goodtitle* v. *Funucan*.

Under a power "to lease all manors, messuages, lands, &c. so as there be reserved as much rent as is now paid for the same," such parts of the estates enumerated in the power as have never been demised may be let; but in a family settlement of an estate consisting of some ground always occupied with the family seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, "that the ancient rent must be reserved," excludes the mansion-house and lands about it never let. *Dougl.* 565—9, 574.

Under a power to a tenant for life to lease for years, reserving the usual covenants, &c. a Lease made by him containing a proviso that in case the premises were blown down or burned, the Lessor should rebuild, otherwise the rent should cease, is void, the Jury finding that such covenant is unusual. 1 *Term Rep.* 705.

If an *Infant* be seised of land in fee-simple, and he make a Lease for years of it, rendering no rent, this Lease is void; but if there be a rent reserved upon the Lease, then the Lease is but voidable, and may, by the acceptance of the rent by the infant after his full age, be made good. *Sheph. Touchst. c.* 14, cites 9 *H.* 7. 24: 18 *E.* 4. 2: *Plowd.* 545. In 3 *Burr.* 1806, it is said to have been long settled, that an infant may make a Lease without rent, to try his title: and that all Leases by an infant, whether with or without rent, if made by deed, are voidable only. See this Dictionary, title *Infant*; and *Bac. Abr.* title *Leases* B.

If a tenant hold under an agreement for a Lease at a yearly rent, by which it is stipulated that the agreement shall continue for the life of the Lessor, and that a clause shall be inserted in the Lease, giving the Lessor's son power to take the house for himself when he came of age, the son must make his election in a reasonable time after he comes of age. The delay of a year is unreasonable, and the tenant cannot be ejected upon half a year's notice to quit, served after such a delay: but if the son had elected within a week or a fortnight, that would have been reasonable. 2 *Term Rep.* 436.

By *stat.* 29 *Geo.* 2. *c.* 31, *Infants*, *Lunaticks*, and *Femes covert*, may apply to the Courts of Chancery or Exchequer, or to the Courts of Equity of the counties palatine of *Chester*, *Lancaster*, and *Durham*, or to the Courts of Great Session of *Wales*, by petition or motion in a summary way, and by the order of those Courts respectively, such persons may by deed only, without levying a fine, surrender Leases for lives or years, and take new Leases for lives or years of the premises comprised therein.

Joint-tenants, tenants in common, and coparceners, may make Leases for life, years, or at will, of their own parts, which shall bind their companions; and in some cases, persons who are not seised of lands in fee, &c. may make Leases for life or years, by special power enabling them to do it; when the authority must be exactly pursued. *Wood's Inst.* 267. But there is a difference, where there is a general power to make Leases, and a particular power. See *ante*, & 8 *Rep.* 69.

If *Joint-tenants* join in a Lease, this shall be but one Lease, for they have but one freehold; but if tenants in common join in a Lease, it shall be several Leases of their several interests. 2 *Ro. Ab.* 64: *Com. Dig.* title *Estates* (G. 6.): *Bac. Abr. Leases* (I. 5.)

3. A Lessor who hath the fee cannot reserve rent to any other but himself, his heirs, &c. And if he reserves a rent to his executors, the rent shall be to the heir, as incident to the reversion of the land. 1 *Inst.* 47. The Lessor may take a distress on the tenements let for the rent; or may have action of debt for the arrears, &c. Also land leased shall be subject to those lawful remedies which the Lessor provides for the recovery of his rent, possession, &c. into whose hands soever the land comes. *Cro. Jac.* 300.

If an house falls down by tempest, &c. the Lessee hath an interest to take the timber to re-edify it for his habitation. 4 *Rep.* 63.

Tenants suffering houses to be uncovered, or in decay; taking away wainscot, &c. fixed to the freehold, unless put up by the Lessee, and taken down before the term is expired; cutting down timber-trees to sell; permitting young trees to be destroyed by cattle, &c. ploughing up ground that time out of mind hath not been ploughed; not keeping banks in repair, &c. are guilty of waste. 1 *Inst* 52: *Dyer* 37: 1 *Salk.* 368.

Lessees are bound to repair their tenements, except it be mentioned in the Lease to the contrary. Though a Lessee for years is not obliged to repair the house let to him which is burnt by accident; if there be not a special covenant in the Lease, that he shall leave the house in good repair at the end of the term: yet if the house be burnt by negligence, the Lessee shall repair it, although there be no such covenant. *Pasch.* 24 *Car. B. R.* A Lessee at will is not bound to sustain or repair, as tenant for years is. If the house of such a tenant is burnt down by negligence, action lies not against the tenant; but action lies for voluntary waste, in pulling down houses, or cutting wood, &c. 5 *Rep.* 13. See title *Fire*.

A Lessee who covenants to pay rent and to repair with an exception of casualties by fire, is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the Lessor after notice. 1 *Term Rep.* 310.

A proviso in a Lease for twenty-one years, that the Landlord shall re-enter on the tenant's committing any act of bankruptcy, whereon a commission shall issue, is good. 2 *Term Rep* 133.

The bankruptcy of the Lessee is no bar to an action of covenant (made before his bankruptcy) brought against him for rent due after the bankruptcy. 4 *Term Rep.* 94.

Though a bankrupt cannot give a lien on any particular goods, yet he may take a demise, and agree that the rent shall be payable on a particular day; *e.g.* he may

agree to pay half a year's rent in advance; where, by the custom of the country, half a year's rent becomes due on the day on which a tenant enters. And in this case the law gives the landlord a power of distraining on that day. 2 *Term Rep.* 600. See this Dictionary, titles *Rent*; *Distress*.

A covenant in a Lease that the Lessee, his executors and administrators, shall constantly reside on the demised premises during the demise, is binding on the assignee of the Lessee, though he be not named. 2 *H. Black. Rep. C. P.* 133.

If both Lessee and Lessor sign a Lease, the Lessee is estopped from pleading *nil habuit in tenementis*, to an action of debt for rent by the Lessor. 6 *Term Rep.* 62.

Covenant will lie against an original Lessee, before he takes actual possession; and so before actual possession against an assignee, under an absolute indefeasible assignment of the whole interest in the term; but not against a mortgagee of the term, even after the mortgage is forfeited, till he takes actual possession. See *Eaton* v. *Jaques*, *Dougl.* 455—461, and the notes there.

Under a proviso that all assignments of a Lease shall be void if not enrolled, Under-Leases are not included; and an Under-Lease is no assignment to the effect of working a forfeiture under a proviso not to assign. *Dougl.* 56, 7, 8, 184. But what cannot be supported as an assignment shall be good as an Under-Lease, against the party granting it. *Dougl.* 188, *in n.*

When the whole term is made over by the Lessee, although in the deed by which that is done, the rent and a power of entry for non-payment is reserved to him and not to the original Lessor, this is an assignment, and not an Under-Lease. *Palmer* v. *Edwards*, *Dougl.* 187, 8, *in n.*

If a Lease contain a proviso that the Lessee, his executors, &c. shall not *set*, *let*, or *assign over* the whole or part of the premises without leave in writing, on pain of forfeiting the Lease; the administratrix of the Lessee cannot *under-let* without incurring a forfeiture, though for less time than the whole term: a parol licence to let part of the premises does not discharge the Lessee from the restriction of such a proviso. 2 *Term Rep.* 425.

A landlord cannot maintain an action of covenant for rent against an under tenant, who holds for a term less than the time granted in the original Lease. *Dougl.* 12, *Holford* v. *Hatch*. But if the whole of a term is made over by the Lessee, although in the deed he reserves the rent, and a power of entry for non-payment to himself and not to the original Lessor; and although he introduce new covenants; the person to whom it is made over may sue the original Lessor or his assignee of the reversion, or be sued by them as assignee of the term, on the respective covenants in the original Lease. *Palmer* v. *Edwards*, *B. R. E.* 23 *Geo.* 3: *Dougl.* 187, 8, *in n.*

An assignee of a bankrupt, a devisee, and a personal representative, are assignees in law to the purpose of being liable to actions on a covenant for rent in a Lease to the bankrupt, devisor, or intestate. *Dougl.* 184. But whether the transfer to them is such an assignment as will occasion a forfeiture under a proviso not to assign, is a much litigated, but as it seems unsettled, question; and it appears that it is not. 3 *Wils.* 237. But see *Dougl.* 184, *in n.*

A Lessee for twenty-one years at a pepper-corn rent for the first half year, and a rack rent for the rest of the term, who by agreement was to put the premises in repair, and covenanted to pay the land-tax, and all other taxes, rates, assessments, and *impositions*, having assigned his term for a small sum in gross, was held not to be liable to pay the expence of a party-wall; either by the provisions of *stat.* 14 *Geo.* 3. *c.* 78, § 41, or by the covenant; but that charge must in such case be borne by the original landlord: for the statute intended to throw that burthen on persons to whom long Leases had been granted, with a view to an improvement of the estate, and who afterwards underlet at a considerable increase of rent. 3 *Term Rep.* 458.

By *stat.* 32 *Hen.* 8. *c.* 34, grantees of reversions have the same remedy against Lessees, their executors, &c. as their grantors had. See title *Covenant* III.

Persons for whose lives estates are held by Lease, &c. remaining beyond sea, or being absent seven years, if no proof be made of their being alive, shall be accounted dead. *St.* 19 *Car.* 2. *c.* 6. See titles *Life-Estate*; *Occupancy*.

4. Lands are leased at will, the Lessee cannot determine his will before or after the day of payment of the rent, but it must be done on that very day; and the law will not allow the Lessee to do it to the prejudice of the Lessor, as to the rent; nor that the Lessor shall determine his will to the prejudice of the Lessee, after the land is sown with corn, &c. *Sid.* 339: *Lev.* 109. For where Lessee at will sows the land, if he does not himself determine the will, he shall have the corn: and where tenant for life sows the corn, and dies, his executors shall have it; but it is not so of tenant for years, where the term ends before the corn is ripe, &c. 5 *Rep.* 116. The Lessor and Lessee, where the estate is at will, may determine the will when they please; but if the Lessor doth it within a quarter, he shall lose that quarter's rent; and if the Lessee doth it, he must pay a quarter's rent. 2 *Salk.* 413. By words spoken on the ground, by the Lessor in the absence of the Lessee, the will is not determined; but the Lessee is to have notice. 1 *Inst.* 55. If a man makes a Lease at will, and dies, the will is determined; and if the tenant continues in possession, he is tenant at sufferance. *Ibid.* 57. But where a Lessor makes an estate at will to two or three persons, and one of them dies, it has been adjudged this doth not determine the estate at will. 5 *Rep.* 10. Tenant at will grants over his estate to another, it determines his will. 1 *Inst.* 57. It hath been said, that where a Lessee for years accepts of a less term from the Lessor even by word, this is a surrender of the term he had by deed. *Sty.* 448. *Sed. q.* No tenant shall take Leases of above two farms, in any town, village, &c. nor hold two unless he dwell in the parish, under penalties and forfeitures, by *stat.* 25 *H.* 8. *c.* 13. § 14. See also *stat.* 21 *H.* 8. *c.* 13. Statutes to which there is not any regard now paid.

Tenant for term of years hath, incident to and inseparable from his estate, unless by special agreement, the same estovers which tenant for life is entitled to; that is to say, house-bote, fire bote, plough-bote, and hay-bote. *Co. Lit.* 45. See titles *Bote*; *Estovers*.

With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him and tenant for life; that where the term of tenant for years depends upon a certainty, as if he holds from *Midsummer* for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before *Midsummer*,

Midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he could never reap the profits of. *Litt.* § 68. But where the Lease for years depends upon an uncertainty, as, upon the death of the Lessor, being himself only tenant for life, or being a husband seised in right of his wife; or if the term of years be determinable upon a life or lives; in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. *Co. Litt.* 56. Not so it it determine by act of the party himself; as if tenant for years does any thing that amounts to forfeiture, in which case the emblements shall go to the Lessor, and not to the Lessee, who hath determined his estate by his own default. *Co. Lit.* 55: and see 2 *Comm.* 144.

Where a Lease came into the hands of the original Lessor by an agreement entered into between him and the assignee of the original Lessee, "that the Lessor should have the premises as mentioned in the Lease, and should pay a particular sum over and above the rent annually, towards the good-will already paid by such assignee," such agreement operates as a surrender of the whole term. 1 *Term Rep.* 441.

If a landlord lease for seven years by parol, and agree that the tenant shall enter at *Lady-day*, and quit at *Candlemas*; though the Lease be void by the statute of *Frauds* as to the duration of the term, the tenant holds under the terms of the Lease in other respects; and therefore the landlord can only put an end to the tenancy at *Candlemas*. 5 *Term Rep.* 471.

Where the term of a Lease is to end on a precise day, there is no occasion for a notice to quit; because the Lease is of course at an end, unless the parties come to a fresh agreement. In the case of a tenancy from year to year, there must be *half a year's* notice to quit ending at the expiration of the year. *Six calendar months* notice is not sufficient. And there is no distinction between houses and lands as to the time of giving notice to quit. 1 *Term Rep.* 54, 159, 162, 3.

Tenant from year to year before a mortgage or grant of the reversion is entitled to six months notice to quit, before the end of the year, from the mortgagee or grantee. 1 *Term Rep.* 380, 2.

Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice to quit as the original Lessor must have given. 3 *Term. Rep.* 159. But ejectment will lie by a mortgagee against a tenant, under a Lease from the mortgagor, made subsequent to the mortgage, without notice to quit. *Dougl.* 21, *Keech* v. *Hall.*

Where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit, to his servant at the dwelling-house, is strong presumptive evidence that the master received the notice; and ought to be left to the Jury. 4 *Term Rep.* 464.

If notice to quit at *Midsummer* be given to a tenant holding from *Michaelmas*, he may insist on the insufficiency of the notice at the trial, though he did not make any objection at the time it was served. 4 *Term Rep.* 361.

II. The *Enabling Statute*, 32 *Hen.* 8. *c.* 28, empowers three manner of persons to make Leases, to endure for three lives, or one and twenty years, which could not do so before. As first, *Tenant in tail* may by such Leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seised in right of his wife, in fee-simple or fee-tail, provided the wife joins in such Lease, may bind her and her heirs thereby. Lastly, all persons seised of an estate of fee-simple in right of their *Churches*, which extends not to parsons and vicars, may (without the concurrence of any other person) bind their successors. But then many requisites must be observed, which the statute specifies; otherwise such Leases are not binding. *Co. Lit.* 44. 1st, The Lease must be by indenture, and not by deed poll or parol. 2d, It must begin from the making, or day of the making, and not at any greater distance of time. 3d, If there be any old Lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4th, It must be either for twenty-one years, *or* three lives; and not for both. 5th, It must not exceed the term of three lives, or twenty-one years, but may be for a shorter time. 6th, Under this *stat.* 32 *Hen.* 8, it must have been of corporal hereditaments, and not of such things as lie merely in grant; for no rent can be reserved thereout by the common law, as the Lessor cannot resort to them to distrain. But now by the statute 5 *Geo.* 3. *c.* 17, a Lease of tithes or other incorporeal hereditaments, alone, may be granted by any Bishop or any such Ecclesiastical or Eleemosynary Corporation, and the successor shall be entitled to recover the rent by an action of debt; which (in case of a freehold Lease) he could not have brought at the common law. 7th, It must be of lands and tenements most commonly letten for twenty years past; so that if they had been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court-roll, it is sufficient. 8th, The most usual and customary feorm or rent for twenty years past, must be reserved yearly on such Lease. 9th, Such Lease must not be made without impeachment of waste. These are the guards imposed by the statute (which was avowedly made for the security of farmers, and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.

Next follows, in order of time, the *Disabling* or *Restraining statute*, 1 *Eliz.* *c.* 19; (made entirely for the benefit of the successor;) which enacts, that all grants by Archbishops and Bishops, (which include even those confirmed by the Dean and Chapter, the which, however long and unreasonable, were good at common law,) other than for the term of twenty-one years, or three lives from the making, or without reserving the usual rent, shall be void. Concurrent Leases, if confirmed by the Dean and Chapter, are held to be within the exception of this statute, and therefore valid; provided they do not exceed, together with the Lease in being, the term permitted by the act. *Co. Lit.* 45. But, by a saving expressly made, this statute of 1 *Eliz.* did not extend to grants made by any Bishop to the Crown; by which means Queen *Elizabeth* procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favourites, whom she thus gratified without any expence

to herself. To prevent which for the future, the *stat.* 1 *Jac.* 1. *c.* 3, extends the prohibitions to grants and Leases made to the King, as well as to any of his Subjects. 11 *Rep.* 71.

Then came *stat.* 13 *Eliz.* *c.* 10, explained and enforced by *stats.* 14 *Eliz.* *cc.* 11, 14: 18 *Eliz.* *c.* 11: 43 *Eliz.* *c.* 29; which extend the restrictions laid by the *stat.* 1 *Eliz.* *c.* 19, on Bishops, to certain other inferior Corporations, both sole and aggregate. From laying all which together, we may collect, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, are restrained from making any Leases of their lands, unless under the following regulations:—1. They must not exceed twenty-one years, or three lives, from the making. 2. The accustomed rent or more must be yearly reserved thereon. 3. Houses in corporations or market towns may be let for forty years, provided they be not the mansion-houses of the Lessors, nor have above ten acres of ground belonging to them; and provided the Lessee be bound to keep them in repair; and they may also be aliened in fee-simple for lands of equal value in recompence. 4. Where there is an old Lease in being, no concurrent Lease shall be made, unless where the old one will expire within three years. 5. No Lease, by the equity of the statute, shall be made without impeachment of waste. *Co. Lit.* 45. 6. All bonds and covenants tending to frustrate the provisions of the *stats.* 13 & 18 *Eliz.* shall be void.

Concerning these restrictive statutes two general observations are to be made. *First*, That they do not, by any construction, enable any persons to make such Leases as they were by common law disabled to make. Therefore a parson or vicar, though he is restrained from making longer Leases than for twenty-one years or three lives, even *with* the consent of the Patron and Ordinary, yet is not enabled to make any Lease at all, so as to bind his successor, *without* obtaining such consent. *Co. Lit.* 44. *Secondly*, That though Leases contrary to these statutes are declared void, yet they are good against the Lessor, during his life, if he be a Sole Corporation; and are also good against an Aggregate Corporation, so long as the Head of it lives, who is presumed to be the most concerned in interest. For the statute was intended for the benefit of the successor only; and no man shall make an advantage of his own wrong. *Co. Litt.* 45: 2 *Comm.* *c.* 20.

Where a new thing is demised with lands accustomably let, though there be great increase of rent, the Lease is void: but more rent than the accustomed rent may be reserved. 5 *Rep.* 5: 6 *Rep.* 37. The Leases according to the statute 32 *Hen.* 8, bind the issue in tail; but not those in reversion or remainder: for if tenant in tail makes a Lease warranted by the statute, and dies without issue, the Lease, as to him in reversion or remainder, is void; though by a common recovery, Leases may be made to bind him in remainder, &c. *Wood's Inst.* 267.

A guardian during the minority of an infant tenant in tail, who was but one year old, made a Lease for twenty years; and it was adjudged not good by the *stat.* 32 *Hen.* 8. *c.* 28, to bind the issue in tail; and it is the same in the case of tenant in dower, tenant by the curtesy, or husband seised in right of his wife, because they have no inheritance. *Dyer* 271.

If a Lease of the wife's land is not warranted by the statute, it is a good Lease against the husband, though not against the wife: the husband and wife cannot bind him in reversion or remainder. 1 *Inst.* 362.

A Lease by the husband of a feme covert's estate, though not within *stat.* 32 *Hen.* 8. *c.* 28, is only voidable. But a mortgage of a feme covert's estate, though in form of a Lease, is void. *Dougl.* 53, 4, *in n.*

If a Bishop have two Chapters, as there may be two or more to one bishoprick; both Chapters must confirm Leases made by the Bishop. 1 *Inst.* 131. A Lease by a Bishop made to begin presently for twenty-one years, when there is an old Lease in being, is good, notwithstanding the statute of 1 *Eliz.* *c.* 19: *Moor Cas.* 241. But if such Lease is to commence at a day to come, it will be void. 1 *Leon.* 44. Lease for three lives by a Bishop of tithes, is void against the successor; although the usual rent be duly reserved. *Moor Cas.* 1078.

Leases of a Dean and Chapter are good, without confirmation of the Bishop. *Dyer* 273: 2 *Nels. Abr.* 1096. Where there is a Chapter and no Dean, they may make grants, &c. and are within the statute. 1 *Mod.* 204. A prebendary is seised in right of the church within the equity of the statute 32 *Hen.* 8. *c.* 28: 4 *Leon.* 51. A prebendary's Lease confirmed by the Archbishop who is his patron, is good, without confirmation of Dean and Chapter. 3 *Bulstr.* 290. But where a prebendary made a Lease for years of part of his prebend, and this was confirmed by Dean and Chapter; because it was not confirmed likewise by the Bishop, who was patron and ordinary of the prebend, the Lease was adjudged void. *Dyer* 60. If a prebendary hath rectories in two several dioceses belonging to his prebend, and his Lease of them is confirmed, by the Bishop Dean and Chapter of the diocese of which he is prebendary, it is good, though not confirmed by the other. *Sid.* 75.

A chancellor of a cathedral church may make a Lease, and it is said it will be good against the successor, though not confirmed, &c. *Sid.* 158. If a parson or vicar makes a Lease for life or years, of lands usually letten, reserving the customary rent, &c. it must be confirmed by Patron and Ordinary, for they are out of the statute 32 *Hen.* 8. *c.* 28. And if the Parson and Ordinary make a Lease for years of the glebe to the patron; and afterwards the patron assigns this Lease to another, such assignment is good, and is a confirmation of that Lease to the assignee. 5 *Rep.* 15. Ancient covenants in former Leases may be good to bind the successor, so as to discharge the Lessee from payment of pensions, tenths, &c. but of any new matter they shall not. 1 *Vent.* 223.

A Lease for years of a spiritual person, will be void by his death, if it is not according to the statutes; and a Lease for life is voidable by entry, &c. of the successor: and so in like cases, Leases not warranted by statute are void or voidable on the deaths of their makers: acceptance of rent on a void Lease shall not bind the successor. 2 *Cro.* 173.

If a Bishop be not Bishop *de jure*, Leases made by him to charge the Bishoprick are void, though all judicial acts by him are good. 2 *Cro.* 353. And where a Bishop makes a Lease, which may tend to the diminution of the revenues of the Bishoprick, &c. which should maintain the successor; there the deprivation or translation of the Bishop, is all one with his death. 1 *Inst.* 329.

There

There is yet another restriction with regard to *College-Leases* by *stat.* 18 *Eliz. c.* 6, which directs that one-third of the old rent then paid, should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6*s.* 8*d.* or a quarter of malt for every 5*s*; or that the Lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges, on the market day before the rent becomes due. This is said to have been an invention of Lord Treasurer *Burleigh* and Sir *Thomas Smith*, then principal Secretary of State; who observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new-found *Indies*, which effects were likely to increase to a greater degree, devised this method for upholding the revenues of colleges. Their foresight and penetration have, in this respect, been very apparent: for though the rent so reserved in corn was at first but one-third of the old rent, or half of what was still reserved in money, yet now the proportion is nearly inverted, and the money arising from corn-rents is, *communibus annis*, almost double to the rents reserved in money. 2 *Comm. c.* 20.

It has been observed, that the price of a quarter of wheat brings at present near 50*s.* and the colleges receiving one-third of their rent in corn, *i. e.* a quarter of wheat, or its value for every 13*s.* 4*d.* which they are paid in money; it follows, that the corn-rent will be in proportion to the money-rent, nearly as four to one. But these rents united are very far from the present value. Colleges, therefore, in order to obtain the difference, generally take a fine upon the renewal of their Leases. It was a great object in colleges to restrain those in possession from making long Leases, and impoverishing their successors, by receiving the whole value of the Lease, by a fine at the commencement of the term. The corn-rent has made the old rent approach in some degree nearer to its present value; otherwise it should seem the principal advantage of a corn-rent is to secure the Lessor from the effect of a sudden scarcity of corn. *Christian's Note* to 2 *Comm. c.* 20. *p.* 322.

The Leases of beneficed clergymen are farther restrained in case of their non-residence, by *stats.* 13 *Eliz. c.* 20: 14 *Eliz. c.* 11: 18 *Eliz. c.* 11: 43 *Eliz. c.* 9; which direct, that if any beneficed clergyman be absent from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish, but that all Leases made by him of the profits of such benefice, and all covenants and agreements of a like nature, shall cease and be void; except in the case of licensed pluralists, who are allowed to demise the living on which they are non-resident, to their curates only; provided such curates do not absent themselves above forty days in any one year. On these statutes it has been determined, that where an incumbent had leased his rectory, and had been afterwards absent for more than eighty days in a year, his tenant could not maintain an ejectment against a stranger who had got into possession, without any right or title whatever. 2 *Term Rep.* 749. If the curate leases over, the Lease will become void by his absence; but not by the absence of the incumbent. *Gibs.* 740.

III. 1. If a Bishop before the statute 1 *Eliz. c.* 19. § 5, leased part of his bishoprick for term of years, reserving rent, and then died; and after another was made Bishop, who accepted and received the rent when due; by this acceptance the Lease was made good; which otherwise the new Bishop might have avoided. It is the same if baron and feme seised of lands in right of the feme, join and make a Lease or feoffment, reserving rent; and the baron dies, after whose death the feme receives or accepts the rent; by this the Lease or feoffment is confirmed, and shall bar her from bringing a *cui in vita. Co. Litt.* 211. Tenant in tail made a Lease for years, rendering 20*s.* rent, and afterwards released 19*s.* and died; the issue in tail accepted the 12*d.* rent: the better opinion was, that by the acceptance of the shilling for rent he had affirmed the Lease, and could not distrain for the 19*s.* rent. *Dyer* 304. Tenant for life, remainder in tail; a stranger levies a fine to him in remainder, who leased the lands to the conusor, rendering rent, the tenant for life died, and the issue in tail accepted the rent: adjudged, that by the fine and acceptance of the rent, the Lease was affirmed. *Dyer* 299. See *Smith* v. *Stapleton, Plowd.* 426, 434.

Lord and tenant; the rent is behind many years, the tenant made a feoffment in fee, and the lord accepted the rent of the feoffee which became due in his time; adjudged, that by such acceptance he shall lose all the arrearages, and cannot avow for the same. 3 *Rep.* 65. *Penant's* case. Lease for years, rendering rent, with a clause of re-entry; the Lessee paid the rent, which the Lessor accepted and put into a bag, but afterwards finding brass money amongst it, he refused to carry it away, and entered for the condition broken; but adjudged unlawful; because after he had accepted the rent he is barred. 5 *Rep.* 113; *Wade's* case.

Acceptance of the next rent due, at a day afterwards, will bar one to enter for a condition broken before, by reason of non payment of the rent; because the Lessor thereby affirmeth the Lease to have continuance. *Co. Lit.* 211. And taking a distress affirmeth the continuance of the rent; but if rent was due at a day before, and thereby the condition was broken, one may receive that rent, and yet re-enter; and if he accept of part of the rent, he may enter for a condition broken, and retain the lands until he has the whole rent. 3 *Rep.* 64: *Co. Lit.* 203.

If an infant accepts of rent at his full age, it makes the Lease good, and shall bind him. *Plow.* 418.

If a Lessor accepts of rent from an assignee, knowing of the assignment, it bars him from action of debt against the Lessee; for the privity of contract is extinguished: but after such acceptance, the Lessor or his assigns may maintain an action against the first Lessee upon his covenant for payment of the rent. 1 *Saund.* 241: 3 *Rep.* 24. But acceptance of rent from the assignee has been adjudged a sufficient notice of the assignment, so that the Lessor could not resort to the first Lessee. 2 *Bulst.* 151.

Lessee for years assigned his term, and died intestate, the Lessor brought debt against his administrator, who pleaded the assignment, and that the plaintiff had notice, and had accepted the rent of the assignee: adjudged, that by the death of the Lessee, the privity of contract was determined, and the action would not lie against the

the administrator. *Cro. Eliz.* 715; cited in *Walker's* case, 3 *Rep.* 24.

Tenant for life makes a Lease for years to commence on a certain day, and dies before the expiration of the Lease, in the middle of a year. The remainder-man receives rent from the Lessee, who continues in possession, (but not under a fresh Lease,) for two years together, on the days of payment mentioned in the Lease. This is evidence from which an agreement will be presumed between the remainder-man and the Lessee, that the Lessee should continue to hold from the day and according to the terms of the original demise; and notice to quit on that day is proper. 1 *H. Black. Rep. C. P.* 97.

2. If a Parson, &c. makes a Lease for years not warranted by the *stat.* 32 *Hen.* 8. *c.* 34, but is void by his death; acceptance of rent by a new parson or successor will not make it good. 1 *Saund.* 241. And if a tenant for life makes a Lease for years, there no acceptance will make the Lease good, because the Lease is void by his death. *Dyer* 46, 239.

Tenant in tail made a Lease for years, rendering rent to him and his heirs, and died; his son and heir accepted the rent, and was afterwards executed for treason, leaving issue a son; the king accepted the rent, but that did not make the Lease good, the lands being in his hands by the attainder, and not in the reverter. *Dyer* 115. Lease for years, with condition, that the Lessee shall not alien or assign, without the assent of the Lessor, and if he did, that then the Lessor should re-enter: he assigned part of the land without assent, &c. and then the Lessor, before notice of the assignment, accepts the rent, and afterwards entered for the condition broken; and adjudged lawful; for the condition being collateral, he might assign the land so secretly, that it may be impossible for the Lessor to know it. 3 *Rep.* 65, *Penant's Case*: *Cro. Eliz.* 553. S. C.

Lease for twenty-one years, rendering rent, on condition, that if the Lessee did let any part of it above three years, then the Lease to be void, and that the Lessor might enter; he let it out for three years, and so from three years to three years, during the term of twenty-one years, if he so long lived; the Lessor accepted the rent of the assignee, and afterwards entered: this was a breach of the condition, and the acceptance of it afterwards did not dispense with it, because the original Lease was void and determined. *Cro. Car.* 368. If tenant in tail make a Lease for years, to commence after his death, rendering rent, in such case acceptance of rent by the Issue will not make the Lease good to bar him, because the Lease did not take effect in the life of his ancestor. *Plowd.* 418.

Where one in remainder, after the expiration of an estate for life, gave notice to the tenant to quit on a certain day, and afterwards accepted half a year's rent; such acceptance being only evidence of a holding from year to year is rebutted by the previous notice to quit, and therefore the notice remains good. *See* 1 *Term Rep.* 161.

The Lessor's receiving rent after a forfeiture is no waiver, unless the forfeiture were known to him at the time. 2 *Term Rep.* 425.

A Lease void in its creation as against a remainder-man, does not become valid in law by his accepting rent, and suffering the Lessee to make improvements after his remainder vests in possession; though it seems that in such case equity would afford relief. See *Doe* v. *Butcher, Dougl.* 50—54, *in n.*

Where a Lease is *ipso facto* void by the condition or limitation, no acceptance of rent afterwards can make it have continuance as between the grantor and grantee; but it is otherwise of a Lease voidable only. See *Dougl.* 578, *in n.*

LEASES OF THE KING. Leases made by the King, of part of the dutchy of *Cornwall*, are to be for three lives, or thirty-one years, and not be made dispunishable of waste, whereon the ancient rent is to be reserved; and estates in reversion, with those in possession, are not to exceed three lives, &c. See *stat.* 13 *Car.* 2. *c.* 4.

All Leases and grants made by letters patent, or indentures under the great seal of *England*, or seal of the Court of Exchequer, or by copy of court-roll, according to the custom of the manors of the dutchy of *Cornwall*, not exceeding one, two, or three lives, or some term determinable thereon, &c. are confirmed; and covenants, conditions, &c. in Leases for lives or years, shall be good in law, as if the King were seised in fee-simple. *Stat.* 1 *Jac.* 2. *c.* 9. See *stats.* 5 & 6 *W.* & *M.* *c.* 18: 12 *Ann. c.* 22. Leases from the Crown of lands in *England* and *Wales*, and under the seals of the dutchy of *Lancaster*, &c. for one, two, or three lives, or terms not exceeding fifty years, are allowed time for inrollment, &c. by *stat.* 10 *Ann. c.* 18. Leases made by the Prince of *Wales* of lands, &c. in the dutchy of *Cornwall*, for three lives, or thirty-one years, on which is reserved the most usual rent paid for the greatest part of twenty years before, shall be good against the King, the Prince, and their heirs, &c. and the conditions of such Leases be as effectual as if the Prince had been seised of an absolute estate in fee-simple in the lands. *Stat.* 10 *Geo.* 2. *c.* 29. See titles *Cornwall*; *King*.

LEASE AND RELEASE, A conveyance of the fee-simple right or interest in lands or tenements, under the statute of Uses, 27 *H.* 8. *c.* 10; giving first the possession, and afterwards the interest, in the estate conveyed. Though the deed of feoffment was the usual conveyance at common law; yet since the statute of Uses, *stat.* 27 *Hen* 8. *c.* 10, the conveyance by Lease and Release has taken place of it, and is become a very common assurance to pass lands and tenements; for it amounts to a feoffment, the use drawing after it the possession without actual entry, &c. and supplying the place of livery and seisin, required in that deed: in the making it, a Lease or bargain and sale for a year, or such like term, is first prepared and executed; "to the intent," as is expressed in the deed, "that by virtue thereof the Lessee may be in actual possession of the lands intended to be conveyed by the Release; and thereby, and by force of the statute 27 *Hen.* 8. *c.* 10, for transferring of uses into possession, be enabled to take and accept a grant of the reversion and inheritance of the said lands, &c. to the use of himself and his heirs for ever:" Upon which the Release is accordingly made, reciting the Lease, and declaring the uses: and in these cases a pepper-corn rent in the Lease for a year is a sufficient reservation to raise an use, to make the Lessee capable of a Release. 2 *Vent.* 35: 2 *Mod.* 262.

Blackstone

Blackstone says, this species of conveyance was first invented by Serjeant *Moore*, soon after the Statute of Uses; and is now the most common of any, and therefore not to be shaken; though very great lawyers, as particularly Mr. *Noy*, Attorney-general to King *Charles* I. formerly doubted its validity. 2 *Mod.* 252. It is thus contrived: a Lease, or rather Bargain and Sale upon some pecuniary consideration for one year, is made by the tenant of the freehold, to the Lessee or bargainee. Now this, without any enrollment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year; and then the statute immediately annexes the *possession*. He therefore being thus in possession is capable of receiving a Release of the freehold and reversion; which must be made to a tenant in possession, and accordingly the next day a Release is granted to him. This is held to supply the place of livery of seisin, and thus a conveyance by Lease and Release is said to amount to a feoffment. *Co. Litt.* 270: *Cro. Jac.* 604.

The form of this conveyance is originally derived to us from the common law; and it is necessary to distinguish in what respect it operates as a common-law conveyance, and in what it operates under the statute of *uses*. At the common law, where the usual mode of conveyance was by feoffment with livery of seisin, if there was a tenant in possession, so that livery could not be made, the reversion was granted, and the tenant attorned to the reversioner. As by this mode the reversion or remainder of an estate might be conveyed without livery, when it depended on an estate previously existing, it was natural to proceed one step further, and to create a particular estate for the express and sole purpose of conveying the reversion; and then by a surrender or Release, either of the particular estate to the reversioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderee or Releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that if a particular estate was made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him, which Release operating by way of enlargement, would give the Releasee (or Relessee as he is sometimes termed) a fee. In all these cases the particular estate was only an estate for years; for at the common law the ceremony of livery of seisin is as necessary to create even an estate of freehold, as it is to create an estate of inheritance. Still an actual entry would be necessary on the part of the particular tenant; for without actual possession the Lessee is not capable of a Release, operating by way of enlargement. But this necessity of entry for the purpose of obtaining the possession, was superseded or made unnecessary by the statute of uses (27 *Hen.* 8. *c.* 10, above alluded to); for by that statute the possession was immediately transferred to the *Cestui que use*; so that a bargainee under that statute is as much in possession, and as capable of a Release before or without entry, as a Lessee is at the common law after entry. All, therefore, that remained to be done to avoid on the one hand the necessity of livery of seisin from the grantor, and to avoid on the other the necessity of an actual entry on the part of the grantee, was, that the particular estate (which, for the reasons above mentioned, should be an estate for years) should be so framed as to be a bargain and sale within the statute. Originally it was made in such a manner as to be both a Lease at the Common Law, and a bargain and sale under the Statute: but as it is held, that where conveyances may operate both by the Common Law and Statute, they shall be considered to operate by the Common Law, unless the intention of the parties appears to the contrary, it became the practice to insert, among the operative words, the words *Bargain and Sell*; (in fact, it is more accurate to insert no other operative words;) and to express that the bargain and sale, or Lease, is made to the intent and purpose that thereby, and by the statute for transferring uses into possession, the Lessee may be capable of a Release. The bargain and sale therefore, or Lease for a year, as it is generally called, operates, and the bargainee is in the possession, by the statute. The Release operates by enlarging the estate or possession of the bargainee to a fee. This is at the Common Law; and if the use be declared to the Releasee in fee-simple, it continues an estate at the Common Law; but if the use is declared to a third person, the statute again intervenes, and annexes or transfers the possession of the Releasee to the use of the person to whom the use is declared. It has been said, that the possession of the bargainee under the Lease is not so properly merged in, as enlarged by, the Release; but at all events it does not, after the Release, exist distinct from the estate passed by the Release. 1 *Inst.* 271. *b. in n.*

As the operation of a Lease and Release depends upon the Lease, or bargain and sale; if the grantor is a *Body Corporate*, the Lease will not operate under the statute of uses; for a Body Corporate cannot be seised to an use, and therefore the Lease of possession, considered as a bargain and sale under the statute, is void; and the Release then must be of no effect for want of a previous *possession* in the Releasee. In cases of this nature, therefore, it is proper to make the conveyance by feoffment, or by a Lease and Release with an *actual entry* by the Lessee previous to the Release; after which the Release will pass the reversion. It may also be observed, that in *exchanges*, if one of the parties die before the exchange is executed by entry, the exchange is void. But if the exchange be made by Lease and Release, this inconvenience is prevented, as the statute executes the possession without entry; and all incidents annexed to an exchange at Common Law will be preserved. 1 *Inst.* 271. *b. in n.*

When an estate is conveyed by Lease and Release, in the Lease for a year there must be the words, *bargain and sell* for money, and five shillings or any other sum, though never paid, is a good consideration, whereupon the bargainee for a year is immediately in possession on the executing of the deed, without actual entry: if only the words *demise, grant and to farm let* are used, in that case the Lessee cannot accept of a Release of the inheritance, until he hath actually entered, and is in possession. 2 *Lil. Abr.* 435. But where *Littleton* says, that if a Lease is made for years, and the Lessor releases to the Lessee before entry, such Release is void; because the Lessee had only a right, and not the possession; and such Release shall not enure to enlarge the estate, without the possession: though this is true at Common Law, it is not so now upon the statute of uses. 2 *Mod.* 250, 251. And if a man make a Lease for life, remainder for life, and

the first Lessee dieth; on which the Lessor releases to him in remainder, before entry; this is a good Release to enlarge the estate, he having an estate in law capable of enlargement by Release, before entry had. 1 *Inst.* 270.

No person can make a bargain and sale, who hath not possession of the lands: but it is not necessary to reserve a rent therein; because the consideration of money raises the use. If a Lease be without any such consideration, the Lessee hath not any estate till entry, nor hath the Lessor any reversion; and therefore a release will not operate, &c. 1 *Inst.* 270, 278: *Cro. Jac.* 169: 1 *Mod.* 253. On Lease at will, a Release shall be good by reason of the privity between the parties; but if a man be only tenant at sufferance, the Release will not enure to him; and as to the person who hath the reversion it is void, for such tenant hath not any possession, there being no estate in him. *Lit.* § 461, 462: *Cro. Eliz.* 21: *Dyer* 251.

In a Lease and Release, to make a tenant to the *præcipe* to suffer a recovery, where the Release is made to *A. B.* and his heirs, (*viz.* the tenant to the *præcipe*,) it must be also said to the use of him the said *A. B.* and his heirs and assigns for ever; for the Relessee must be absolute tenant of the freehold. 2 *Vent.* 312: *Lil. Conveyance*, 251. And a Release made on trust, must be to *A. B.* his heirs and assigns, to the only use and behoof of the Relessee, his heirs and assigns for ever; in trust for *C. D.* who is to be a party to the deed, and the purchase money to be paid by the *cestui que trust*. If the words *to the use*, &c. are not inserted in the Release, the estate doth not execute by the statute of uses, and the trust is void. *Lil. Conv.* 233, 251. See titles *Recovery*; *Trust*.

A Lease and Release make but one conveyance, being in the nature of one deed. 1 *Mod.* 252.

For further information as to the principles in which this form of conveyance originates, and under which it operates, see this Dictionary, titles *Conveyance*; *Deed*; *Feoffment*; *Trusts*; *Uses*; &c.

LEASING or LESING, See *Gleaning*.

LEAT, See *Milleat*.

LEATHER. There are several statutes relating to Leather: the *stat.* 27 *Hen.* 8. *c.* 14, directs packers to be appointed for Leather intended to be transported; but the 18 *Eliz. c.* 9, prohibits the shipping of Leather, on penalty of forfeiture, &c. Though by *stat.* 20 *Car.* 2. *c.* 5, transportation of Leather was allowed to *Scotland*, *Ireland*, or any foreign country, paying a custom or duty; which statute was continued by divers subsequent acts. See *stat.* 1 *Jac.* 1. *c.* 22; and this Dictionary, title *Navigation Acts*. No person shall ingross Leather to sell again, under the penalty of forfeiture; none but tanners are to buy any rough hides of Leather, or calve-skins in the hair, on pain of forfeiture; and no person shall forestall hides, under the penalty of 6*s.* 8*d.* a hide. Leather not sufficiently tanned, is to be forfeited. In *London*, the Lord Mayor and Aldermen are to appoint and swear searchers of Leather, out of the company of shoemakers, &c. and also triers of sufficient Leather; and the same is to be done by mayors, &c. in other towns and corporations; and searchers allowing insufficient Leather, incur a forfeiture of 40*s.* Shoemakers making shoes of insufficient Leather, are liable to 3*s.* 4*d.* penalty. *Stat.* 1 *Jac.* 1. *c.* 22.

Red tanned Leather is to be brought into open Leather markets, and searched and sealed before exposed to sale, or shall be forfeited; and contracts for sale otherwise to be void. *Stat.* 13 & 14 *Car.* 2. *c.* 7. Hides of Leather are adjudged the ware and manufacture of the currier, and subject to search, &c. All persons dealing in Leather may buy tanned Leather searched in open market; and any person may buy or sell Leather hides or skins by weight. *Stat.* 1 *W.* & *M. c.* 33. Duties are granted on Leather, and entries to be made of tan-yards, under the penalty of 50*l.* and tanners and Leather-dressers using any private tan-yards, or concealing skins, &c. shall forfeit 20*l.* leviable by Justices of Peace, by distress, &c. *Stats.* 9 *Ann. c.* 11. See 5 *Geo.* 1. *c.* 2: 9 *Geo.* 1. *c.* 27. Artificers may freely buy their Leather, and cut it and sell it in small pieces. 12 *Geo.* 2. *c.* 25. Penalty on curriers neglecting to curry Leather. *Ibid.* See this Dictionary, titles *Tanners*; *Manufacturers*.

LECCATOR, A debauched person, *Lecher*, or whoremaster.

LECHERWITE, See *Lairwite*.

LECTISTERNIUM, A bed, sometimes all that belongs to a bed. *Flor. Worc. p.* 631.

LECTRINUM, A pulpit. *Mon. Angl. tom.* 3. *p.* 243.

LECTURER, *Prælector*.] A reader of lectures. In *London*, and other cities, there are Lecturers who are assistants to the rectors of churches in preaching, &c. These Lecturers are chosen by the Vestry, or chief inhabitants of the parish, and are usually the afternoon preachers: the law requires, that they should have the consent of those by whom they are employed, and likewise the approbation and admission of the Ordinary; and they are, at the time of their admission, to subscribe to the thirty-nine articles of religion, &c. required by the *stat.* 13 & 14 *Car.* 2. *c.* 4. They are to be licensed by the Bishop, as other ministers, and a man cannot be a Lecturer without a licence from a Bishop or Archbishop; but the power of a Bishop, &c. is only as to the qualification and fitness of the person, and not as to the right of the Lectureship; for if a Bishop determine in favour of a Lecturer, a prohibition may be granted to try the right. *Mich.* 12 *W.* 3. *B. R.* If Lecturers preach in the week-days, they must read the common prayer for the day when they first preach, and declare their assent to that book; they are likewise to do the same the first Lecture-day in every month, so long as they continue Lecturers, or they shall be disabled to preach till they conform to the same: and if they preach before such conformity, they may be committed to prison for three months, by warrant of two Justices of Peace, granted on the certificate of the Ordinary. *stat.* 13 & 14 *Car.* 2. *c.* 4.

Where Lectures are to be preached or read in any cathedral or collegiate church, if the Lecturer openly, at the time aforesaid, declare his assent to all things in the book of Common Prayer, it shall be sufficient; and university sermons or Lectures are excepted out of the act concerning Lectures. There are Lectures founded by the donations of pious persons, the Lecturers whereof are appointed by the founders; without any interposition or consent of rectors of churches, &c. though with the leave and approbation of the bishop; such as that of Lady

Lady *Moier* at St. *Paul's*, &c. But such is not entitled to the pulpit without the consent of the Rector, or Vicar, in whom the freehold of the church is. *Cases B. R.* 42c, 433.

The Court of *B. R.* will not grant a *mandamus* to a Bishop to licence a Lecturer without the consent of the Rector, where the Lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent is shown. *R.* v. *London,* (Bp.) 1 *Term Rep.* 331. Nor will that Court grant a *Mandamus* to the Rector, to certify to the Bishop the election of a Lecturer, chosen by the inhabitants, where no such custom is shown, though the Lecturer has been paid out of the poor rates. But such *immemorial custom,* if in fact it exists, is binding on the Rector. 4 *Term Rep.* 125. *R.* v. *Field.*

LECTURERS of Divinity, Law, Physick, &c. in the universities of *Oxford* and *Cambridge*; Vide *Regius Professor.*

LECTERNIUM, *lectorium.*] The desk or reading place in churches. *Stat. Eccl. Paul. Lond.* MS. 44.

LEDGRAVE or LEDGREVE, See *Lathreve.*

LEDO, *ledona.*] The rising water or increase of the sea.

LEET or COURT-LEET, See title *Court-Leet.*

LEETS or LEITS, Meetings appointed for the nomination or election of officers: often mentioned in Archbishop *Spotswood's* History of the Church of *Scotland.*

LEGA or LACTA. Anciently the allay of money was so called. *Spelm.*

LEGABILIS, Signifies what is not entailed as hereditary; but may be bequeathed by Legacy, in a last will and testament. *Articula proposita in parliamento coram Rege; Anno* 1234.

LEGACY,

Legatum.] A Bequest, or gift of goods and chattels by will or testament: the person to whom it is given is styled the Legatee: and if the gift is of the residue of an estate after payment of debts and Legacies, he is then styled the Residuary Legatee.

This Bequest transfers an inchoate property to the Legatee; but the Legacy is not perfect without the assent of the executor; for if one has a general or pecuniary Legacy of 100 *l.*, or a specific one of a piece of plate, he cannot in either case take it without the consent of the executor. For in him all the chattels are vested; and it is his business first of all to see, whether there is a sufficient sum left to pay the debts of the testator. See *Co. Litt.* 111: *Aleyn.* 39: *Bract. l.* 2. *c.* 26. But if there is a fund to pay the debts, and the executor then refuses his assent to a Legacy, he may be compelled to give it, either by the Spiritual Court, or by a Court of Equity. *March, Rep.* 19.

In case of a deficiency of assets, all the *general* Legacies must abate proportionably, in order to pay the debts; but a specific Legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it. 2 *Vern.* 111. Upon the same principle, if the Legatees have been paid their Legacies, they are afterwards bound to refund a rateable part in case debts come in, more than sufficient to exhaust the residue after the Legacies paid. 2 *Vern.* 205.

If the Legatee dies before the Testator, the Legacy is a lost or *lapsed* Legacy, and shall sink into the residue. And if a *contingent* Legacy be left to any one, as *when* he attains, or *if* he attains the age of twenty-one, and he dies before that time, it is a lapsed Legacy. *Dy.* 59; 1 *Eq. Ab.* 295. But a Legacy to one *to be paid* when he attains the age of twenty-one years, is a *vested* Legacy; an interest which commences *in præsenti,* although it be *solvendum in futuro:* and if the Legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable in case the Legatee had lived. This distinction is borrowed from the civil law; and its adoption in our Courts is not so much owing to its intrinsick equity, as to its having been before adopted by the *Ecclesiastical Courts.* For since the *Chancery* has a *concurrent jurisdiction* with them, in regard to the recovery of Legacies, it was reasonable that there should be a conformity in these determinations; and that the Subject should have the same measure of justice in whatever Court he sued. 1 *Eq. Ab.* 295. But if such (contingent) Legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir; for with regard to devises affecting lands, the Ecclesiastical Court hath no concurrent jurisdiction. 2 *P. Wms.* 601, 610. And in case of a vested Legacy due immediately, and charged on land, or money in the funds, which yield an immediate profit, *interest* shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator. 2 *P. Wms.* 26, 7.

Besides these formal Legacies contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a *donation, causâ mortis;* a gift in prospect of death. And that is, when a person in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered, to another the possession of any personal goods, (under which have been included bonds and bills drawn by the deceased upon his banker,) to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executors; yet it shall not prevail against creditors; and is accompanied with this implied trust, that if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death; *mortis causâ. Pre. Ch.* 269: 1 *P. Wms.* 406, 441: 3 *P. Wms.* 357. See 2 *Vez.* 431.

As this donation may be avoided by creditors, so may it by the wife or children of a freeman, if it break in on their customary shares. 2 *Vern.* 612. The delivery of receipts for *South-Sea* annuities does not amount to a gift of the annuities themselves. *Ward* v. *Turner,* 2 *Vez.* 442. It is undecided whether the delivery of a mortgage deed will amount to a gift of the money due on the security. See *Richards* v. *Syms,* cited 2 *Vez.* 436: *Hassell* v. *Tynte, Ambl.* 318.

One cannot sue in the Spiritual Court for a *donatio causâ mortis.* 2 *Stra.* 777. See further this Dictionary, title *Donatio causâ mortis.*

Having said thus much on the subject of Legacies in general, we may proceed more particularly to inquire,

1. *Who may be Legatees; of lapsed and vested Legacies, and of the ademption of Legacies.*
2. *Of the Payment of Legacies; and herein of Specific Legacies.*
3. *Of Interest on Legacies.*
4. *Of Suits to recover Legacies.*
5. *Of Devises to Creditors, &c. in satisfaction of Demands due from the Testator.—Of Legacies to Executors in satisfaction of the Residue*, See title *Executor* V. 8.

1. It seems necessary, that a Legatee should be born at the time of making the will; and it has been adjudged, where Legacies were given to a man's children, that those who were born afterwards should have no share thereof. 1 *Bulst.* 153. But it has been otherwise decreed in Chancery. 1 *Ch. Rep.* 301.

The name of a Legatee being very falsely spelt, it was referred to a master in Chancery, to examine who was the person intended. 1 *P. Wms.* 425. Some persons are incapable of taking by Legacy, under several statutes; as in *stat.* 13 *W.* 3. *c.* 6, Officers, Counsellors, Lawyers, &c. not taking the oaths; and 5 *Geo.* 1. *c.* 27, Artificers going abroad, &c. See further who may be Devisees, this Dictionary, title *Will.*

The general rule is, that if the Legatee die before the Testator, or before the condition upon which the Legacy is given be performed, or before it be vested in interest, the Legacy is extinguished. *Treat. Eq. lib.* 4. *pt.* 1. *c.* 2. § 3.—But a bequest may be so specially framed as to prevent the death of the Legatee operating a lapse of the Legacy. See 3 *Atk.* 572, 580.—Neither will the rule extend to a Legacy to two or more; for though, by the civil law, there is no survivorship amongst Legatees, yet it is settled that a Legacy to two or more is not extinguished by the death of one, but will vest in the survivor. *Gilb. Rep.* 137: 2 *Atk.* 220.—Nor will the rule extend to those cases where the Legacy is given over after the death of the first Legatee; for in such cases the Legatee in remainder shall have it immediately. 1 *And.* 33. *pl.* 82: 2 *Vern.* 207: 1 *P. Wms.* 274: 3 *P. Wms.* 113: *Pre. Ch.* 37: *Mosel.* 319: 2 *Vern.* 378.—Nor will a Legacy lapse by the death of the Legatee in the testator's life-time, if he be to take as a Trustee. See 1 *Ves.* 140: and 2 *Vern.* 468, in which latter case the point is doubted.

Where a father makes a provision for a child by his will, and afterwards gives to such child, being a daughter, a portion in marriage; or, being a son, a sum of money to establish him in life, (such portion or sum being in amount equal to, or greater than the Legacy,) it is an implied ademption of the Legacy; for the law will not intend that the father designed two portions to one child. 1 *P. Wms.* 680: 2 *Ch. Rep.* 85: 2 *Vern.* 115, 257: 2 *Atk.* 216: *Ambl.* 325: 2 *Bro. C. R.* 307.—But this implication will not arise, if the provision by the will be by bequest of the residue. 2 *Atk.* 216:—or if the provision in the father's life-time be subject to a contingency; 2 *Atk.* 491:—or be not *ejusdem generis* with the Legacy; 1 *Bro. C. R.* 425:—or if the testator be a stranger; 2 *Atk.* 516: 2 *Bro. C. R.* 493: And such implication is always liable to be refuted by evidence. 2 *Atk.* 516: 2 *Bro. C. R.* 165, 519.

A man devised 200*l.* a piece to the two children of *A. B.* at the end of ten years after the death of the testator; afterwards the children died within the ten years; and it was held a lapsed Legacy: for there is a difference where a devise is to take effect at a future time, and where the payment is to be made at a future time; and whenever the time is annexed to the Legacy itself, and not to the payment of it, if the Legatee dies before the time happens, it is a lapsed Legacy. 2 *Salk.* 415. A bequest of money to one at the age of twenty-one, or day of marriage, *without saying to be paid* at that time, and the Legatee dies before the term; this is a lapsed Legacy: And so it is if the devise had been to her when she shall marry; or when a son shall come of age, and they die before. *Godb.* 182: 2 *Vent.* 342.

But a devise of a sum of money, *to be paid* at the day of marriage, or age of twenty-one years; if the Legatee die before either of these happen, the Legatee's administrator shall have it, because the Legatee had a present interest, though the time of payment was not yet come; and it is a charge on the personal estate which was in being at the testator's death; and if it were discharged by this accident, then it would be for the benefit of the executor, which was never intended by the testator. 2 *Vent.* 366: 2 *Lev* 207. A father bequeathed goods to his son, when he should be of the age of twenty-one years, and if he die before that time, then his daughter should have them; afterwards the father died, and then the son died before he was of age; adjudged, that the daughter shall have the goods given in Legacy immediately, and not stay till her brother would have been of age, if he had lived. 1 *And.* 33. And where a Legacy was devised to an infant, to be paid when he shall come of age, and he died before that time; it was ruled that his administrator should have it presently, and not stay until the infant should have been of age, if he had lived. 1 *Leon.* 278. In a case of this nature, it has been decreed in equity, that although the administrator should have the Legacy, yet he must wait for it till such time as the child would have come to twenty-one. 2 *Vern.* 199.

That if the Legacy be to the Legatee *payable to him* at a certain age, and the Legatee die before he attain such age, this is a vested and transmissible interest in the Legatee; See 2 *Vent.* 342: 2 *Ch. Ca.* 155: 1 *Vern.* 462: 3 *P. Wms.* 138: 2 *Vern.* 199.—Otherwise, if the Legacy be to the Legatee generally, at or when he attains such age. 2 *Vent.* 342: 2 *Salk.* 415: 1 *Eq. Ab.* 295, 6; and see 1 *Bro. C. R.* 119.—If the Legacy be made to carry interest, though the words *to be paid*, or *payable*, are omitted, it is a vested and transmissible interest. 2 *Vent.* 342: 2 *Ch. Ca.* 155: 2 *Vern.* 673: 2 *Ves.* 263: 3 *Atk.* 645. So if the bequest be to *A.* for life, and after the death of *A.* to *B.* the bequest to *B.* is vested, upon the death of the testator; and will not lapse by the death of *B.* in the life-time of *A.* 2 *Vent.* 347: 1 *P. Wms.* 566: 2 *Vern.* 378: *Ambl.* 167: 1 *Bro. C. R.* 119: and the notes there; 1 *Bro. C. R.* 181.

Where a Legacy is to arise out of the real estate, it shall not go to the representative of the Legatee; but sink in the inheritance. And yet where 1000*l.* was given by a person out of lands, to his daughter, and interest to be computed from his death, &c. here, though the Legatee died before the time appointed for paying the

the ſame, it was held the Legacy ſhould be raiſed notwithſtanding; and the Lord Chancellor ſaid, that this Legacy was a veſted one. *2 Vern. Rep.* 617: *Barnardiſt.* 328, 330. A perſon by will, *&c.* gives a portion or Legacy to a child, payable at twenty-one years of age, out of a real and perſonal eſtate, and the child dies before the Legacy becomes payable; in that caſe, ſo much thereof as the perſonal eſtate will pay, ſhall go to the child's executors and adminiſtrators: but ſo far as the Legacy is charged upon the land, it is ſaid it ſhall ſink. *2 Peere Williams* 613. Alſo if a Legacy be given to one to be paid out of ſuch a fund, and the ſame fails, it has been reſolved, that it ought to be paid out of the perſonal eſtate; and the failing of the manner appointed for payment ſhall not defeat the Legacy. *1 P. Wms.* 779.

3. If a Legacy when due be paid to the father of an infant, it is no good payment; and the executor may be obliged in equity to pay it over again: and where any Legacy is bequeathed to a feme covert, paying it to her alone, is not ſufficient, without her huſband. *1 Vern.* 261.

Executors are not bound to pay a Legacy, without ſecurity to refund. *Chan. R.* 149, 257. And if ſentence be given for a Legacy in the Eccleſiaſtical Court, a prohibition lies, unleſs they take ſecurity to refund. *2 Ventr.* 358. If an executor pays Legacies, and, ſeven years after, covenant is broken, for which action is brought againſt the executor; the court inclined that it was a *Devaſtavit*, and that the executor ought to have taken ſecurity for his indemnity upon payment of the Legacies. *Allen* 38. Though it has been adjudged that a covenant is no duty till broken; and therefore ſince it is uncertain whether it will be broken or not, it ſhall be preſumed it will not; and the Legacies being a preſent duty, ſhall be paid by the executor, notwithſtanding any covenant not actually broken. *Style.* 37: *1 Nels. Ab.* 786. If one binds himſelf and his executors in an obligation, *&c.* to perform a certain thing, and in his will gives divers Legacies and dies, leaving goods only ſufficient to pay the obligation when forfeited, this obligation ſhall be no bar to the Legacies, becauſe it is uncertain whether the ſame may ever be forfeited; though the executor may therefore make a delivery upon condition, *viz.* to return the Legacies if the obligation becomes forfeited, and the penalty be recovered. *1 Roll. Ab.* 928: *2 Ventr.* 358.

The executor is to pay the Legacies after the debts: but executors cannot in equity pay their own Legacies firſt, where there is not enough to pay all of them, but ſhall have an equal proportion with the reſt of the Legatees. *Chan. R.* 354. An executor has election, where any chattel is given to him, to have and take it in one right or the other, *viz.* as executor, or Legatee, which is to be made by a ſpecial taking, or declaration, *&c.* 10 *Rep.* 47: *Plowd.* 519: *Dyer.* 277.

If there be a ſpecific Legacy given of any thing, as a horſe, ſilver cup, *&c.* it muſt be delivered before any other Legacy, provided there be aſſets. *Offic. Exec.* 317. And if there be enough to pay all the Legacies after the debts are ſatisfied, the Legacies ſhall all be paid; but if there is not ſufficient to pay debts or more, the Legatees muſt loſe their Legacies, or a propor tionable part of them. *Plowd.* 526: See *1 Lill. Ab.* 579.

A ſpecific Legacy is, where, by the aſſent of the executor, the property of the Legacy will veſt—As there is a benefit one way to a ſpecific Legatee, that he ſhall not contribute, (in caſe of a deficiency to pay all the Legacies,) ſo there is a hazard the other way—For inſtance, if ſuch ſpecific Legacy, being a *leaſe*, be evicted; or, being *goods*, be loſt or burnt; or, being a *debt*, be loſt by the inſolvency of the debtor: in all thoſe caſes ſuch ſpecific Legatee ſhall have no contribution from the other Legatees, and therefore ſhall pay none towards them. *Hinton* v. *Pinke*, *1 P. Wms.* 539.

Theſe conſequences attending a ſpecific Legacy have raiſed, in the ſeveral caſes to be met with in the books, the queſtion, whether a Legacy was *ſpecific* or *general?*—A ſpecific Legacy (ſtrictly ſpeaking) is ſaid by *Ld. Hardwicke* in *Purſe* v. *Snaplin*, *1 Atk.* 417, to be a bequeſt of a particular chattel, *ſpecifically* deſcribed and diſtinguiſhed from all other things of the ſame kind; or, in other words, an *individual* Legacy.—Money, therefore, if ſufficiently *diſtinguiſhed*, may be the ſubject of a ſpecific bequeſt; as money in a certain cheſt, *&c. Lawſon* v. *Stitch*, *1 Atk.* 508; or a particular debt; as to the ademption of which latter by payment in the teſtator's life-time, See *Thomond* (E.) v. *Suffolk* (E.), *1 P. Wms.* 461.—So of *Stock* in *Aſhton* v. *Aſhton*, *Talb.* 152: *Avelyn* v. *Ward*, *1 Vez.* 424: *Drinkwater* v. *Falconer*, *2 Vez.* 623.—So a bequeſt of a part of a ſpecific chattel may be equally a ſpecific Legacy. *3 Atk.* 103.

But the Legatees of ſpecific parts, though not liable to abatement with *general* Legatees, yet muſt abate proportionably among themſelves upon deficiency of the ſpecific thing bequeathed. *Sleech* v. *Thorington*, *2 Vez.* 563; or on deficiency of the general aſſets for payment of debts. *Long* v. *Short*, *1 P. Wms* 403.—So ſpecific Legatees of diſtinct chattels ſhall abate proportionably on a deficiency of general aſſets. *Devon* (D.) v. *Atkins*, *2 P. Wms.* 382.

On the other hand, a mere bequeſt of *quantity*, whether of money or any other chattel, is a general Legacy; as of a quantity of Stock: *Purſe* v. *Snaplin*, *1 Atk.* 414: *Sleech* v. *Thorington*, *2 Vez.* 562: and where the teſtator has not ſuch Stock at his death, it is a direction to the executor to procure ſo much Stock for the Legatee, *Partridge* v. *Partridge*, *Talb.* 227.—So the purpoſe to which a *general* Legacy is to be applied will not alter its nature; as in the caſe of *Hinton* v. *Pinke*, *1 P. Wms.* 539. Perſonal annuities given by will are general Legacies, *Hume* v. *Edwards*, *3 Atk.* 693: *Lewin* v. *Lewin*, *2 Vez.* 417. How far a Legacy of money, to be paid out of a certain fund, ſhall be adeemed by the failure of the fund, ſee *Savile* v. *Blackett*, *1 P. Wms.* 778: *2 P. Wms.* 330, Mr. *Cox*'s Note (1): And ſee *Treat. Eq. lib.* 4. *pt.* 1. *c.* 2. § 5. in *n.*

A ſum bequeathed out of a debt muſt be paid though the debt is recovered by the teſtator; otherwiſe of a bequeſt of the debt itſelf. *2 Stra.* 824.

As an executor is not obliged to pay a Legacy without ſecurity given him by the Legatee to refund, if there are debts, becauſe the Legacy is not due till the debts are paid, and a man muſt be juſt before he is charitable; ſo in ſome caſes, the executor may be compelled to give ſecurity to the Legatee for the payment of his Legacy; as where a teſtator bequeathed 1000*l.* to a perſon, to be paid at the age of twenty-one, and made an executor, and

and died; afterwards the Legatee exhibited a bill in equity against the executor, setting forth that he had wasted the estate, and praying that he might give security to pay the Legacy when it should become due; and it was ordered accordingly. 1 *Ch. Rep.* 136, 257. See *post*, 4.

3. If a Legacy is devised, and no certain time of payment, and the Legatee is an infant, he shall have interest for the Legacy from the expiration of one year after the testator's death; for so long the executor shall have, that he may see whether there are any debts, and no laches shall be imputed to the infant: but if the Legatee be of full age, he shall have no interest but from the time of the demand of his Legacy. Where a Legacy is payable at a day certain, it must be paid with interest from that day. 2 *Salk.* 415: 2 *Nelf. Abr.* 1114. A person gives a Legacy charged upon land, which yields rents and profits, and there is no day of payment mentioned, the Legacy shall carry interest from the testator's death, because the land yields profit from that time: though were it charged on the personal estate, and the will mentions no time for paying it, there the Legacy bears interest only from the end of a year after the death of the testator; which is said to be the settled difference. 2 *P. Wms.* 26. It has been decreed in equity, that although a Legacy be devised to be paid at a certain time, it carries interest only from such time as it is demanded: it is otherwise of a debt; and in such case non-payment at the day has been held no breach, without demand and refusal. *Preced. Chanc.* 161. See *Abr. Caf. Eq.* 286. One having a Legacy given him, payable within a year, knew nothing of it till a great while afterwards, when the executor published it in the *Gazette*; here Chancery would allow no interest, but the bare Legacy. *Preced. Chanc.* 11.

4. Legacies being gratuities, and no duties, action will not lie at Common Law for the recovery of a Legacy; but remedy is to be had in the Chancery or Spiritual Court. *Allen* 38. The cognizance of a Legacy properly belongs to the Spiritual Courts, for such bequests were not good by the Common Law; but this is to be understood, where a Legacy is devised generally: if it is payable out of the land, or out of the profits of the land, an action on the case lies at Common Law; but the usual remedy is in Chancery. *Sid.* 44: 3 *Salk.* 223. By *Holt* Chief Justice, a Legatee may maintain an action of debt at Common Law against the owner of land, out of which the Legacy is to be paid; and since the statute of wills gives him a right, by consequence he shall have an action at law to recover it. 2 *Salk.* 415. And sometimes the Common Law takes notice of a Legacy, not directly, but in a collateral way; as where the executor promised to pay the money, if the Legatee would forbear to sue for the Legacy, this was adjudged a good consideration to ground an action; but that it would not lie for a Legacy in specie; which would be to divest the Spiritual Court of what properly belonged to their jurisdiction, by turning suits which might be brought there into actions on the case. *Raym.* 23 And it is now positively determined that no action at law lies for a Legacy; the Court of Chancery being the proper jurisdiction for that purpose. *Deeks v. Strutt*, 5 *Term Rep.* 690.—The reason given in this case seems to contradict the principle of another case in *Cowp.* 284, 9; where it was held, that if an executor, in consideration of assets in his possession, promises to pay a Legacy, an action of assumpsit lies against him in his own right.—In the first mentioned of these cases, however, no express promise *was proved*.—If security is given by bond to pay a Legacy, in such case an action at law is the proper remedy; by giving the bond, the Legacy is, as it were, extinct, and becomes a debt at Common Law, and the Legatee can never afterwards sue for it in the Spiritual Court. *Yelv.* 39. For the recovery of a debt or such like thing in action, given by way of Legacy, it is best to make the Legatee executor as to that debt, &c. or he must have a letter of attorney to sue in the executor's name. *Wood's Inst.* 330.

It is without question that the suit for a personal Legacy may be brought in Chancery; and if the matter has proceeded to a sentence in the Ecclesiastical Court, it is proper to go into Chancery for the executor's indemnity: where the Legatees are to give security to refund, and that Court will see money put out for children. On like principles a bill for the distribution of an intestate's personal estate is proper in Chancery, for the Spiritual Court in that case has but an ineffectual jurisdiction. See *Fonblanque's Treat. Eq. lib.* 4. *pt.* 1. *c.* 1. § 2.

An executor being, in equity, considered as a trustee for the Legatee, with respect to his Legacy, and as a trustee in certain cases for the Next-of-kin as to the undisposed surplus, is the true ground of equitable jurisdiction in enforcing the payment of a Legacy, or distribution of personal estate. See 1 *P. Wms.* 544, 575.

That the jurisdiction of our Courts of Equity is, in such cases, more effective and protective of the interest of creditors and Legatees, is evident in several instances, particularly in compelling executors to give security for a Legacy payable at a future day, the executor appearing to have wasted the estate. 1 *Ch. Ca.* 121:—or to bring the fund into Court. 3 *Bro. C. R.* 365. And there are cases in which a Court of Equity will restrain proceedings in the Ecclesiastical Court for a Legacy; as where a husband is suing for a Legacy in right of his wife. See 2 *Atk.* 420: *Toth.* 114: *Pre. Ch.* 548.

The Spiritual Court administers redress in the case of subtraction or the withholding or detaining of Legacies, as a consequential part of their testamentary jurisdiction; but in this case the Courts of Equity exercise a *concurrent jurisdiction*, as incident to some other species of relief required: and as it is beneath the dignity of the King's Courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives there also its full determination. See 3 *Comm.* 98. *c.* 7.

5. Where a testator gives his debtee a Legacy greater than his debt, it shall be taken in satisfaction of it: though where the Legacy is less, it shall not be deemed as any part thereof; but as a Legacy is a gift, sometimes the Legatee has been decreed both. 1 *Salk.* 155: 2 *Salk.* 508. If a greater Legacy is given by a codicil, to the same person that was Legatee in the will, it shall not be a satisfaction, unless so expressed. 1 *P. Wms.* 424.

Although a Legacy is to be taken as a gift, yet a man shall be intended to be just before he is kind; so that a bequest of the *same sum* by the debtor to the creditor shall be applied in satisfaction of the debt. *Pre. Ch.* 394: 2 *P. Wms.* 130: 3 *P. Wms.* 354: 1 *Vez.* 123:

Mosel.

Mosel. 7: See 2 *P. Wms.* 616.—Yet where there are assets, and the testator intended both, it may be as good equity to construe him both just and kind; and the construction of making a gift a satisfaction, has, in many cases, been carried too far. See 1 *Salk.* 155: 1 *P. Wms.* 410: 2 *P. Wms.* 616.

If a Legacy be less than the debt, it was never held to go in satisfaction. 2 *Salk.* 508: *Pre. Ch.* 394: 2 *P. Wms.* 616: 2 *Vern.* 478: *Mosel.* 295.—So if the Legacy were upon condition, or upon a contingency; for the will is intended for the Legatee's benefit; and therefore it could not be supposed that the testator would give him an uncertain recompence in satisfaction of a certain demand. *Pre. Ch.* 394: *Salk.* 508: 2 *Atk.* 300, 491: 2 *P. Wms.* 555: 2 *Vez.* 519.—So where the Legacy is not equally beneficial with the debt in some one particular, although it may be more so in another, as in time of payment. *Pre. Ch.* 236: 2 *Vern.* 478: 2 *Atk.* 300: 3 *Atk.* 96: 1 *Bro C. R.* 129, 295.—So if the thing were of a different nature, as land, it should not go in satisfaction of money, unless there was a defect of assets. 2 *P. Wms.* 616: *Salk.* 508: 3 *P. Wms.* 245.—So if the debt was contracted after the Legacy given; as the testator could not have it in contemplation to satisfy a debt not then in being. 2 *Salk.* 508: 2 *P. Wms.* 342: 1 *P. Wms.* 409: 3 *P. Wms.* 353.—So if the debt was upon an open or running account, so that it might not be known to the testator whether he owed any money to the Legatee or not. 1 *P. Wms.* 299.

Cases of this nature therefore depend upon circumstances; and where a Legacy has been decreed to go in satisfaction of a debt, it must be grounded upon some evidence, or at least a strong presumption that the testator did so intend it; for a Court of Equity ought not to hinder a man from disposing of his own as he pleases: and therefore the intention of the party is to be the rule: for where he says he gives a Legacy, the Court cannot contradict him, and say he pays a debt. See *Treat. Eq. lib.* 4. *pt.* 1. *c.* 1. § 5; and the notes there.

LEGALIS HOMO, He who stands *rectus in curia*, not outlawed, excommunicated, or infamous; and in this sense are the words *probi & legales homines*: hence also legality is taken for the condition of such a man. *Leg. Ed. Conf. c.* 18.

LEGALIS MONETA ANGLIÆ, Lawful money of *England*, is gold or silver money coined here by the King's authority, &c. 1 *Inst.* 207. See title *Coin.*

LEGAMANNUS, See *Lageman.*

LEGATARY, *Legatarius.*] He or she to whom any thing is bequeathed; a *Legatee.* See *stat.* 27 *Eliz. c.* 16. *Spelman* says, it is sometimes used *pro Legato vel Nuncio.*

LEGATE, *Legatus.*] An ambassador or Pope's Nuncio. There are two sorts of *Legates*, a *Legate à latere*, and *Legatus natus*; the difference between whom is thus: *Legatus à Latere* was usually one of the Pope's family vested with the greatest authority in all ecclesiastical affairs over the whole kingdom where he was sent; and, during the time of his legation, he might determine even those appeals which had been made from thence to *Rome*: *Legatus natus* had a more limited jurisdiction, but was exempted from the authority of the *Legate à latere*; and he could exercise his jurisdiction in his own province. The Popes of *Rome* had formerly in *England* the archbishops of *Canterbury* their *Legatus natus*; and, upon extraordinary occasions, sent over a *Legatus à latere.*

LEGATEE, The person to whom a Legacy is bequeathed by a last will.

LEGATORY, See *Legatary.*

LEGATUM, In the ecclesiastic sense, was a legacy given to the church, or accustomed mortuary. *Cowell.*

LEGEM FACERE, To make law, or oath: *Legem habere*, to be capable of giving evidence upon oath; *Minor non habet legem. Selden's notes on Heng.* 133.

LEGERGILD, *Legergildum.*] See *Lairwite.*

LEGIOSUS, Litigious, and so subjected to a course of law. *Cowell.*

LEID, Vide *Lathe & Lath-reve.*

LEIPA, A departure from service.——*Si quis à Domino suo sine licentia discedat, ut* leipa *emendetur, & redire cogatur. Leg. Hen.* 1. *c.* 43. *Blount.*—Rather, an *Eloper*; the person who escapes or departs. See *Spelm. in. v.*

LEIRWIT, *Mulcta adulteriorum. Fleta, lib.* 1. *c.* 7.] Is used for a liberty, whereby a lord challengeth the penalty of one that lieth unlawfully with his bondwoman. *Cowell.*

LEITHEN, Vide *Lathe* and *Lathe-reve.*

LEMON JUICE, See *Lime.*

LENT, From the Germ. *Lentz.* i. e. *Ver.* The Spring Fast] A time of fasting for forty days, next before *Easter*; mentioned in *stat.* 2 & 3 *Ed.* 6. *c.* 19. First commanded to be observed in *England* by *Ercombert*, seventh King of *Kent*, before the year 800. *Baker's Chron.* 7. No meat was formerly to be eaten in *Lent*, or on *Wednesdays* or other fish days, but by licence, under certain penalties. And butchers were not to kill flesh in the *Lent*, unless for victualling ships, &c.

LEP AND LACE, *Leppe & Lasse.*] A custom in the manor of *Writtle* in *Essex*, that every cart which goes over *Greenbury* within that manor, (except it be the cart of a nobleman) shall pay 4 *d.* to the lord. This *Greenbury* is conceived to have been anciently a market-place; on which account this privilege was granted. *Blount.*

LEPA, A measure which contained the third part of two bushels: whence we derive a *seed-leap. Du Cange.*

LEPORARIUS, A greyhound for the hare. *Mon. Ang. tom.* 2. *fol.* 283.

LEPORIUM, A place where hares are kept together. *Mon. Ang. tom.* 2. *fol.* 1035.

LEPROSO AMOVENDO; An ancient writ that lay to remove a Leper or Lazar, who thrust himself into the company of his neighbours in any parish, either in the church, or at other public meetings, to their annoyance. *Reg. Orig.* 237. The writ lay against those Lepers that appear outwardly to be such, by sores on their bodies, smell, &c. and not against others: and if a man were a Leper, and keep within his house, so as not to converse with his neighbours, he shall not be removed. *New Nat. Br.* 521.

LE ROY LE VEUT, See *Royal Assent*; *Parliament.*

LE ROY S' AVISERA, By these words to a bill, presented to the King by his houses of parliament, are understood his denial of that bill. By this means the indelicacy

indelicacy of a positive refusal to give the Royal Assent to a bill passed by the Lords and Commons is avoided. See tit. *Parliament*

LESCHEWES, Trees fallen by chance, or wind-falls. *Broke's Abr.* 341.

LESIA, A leash of greyhounds, now restrained to the number of three, but formerly more. *Spelm.*

LESPEGEND, Sax. *Les pegen Baro minor*] *Sint sub qualibet horum quatuor ex mediocribus hominibus quos Angli* Lespegend *nuncupant, Dani vero* young-men *vocant, locati, qui curam et onus tum viridis tum veneris suscipiant.* —Hence it appears that this was an inferior officer in forests, to take care of the vert and venison therein, &c. —*Constitut. Canut. de Foresta*, Art. 2.

LESSA, A legacy; from this word also Lease is derived. *Mon. Ang. tom.* 1. *pag.* 562.

LESSOR AND LESSEE, The parties to a Lease. The former he who makes the Lease, the latter to whom it is made.

LESTAGE, See *Ballast*.

LESTAGEFRY, Lestage-free, or exempt from the duty of paying ballast money. *Cowell.*

LESWES, or LELVES, Is a word used in *Domesday*, to signify pastures, and is still used in many places of *England*, and often inserted in deeds and conveyances. *Cowell.* Hence the modern term *Leasowes*.

LETARE JERUSALEM, See *Quadragesimalia*.

LETHERWITE, See *Leirwit*.

LETTERS, Threatening, See *Threatening Letters*.

LETTER MISSIVE FOR ELECTING OF A BISHOP. A letter from the King to the Dean and Chapter, containing the name of the person whom he would have them elect. See title *Bishop*.

LETTER MISSIVE IN CHANCERY, To a Peer. See *Chancery*.

LETTERS OF ABSOLUTION, *Literæ absolutoriæ.*] Absolvatory letters, were such in former times, when an abbot released any of his brethren *ab omni subjectione & obdientia*, &c. and made them capable of entering into some other order of religion. *Mon. Faversbamensi. p.* 7.

LETTER OF ATTORNEY, *Litera Attornati*] A writing, authorising another person, who in such case is called the *Attorney* of the party appointing him, to do any lawful act in the stead of another: as to give seisin of lands; receive debts, or sue a third person, &c. A *Letter of Attorney* is either general or special. The nature of this instrument is to give the attorney the full power and authority of the maker, to accomplish the act intended to be performed: and sometimes these writings are revocable, and sometimes not so: but when they are revocable, it is usually a bare authority only; they are irrevocable when debts, &c. are assigned to another, in which case the word, irrevocably, is inserted; and the intention of them then, is to enable the assignee to receive the debt, &c. to his own use.

In cases of Letters of Attorney it was anciently held that the authority must be strictly pursued: if it be to deliver livery and seisin of lands between certain hours, and the attorney doth it before or after; or in a capital messuage, and he does it in another part of the land, &c. the act of the attorney to execute the estate shall be void. *Plowd* 475. But notwithstanding the ancient opinions for pursuing authorities with great strictness and exactness, yet in case of livery and seisin they have been always favourably expounded of later times, unless where it hath appeared, that the authority was not pursued at all; as if a Letter of Attorney be made to three, two cannot execute it, because they are not the parties delegated, and they do not agree with the authority. 2 *Mod. Rep.* 79. Where the attorney does less than the authority mentions, it is void: it is said if he doth more, it may be good for so much as he had power to do, and void for the rest; yet both these rules have divers exceptions and limitations. *Vide* 1 *Inst.* 258. Where two attornies were made jointly and severally to deliver seisin of lands, &c. and one of them delivered seisin of part of the land, and after another attorney, being tenant thereof for years, gave livery of the other part of the land: this was held good, though made at several times. 1 *And.* 247. And if a man make a deed of feoffment of lands in divers counties, with such a Letter of Attorney, the livery must be at several times; otherwise it cannot be made. *Ibid.* See 1 *Leon.* 192, 260.

If a Mayor and Commonalty make a feoffment of lands, and execute a Letter of Attorney to deliver seisin, the livery and seisin, after the death of the mayor, will be good, by reason the Corporation dieth not. 1 *Inst.* 52. In other cases, by the death of the party giving it, the power given by Letter of Attorney generally determines. A person made a Letter of Attorney to a creditor to receive all his wages and pay due from a ship, and afterwards died at sea; this authority was adjudged to be so determined, that all the rest of the creditors should have a share in his administration. *Preced. Chanc.* 125: 2 *Vern.* 391. Sailors generally make the attorney executor also. See title *Navy*. See further as to Letters of Attorney, *Com. Dig.* title *Attorney* (C).

A Letter of Attorney to receive Rents, Debts, and Dividends, and to demise Premises.

KNOW all men by these presents, That I A. B. *of the parish of* Christ Church *in the county of* Middlesex, *spinster, for divers good causes and considerations me hereunto moving, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint,* C. D. *of the parish of* Christ Church *aforesaid, weaver, my true and lawful attorney for me, and in my name, place, and stead, and for my use, to ask, demand, and receive, all and every rent and rents, sum and sums of money now due, or which hereafter shall or may grow due to me from any person and persons whomsoever, who have been, now are, or hereafter shall or may be tenant or tenants of any messuages or tenements, lands, hereditaments, and premises, or of any part or parts, share or shares, of any messuages or tenements, lands, hereditaments, and premises, in* Great Britain, *the island of* Jamaica, *or elsewhere, belonging to me; and of and from all and every other person and persons liable to or empowered to pay the same; and upon receipt thereof, or of any part thereof, acquittances or other sufficient discharges for me and in my name, or in his own name, to make and give for what he shall so receive, and for non-payment of such rent or rents or any part thereof, to enter into and upon all or any of the messuages or tenements, lands and premises, liable to the payment*

payment thereof, and distrain for the same, and the distress and distresses then and there found to take away, sell, and dispose of according to law; and also for me and in my name, and for my use, to ask, demand, and receive, of and from all and every corporations and companies, all and every sum and sums of money now due or which hereafter shall or may grow due to me for dividends, interest, or profits of any sum or sums of money, parts, or shares now belonging, or which shall belong to me therein respectively; and likewise to ask, demand, sue for, recover, and receive all and every debt and debts, sum and sums of money due, or to grow due and payable to me, from any other person or persons, for any other matter, cause, or thing whatsoever, and upon receipt thereof, or of any part thereof in my name, or in his own name, to make and give proper receipts and discharges for the same; and in case any tenant or tenants, of any messuages or tenements, lands and premises wherein I have any right or interest, shall quit or leave the premises by them respectively holden, then and in that case I do hereby give and grant to my said attorney, full power and authority to demise, let, and set the same respectively, or any part thereof, to such person or persons, and for such rent and rents, and for such term and time, and under such covenants and agreements as my said attorney shall think fit, and to expend and apply such part of the rents and profits of the said premises as shall come to his hands, in repairing and improving the same, as my said attorney shall judge proper, and one or more attorney or attornies under him, for all or any the purposes aforesaid, to make and at pleasure to revoke; Giving and hereby granting to my said attorney full power and authority in the performance of all and singular the premises aforesaid, as fully and amply in every respect as I myself might or could do if personally present; hereby ratifying and confirming all and whatsoever my said attorney shall lawfully do or cause to be done, in and about the said premises, by virtue hereof. In witness whereof, I the said A. B. *have hereunto set and subscribed my hand and seal this —— day of —— in the year of our Lord ——.*

Sealed and delivered (being first duly stampt) in the presence of }

LETTERS CLAUS, *Literæ Clausæ.*] Close Letters, opposed to Letters-patent: being commonly sealed up with the King's Signet or Privy Seal; whereas the Letters-patent are left open and sealed with the broad seal.

LETTER OF CREDIT, Is where a merchant or correspondent writes a Letter to another, requesting him to credit the bearer with a certain sum of money. *Merch. Dict.* See title *Bill of Exchange.*

LETTERS OF EXCHANGE, *Literæ Cambii.*] *Reg. Orig.* 194. See title *Bill of Exchange.*

LETTER OF LICENCE, An instrument or writing made by creditors to a man that hath failed in his trade, allowing him longer time for the payment of his debts, and protecting him from arrests in going about his affairs. These Letters of Licence give leave to the party to whom granted to resort freely to his creditors, or any others, and to compound debts, &c. And the creditors severally covenant, that if the debtor shall receive any molestation or hindrance from any of them, he shall be acquitted and discharged of his debt against such creditors, &c.

LETTERS OF MARQUE, Are extraordinary Reprisals for reparation to merchants taken and despoiled by strangers at sea, grantable by the Secretaries of State, with the approbation of the King and Council; and usually in time of war, &c. *Lex Mercat.* 173.

The words *Marque* and *Reprisal* are used as synonimous, and signify, the latter a taking in return, the former the passing the frontiers in order to such taking. *Dufresne title Marca.*

As the delay of making war by the Sovereign Power of the Nation, may sometimes be detrimental to individuals who have suffered by depredations from foreign States; the laws of *England* have, in some respect, armed the Subject with powers to impel the prerogative of the Crown in this particular, by directing his ministers to issue Letters of Marque and Reprisal upon due demand; the prerogative of granting which is nearly related to, and plainly derived from, that of making war; (See title *King*;) this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These Letters are grantable by the Law of Nations, wherever the Subjects of one State are oppressed and injured by those of another; and justice is denied by that State to which the oppressor belongs. In this case, Letters of *Marque* and *Reprisal* may be obtained, in order to seize the bodies or goods of the Subjects of the offending State, until satisfaction be made, wherever they happen to be found; and in fact this custom of reprisals seems dictated by nature. The necessity however, is obvious of calling in the Sovereign Power to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. In pursuance of which principle it is declared by *stat.* 4 *Hen.* 5. *c.* 7, that if any Subjects of the realm are oppressed, *in the time of truce*, by any foreigners, the King will grant Marque in due form, to all that feel themselves grieved; which form is thus directed to be observed: the sufferer must first apply to the Lord Privy Seal, and he shall make out Letters of Request under the Privy Seal; and if after such request of satisfaction made, the party required do not within convenient time make due satisfaction or restitution to the party grieved, the Lord Chancellor shall make him out Letters of Marque under the Great Seal; and by virtue of these, he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber and a pirate. See 1 *Comm. c.* 7. *p.* 258, 9.

It is observable that the above statute of *Henry* V. is confined to the time of a truce, wherein there is no express mention that all Marques and Reprisals shall cease. It seems that the manner of granting Letters of Marque under this statute has been long disused, as it could only be granted to persons actually grieved. But if, during a war, a Subject without any commission from the King should take an enemy's ship, the prize would not be the property of the captor, but would be one of the *droits* of Admiralty, and would belong to the King, or his grantee the Admiral. *Carth.* 399. Therefore, to encourage merchants and others to fit out privateers, or armed ships, in time of war, the Lord High Admiral or the Commissioners of the Admiralty are, from time to time, empowered by various acts of parliament to grant commissions to the owners of such ships; and the prizes captured are divided between the owners and the

the captain and crew of the privateer. But the owners, before the commission is granted, shall give security to the Admiralty, to make compensation for any violation of treaties between those powers with whom the nation is at peace: And by *stat.* 24, *Geo.* 3. *c.* 47, they must also give security that such armed ship shall not be employed in smuggling. These commissions are now upon all occasions, as well as in the statutes, called Letters of Marque: See *stats.* 20 *Geo.* 2. *c.* 34: 19 *Geo.* 3. *c.* 67: 33 *Geo.* 3. *c.* 66. § 14—20.—Sometimes the Lords of the Admiralty have this authority by a proclamation from the King in Council, as was the case in *December* 1780, to empower them to grant Letters of Marque to seize the ships of the *Dutch*. See *Christian*'s Note on 1 *Comm. c.* 7. *ub. sup.*

If a Letter of Marque wilfully and knowingly take a ship and goods belonging to another nation, not of that State against whom the commission is awarded, but of some other in amity, this amounts to a downright piracy. *Rol. Abr.* 430. See further title *Reprisal*.

LETTERS PATENT, *Literæ patentes.*] Sometimes called Letters overt; are writings of the King sealed with the Great Seal of *England*, whereby a person is enabled to do or enjoy that which otherwise he could not; and so called, because they are open with the seal affixed, and ready to be shewn for confirmation of the authority thereby given. And we read of Letters Patent to make denizens, *&c.* Letters Patent may be granted by common persons, but in such case they are not properly called Patentees; yet for distinction, the King's Letters Patent have been called Letters Patent Royal. See *stat.* 2 *H.* 6. *c.* 10. See titles *Patents*; *Grants to the King*.

LETTERS OF SAFE CONDUCT, See title *Safe Conduct*.

LEVANT AND COUCHANT, Is a law term for cattle that have been so long in the ground of another, that they have lain down and are risen again to feed; in ancient records *levantes et cubantes*. When the cattle of a stranger are come into another man's ground, and have been there a good space of time, (supposed to be a day and a night,) they are said to be *levant* and *couchant*. *Terms de Ley*: 2 *Lil. Abr.* 167. Beasts of a stranger on the lord's ground may be distrained for rent, though they have not been *levant* and *couchant*; but it is otherwise if the tenant of the land is in fault in not keeping up his mounds, by reason whereof the beasts escape upon the land. *Wood's Inst.* 190. See title *Distress* I. 2.

LEVANUM, From Lat. *Levare*, to make lighter:] Leavened bread.

LEVARE FŒNUM, To make hay, or properly to cast it into wind-rows, in order to cock it up. *Paroch. Antiq. pag.* 320. Hence *una levatio fœni* was one day's hay-making, a service paid the lord by inferior tenants. *Paroch. Antiq.* 402.

LEVARI FACIAS, A writ of execution directed to the Sheriff for levying a sum of money upon a man's lands and tenements, goods and chattels, who has forfeited his recognizance. *Reg. Orig.* 298. This writ was given by the Common Law, before the statute *West.* 2. *c.* 18, gave the writ of *elegit*; and a *Levari Facias* commands the debt to be levied *de exitibus & proficuis terræ*, *&c.* And cattle of a stranger on the land have been held issues of the land, which is debtor. 1 *Salk.* 395.

On a judgment in an inferior court, and a *Levari Facias*, whereupon a warrant was made to levy the debt *de terris et catallis*, it was adjudged that the precept ought to be to levy the money *de terris bonis et catallis*, *&c.* 2 *Lutw.* 1410. A *Levari Facias* in debt lies against a parson, directed to the bishop, *&c.* to levy the money on his spiritual goods. 13 *H.* 4. 17.

There is a *Levari Facias damna disseisitoribus*, for the levying of damages, wherein the disseisor has formerly been condemned to the disseisee. *Reg. Orig.* 214. Also *Levari Facias residuum debiti*, to levy the remainder of a debt upon lands and tenements, or chattels of the debtor, where part has been satisfied before. *Reg. Orig.* 299. And a *Levari Facias quando vicecomes returnavit quod non habuit emptores*, commanding the sheriff to sell the goods of the debtor, which he has taken, and returned that he could not sell. *Reg. Orig.* 300. See title *Execution*.

LEUCA, A measure of land, consisting of 1500 paces. *Ingulphus* says, it is 2000 paces, *pag.* 910. In the *Monastic.* 1 *tom. p.* 313, it is 480 perches.

LEUCATA, A space of ground, as much as a mile contains. *Monast.* 1 *tom. p.* 768. And so it seems to be used in a charter of *William* the Conqueror to *Battle Abbey*. *Cowell.*

LEVELLUS, A level, even or upon the level. *Cowell.*

LEVITICAL DEGREES, See title *Descent*.

LEVY, *Levare.*] Is used in the law for to collect, or exact; as to levy money, *&c.* Sometimes it signifies to erect, or cast up; as to levy a ditch, *&c.* To levy a fine of land, is the usual term for the completing that conveyance: in ancient time, the word rere a fine, was made use of. 17 *H.* 6. See title *Fine*.

LEVYING MONEY WITHOUT CONSENT OF PARLIAMENT. No Subject of *England* can be constrained to pay any aids or taxes, even for the defence of the realm or the support of Government, but such as are imposed by his own consent, or that of his representatives in parliament. See *stats.* 25 *Ed.* 1. *cc.* 5, 6: 34 *Ed.* 1. *stat.* 4. *c.* 1: 14 *Ed.* 3. *stat.* 2. *c.* 1: The petition of right, 3 *Car.* 1. *c.* 1: *stat.* 1 *W. & M. stat.* 2. *c.* 2; and this Dict. titles *Liberties*; *Taxes*.

LEVYING WAR AGAINST THE KING, See title *Treason*.

LEWDNESS. Open and notorious Lewdness, is an offence against religion and morality, either by frequenting houses of ill fame, which is an indictable offence, *Poph.* 208; or by some grossly scandalous and public indecency, for which the punishment is fine and imprisonment; and in *Mich. T.* 15 *Car.* 2, a person was indicted for open Lewdness in shewing himself naked on a balcony, and other misdemeanors, and was fined 2000 marks, imprisoned for a week, and bound to his good behaviour for three years. 1 *Sid.* 168. In times past, when any man granted a lease of his house, it was usual to insert an express covenant, that the tenant should not entertain any lewd woman, *&c.* See titles *Bawdy-house*; *Fornication*.

A temporal punishment may also in certain circumstances be inflicted for having bastard children. By *stat.* 18 *Eliz. c.* 3, two justices may take order for the punishment of the

the mother and reputed father; but what that punishment shall be, is not therein ascertained, though the contemporary exposition was that a corporal punishment was intended. *Dalt. J. c.* 11. By *stat.* 7 *Jac.* 1. *c.* 4, a specific punishment, commitment to the house of correction, is inflicted on the woman only. But in both cases it seems that the penalty can only be inflicted if the bastard becomes chargeable to the parish; for otherwise the very maintenance of the child is considered as a degree of punishment. 4 *Comm. c.* 4. *p.* 65. See title *Bastard* II. 1.

Many offences of the incontinent kind fall properly under the jurisdiction of the Ecclesiastical Court; and are appropriated to it. But except those appropriated cases, the Court of King's Bench is the *Custos Morum* of the people; and has the superintendency of offences *contrà bonos mores.* 3 *Burr.* 1438. An information has been granted in that Court against a number of persons concerned in assigning a young girl as an apprentice to a gentleman under a pretence of learning musick, but for the purposes of prostitution. 3 *Burr.* 1438, *&c.* There is also an instance of an information for a conspiracy, granted against a Peer and several others, for enticing away a young lady from her father's house, and procuring her seduction by the Peer. 3 *St. Tr.* 519. And all such acts of indecency and immorality are also punishable by indictment in any criminal Court, as public misdemeanors. 4 *Comm. c.* 4. *p.* 64, *in n.*

LEX, A law for the government of mankind in society. *Lit. Dict.* It is often taken for *judicium Dei* or *Ordeal.* See *Lada*; *Law.*

LEX AMISSA, or *legem amittere, viz.* One who is an infamous, perjured, or outlawed person. See *Bracton, lib.* 4. *c.* 19. *par.* 2.

LEX APOSTATA, or LEGEM APOSTATARE, Is to do a thing contrary to law. See *Leg. H.* 1. *c.* 12. *· lex [illegible] nulla vera quae sit reus prius vice.*

LEX BREHONIA, The *Brehon* or *Irish* law, overthrown by K. *John.* See *Ireland.*

LEX BRETOISE, Was the law of the ancient *Britons*, or *Marches of Wales.* Lex Marchiarum.

LEX DERAISNIA, The proof of a thing, which one denies to be done by him, where another affirms it; defeating the assertion of his adversary, and shewing it to be against reason or probability: this was used among the *Old Romans* as well as the *Normans. Grand Custumar. c.* 126.

LEX JUDICIALIS, Ordeal. *Leg. H.* 1. See *Lada.*

LEX SACRAMENTALIS, *Leg. H.* 1. *c.* 9. Purgation by oath. See *Wager of Law.*

LEX TALIONIS, Is *juris positivi*; and the *taliones* among the *Jews* were converted into pecuniary estimates, so that the price of an eye, *&c.* lost, was allowed to the person injured. 1 *Hale's Hist. P. C.* 12.

It does not appear that this is a principle applicable to laws of a civilized state: when it was once attempted to introduce into *England* the Law of Retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by *stat.* 37 *E.* 3. *c.* 18, that such as preferred any suggestions to the King's Great Council, should put in sureties of taliation; that is, to incur the same pain that the other should have had in case the suggestion were found untrue. But after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its stead. *Stat.* 38 *E.* 3. *c.* 9. See 4 *Comm. c.* 1. *p.* 12, 14.

LEX TERRÆ, The law and custom of the land, distinguished by this name from the Civil Law. See *Selden, in Dissertatione ad Fletam, c.* 9. *par.* 3.

LEX WALLENSICA, The *British* law, or law of *Wales. Statut. Wall.*

LEY, LEYS, *Fr.* Law, Laws.

LEY, LEE, LAY, Whether in the beginning or end of names of places, signify an open field, or large pasture. From the *Saxon, leag, campus, pascuum*; as *Bletchingley, &c. Cotwell.*—*Leys* in Domesday is used for pasture.

LEY-GAGER, *Wager of Law.* See that title.

L I B E L:

LIBELLUS FAMOSUS.] A contumely or reproach, published to the defamation of the Government, of a Magistrate, or of a private person. *Com. Dig.* title *Libel* (A).

It is also defined to be, a malicious defamation, expressed either in printing or writing, or by signs, pictures, *&c.* tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule. 1 *Hawk. P. C. c.* 73. § 1: *Bac. Abr.* title *Libel*: 5 *Mod.* 165: 5 *Co.* 121, 5.

Libels, says *Blackstone*, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an *immoral* or *illegal* tendency. Considered particularly as offences against the public peace, they are malicious defamations of any person, and especially a Magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, or ridicule. The direct tendency of these Libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. 4 *Comm. c.* 11. *p.* 150: 3 *Comm. c.* 8. *p.* 125.

From the different modes in which a Libel may be conveyed, a distinction has been made between a Libel *in scriptis*, and one *sine scriptis*; i. e. in writing, or without writing. 3 *Inst.* 174.

I. *What shall be considered as a Libel.*
II. *Of its Publication.*
III. *In what Cases the Truth of a Libel may or may not be pleaded in justification of it.*
IV. *Of its Punishment.* See title *Jury* IV. 2.

I. A Libel is the greatest degree of scandal, and does not die like words which may be forgot, an action for which is confined to the person; but the cause of action for scandal in a Libel survives. 5 *Rep.* 125.

This species of defamation is usually termed *written scandal*; and thereby receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation; and to continue longer and propagate wider and farther than any other scandal. 5 *Rep.* 125: *Bac. Abr.* title *Libel* (A).

The important distinction between Libels and words spoken was fully established in the case of *Villers* v. *Mousley*, 2 *Wils.* 403. *viz.* That whatever renders a man ridiculous, or lowers him in the esteem and opinion of the world, amounts to a Libel; though the same ex-

 pressions,

pressions, if spoken, would not have been defamation: as, to call a person in writing *an itchy old toad*, was held in that case to be a Libel; although as words spoken they would not have been actionable. And on this ground a young lady of quality in the year 1793 recovered 4000*l.* damages for reflections upon her chastity, published in a news-paper, although she could have brought no action for the grossest verbal aspersions that could have been uttered against her honour. An action for a Libel also differs from an action for words in this particular; that the former may be brought at any time within six years, and *any* damages will entitle the plaintiff to full costs. *Christien's* note on 1 *Comm. p.* 125, 6. To print of any person that he is a swindler, is a Libel and actionable. 1 *Term. Rep.* 748.

All Libels are made against private men, or magistrates, and public persons; and those against magistrates deserve the greatest punishment: if a Libel be made against a private man, it may excite the person libelled, or his friends, to revenge and break the peace; and if against a magistrate, it is not only a breach of the peace, but a scandal to government, and stirs up sedition. 5 *Rep.* 121.

Where a writing inveighs against mankind in general, or against a particular order of men, this is no Libel; it must descend to particulars and individuals to make it a Libel. *Trin.* 11 *W.* 3. *B. R.* But a general reflection on the Government is a Libel, though no particular person is reflected on: and the writing against a known law is held to be criminal. 4 *St. Tr.* 672, 903. According to *Holt C. J.* scandalous matter is not necessary to make a Libel; it is enough if the defendant induces an ill opinion to be had of the plaintiff, *&c.* And if a man speak scandalous words, unless they are put in writing, he is not guilty of a Libel; for the nature of a Libel consisteth in putting the infamous matter into writing. 2 *Salk.* 417: 3 *Salk.* 226. A defamatory writing, expressing only one or two letters of a man's name, if it be in such a manner, that from what goes before and follows after, it must be understood, by the natural construction of the whole, to signify and point at such a particular person, is as properly a Libel as if the whole name were expressed at large. 1 *Hawk. P. C.* c. 73. § 5. For, adds *Hawkins*, it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions: and it is a ridiculous absurdity to say that a writing which is understood by every the meanest capacity cannot possibly be understood by a Judge and Jury. On application for an information for this offence, some friend to the party complaining should in such case state by affidavit the having read the Libel, and that he understands and believes it to mean the party. 3 *Bac. Abr. in n.* And in the case of actions for Libels by signs or pictures, it seems necessary always to show by proper inuendoes and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed, otherwise it cannot appear that such Libel by picture was understood to be levelled at the plaintiff, or that it was attended with any actionable consequences. 3 *Comm. c.* 8. *p.* 126.

Though a private person or magistrate be dead at the time of making the Libel, yet it is punishable; as it tends to a breach of the peace. *Hob.* 215: 5 *Co.* 125: 1 *Hawk. P. C. c.* 73. § 1: 4 *Term Rep.* 126; 129 *in n.* But an indictment for publishing libellous matter reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, and to stir up the hatred of the King's Subjects against them, and to excite his relations to a breach of the peace, cannot be supported; and judgment was in this case accordingly arrested. *R.* v. *Topham*, 4 *Term Rep.* 126. See *R.* v. *Critchley*, 4 *Term Rep.* 129, *in n.*

A private Libel for a private matter, as a letter scandalizing a person courting a woman, is indictable, and punishable by fine. *Sid.* 270. No writing is esteemed a Libel, unless it reflect upon some particular person; and a writing full of obscene ribaldry, is not punishable by any prosecution at Common Law; but the author may be bound to the good behaviour, as a person of evil fame. 1 *Hawk. P. C. c.* 73. § 9. It was so agreed in *Read*'s *Case*, 1 *Mod.* 142; but in the case of the *K.* v. *Curl*, *Mich.* 1 *Geo.* 2, for publishing an obscene book, the court were unanimous that it is a temporal offence, and that *Read*'s case was not law. *Stra.* 788, 834: See also 4 *Burr.* 2527.

Printing or writing may be libellous, though the scandal is not directly charged, but obliquely and ironically; and where a writing, pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally famous for, pitches on such qualities only which their enemies charge them with the want of; as by proposing such a one to be imitated for his learning, who is known to be a good soldier, but an illiterate man, *&c.* this will amount to a Libel. 1 *Hawk. P. C. c.* 73. § 4.

The petition of the Seven Bishops in the reign of King *James* II. against the King's declaration, setting forth, that it was founded on a dispensing power, which had been declared illegal in parliament, *&c.* was called a seditious Libel against the King: and they were committed to the *Tower*; but being after tried at bar, were acquitted. 3 *Mod.* 212. See *State Trials*. The printing of a petition to a committee of parliament, (which would be a Libel against the party complained of, were it made for any other purpose,) and delivering copies thereof to the members of the committee, is not the publication of a Libel, being justified by the order and course of proceedings in parliament. 1 *Hawk. P. C. c.* 73. § 8.

Scandalous matter in legal proceedings by bill, petition, *&c.* in a court of justice amounts not to a Libel, if the court hath jurisdiction of the cause. *Dyer*, 285: 4 *Rep.* 14. But he who delivers a paper full of reflections on any person, in nature of a petition to a committee, to any other persons except the members of parliament who have to do with it, may be punished as the publisher of a Libel. 1 *Hawk. c.* 73. § 8. And by the better opinion, a person cannot justify the printing any papers which import a crime in another, to instruct counsel, *&c.* but it will be a Libel. *Sid.* 414.

An order made by a Corporation and entered in their books, stating, that *A. B.* (against whom a jury had found a verdict with large damages, in an action for a malicious prosecution for perjury, which verdict had been confirmed in *C. B.*) was actuated by motives of public

public justice in preferring the indictment, is a Libel reflecting on the administration of public justice, for which the Court of *K. B.* will grant an information against the members making the order. 2 *Term Rep.* 199. But it is no Libel to assign on the books of a Quakers meeting their reasons for expelling a member. 1 *Black. Rep.* 386.

II. The communication of a Libel to any one person is a publication in the eye of the law; *Moor* 813; and therefore the sending an abusive private letter to a man is as much a Libel as if it were openly printed; for it equally tends to a breach of the peace; 2 *Brownl.* 151, 7: 12 *Rep.* 35: *Hob.* 215: *Poph.* 139: 1 *Hawk. P. C. c.* 73. § 11: 4 *Comm. c.* 11. *p.* 150: *Bac. Abr.* title *Libel* B (2); in which latter book it is stated that this was a matter of doubt; but a case is mentioned where an information was granted under such circumstances; and at all events it is an offence against the King's peace, punishable by indictment; and if copies of it are afterwards dispersed, it aggravates the crime, or rather makes it a new crime, for which the party may have an action. *Poph.* 35: *Hob.* 62. Writing a letter to a man, and abusing him for his public charities, &c. is a libellous act, punishable by indictment. *Hob.* 215.

In the making of Libels, if one man dictates, and another writes a Libel, both are guilty; for the writing after another shews his approbation of what is contained in the Libel; and the first reducing a Libel into writing may be said to be the making it, but not the composing: if one repeats, another writes, and a third approves what is written, they are all makers of the Libel; because all persons who concur to an unlawful act are guilty. 5 *Mod.* 167. The making a Libel is the genus; and composing and contriving is one species; writing, a second species; and procuring to be written, a third; and one may be found guilty of writing only, &c. 2 *Salk.* 419, &c. But observe, a mere writing, without a publication, was not in question in *Salkeld*. It is conceived that for the mere writing of a Libel, not published, no action can be maintained, nor prosecution legally supported.

If one writes a copy of a Libel, and does not deliver it to others, the writing is no publication: but it has been adjudged, that the copying a Libel, without authority, is writing a Libel, and he that thus writes it, is a contriver; and that he who hath a written copy of a known Libel, if it is found upon him, this shall be evidence of the publication; but if such Libel be not publicly known, then the mere having a copy is not a publication. 2 *Salk.* 417: 2 *Nelf. Abr.* 1122. Writing a copy of a Libel is writing of a Libel, as it has the same pernicious consequence; and if the law were otherwise, men might write copies, and print them with impunity. 2 *Salk.* 419. And when a Libel appears under a man's own hand-writing, and no author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. *Ibid.* If one reads a Libel, or hears it read, and laughs at it, it is not a publishing; for before he reads or hears it read, he cannot know it to be a Libel: though if he afterwards reads or repeats it, or any part thereof, in the hearing of others, it is a publication of it: yet if part of it be repeated in mirth without any malicious purpose of defamation, it is said to be no offence. 9 *Rep.* 59: *Moor* 862. Every one convicted of publishing a Libel ought to be esteemed the contriver or procurer: the procurer and writer of a Libel have been held to be both contrivers; also he who procures another to publish it, and the publisher, are both publishers: and the contriver, procurer, and publisher of a Libel, are punishable by fine, imprisonment, pillory, or other corporal punishment, at the discretion of the court, according to the heinousness of the crime, &c. *Moor.* 627: 5 *Rep.* 125: 3 *Inst.* 174: 3 *Cro.* 17. See 1 *Hawk. P. C. c.* 73.

When any man finds a Libel, if it be against a private person, he ought to burn it, or deliver it to a magistrate; and where it concerns a magistrate, he should deliver it presently to a magistrate. 5 *Rep.* 125. If a Libel be found in a house, the master cannot be punished for framing, printing, and publishing it; but it is said he may be indicted for having it, and not delivering it to a magistrate; 1 *Vent.* 31; or it may in some cases be considered as evidence of his being the author or publisher. 2 *Salk.* 418.

The sale of the Libel by a servant in a shop, is *primâ facie* evidence of publication, in a prosecution against the master; and is sufficient for conviction, unless contradicted by contrary evidence showing that he was not privy, nor in any way assenting to it. 4 *Term Rep.* 126: 5 *Burr.* 2686, 7: 1 *Hawk. P. C. c.* 73. § 10, *in n.*

Proof that the defendant gave a bond to the Stamp-office for the duties on the advertisements in a news-paper, under *stat.* 29 *Geo.* 3. *c.* 50. § 10; and had occasionally applied at the Stamp-office respecting the duties, is evidence that he is the publisher. 4 *Term Rep.* 126.

III. It is immaterial, on a criminal prosecution, with respect to the essence of a Libel, whether the matter of it be true or false; because it equally tends to a breach of the peace; and the provocation, not the falsity, is the thing to be punished criminally: though doubtless the falsehood of it may aggravate its guilt and enhance its punishment. In a civil action, a Libel must appear to be false as well as scandalous: for if the charge be true the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace: and therefore upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But in a criminal prosecution, the tendency which all Libels have to create animosities and to disturb the public peace is the whole that the law considers. And therefore in such prosecutions, the only points to be enquired into are, first the making or publishing of a book or writing; and secondly, whether the matter be criminal; and if both these points are against the defendant, the offence against the Public is complete. 4 *Comm. c.* 11. *p.* 150, 1: See *post.* IV.

It seems to be clearly agreed, that, in an indictment or criminal prosecution for a Libel, the party cannot justify that the contents thereof are true, or that the person upon whom it is made had a bad reputation; since the greater appearance there is of truth in any malicious invective, so much the more provoking it is: for, as Ld. *Coke* observes, in a settled state of government the party grieved ought to complain for every

injury

injury done him, in the ordinary course of law; and not by any means to revenge himself by the odious course of libelling or otherwise. *Bac. Abr. tit. Libel* (A 5.) cites 5 *Co.* 125: *Hob.* 253: *Moor* 627: 1 *Hawk. P. C. c.* 73.

It is termed *libellus famosus seu infamatoria scripta*, and from its pernicious tendency has been held a public offence at the Common Law: for men not being able to bear the having their errors exposed to public view, were found by experience to revenge themselves on those who made sport with their reputations, from whence arose duels and breaches of the peace: and hence written scandal has been held in the greatest detestation, and has received the utmost discouragement in the courts of justice. *Lamb. Sax. Law*, 64: *Bract. lib.* 3. *c.* 36: 3 *Inst.* 174: 5 *Co.* 125: cited *Bac. Abr. tit. Libel* ad *init.*

The above authorities have been quoted, principally to obviate an error too generally received, that the late venerable Chief Justice of the *King's Bench* (the *Earl* of *Mansfield*) was the first who broached the doctrine, *the greater the truth the greater the Libel.* A maxim which appears to be as well founded in ancient authority, as it is in sound reason, so far as relates to criminal prosecutions; and the adoption of it cannot, by any reasoning or honest man, be thought to reflect disgrace upon the high and estimable character of that upright and respectable Judge.

But although it has been held, *at least for these two centuries*, that the truth of a Libel is no justification in a criminal prosecution, yet in many instances it is considered as an extenuation of the offence; and the Court of *King's Bench* has laid down this general rule: *viz.* that it will not grant an Information for a Libel, unless the prosecutor who applies for it makes an affidavit, asserting directly and pointedly that he is innocent of the charge imputed to him. But this rule may be dispensed with, if the person libelled resides abroad; or if the imputations of a Libel are general and indefinite; or if it is a charge against the prosecutor for language which he has held in parliament. *Dougl.* 271 (284); 372 (388): but in this latter case, a member cannot justify publishing the speech made by him in parliament, in the public newspapers, if it contain libellous matter. *Earl of Abingdon's Ca.* 6 *Term Rep.*

Where on application for an information the truth of the Libel is not denied, the court (except in the particular instances above mentioned) will leave the injury to be remedied in the ordinary course of justice by action or indictment. *Stra.* 498. See *post.* IV. But the Court will not grant this extraordinary remedy by information, nor should a Grand Jury find an indictment, unless the offence be of such signal enormity, that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor, to vindicate the common right of all, though violated only in the person of an individual: for the malicious publication of even truth itself cannot in policy be suffered to interrupt the tranquillity of any well-ordered Society. This is a principle so rational and pure that it cannot be tainted by the vulgar odium which has accompanied the derivation of the doctrine from the tyranny of the Star-chamber: the adoption of it by the worst of courts can never weaken its authority; and without it all the comforts of Society might with impunity be hourly endangered or destroyed. Vide *Law of Libels*: 1 *Hawk. P. C. c.* 73. § 6, *in n.*

There are authorities that truth is not a justification even in an action for a Libel; and a very learned writer seems to doubt whether such a plea would now be admitted by the Courts, if the accusation in the Libel did not amount to an indictable offence. 3 *Woodd.* 182. It seems however that the contrary is the prevailing opinion; and that in every action for a Libel, if specific instances can be stated upon the record so as to support the general charge of the Libel, the courts would determine them to be a sufficient justification of the defendant. 1 *Term Rep.* 748.

It is not competent to a defendant charged with having published a Libel, to prove that a paper, similar to that for the publication of which he is prosecuted, was published on a former occasion by other persons who have never been prosecuted for it. 5 *Term Rep.* 436.

IV. The punishment of Libellers for either making, repeating, printing, or publishing the Libel is fine, and such corporal punishment (as imprisonment, pillory, &c.) as the Court in its discretion shall inflict; regarding the quantity of the offence, and the quality of the offender. 1 *Hawk. P. C. c.* 73. § *ult.*

If a printer print a Libel against a private person, he may be indicted and punished for it; and so may he who prints a Libel against a magistrate, and much more one who does it against the King and State: nor can a person in such a case excuse himself by saying they were dying speeches, or the words of dying men; for a man may at his death justify his villainy; and he who publishes it is punishable: and it is no excuse for the printing or publishing a Libel, to say that he did it in the way of trade, or to maintain his family. 1 *St. Tr.* 982, 986.

Also if booksellers, &c. publish or sell Libels, though they know not the contents of them, they are punishable. It has been resolved, that where persons write, print, or sell, any pamphlets, scandalizing the public, or any private persons, such libellous books may be seized, and the persons punished by law: and all persons exposing any books to sale, reflecting on the Government, may be punished: also writers of news, (though not scandalous, seditious, or reflecting on the Government, if they write false news,) are indictable. 2 *St. Tr.* 477. See *Scandalum magnatum*; *False News.*

One was indicted for a Libel in scandalizing the King's witnesses, and reflecting on the justice of the nation, and had judgment of the pillory and fine. 3 *St. Tr.* 50. A person for libelling the Lord Chancellor *Bacon*, affirming that he had done injustice, and other scandalous matter, was sentenced to pay 1000*l.* fine, to ride on a horse with his face to the tail from the *Fleet* to *Westminster*, with his fault written on his head, to acknowledge his offence in all the Courts at *Westminster*, stand in the pillory, and that one of his ears should be cut off at *Westminster*, and the other in *Cheapside*, and to suffer imprisonment during life. *Poph.* 135. One who exhibited a Libel against a Lord Chief Justice, directed to the King, calling the Chief Justice, traitor, perjured judge, &c. had judgment to stand in the pillory, was fined

1000 marks, and bound to good behaviour during life. *Cro. Car.* 125.

With regard to Libels in general, there are, as in many other cases, two remedies; one by indictment or information, and the other by action. The former for the public offence; for, as has been repeatedly remarked, every Libel has a tendency to the breach of the peace, by provoking the person libelled to break it; which offence, we have seen, is the same in point of law, whether the matter contained be true or false; and therefore it is that the defendant, on an indictment for publishing a Libel, is not allowed to allege the truth of it by way of justification. But in the remedy by action on the case, which is to repair the party in damages for the injury done him, the defendant may, as for words spoken, justify the truth of the facts, and show that the plaintiff has received no injury at all. The chief excellence therefore of a civil action for a Libel consists in this, that it not only affords a reparation for the injury sustained, but it is a full vindication of the innocence of the person traduced. See 3 *Comm. c.* 8. *p.* 125, 6, *& n.*

It hath been held, that writing a seditious Libel is not an actual breach of the peace; and that a member of parliament writing such a Libel, is entitled to his privilege from being arrested for the same. 2 *Wilf.* 159.

In informations and law proceedings, there are two ways of describing a Libel; by the sense, and by the words: the first is *cujus tenor sequitur*, and the second *quae sequitur in haec Anglicana verba, &c.* in which the description is by particular words, and whereof every word is a mark; so that if there is any variance, it is fatal: in the other description by the sense, it is not material to be very exact in the words, because the matter is described by the sense of them. 2 *Salk.* 660. See *Indictment*; *Information*; *Pleading*.

The declaration for a Libel must lay it to be, "of and concerning the plaintiff," otherwise there can be no judgment. 2 *Strange* 934.

It has been frequently determined, that in the trial of an indictment for a Libel the only questions for the consideration of the Jury are the fact of publishing, and the truth of the inuendoes: that is, the truth of the meaning and sense of the passages of the Libel, as stated and averred in the record; whether the matter be or be not a Libel is a question of law for the consideration of the Court. 3 *Term Rep.* 428. But see the *stat.* 32 *Geo.* 3. *c.* 60; and this Dictionary, title *Jury* IV. 2.

When a person is brought before the Court to receive judgment for a Libel, his conduct subsequent to his conviction may be taken into consideration, either by way of aggravation or mitigation of his punishment. 3 *Term Rep.* 432.

In all the instances where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous Libels are punished by the *English* law, some with a greater, others with a less, degree of severity, the Liberty of the Press, properly understood, is by no means infringed or violated. THE LIBERTY OF THE PRESS is, indeed, essential to the nature of a *Free State*; but this consists in laying no *previous* restraints upon publications; and not in freedom from censure for criminal matter, when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the Press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a Licenser, as was formerly done both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man; and make him the arbitrary and infallible Judge of all controverted points in Learning, Religion, and Government. But to punish, as the law does at present, any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of Peace and Good Order, of Government and Religion, the only solid foundations of Civil Liberty. Thus, the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left. The disseminating or making public of bad sentiments, destructive of the ends of Society, is the crime which Society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used for the restraining of the just freedom of the press, "that it was necessary to prevent the daily abuse of it," will entirely lose its force when it is shown, (by a seasonable exertion of the laws,) that the press cannot be abused to any bad purpose, without incurring a suitable punishment; whereas it can never be used to any good one, when under the controul of an Inspector. So true it will be found, that to censure the *licentiousness*, is to maintain the *liberty* of the Press. 4 *Comm. c.* 11, *ad fin.*

The above observations deserve the serious attention of every Juryman, who wishes well to the Constitution and happiness of his country; to them we shall only add the remark of another celebrated writer on this subject. —The danger of such unbounded liberty, (of unlicensed printing,) and the danger of bounding it, have produced a problem in the science of Government, which human understanding seems hitherto unable to solve. If nothing may be published but what civil authority shall have previously approved, Power must always be the standard of Truth: if every dreamer of innovations may propagate his projects, there can be no settlement; if every murmurer at Government may diffuse discontent, there can be no peace; and if every sceptic in theology may teach his follies, there can be no religion. The remedy against these evils is *to punish the Authors*; for it is yet allowed that every Society may punish, though not prevent, the publication of opinions which that Society shall think pernicious. But this punishment, though it may crush the author, promotes the book; and it seems not more reasonable to leave the right of printing unrestrained, because writers may afterwards be censured, than it would be to sleep with doors unbolted, because by our laws we can hang a thief. *Johnson, in vitâ Milton.*

For further matter connected with Libels, see titles *Words*; *Scandalum Magnatum*; *Treason*; *False News*, &c.

LIBEL, in the Spiritual Court, from *libellus*, a little book: the original Declaration of any action in the civil law. See *stat.* 2 *E.* 6. *c.* 13.

If upon a Libel for any ecclesiastical matter, the defendant make a surmise in *B. R.* to have a prohibition, and such surmise be insufficient, the other party may shew

shew it to the Court, and the Judges will discharge it. 1 *Leon*. 10, 128. The Libel used in ecclesiastical proceedings, consists of three parts. 1. The major proposition, which shews a just cause of the petition. 2. The narration, or minor proposition. 3. The conclusion, or conclusive petition, which conjoins both propositions, &c. 3 *Comm* 100.

LIBER NIGER, See *Black-book*.

LIBERA, A livery or delivery of so much grass or corn to a customary tenant, who cut down or prepared the said grass or corn, and received some part or small portion of it as a reward or gratuity. *Cowell*.

LIBERA BATELLA. A free boat. Right of fishing. *Plac. in itin. ap. Cestr.* 14 *H.* 7.

LIBERA CHASEA HABENDA, A judicial writ granted to a person for a free chase belonging to his manor; after proof made by inquiry of a Jury, that the same of right belongs to him. *Reg. Orig.* 36.

LIBERAM LEGEM, *amittere liberam legem*, is to become infamous, and not to be accounted *liber et legalis homo*. See titles *Battle*; *Champion*.

LIBERA PISCARIA, A free fishery, which being granted to one, he hath a property in the fish, &c. 2 *Salk*. 637. See title *Fish, Fisheries, and Fishing*.

LIBER TAURUS. A free bull. *Norf.* 16 *Ed.* 1.

LIBERA WARA. See *Wara*.

LIBERATE, A writ that lies for the payment of a yearly pension or sum of money granted under the Great Seal, and directed to the Treasurer and Chamberlains of the Exchequer, &c. for that purpose. In another sense it is a writ to the Sheriff of a county for the delivery of possession of lands and goods extended, or taken upon the forfeiture of a recognisance. Also a writ issuing out of the Chancery directed to a gaoler for delivery of a prisoner that hath put in bail for his appearance. *F. N. B.* 132: 4 *Inst.* 116. This writ is most commonly used for delivery of goods, &c. on an extent; and by the extent the conusee of a recognisance hath not any absolute interest in the goods, until the *Liberate*. 2 *Lil.* 169. It has been adjudged, that where an extent is upon a statute-merchant, there needs no *Liberate*, for the Sheriff may deliver all in execution without it; but where an extent is upon a statute staple, or a recognisance, there must be a return made of such an extent, and then a *Liberate* before there can be a delivery in execution. 3 *Salk*. 159. See titles *Extent*; *Execution*.

LIBERATIO, Money, meat, drink, clothes, &c. yearly given and delivered by the Lord to his domestic servants. *Blount*.

LIBERTAS ECCLESIASTICA. This is a frequent phrase in our old writers, to signify church liberty, or ecclesiastical immunities; the right of investiture extorted from our Kings by force of papal power, was at first the only thing challenged by the clergy, as their *Libertas ecclesiastica*: but by degrees, under weak princes and prevailing factions, under the title of 'church liberty,' they contended for a freedom of their persons and possessions from all secular power and jurisdiction, as appears by the canons and decrees of the Council held by *Boniface*, Archbishop of *Canterbury*, at *Merton*, *A. D.* 1258, and at *London*, *A. D.* 1260, &c. *Cowell*.—See Lord *Littleton's Hist. of Hen.* II. and *Robertson's Hist. of Emp. C.* V.

LIBERTATE PROBANDA, An ancient writ which lay for such as, being demanded for villeins, offered to prove themselves free; directed to the Sheriff that he should take security of them for the proving of their freedom before the Justices of assise, and that in the mean time they should be unmolested. *F. N. B.* 77. See titles *Tenures*; *Villein*.

LIBERTATIBUS ALLOCANDIS, A writ lying for a citizen or burgess, impleaded contrary to his liberty, to have his privilege allowed. *Reg. Orig.* 262. And if any claim a special liberty to be impleaded within a city or borough, and not elsewhere, there may be a special writ *de Libertatibus allocandis*, to permit the burgesses to use their liberties, &c. These writs are of several forms, and may be used by a Corporation, or by any single person, as the case shall happen. *New Nat. Br.* 509, 510. The Barons of the Cinque Ports, &c. may sue forth such writs, if they are delayed to have their liberties allowed them. *Ibid*.

LIBERTATIBUS EXIGENDIS IN ITINERE, An ancient writ whereby the King commands the Justices in Eyre to admit of an attorney for the defence of another man's liberty. *Reg. Orig.* 19.

LIBERTIES or FRANCHISES These are synonimous terms, and their definition is, a royal privilege, or branch of the King's prerogative, subsisting in the hands of a Subject. The kinds of them are various, and almost infinite. See title *Franchise*.

A LIBERTY. A privilege held by grant or prescription, by which men enjoy some benefit beyond the ordinary Subject. *Bract*.

LIBERTY,

In its most general signification, is said to be a power to do as one thinks fit; unless restrained by the Law of the land: and it is well observed, that human nature is ever an advocate for this Liberty; it being the gift of God to man in his creation; therefore every thing is desirous of it, as a sort of restitution to its primitive state. *Fortesc.* 96. It is upon that account the laws of *England* in all cases favour Liberty, and which is accounted very precious, not only in respect of the profit which every one obtains by his Liberty, but also in respect of the public. 2 *Lil. Abr.* 169.

According to *Montesquieu*, Liberty consists principally in not being compelled to do any thing which the law does not require; because we are governed by civil laws, and therefore we are free, living under those laws. *Spirit of Laws, lib.* 26. *c.* 20.

The absolute *Rights of Man*, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated *The Natural Liberty of Mankind*. This Natural Liberty consists properly in a power of acting as one thinks fit, without any restraint or controul, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endowed him with the faculty of free will. 1 *Comm. c.* 1.

But every man, when he enters into Society, gives up a part of his Natural Liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform

form to those laws which the Community has thought proper to establish. This species of legal obedience and conformity, is infinitely more desirable than that wild and savage Liberty which is sacrificed to obtain it. For no man, who considers a moment, would wish to retain the absolute and uncontrouled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. See *Mont. Spirit of Laws, lib.* 11. *c.* 3.

Political or *Civil Liberty*, therefore, which is that of a member of Society, is no other than Natural Liberty, so far restrained by human laws, and no farther, as is necessary and expedient for the general advantage of the Public. 1 *Comm. c.* 1. *p.* 125.

Hence we may collect that the Law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the Natural, increases the Civil, Liberty of mankind: but that every wanton and causeless restraint of the will of the Subject, whether practised by a Monarch, a Nobility, or a Popular Assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference without any good end in view, are regulations destructive of Liberty; whereas, if any public advantage can arise from observing such precepts, the controul of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance, by supporting that state of Society which alone can secure our independence. So that Laws, when prudently framed, are by no means subversive, but rather introductive of Liberty; for where there is no Law there is no Freedom. *Locke on Gov. part* 2. § 57. But then, on the other hand, that constitution or form of Government, that system of laws, is alone calculated to maintain Civil Liberty, which leaves the Subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint. 1 *Comm.* 125, 6.

The above definition of the learned commentator is admitted by his latest editor to be clear, distinct, and rational, as far as relates to *Civil Liberty*; in the definition of which, however, he adds, it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all; or as much so as the nature of things will admit. 1 *Comm.* 126, *n.*

Political Liberty is distinguished by Mr. *Christian* from *Civil Liberty*, and he defines it to be, the security with which from the constitution, form, and nature, of the established Government, the Subjects enjoy Civil Liberty. No ideas, continues he, are more distinguishable than those of Civil and Political Liberty; yet they are generally confounded; and the latter cannot yet claim an appropriate name. The learned Judge (*Blackstone*) uses Political and Civil Liberty indiscriminately; but it would perhaps be convenient uniformly to use those terms in the respective senses here suggested, or to have some fixed specific denominations of ideas which, in their natures, are so widely different. The last species of Liberty has probably more than the rest, engaged the attention of Mankind, and particularly of the People of *England*. Civil Liberty, which is nothing more than the impartial administration of equal and expedient laws, they have long enjoyed nearly to as great an extent as can be expected under any human establishment; and under a King who has no power to do wrong, yet all the prerogatives to do good, with the two Houses of Parliament, the people of *England* have a firm reliance that this Civil Liberty is secure, and that they shall retain and transmit its blessings, and those of Political Liberty also, to the latest posterity. See 1 *Comm.* 126, *n.*

There is another common notion of Liberty, which is nothing more than a freedom from confinement. This is a part of Civil Liberty, but it being the most important part, as a man in a gaol can have but the exercise and enjoyment of few rights, it is κατ' ἐξοχὴν, called Liberty.

The different definitions of the term Liberty, here given and commented upon, should not be thought tautologous or uninteresting; since it is a word which it is of the utmost importance to mankind that they should clearly comprehend; for though *a genuine spirit of Liberty* is the noblest principle that can animate the heart of Man, yet Liberty, in all times, has been the clamour of men of profligate lives and desperate fortunes: *Falsò Libertatis vocabulum obtendi ab iis, qui,* privatim degeneres, in publicum exitiosi, *nihil spei nisi per discordias habeant. Tac. Ann.* 11. *c.* 17.

The idea and practice of this Political or Civil Liberty flourish in their highest vigour in these kingdoms; where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owners: the Legislature, and of course the laws of *England*, being particularly adapted to the preservation of this inestimable blessing, even in the meanest Subject. 1 *Comm.* 126, 7.

The absolute rights of every *Englishman*, (which, taken in a political and extensive sense, are usually called their Liberties,) as they are founded on nature and reason, so they are coeval with our form of Government, though subject at times to fluctuate and change; their establishment, excellent as it is, being still human. At some times we have seen them depressed by overbearing and tyrannical princes: at others, so luxuriant as even to tend to anarchy, a worse state than tyranny itself; as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments; and as soon as the convulsions consequent on the struggle have been over, the balance of our Rights and Liberties has settled to its proper level; and their fundamental articles have been, from time to time, asserted in Parliament as often as they were thought to be in danger.

First, By the *Great Charter* of Liberties, which was obtained, sword in hand, from King *John*; and afterwards, with some alterations, confirmed in Parliament by King *Henry* III. his son; which Charter contained very few new grants; but as Sir *Edward Coke* observes, (2 *Inst. proëm.*) was for the most part declaratory of the principal grounds of the fundamental laws of *England*.— Afterwards by the statute called *Confirmatio Cartarum*, 25 *Ed.* 1, whereby the Great Charter is directed to be allowed as the Common Law: all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be

be as constantly denounced against all those who by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes from *Edw.* I. to *Henry* IV; of which the following are the most forcible.

Stat. 25 *Ed.* 3. *st.* 5. *c.* 4. None shall be taken by petition or suggestion made to the King or his Council, unless it be by indictment of lawful people of the neighbourhood, or by process made by writ original at the Common Law. And none shall be put out of his franchises or freehold, unless he be duly brought to answer, and forejudged by course of law; and if any thing be done to the contrary, it shall be redressed and holden for none.

Stat. 42 *Ed.* 3. *c.* 3. No man shall be put to answer without presentment before Justices, or matter of record of due process, or writ original, according to the ancient law of the land. And if any thing be done to the contrary, it shall be void in law, and held for error.

After a long interval these Liberties were still further confirmed by *The Petition of Right*; which was a parliamentary declaration of the Liberties of the people, assented to by King *Charles* I. in the beginning of his reign. This was closely followed by the still more ample concessions made by that unhappy Prince to his Parliament; (particularly the dissolution of the Star-chamber, by *stat.* 16 *Car.* 1. *c.* 10;) before the fatal rupture between them; and by the many salutary laws, particularly the Habeas Corpus Act, passed under King *Charles* II.

To these succeeded *The Bill of Rights*, or Declaration delivered by the Lords and Commons to the Prince and Princess of *Orange*, *February* 13, 1688; and afterwards enacted in Parliament, when they became King and Queen; which, as peculiarly interesting, is here inserted at length.

Stat. 1 *Wil.* & *Mar. st.* 2. *c.* 2. § 1. Whereas the Lords Spiritual and Temporal, and Commons, assembled at *Westminster*, representing all the Estates of the People of this realm, did upon the 13th of *February* 1688, present unto their Majesties, then Prince and Princess of *Orange*, a declaration, containing that,

The said Lords Spiritual and Temporal, and Commons, being assembled in a full and free representative of this nation, for the vindicating their ancient rights and liberties, DECLARE,

That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal;

That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal;

That the commission for erecting the late Court of Commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious;

That levying money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, *is illegal*;

That it is the right of the Subjects to petition the King; and all commitments and prosecutions for such petitioning, are illegal;

That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law;

That the Subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law;

That election of members of Parliament ought to be free;

That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament;

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

That Jurors ought to be duly impanelled and returned, and Jurors which pass upon men in trials for high treason ought to be freeholders;

That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void;

And for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliaments ought to be held frequently;

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings, or proceedings, to the prejudice of the People in any of the said premises, ought in any wise to be drawn hereafter into consequence or example:

Sect. 6. All and singular the Rights and Liberties asserted and claimed in the said Declaration are the true, ancient, and indubitable Rights and Liberties of the People of this Kingdom, and so shall be esteemed, allowed, adjudged, and taken to be; and all the particulars aforesaid shall be firmly holden as they are expressed in the said Declaration; and all officers shall serve their Majesties according to the same in all times to come.

Sect. 12. No Dispensation by *non obstante* of any statute shall be allowed, except a dispensation be allowed of in such statute; and except in such cases as shall be specially provided for during this session of Parliament.

Sect. 13. No charter granted before the 23d of *October* 1689, shall be invalidated by this act, but shall remain of the same force as if this act had never been made.

Lastly, These Liberties were again asserted at the commencement of the present century, in the Act of Settlement, *stat.* 12 & 13 *W.* 3. *c.* 2, whereby the Crown was limited to his present Majesty's illustrious House; and some new provisions were added at the same fortunate æra, for better securing our *Religion*, *Laws*, and *Liberties*, which the statute declares to be "the birthright of the people of *England*;" according to the ancient doctrine of the Common Law. *Plowd.* 55: see 1 *Comm.* *c.* 1.

Thus much for the *Declaration* of our Rights and Liberties. The Rights themselves thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other than either that *residuum* of Natural Liberty, which is not required by the laws of Society to

be

be sacrificed to public convenience; or else those civil privileges which Society hath engaged to provide in lieu of the Natural Liberties so given up by individuals. These, therefore, were formerly, either by inheritance or purchase, the rights of all mankind; but in most other countries of the world, being now more or less debased or destroyed, they at present may be said to remain, in a peculiar and emphatical manner, *the Rights of the People of England*.

These Rights may be reduced to three principal or primary articles;

The Right of *Personal Security*.
The Right of *Personal Liberty*.
The Right of *Private Property*.

As there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important Rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense. 1 *Comm.* 129.

The Right of *Personal Security* consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. The enjoyment of this right is secured to every Subject by the various laws made for the punishment of those injuries, by which it is any way violated; for a particular detail of which, see this Dictionary, titles *Assault*; *Homicide*; *Mathem*; *Libel*; *Nusance*, &c.

Life, however, may, by the divine permission, be frequently forfeited for the breach of those laws of Society which are enforced by the sanction of capital punishments. On this subject it is sufficient at present to observe, that whenever the constitution of a State vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the Subject, such constitution is in the highest degree tyrannical; and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the Subject is aware of the danger he is exposed to, and may, by prudent caution, provide against it. The Statute Law of *England* does therefore very seldom, and the Common Law does never, inflict punishment extending to life or limb, unless upon the highest necessity; and the constitution is an utter stranger to any arbitrary power of killing or maiming the Subject without the express warrant of law. The words of the Great Charter, *c.* 29, are "*Nullus liber homo capiatur, imprisonetur, vel aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terræ.* No Freeman shall be taken, imprisoned, or any way destroyed, unless by the lawful judgment of his peers, or by the law of the land." Which words, *aliquo modo destruatur*, according to *Coke*, include a prohibition not only of *killing* or *maiming*, but also of *torturing*, (to which our laws are strangers,) and of every oppression by colour of an illegal authority. And it is enacted by *stat.* 5 *E.* 3. *c.* 9, that no man shall be attached by any accusation, nor forejudged of life or limb, nor shall his lands or goods be seised into the King's hands contrary to the Great Charter, and the law of the land. And again by *stat.* 28 *E.* 3. *c.* 3, that no man shall be put to death without being brought to answer by due process of law. 1 *Comm.* 133.

The Right of *Personal Liberty* consists in the power of loco motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. On this right there is at present no occasion to enlarge. For the provisions made by the laws of *England* to secure it, see this Dictionary, titles *Habeas Corpus*; *False Imprisonment*; *Bail*; *Arrest*, &c. &c.

The absolute *Right of Property*, inherent in every *Englishman*, consists in the free use, enjoyment, and disposal of all his acquisitions, without any controul or diminution, save only by the laws of the land. The origin of private property is probably founded in nature; but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from Society; and are some of those civil advantages in exchange for which every individual has resigned a part of his Natural Liberty. The laws of *England* are, therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the *Great Charter*, *c.* 29, has declared, that no freeman shall be disseised or divested of his freehold, or of his Liberties or free customs, (or be outlawed, banished, or otherwise destroyed, nor shall the King pass or send upon him,) but by the judgment of his peers, or by the law of the land. And by a variety of antient statutes it is enacted, that no man's lands or goods shall be seised into the King's hands, against the Great Charter and the law of the land: and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed and holden for none. See *stats.* 5 *E.* 3. *c.* 9: 25 *E.* 3. *st.* 5. *c.* 4: *ante* 28 *E.* 3. *c.* 3.

So great moreover is the regard of the Law for private property, that it will not authorize the least violation of it: no, not even for the general good of the whole community. In instances where the property of an individual is necessary to be obtained for the accommodation of the public, as in the case of enlarging or turning highways, all that the Legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power indulged with caution, and which none but the Legislature, or those acting under their immediate direction, can perform. See *stat.* 13 *Geo.* 3. *c.* 78; and this Dictionary, title *Highways*.

Another effect of this right of private property is, that no Subject of *England* can be constrained to pay any aids or taxes, even for the defence of the realm, or the support of the government, but such as are imposed by his own consent, or that of his representatives in Parliament. By *stat.* 25 *Ed.* 1. *c.* 5, 6, it is provided, that the King shall not take any aids or *tasks*, but by the common assent of the realm. And what that common assent is, is more fully explained by *stat.* 34 *Ed.* 1. *st.* 4. *c.* 1; which enacts, that no talliage or aid shall be taken, without the assent of the Archbishops, Bishops, Earls, Barons, Knights, Burgesses, and other freemen of the land: and again, by *stat.* 14 *Ed.* 3. *st.* 2. *c.* 1, the Prelates, Earls, Barons, and Commons, Citizens, Burgesses, and Merchants, shall not be charged to make any aid, if

 it

it be not by the common assent of the great men and Commons in Parliament. And as this fundamental law had been shamefully evaded, under many preceding Princes, by compulsive loans and benevolences, extorted without a real and voluntary consent, it was made an article in the *Petition of Right*, 3 *Car.* 1, that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of Parliament. And, lastly, by the *Bill of Rights*, *stat.* 1 *W. & M. st.* 2. *c.* 2, it is declared, that levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, or for longer time, or in other manner than the same is or shall be granted, is illegal. 1 *Comm.* 140.

The above is a short view of the *principal* absolute rights which appertain to every *Englishman*; and the Constitution has provided for the security of their actual enjoyment, by establishing certain other *auxiliary, subordinate, rights*, which serve principally as outworks or barriers to protect and maintain those principal rights inviolate. These are,

The Constitution, Powers, and Privileges of *Parliament*.
The *Limitation* of the King's *Prerogative*.
The Right of applying to *Courts of Justice* for Redress of Injuries.
The Right of *Petitioning* the *King* or *Parliament*.
The Right of having *Arms* for Defence.

This last auxiliary right of the Subjects of having arms for their defence, suitable to their condition and degree, and such as are allowed by law, is declared by the Bill of Rights; and it is, indeed, a public allowance, under due restrictions of the natural right of resistance and self-preservation, when the sanctions of Society and Laws are found insufficient to restrain the violence of oppression. See this Dictionary, title *Arms*.

As to the *first* and *second* of the subordinate rights above mentioned, see this Dictionary, titles *Parliament*; *King*. With respect to the *third* and *fourth* some short information is here subjoined.

Since the Law is, in *England*, the supreme arbiter of every man's life, liberty, and property, *Courts of Justice* must at all times be open to the Subject, and the law be duly administered therein. The emphatical words of *Magna Carta, c.* 29, spoken in the person of the King, who, in judgment of law, (says Sir *Ed. Coke*,) is ever present, and repeating them in all his Courts, are these: "*Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.*—To none will we sell, to none will we deny, or delay, right or justice." And therefore every Subject, for injury done to him in his goods, his lands, or his person, by any other Subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay. 2 *Inst.* 55.

It were endless to enumerate all the *affirmative* acts of Parliament wherein justice is directed to be done according to the law of the land; and what that law is every Subject knows, or may know if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of Parliament. A few *negative* statutes may however be mentioned, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by *Magna Carta, c.* 29, that no freeman shall be outlawed, that is, put out of the protection and benefit of the law, but according to the laws of the land. By *stats.* 2 *Ed.* 3. *c.* 8: 11 *Ric.* 2. *c.* 10, it is enacted, "that no commands or letters shall be sent under the Great Seal, or the Little Seal, the Signet or Privy Seal, in disturbance of the law; or to disturb or delay common right; and though such commandments should come, the Judges shall not cease to do right." This is also made a part of their oath, by *stat.* 18 *Ed.* 3. *st.* 4. And by the Bill of Rights it is declared, that the pretended power of suspending or dispensing with laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.

Not only the substantial part, or judicial decisions of the law, but also the formal part, or method of proceeding, cannot be altered but by Parliament: for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The King, it is true, may erect new Courts of Justice; but then they must proceed according to the old established forms of the Common Law. For which reason it is declared in the *stat.* 16 *Car.* 1. *c.* 10, upon the dissolution of the Court of Star-chamber, that neither his Majesty nor his Privy Council have any jurisdiction, power or authority, by *English* bill, petition, articles, or libel, (which were the course of proceeding in the Star-chamber borrowed from the Civil Law,) or by any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of the lands or goods of any Subjects of this kingdom; but that the same ought to be tried and determined in the ordinary Courts of Justice, and by *course of law*. See this Dictionary, titles *Judges*; *Courts*; *Chancery*; &c.

The right of petitioning the King, or either House of Parliament, for the redress of grievances, appertains to every individual in cases of any uncommon injury, or infringement of the rights already particularized, which the ordinary course of law is too defective to reach. The restrictions, for some there are, which are laid upon this right of petitioning in *England*, while they promote the spirit of peace, are no check upon that of Liberty; care only must be taken, lest, under the pretence of petitioning, the Subject be guilty of any riot or tumult: as happened in the opening of the memorable Parliament in 1640.—And to prevent this, it is provided by *st.* 13 *C.* 2. *st.* 1. *c.* 5, that no petition to the King or either House of Parliament, for any alteration in Church or State, shall be signed by above twenty persons, unless the matter thereof be approved by three Justices of the peace, or the major part of the Grand Jury in the county; and in *London* by the Lord Mayor, Aldermen, and Common Council; nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the Bill of Rights, that the Subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal. The sanction of the Grand Jury may be given either at the Assises or Quarter Sessions; the punishment for offending against the *stat.* 13 *Car.* 2, not to exceed a fine of 100*l.*, and three months' imprisonment. Upon the trial of Lord *George Gordon*, the Court of King's Bench

Bench declared, that they were clearly of opinion, that this statute was not in any degree affected by the Bill of Rights. *Dougl.* 571.

In the several articles above enumerated, consist THE RIGHTS, or as they are more frequently termed, THE LIBERTIES, OF ENGLISHMEN. Liberties more generally talked of than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank or property; lest his ignorance of the points whereon they are founded, should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference, and criminal submission, on the other. And all these Rights and Liberties it is our birthright to enjoy entire, unless where the laws of our country have laid them under necessary restraints: restraints in themselves so gentle and so moderate, as will appear on a minute inquiry, that no man of sense or probity would wish to see them slackened: for all of us have it in our choice to do every thing that a good man would desire to do; and are restrained from nothing but what would be pernicious either to ourselves or our fellow citizens. So that this review of our situation may fully justify the observation of a learned *French* author; (of former times!) who hath not scrupled to profess that the ENGLISH is the only Nation in the world where *Political* or *Civil Liberty* is the DIRECT END OF ITS CONSTITUTION. *Montesq. Sp. L.* xi. 5. See 1 *Comm* c. 1. *ad fin.*

LIBERTY TO HOLD PLEAS, Signifies to have a court of one's own; and to hold it before a Mayor, Bailiff, &c. See *Franchise.*

LIBLACUM, The manner of bewitching any person; also a barbarous sacrifice. *Leg Athelstan.* 6.

LIBRÆ, ARSÆ, & PENSATÆ; & AD NUMERUM, A phrase which often occurs in the Domesday-Register, and some other memorials of that and the next age—as "*Ailesbury* in *Buckinghamshire*, the King's manor.—*In totis valentiis reddit* lvi *libr. arsas & pensatas, & de theloneo* x *libr. ad numerum*, i.e. in the whole value it pays fifty-six pounds burnt and weighed; and for toll ten pounds by tale." For they sometimes took their money *ad numerum*, by tale, in the current coin upon content: but sometimes they rejected the common coin by tale, and money coined elsewhere than at the King's mint, by cities, bishops, and noblemen who had mints, as of too great alloy, and would therefore melt it down to take it by weight when purified from the dross; for which purpose they had in those times always a fire ready in the Exchequer to burn the money, and then weigh it. *Cowell.*

LIBRA PENSA, A pound of money in weight. See the preceding article.

LIBRARY. Where a Library is erected in any parish, it shall be preserved for the uses directed by the founders; and incumbents and ministers of parishes, &c. are to give security therefore, and make catalogues of the books, &c. None of the books shall be alienable, without consent of the bishop, and then only where there is a duplicate of such books; if any book shall be taken away and detained, a justice's warrant may be issued to search for and restore the same: also action of trover may be brought in the name of the proper Ordinary, &c. And bishops have power to make rules and orders concerning Libraries, appoint persons to view their condition, and inquire of the state of them in their visitation. *Stat.* 7 *Ann. c.* 14.

Cotton Library settled in the family for the use of the public. *Stat.* 12 & 13 *W.* 3. *c.* 5. Vested in the Crown, *stat.* 5 *Ann. c.* 30. Establishment of the *British* Museum, 26 *Geo.* 2. *c.* 22: 27 *Geo.* 2. *c.* 1. § 3.

LIBRATA TERRÆ, Four oxgangs of land, every oxgang containing thirteen acres. *Skene, verb. Bovata terræ.* So much land, anciently, as was worth twenty shillings a-year; for in *Henry* the Third's time, he that had *quindecim libras terræ*, was to receive the order of knighthood. See *Farding deal.*

LICENCE, *licentia.*] A power or authority given to a man to do some lawful act: and is a personal liberty to the party to whom given, which cannot be transferred over; but it may be made to a man, or his assigns, &c. 12 *Hen.* 7. 25. There may be a parol Licence, as well as by deed in writing; but if it be not for a certain time, it passes no interest. 2 *Nels. Abr.* 1123. And if there be no time certain in the Licence; as if a man licence another to dig clay, &c. in his land, but doth not say for how long, the Licence may be countermanded; though if it be until such a time, he cannot. *Poph.* 151. If a lessor licence his lessee (who is restrained by covenant from aliening without Licence) to alien, and such lessor dies before he aliens, this is no countermand of the Licence: so it is if the lessor grants over his estate. *Cro. Jac.* 133. But where a lord of a manor for life granteth a Licence to a copyhold tenant to alien, and dieth; the Licence is destroyed, and the power of alienation ceaseth. 1 *Inst.* 52. Copyhold tenants leasing their copyhold for a longer time than one year, are to have a Licence for it; or they incur a forfeiture of their estate. 1 *Ind.* 63. If any Licence is given to a person, and he abuses it, he shall be adjudged a trespasser *ab initio.* 8 *Rep.* 146.

A. grants to *B.* a way over his ground, or Licence to go through it to the church; by this none but *B.* himself may go in it; but if one give me Licence to go over his land with my plough, or to cut down a tree therein, and take it away; by this I may take what help is needful to do the same. So if it be to hunt and kill and carry away deer; not if it be to hunt and kill only. 12 *Hen.* 7. 25: 13 *Hen.* 7. 8: 8 *Rep.* 146. See titles *Trespass*; *Lease*; *Way*; *Copyhold*, &c.

By Licence a man may practise physic and surgery in *London*; and do divers other things. Licences are also necessary for the carrying on various trades and professions, on which a duty is laid for the purpose of raising a revenue to Government. See this Dictionary, titles *Excise*; *Taxes*.

LICENCE TO ALIEN IN MORTMAIN. Alienations in Mortmain to ecclesiastical persons, &c. are restrained by several statutes; but the King may grant Licences to any person or bodies politic, &c. to alien or hold lands in Mortmain. See *stat.* 7 & 8 *W.* 3. *c.* 37; and this Dictionary, titles *Mortmain*; *Charitable Uses*.

LICENCE TO ARISE, *licentia surgendi.*] A Liberty or space of time anciently given by the Court to a tenant to *arise* out of his bed, who is essoined *de malo lecti*, in a real action: and it is also the writ thereupon. *Bracton.* And the law in this case is, that the tenant may not arise or go out of his chamber until he hath been

been viewed by knights thereto appointed, and hath a day assigned him to appear; the reason whereof is, that it may be known whether he caused himself to be essoined deceitfully or not; and if the demandant can prove that he was seen abroad before the view or Licence of the Court, he should be taken to be deceitfully essoined, and to have made default. *Bracton, lib.* 5: *Fleta, lib.* 6. *c.* 10 See title *Essoin.*

LICENCE TO FOUND A CHURCH, Granted by the King. See *Church.*

LICENCE TO GO TO ELECTION of Bishops, is by *Congé d'Eslire* directed to the Dean and Chapter to elect the person named by the King, &c. *Reg. Writs* 294: *Stat.* 25 *H.* 8. *c.* 20. See title *Bishops.*

LICENCE OF THE KING to go beyond sea may be revoked before the time expires; because it concerns the public good. *Jenk. Cent.* See title *Ne exeat Regnum.*

LICENCE OF MARRIAGE. Bishops have power to grant Licences for the marrying of persons; and parsons marrying any person without publishing the bans of matrimony, or without Licence, incur a forfeiture of 100*l.* &c. by *stat.* 7 & 8 *W.* 3. *c.* 35. See also *stat.* 26 *Geo.* 2. *c.* 33; this Dictionary, title *Marriage.*

LICENCE TO ERECT A PARK, WARREN, &c. See titles *Park*; *Warren.*

LICENSING OF BOOKS, See *Libel*; *Printing.*

LICENTIA CONCORDANDI, Is that Licence for which the King's silver is paid on passing a Fine. See title *Fine of Lands.*

LICENTIA SURGENDI, See *Licence to arise.*

LICENTIA TRANSFRETANDI, A writ or warrant directed to the keeper of the port of *Dover*, or other sea-port, commanding them to let such persons pass over sea, who have obtained the King's Licence thereunto. *Reg. Orig.* 193.

LIDFERD LAW, A proverbial speech, intending as much as to hang a man first, and judge him afterwards.

LIEGE, *ligeus.*] Is used for Liege Lord, and sometimes for Liege Man: Liege Lord is he that acknowledgeth no superior; and Liege Man is he who oweth allegiance to his Liege Lord. The King's Subjects are called Liege People, because they owe and are bound to pay allegiance to him. *Stats.* 8 *Hen.* 6. *c.* 10: 14 *Hen.* 8. *c.* 2. But in ancient times, private persons, as lords of manors, &c. had their Lieges. *Skene* saith, that this word is derived from the *Italian*, *Liga*, a bond or league; others derive it from *Litis*, which is a man wholly at the command of the Lord. *Blount.* See title *Allegiance.*

[redacted] AND LIEGE PEOPLE, *Ligati.*] See *Liege.*

LIEN, *Fr.*] Is a word used in the law, of two significations: personal Lien, such as bond, covenant, or contract; and real Lien, a judgment, statute, recognisance, which oblige and affect the land. *Terms de Ley.*

It signifies an obligation, tie, or *claim* annexed to, or attaching upon, any property; without satisfying which such property cannot be demanded by its owner. Thus the costs of an attorney are a *Lien* upon deeds and papers in his hands; a factor has a *Lien* on goods in his hands for balance due from his principal, &c. See titles *Attorney*; *Factor*; *Mortgage*; *Judgment*; &c.

LIEU, Instead or in place of another thing. And when one thing doth come in the place of another, it shall be of the same nature as that was; as in case of an exchange, &c. 2 *Shep. Abr.* 359. See title *Exchange.*

LIEU CONUS, In law proceedings, signifies a castle, manor, or other *notorious place*, well known and generally taken notice of by those that dwell about it. 2 *Lil. Abr.* 641. A *venire facias*, for a Jury to appear, may be from a *lieu conus*: and a Fine or Recovery of lands in a *lieu conus*, is good; but it is said in a *scire facias* to have execution of such fine, the vill or parish must be named. 2 *Cro.* 574: 2 *Mod. Rep.* 48, 49.

LIEUTENANT, *locum tenens.*] Is the King's Deputy, or he that exercises the King's or any other's place, and represents his person; as the Lieutenant of *Ireland*. See *stats.* 4 *Hen.* 4. *c.* 6: 2 & 3 *Ed.* 6. *c.* 2. The Lieutenant of the Ordnance. See *stat.* 39 *Eliz. c.* 7. And the Lieutenant of the Tower, an officer under the *Constable*, &c. The word Lieutenant is also used for a military officer, next in command to the captain.

LIFE, Union and co-operation of soul with body; enjoyment or possession of terrestrial existence. *Johns.*

The Life of every man is under the protection of the law. *Wood's Inst.* 11. A lease made to a person during Life, is determinable by a civil death; but if it be to hold during natural Life, it will be otherwise. 2 *Rep.* 48.

LIFE ESTATES: Estates of freehold, not of inheritance. Of these some are conventional, or expresly created by the act of the parties; others merely legal, or created by construction and operation of law. See this Dictionary, titles *Estate*; *Dower*; *Courtesy*; *Tail.*

Estates for Life, expresly created by deed or grant, (which alone are properly conventional,) are, where a lease is made of lands or tenements to a man to hold for the term of his own Life, or for that of any other person, or for more Lives than one; in any of which cases he is styled Tenant for Life; only when he holds the estate by Life of another, he is usually called *Tenant, pur autre vie*; (for another's Life). *Litt.* § 56.

These Estates for Life are, like inheritances, of a feodal nature; and were for some time the highest estate that any man could have in a feud. See title *Tenures.* They are given and conferred by the same feodal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services, as the lord or lessor and his tenant or lessee have agreed on. 2 *Comm. c.* 8. *p.* 120.

Estates for Life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific Estate. As if one grant to *A. B.* the manor of *Dale*, this makes him Tenant for Life. *Co. Lit.* 42. For though, as there are no words of inheritance or *heirs* mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an Estate for Life. Also such a grant at large, or a grant for term of Life generally, shall be construed to be an Estate for the Life *of the grantee*, in case the grantor hath authority to make such a grant; for an estate for a man's own Life is more beneficial and of a higher nature than for any other Life; and the rule of law is, that all grants are to be taken

taken most strongly against the grantor, unless in the case of the King. *Co. Lit.* 42, 36.

Such Estates for Life will endure, generally speaking, as long as the Life for which they are granted; but there are some Estates for Life which may determine upon future contingencies, before the Life for which they are created expires. As if an Estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these and similar cases whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective Estates are absolutely determined and gone. *Co. Lit.* 42: 3 *Rep.* 20. Yet while they subsist, they are reckoned Estates for Life; because the time for which they will endure being uncertain, they may, by possibility, last for Life; if the contingencies upon which they are to determine do not sooner happen.

In case an Estate be granted to a man for his Life generally, it may also determine by his civil death; for which reason, in conveyances the grant is usually made for the term of a man's *natural* Life, which can only determine by his natural death. This civil death was formerly held to commence if any man was banished or abjured the realm, by the process of the Common Law; (see title *Abjuration*;) or entered into religion, that is, went into a monastery, and became there a monk professed; in which cases he was absolutely dead in law, and his next heir should have his Estate; for such banished man was entirely cut off from society; and such monk, upon his profession, renounced solemnly all secular concerns. But even in the times of popery the law of *England* took no cognisance of profession in any foreign country; because the fact could not be tried in our Courts; *Co. Lit.* 132: and therefore, since the Reformation, this disability is held to be abolished, 1 *Salk.* 162. as is also the disability of banishment consequent upon abjuration, by *stat.* 21 *Jac.* 1. *c.* 28. One species of civil death may, however, still exist in this country: that is, where a man by *act of Parliament*, is attainted of treason or felony; and, saving his life, is banished for ever; this Lord *Coke* declares to be a civil death: but he says, a temporary exile is not a civil death. Under this reasoning, where a man receives judgment of death, and afterwards leaves the kingdom for life, upon a conditional pardon, there can be very little doubt but this amounts to a civil death; this practice did not exist in the time of Lord *Coke*, who says, that a man can only lose his country by authority of Parliament. 1 *Inst.* 133. See 1 *Comm. c.* 1. *p.* 131, 3, & *n.*

The *incidents* to an Estate for Life are principally the following, which are applicable not only to those species of Tenants for Life, which are expresly created by deed, but also to those which are created by act and operation of law. See 2 *Comm. c.* 8.

First, Every Tenant for Life, unless restrained by covenant or agreement, may, of common right, take upon the land demised to him reasonable estovers or botes. *Co. Litt.* 41. For he hath a right to the full enjoyment and use of the land and all its profits, during his Estate therein. See titles *Estovers*; *Common of Estovers*. But he is not permitted to cut down timber, or do other waste upon the premises; for the destruction of such things, as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his Estate; but tends to the permanent and lasting loss of the person entitled to the inheritance. 1 *Inst.* 53. See this Dictionary, title *Waste*.

In the *second* place, Tenant for Life, or his representatives, shall not be prejudiced by any sudden determination of his Estate; because such a determination is contingent and uncertain. *Co. Litt.* 55. Therefore, if a Tenant for his own Life sows the lands, and dies before harvest, his executors shall have the emblements or profits of the crop; for the Estate was determined by the act of God; and it is a maxim in the law, *actus Dei nemini facit injuriam*. The representatives therefore of the Tenant for Life shall have the emblements, to compensate for the labour and expence of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore, by the feodal law, if a Tenant for Life died, between the beginning of *September* and the end of *February*, the Lord who was entitled to the reversion was also entitled to the profits of the whole year; but if he died between the beginning of *March* and the end of *August*, the heirs of the Tenant received the whole. From hence our law of emblements seems to have been derived, but with very considerable improvements; and its advantages are particularly extended to the parochial Clergy, by *stat.* 28 *H.* 8. *c.* 11: for all persons who are presented to any ecclesiastical benefice, or to any civil office, are considered as Tenants for their own Lives, unless the contrary be expressed in the form of the donation. 1 *Comm. c.* 8. *p.* 122, 3. See title *Emblements*.

A *third* incident to Estates for Life relates to the under-tenants or lessees. For they have the same, nay greater indulgencies than their lessors the original Tenants for Life. *The same*; for the law of estovers and emblements, with regard to the Tenant for Life, is also law with regard to his under-tenant, who represents him and stands in his place. *Co. Litt.* 55. *Greater*; for in those cases where Tenant for Life shall not have the emblements, because the Estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate*: her taking a husband is her own act, and therefore deprives her of the emblements; but if she leases her Estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her. *Cro. Eliz.* 461: 1 *Rol. Abr.* 727. The lessees of Tenants for Life had also at the Common Law another most unreasonable advantage; for at the death of their lessors, the Tenants for Life, these under-tenants might, if they pleased, quit the premises, and pay no rent to any body for the occupation of the land, since the last quarter-day, or other day assigned for payment of rent. 10 *Rep.* 127. To remedy which, it is now enacted by *stat.* 11 *Geo.* 2. *c.* 19. § 15, that the executors or administrators of Tenant for Life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent, from the last day of payment to the death of such lessor. See this Dictionary, titles *Rents*; *Leases*.

By

By *stat.* 19 C. 2. c. 6, where persons for whose lives Estates are held, shall absent themselves for seven years, they shall be presumed dead. And by *stat.* 6 *Ann. c.* 18, persons for whose lives Estates are held, are, on application to the Lord Chancellor, to be produced. The tenant holding after the determination of the Life, deemed a trespasser. See title *Death*. Posthumous children enabled to take in remainder, where the Life Estate is determined, *Stat.* 10 & 11 *W.* 3. *c.* 16. See title *Occupancy*.

LIFE-RENT, A rent which a man receives for term of Life, or for sustentation of it. *Skene.*

LIGEANCE; *Legeancy, ligeantia.*] The true and faithful obedience of a Subject to his Sovereign: and is also applied to the territory and dominion of the Liege Lord; as children born out of the Ligeance of the King, &c. *Stat.* 25 *Ed.* 3: *Co. Litt.* 129. See title *Allegiance.*

LIGHTS. Stopping Lights of a house is a nusance; but stopping a prospect is not, being only matter of delight, not of necessity: and a person may have either an assise of nusance against the person erecting any such nusance, or he may stand on his own ground and abate it. 9 *Rep.* 58: 1 *Mod* 54. For any nusance erected or being on the soil of my neighbour, whereby I sustain damage, I may maintain an action on the case. If a man has a vacant piece of ground, and builds thereupon a house, with good Lights, which he sells or lets to another; and after he builds upon ground contiguous, or lets the same to another person, who builds thereupon to the nusance of the Lights of the first house, the lessee of the first house may have an action on the case against such builder, &c. And though formerly they were to be Lights of an ancient messuage, that is now altered. *Mod. Cas.* 116, 314. See titles *Nusance*; *Trespass.*

LIGHTS AND LAMPS, Householders in *Middlesex* and *Surrey* within the bills of mortality, to set out lamps, from *Lady-day* to *Michaelmas-day.* 2 *W.* & *M. sess.* 2. *c.* 8, § 15.

With respect to *London* and *Westminster* there are variety of acts, for paving, lighting, and cleansing the streets, &c. not necessary to enumerate. See title *London.*

LIGNAGIUM, The right of cutting of fuel in woods; and sometimes it is taken for a tribute or payment due for the same.

LIGNUM VITÆ, An apothecary's drug. *Lignum Vitæ* of the product of the *British* plantations in *America* may be imported free from all customs and impositions. *Stat.* 1 *Geo.* 2. *st.* 2. *c.* 17. § 5. See title *Navigation-Acts.*

LIGNAMINA, Timber fit for building. *Du Fresne.*

LIGULA, A copy or transcript of a court-roll or deed mentioned by Sir *John Maynard* in his *Mem. in Scaccar.* 12 *Ed.* 1.

LIGURITOR, A flatterer. *Leg. Canut.* 29. *Somner* is of opinion that it signifies a glutton, from the Saxon *licera, gulosus. Cowell.*

LIMBS. The Limbs as well as the life of a man are of such high value, in the estimation of the law of *England*, that it pardons even homicide, if committed *se defendendo*, or in order to preserve them. 1 *Comm.* 130. See titles *Homicide*; *Maihem*; *Assault.*

LIME AND LEMON-JUICE, Are liable to certain duties on importation. See title *Navigation Acts.*

LIMITATION,

LIMITATIO.] A certain time, assigned by statute, within which an action must be brought.

I. *The Nature, Origin, and general Rules as to Limitations of Actions.*

II. *More particularly of the Limitations of Actions as divided, into*—1. *Real,*—2. *Penal,*—*and* 3. *Personal.*

III. *Of the Time when the Right of Action accrued, so as to be affected by the Statutes; and of the Courts bound thereby.*

IV. *The Exceptions in the Statute of Limitations, Statute* 21 *Jac.* 1. *c.* 16.—1. *Relating to Infants;* —2. *Merchant's Accounts;*—3. *Persons beyond Sea;* —4. *Executors and Administrators;*—5. *In cases of Defect of Jurisdiction;*—6. *Of suing out a Writ to save the Statute;*—7. *Of reviving a Debt barred by Statute;*—8. *Of Pleading.*

I. THE time of Limitation is two-fold, first, in writs, by divers acts of Parliament; secondly, to make a title to any inheritance, and that is by the Common Law. *Co. Lit.* 114, 115.

It seems, that by the Common Law there was no stated or fixed time to bring actions; for though it be said by *Bracton*, that *omnes actiones in mundo infra certa tempora limitationem habent*; yet Lord *Coke* says, that the Limitation of Actions was by force of divers acts of Parliament; also, says he, this general position of *Bracton's* admitted of several exceptions. *Bract. lib.* 2. *fol.* 228: 2 *Inst.* 95: *Co. Litt.* 115: 4 *Co.* 10, 11.

But by the ancient law there was a stated time for the heir of the tenant to claim after the death of his ancestor, that is to say, a year and a day after he was fourteen years old, or else he lost his land, according to the feudal text; *Prætèrea si quis infeudatus major quatuordecim annis sua incuria, vel negligentia per ann. & diem steterit, quod feudi investituram à proprio domino non petierit, transacto hoc spatio, feudum amittat & ad dominum redeat. Spelm. Gloss.* 32.

The fixing upon the period of a year and a day, upon several other occasions, seems to have been deduced from this ancient rule; and on this occasion was pitched upon, because the services appointed seem to be annually computed; therefore the feud was ordered to be taken up within such time as such annual services became due, or else it was lost and returned to the lord; and the same time that was appointed to the tenant to claim from the lord was also appointed to make his claim upon any disseisor; and if no such claim was made, the disseisor dying seised cast the right of possession upon the heir; and this was to keep the same uniformity in point of time through the law, as also that the lord might be at a certainty whom he might take for his tenant, and admit upon every descent; and since the heir of the tenant anciently lost the whole land, in case he did not take it up within time, it was fit the tenant should lose the right and possession, in case he did not claim within the same time upon the disseisor; that the heir of the disseisor might be in peace, in case the person that had right did not make his claim upon him, and that from thenceforth the lord might receive him into his feud; and as upon the ancient plan of feudal constitution,

constitution, if the heir did not take up the feud within a year and a day, a desertion and dereliction was presumed; so also if the dissei-see did not claim within the same time, the right of possession was relinquished. *Spelm. Gloss. annus & dies* 32, 33.

Before the *stat.* 32 *Hen.* 8. *c.* 2, certain remarkable periods were fixed upon, within which the titles, whereon men designed to be relieved, must have accrued; thus in the time of *Hen.* III. by the statute of *Merton*, 20 *Hen.* 3. *c.* 8, at which time the Limitation in a writ of right was from the time of King *Henry* I. it is reduced to the time of King *Henry* II.; and for assises of *mort d'ancestor*, they were thereby reduced from the last return of King *John* out of *Ireland*, which was 12 *Johannis*; and for assises of *novel disseisin, à prima transfretatione Regis in Normanniam*, which was 5 *Hen.* 3, and which before that had been *post ultimum redditum Henrici* 3. *de Britannia*; and this Limitation was also afterwards by the statutes *Westm.* 1. (3 *Ed.* 1.) *c.* 39, and *Westm.* 2. (3 *Ed.* 1.) *c.* 46, reduced to a narrower compass, the writ of right being limited to the first coronation of *Hen.* III. For these ancient limitations, see *Co. Lit.* 14. *b.* 115. *a*; 2 *Inst.* 94, 95: 2 *Rol. Abr.* 111: *Hale's Hist. of the Law*, 122: 2 *Keb.* 45. This last date of Limitation continued so long unaltered, that it became indeed no Limitation at all; it being above three hundred years from *Henry* III's coronation to the year 1540, when the statute of Limitations, 32 *Hen.* 8. *c.* 2, was made. This statute, therefore, instead of limiting actions from the date of a particular event, as before, which in process of years grew abused, took another and more direct course, which might endure for ever, by limiting a certain period of time previous to the commencement of every suit. See 3 *Comm. c.* 10. *p.* 189.

There are now several *statutes of Limitation*, by which a certain time is prescribed, beyond which no plaintiff can lay his cause of action. This, by *stat.* 32 *Hen.* 8. *c.* 2, in a *Writ of Right* is 60 years. In assizes, writs of entry, or other *possessory actions real*, of the seisin of one's ancestors in lands; and either of their seisin or one's own, in rents, suits, and services; 50 years. And in *actions real* for lands grounded upon one's own seisin or possession, such possession must have been within 30 years. By *stat.* 1 *Mary*, *st.* 2. *c.* 5, this Limitation does not extend to any suit for *Advowsons*, upon reasons hereafter mentioned. See *post*. II. 1.

By *stat.* 21 *Jac.* 1. *c.* 2, a time of Limitation was extended to the case of the King, *viz.* sixty years precedent to *February* 19, 1623; 3 *Inst.* 189; but this becoming ineffectual by efflux of time, the same term of Limitation was fixed, by *stat.* 9 *Geo.* 3. *c.* 16, to commence and be reckoned backwards, from the time of bringing any suit or other process, to recover the thing in question; so that a possession for sixty years is now a bar even against the prerogative, in derogation of the ancient maxim, *nullum tempus occurrit regi*. See this Dictionary, title *King*, V. 2.

By *stat.* 21 *Jac.* 1. *c.* 16, the time of Limitation in any writ of *formedon*, is 20 years; and by a consequence, the same term is also the Limitation in every action of *Ejectment*; for no ejectment can be brought, unless where the lessor of the plaintiff is entitled to enter on the lands; and by this statute (21 *Jac.*) no *entry* can be made by any man unless within 20 years after his right shall accrue. And by *stat.* 4 & 5 *Ann. c.* 16, no entry shall be of force to satisfy the said statute of Limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect. See this Dictionary, titles *Ejectment*; *Entry*; *Fine*.

By the same statute, 21 *Jac.* 1. *c.* 16, (which, from the general extent of it to almost all actions, is usually termed emphatically, *The Statute of Limitations*,) all actions of trespass, (*quare clausum fregit*, or otherwise,) detinue, trover, replevin, account, and case, (except upon accounts between merchants,) debt on simple contract, or for arrears of rent, are limited to 6 years after the cause of action commenced; (and see *stat.* 4 & 5 *Ann. c.* 16. *post.* III. *ad fin.*) Actions of assault, menace, battery, mayhem, and imprisonment, must be brought within 4 years; and actions for words within 2 years after the injury committed.

By *stat.* 27 *Geo.* 3. *c.* 44, suits in *Ecclesiastical Courts* for defamatory words must be commenced within six months.

By *stat.* 31 *Eliz. c.* 5, all suits, indictments, and informations upon any *penal statutes*, where any forfeiture is to the Crown alone, shall be sued within 2 years; and when the forfeiture is to a Subject, or to the Crown and a Subject, within *one* year after the offence committed; unless where any other time is specially limited by the statute.

By *stat.* 10 *W.* 3. *c.* 14, no *Writ of Error*, *Scire Facias*, or other suit, shall be brought to reverse any Judgment, Fine, or Recovery for error, unless it be prosecuted within 20 years. See this Dictionary, titles *Error*; *Fine of Lands*; *Judgment*.

A writ of error to reverse a Common Recovery cannot be brought after twenty years, though the right of the plaintiff in error accrued within that time. 2 *Stra.* 1257.

No statute has fixed any Limitation to a Bond or Specialty; but where no interest has been paid upon a bond, and no demand proved thereon for twenty years, the Judges recommend it to the Jury to presume it discharged, and to find a verdict for the defendant. 2 *Term Rep.* 270. See this Dictionary, title *Bond*.

II. 1. By *stat.* 32 *H.* 8. *c.* 2, it is enacted, "That no person shall from thenceforth sue, have, or maintain, any writ of right, or make any prescription, title, or claim, to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments, of the possession of his or their ancestor or predecessor, and declare and alledge any further seisin or possession of his ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor, which hath been or now is, or shall be seised of the said manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments, within threescore years next before the *teste* of the same writ, or next before the said prescription, title, or claim so hereafter to be sued, commenced, brought, made, or had."

And it is further enacted by the said statute, *par.* 2, "That no manner of person shall sue, have, or maintain any assise of *mort d'ancestor*, cosenage, ayle, writ of entry upon disseisin, done to any of his ancestors or predecessors, or any manors, lands, tenements, or other hereditaments, of any further seisin or possession of his or

their

their ancestor or predecessor, but only of the seisin or possession of his or their ancestor or predecessor, which was or hereafter shall be seised of the same manors, lands, tenements, or other hereditaments, within fifty years next before the *teste* of the original of the same writ hereafter to be brought."

It is further enacted, *par.* 3, "That no person shall sue, have, or maintain any action for any manors, lands, tenements, or other hereditaments, of or upon his or their own seisin or possession therein, above thirty years next before the *teste* of the original of the same writ hereafter to be brought."

And further, *par.* 4. "That no person shall hereafter make any avowry or cognizance for any rent, suit or service, and allege any seisin of any rent, suit or service, in the same avowry or cognizance in the possession of any other, whose estate he shall pretend or claim to have, above fifty years next before the making of the said avowry or cognizance."

Fifty years is the true term of Limitation in this instance; though *Rastall's* and some other editions of the statutes make it only forty years; an error adopted by *Coke*, (2 *Inst.* 95,) and other writers. See 3 *Comm. c.* 10. *p.* 189, *in n.*

And it is further enacted by the said statute, *par.* 5, "That all formedons in reverter, formedons in remainder, and *scire facias* upon fines of any manors, lands, tenements, or other hereditaments, at any time hereafter to be sued, shall be sued and taken within fifty years next after the title and cause of action fallen, and at no time after the fifty years past."

Note; This statute hath the usual saving, for infants, feme coverts, persons in prison, and beyond sea.

In the construction of this statute it hath been holden,

That in a formedon in reverter or remainder, or on a *scire facias*, on a fine of such nature, the demandant need not mention the statute in order to make out his title; but the tenant, if he would take advantage of it, must plead it. *Dyer* 315. *b. pl.* 101. So in an avowry for rent. *Moor* 31. *pl.* 102: 1 *Rol. Rep.* 50.

It has been held, that this statute being in restraint of the Common Law, ought to be construed strictly; that therefore it does not extend to a formedon *in descender*, *cessavit* nor *rescous*. 4 *Co.* 8: 1 *And.* 16: *Lit. Rep.* 342.

To a bill in Chancery, to be relieved touching a rent-charge upon lands by a will, the defendant pleaded the statute of Limitations, and that there had been no demand or payment in forty years; and it was held, that this statute concerns only customary rents between landlord and tenant, and not any rent that commences by grant, whereof the commencement may be shewn. 2 *Vern.* 235.

The statute does not extend to the services of escuage, homage, and fealty, for a man may live above the time limited by the act; neither doth it extend to any other service which by common possibility may not happen or become due within sixty years, as to cover the hall of the lord, or to attend the lord in the war, &c. *Co. Lit.* 115. *a*: 2 *Inst.* 95: 4 *Co.* 10, *Bevil's* case: 8 *Co.* 65: 3 *Lev.* 21.

And where the tenure is by homage, fealty, and escuage uncertain, and by suit of court or rent, or any other annual service, the seisin of the suit or rent, or any other annual service, is a good seisin of the homage, fealty, or escuage, or other accidental services, as wardship, heriot-service, or the like. 2 *Inst.* 96: 4 *Co.* 8. *b*: *Winch.* 32: *Hutt.* 50: 2 *Rol. Rep.* 392.

By *stat.* 1 *Mar. st.* 2. *c.* 5, it is enacted, "That the *stat.* 32 *Hen.* 8. *c.* 2, shall not extend to any writ of right of advowson, *quare impedit*, or assise of *darrein presentment*, nor *jus patronatûs*, nor to any writ of right of ward, writ of ravishment of ward for the wardship of the body, or for the wardship of any castles, honours, manors, lands, tenements, or hereditaments holden by knight service; but that such suits may be brought as before the making of the said act.

There is, therefore, no Limitation with regard to the time within which any actions touching advowsons are to be brought; at least none later than the times of *Richard* I. and *Henry* III. And this upon very good reason; because it may easily happen, that the title to an advowson may not come in question, nor the right have opportunity to be tried within 60 years; which is the longest period of Limitation assigned by the *stat.* 32 *Hen.* 8. *c.* 2. For Sir *Edward Coke* says, that there was a parson of one of his churches that had been incumbent there above fifty years; nor are instances wanting where two successive incumbents have continued for upwards of one hundred years. Had therefore the last of these incumbents been the clerk of an usurper, or had been presented by lapse, it would have been necessary and unavoidable for the patron, in case of a dispute, to have recurred back above a century, in order to have shown a clear title and seisin, by presentation and admission of the prior incumbent. But though, for these reasons, a Limitation is highly improper with respect only to the length of time, yet as the title of advowsons is, for want of some Limitations, rendered more precarious than that of any other hereditament, (especially since the *stat.* 7 *Ann. c.* 18, hath allowed possessory actions to be brought upon any prior presentation, however distant,) it might perhaps be better, if a Limitation were established, with respect to the number of avoidances; or rather if a Limitation were compounded of the length of time and the number of avoidances together: for instance, if no seisin were admitted to be alleged in any of these writs of patronage after sixty years *and* three avoidances were past. 3 *Comm. c.* 16. *p.* 250.

By *stat.* 21 *Jac.* 1. *c.* 16, which the preamble declares to be for quieting men's estates, and avoiding of suits, it is enacted, "That all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of parliament; and after the said twenty years expired, no person or persons, or any of their heirs, shall have or maintain any such writ of or for any of the said manors, lands, tenements or hereditaments; and that all writs of formedon in descender, formedon in remainder, formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title, or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; and that no person or persons that now hath any right or title of

entry,

entry, into any manors, lands, tenements, or hereditaments, now held from him or them, ſhall thereinto enter, but within twenty years next after the end of this preſent ſeſſion of parliament, or within twenty years next after any other title of entry accrued; and that no perſon or perſons ſhall at any time hereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which ſhall hereafter firſt deſcend or accrue to the ſame; and in default thereof ſuch perſons ſo not entering, and their heirs, ſhall be utterly excluded and diſabled from ſuch entry after to be made; any former law, &c.

"Provided, That if any perſon or perſons, that is or ſhall be entitled to ſuch writ or writs, or that hath or ſhall have ſuch right or title of entry, be or ſhall be, at the time of the ſaid right or title firſt deſcended, accrued, come, or fallen, within the age of one and twenty years, feme covert, *non compos mentis*, imprisoned, or beyond the ſeas; that then ſuch perſon and perſons, and his and their heir and heirs, ſhall or may, notwithſtanding the ſaid twenty years be expired, bring his action, or make his entry, as he might have done before this act; ſo as ſuch perſon and perſons, or his or their heir and heirs, ſhall within ten years next after his and their full age, diſcoverture, coming of ſound mind, enlargement out of priſon, or coming into this realm, or death, take benefit of and ſue forth the ſame, and at no time after the ſaid ten years."

In the conſtruction of this part of this ſtatute it hath been holden,

That the poſſeſſion of one joint-tenant is the poſſeſſion of the other, ſo far as to prevent this ſtatute. 1 *Salk.* 285.

That a claim of entry to prevent the ſtatute of Limitations muſt be upon the land, unleſs there be ſome ſpecial reaſon to the contrary. 1 *Salk.* 285.

That if a perſon be barred of his formedon, he is not thereby hindered to purſue his right of entry which afterwards accrues to him; no more than a perſon who has ſeveral remedies, and diſcharges one of them, is excluded thereby from purſuing the others. 1 *Lutw.* 781: 1 *Salk.* 339: 2 *Salk.* 422.

If *A.* has had poſſeſſion of lands for twenty years without interruption, and then *B.* gets poſſeſſion, upon which *A.* is put to his ejectment; though *A.* is plaintiff, yet the poſſeſſion of twenty years ſhall be a good title in him, as if he had ſtill been in poſſeſſion; becauſe a poſſeſſion for twenty years is like a deſcent which tolls entry, and gives a right of poſſeſſion, which is ſufficient to maintain an ejectment. 1 *Salk.* 421: ſaid to have been twice ſo ruled by *Holt*.

If one tenant in common receives the whole profits for twenty years, or more, yet this does not bar his companion; for the ſtatute of Limitations never runs againſt a man, but where he is actually ouſted or diſſeiſed. 1 *Salk.* 423.

It has been ruled, that copyholds are within the ſtatute of Limitations; becauſe it is an act made for the preſervation of the public quiet, and no ways tending to the prejudice of the lord or tenant. *Moor* 410.

Eccleſiaſtical perſons, it has been ſaid, are not bound by any of the ſtatutes of Limitations, becauſe it would be a ſide-wind to evade the ſtatutes made to prohibit their alienations. *Comp. Incumb.* 429.

2. By *ſtat.* 31 *Eliz. c.* 5. *par.* 5, it is enacted, "That all actions, ſuits, bills, indictments, or informations, which ſhall be brought for any forfeiture upon any ſtatute penal, made or to be made, whereby the forfeiture is or ſhall be limited to the Queen, &c. ſhall be brought within two years after the offence; and that all actions, ſuits, bills, or informations, which ſhall be brought for any forfeiture upon any penal ſtatute, made or to be made, except the ſtatutes of tillage, the benefit and ſuit whereof is or ſhall be by the ſaid ſtatute limited to the Queen, her heirs or ſucceſſors, and to any other that ſhall proſecute in that behalf, ſhall be brought by any perſon that may lawfully ſue for the ſame within one year next after the offence committed; and in default of ſuch purſuit, that then the ſame ſhall be brought for the Queen's Majeſty, her heirs or ſucceſſors, any time within the two years after that year ended. Where a ſhorter time is limited by any penal ſtatute, the proſecution muſt be within that time."

Alſo ſee *ſtats.* 18 *Eliz. c.* 5: 21 *Jac.* 1. *c.* 4; the former requiring a memorandum of the day of exhibiting an information, the latter an oath from the informer.

In the conſtruction of theſe ſtatutes it hath been holden,

That the *ſtat.* 21 *Jac.* 1. *c.* 4, does not extend to any offence created ſince that ſtatute; ſo that proſecutions on ſubſequent penal ſtatutes are not reſtrained thereby, but that ſtatute is to them as it were repealed *pro tanto.* 1 *Salk.* 372, 3: 5 *Mod.* 425. And that the ſaid ſtatute, 21 *Jac.* 1, only applies to thoſe penal ſtatutes, on which proceedings may be had before the Juſtices of Aſſiſe, Juſtices of the Peace, &c. 3 *Term Rep.* 362.

That if an offence prohibited by any penal ſtatute be alſo an offence at Common Law, the proſecution of it as of an offence at Common Law, is no way reſtrained by any of theſe ſtatutes. *Hob.* 270: 4 *Mod.* 144.

That if an information *tam quam* be brought after the year on a penal ſtatute, which gives one moiety to the informer, and the other to the King, it is naught only as to the informer, but good for the King. *Cro. Car.* 331: *Cro. Jac.* 366; and *vide Dalt.* 60.

When the forfeiture is to the Crown and a Subject, a common informer muſt ſue within one year, and the Crown may proſecute for the whole penalty at any time within two years after that year ended. 3 *Comm. c.* 20, *p.* 307, *in n.*

That if a ſuit on a penal ſtatute be brought after the limited time, the defendant need not plead the ſtatute, but may take advantage of it on the general iſſue. 1 *Show.* 353.

That the party grieved is not within the reſtraint of theſe ſtatutes, but may ſue in the ſame manner as before. *Cro. Eliz.* 645: *Noy* 71: 3 *Leon.* 237.

It ſeems doubtful, whether a ſuit by a common informer on a penal ſtatute, which firſt gives an action to the party grieved, and in his default, after a certain time, to any one who will ſue, be within the reſtraint of theſe ſtatutes. 1 *Show.* 353, 354.

It has been held by three judges, that ſuing out a *latitat* within the year was a ſufficient commencement of the ſuit to ſave the limitation of time on a penal ſtatute; becauſe the *latitat* is the original in *B. R.* and may be continued on record as an original. But *Holt* held otherwiſe, for the action being for a penalty given by a

 ſtatute,

statute, the plaintiff might have brought an action of debt by original in *B. R.* because the statute gives the action; and he held, that there was a difference between a civil action, and an action given by statute; for in the first case, the suing out a *latitat* within the time, and continuing it afterwards, will be sufficient; but in the other case, if the party proceeds by bill, he ought to file his bill within time, that it may appear so to be upon the record itself. *Carth.* 232: *Show.* 353. But upon a writ of error, all the Judges in the Exchequer Chamber held, that a *latitat* is a kind of original in the King's Bench. 2 *Ld. Raym.* 883. And accordingly, in two subsequent cases, it was holden to be a good commencement of the suit in a penal action. 2 *Burr.* 950: 3 *Burr.* 1243: *Cowp.* 454.—See as to Limitations of Indictments, and Informations in criminal cases, this Dictionary, titles *Appeal*; *Indictment*; *Information*; *Treason*, &c.

3. By *stat.* 21 *Jac.* 1. *cap.* 16, it is enacted, That all actions on the case for words shall be commenced and sued within TWO years *next after* the words spoken, and not after.

In the construction of this branch of the statute it hath been holden,

That an action of *scandalum magnatum* is not within the statute. *Lit. Rep.* 342: 3 *Keb.* 645.

That it extends not to actions for slander of title; for that is not properly slander, but a cause of damage; and the slander intended by the statute is to the person. *Cro. Car.* 141.

That if the words are of themselves actionable, without the necessity of alleging special damages, although a loss ensues, yet in this case the statute of Limitations is a good bar; but if the words at the time of the speaking of them are not actionable, but a subsequent loss ensues, which entitles the plaintiff to his action, in such case the statute is no bar. 1 *Sid.* 95: *Raym.* 61: and see 3 *Mod.* 111.

That if an action for words be founded upon an indictment, or other matter of record, it is not within this statute. 1 *Sid.* 95.

By the same *stat.* 21 *Jac.* 1. *c.* 16, it is enacted, that all actions of trespass, of assault, battery, wounding, imprisonment, or any of them, shall be commenced and sued within FOUR years *next after* the cause of such actions or suits, and not after.

It seems, that if a man brings trespass for beating his servant, *per quod servitium amisit*, this is not such an action as is within this branch of the statute, being founded on the special damage. 1 *Salk.* 206: 5 *Mod.* 74.

If to an action of assault, battery, and imprisonment, the defendant pleads, as to the assault and imprisonment, the statute of Limitations, without answering particularly to the battery, otherwise than by using the words *transgressio prædicta*, it is sufficient; for these words are an answer to the whole. 1 *Lev.* 31.

By the same *stat.* 21 *Jac.* 1. *c.* 16, it is enacted, that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover* and replevin for taking away of goods and chattels, all actions of account, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions on the case, (other than for slander,) all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, shall be commenced and sued within SIX years *next after* the cause of action.

Provision is made for feme-coverts, persons that are *non compos*, imprisoned, or beyond sea.

Under the head of Actions upon the Case are included actions for libels, criminal conversation, seduction, and actions for such words as are not actionable without a special damage; and all other actions on the case, being of equal mischief, and plainly within the intention of the legislature. See *Cro. Car.* 245, 333: 2 *Saund.* 120: 2 *Mod.* 71: 1 *Sid.* 455: 3 *Comm. c.* 8. *p.* 307, *in n.* As to actions in the Admiralty for Seamen's wages, see *post.* III.

It hath been adjudged, that an action of debt on *stat.* 2 & 3 *Ed.* 6. *c.* 13, for not setting out tithes, is not within the statute; the action being grounded on an act of Parliament, which is the highest record. *Cro. Car.* 513; *Talory* v. *Jackson*: 1 *Saund.* 38: 2 *Saund.* 66: 1 *Sid.* 305, 415: 1 *Keb.* 95: 2 *Keb.* 462.

So an action of debt for rent reserved on a lease by indenture is out of the statute, the lease by indenture being equal to a specialty. *Hutt.* 109: 1 *Saund.* 38.

Also an action of debt for an escape is not within the statute; not only because it is founded *in maleficio*, and arises on a contract in law, which is different from those actions of debt on a lending or contract mentioned in the statute, but also because it is grounded on *stat.* 1 *Rich.* 2. *cap.* 12, which first gave an action of debt for an escape, there being no remedy for creditors before, but by action on the case. 1 *Saund.* 37; *Jones* v. *Pope*: 1 *Lev.* 191: 2 *Keb.* 903: 1 *Sid.* 305.

So this statute cannot be pleaded to an action of debt brought against a sheriff for money by him levied on a *fieri facias*; because the action is founded *in maleficio*, as also upon the judgment on which the *fieri facias* issued, which is a matter of record. 1 *Mod.* 212, 245: 2 *Show.* 79.

An action of debt on an award under the hand and seal of the arbitrators, though the submission was by parol, is not within the statute. 2 *Saund.* 64: *Sid.* 415: 1 *Lev.* 273: 2 *Keb.* 462, 496, 533.

An action of debt for a fine of a copyholder is not within the statute. 1 *Keb.* 536: 1 *Lev.* 273.

If a man recovers a judgment or sentence in *France* for money due to him, the debt must be considered here only as a debt by simple contract, and the statute of Limitations will run upon it. 2 *Vern.* 540 *Sed qu.* See *Dougl.* 1.

If the plaintiff be in *England* at the time the cause of action accrues, the time of Limitation begins to run, so that if he, or (if he dies abroad) his representative does not sue within six years, he is barred by the statute. 1 *Wils. par.* 1. 134. See *stat.* 4 & 5 *Ann. c.* 16. *post.* III.

It seems that to an *assumpsit* brought by the assignees of a bankrupt, for a debt due to the bankrupt, this statute is a good bar; for though the assignment is by force of an act of Parliament, yet the assignees stand only in the place of the bankrupt, and can have no other right nor remedy than he had. 2 *Lev.* 166: 3 *Keb.* 645: *Comb.* 70.

It seems clearly agreed, that though the statutes of Limitation bind the courts of equity, that yet a trust is not within these statutes. *March* 129. 2 *Salk.* 124.

A charity

A charity is not barred by length of time, nor within the ſtatute of Limitations. 2 *Vern.* 399.

So it hath been held, that a legacy is not within the ſtatute of Limitations. 1 *Vern.* 256.

It ſeems to be the doctrine of Courts of Equity, that mortgages are not within the ſtatute of Limitations; yet where a man comes in at an old hand, it hath been ſometimes decreed, that the poſſeſſor ſhould account no further than for the profits made in his own time, to diſcourage the ſtirring in ſuch dormant titles; alſo the courts have allowed length of time to be pleaded in bar, where the mortgaged eſtate hath deſcended as a fee without entry or claim from the mortgagor, and where the poſſeſſor would be intangled in a long account; and in theſe caſes the ſtatute of Limitations has been mentioned as a proper direction to go by. 1 *Chan. Ca.* 102. See title *Mortgage.*

III. This ſtatute cannot be a bar unleſs the ſix years are expired, after there hath been complete cauſe of action; as if a man promiſe to pay 10*l.* to *J. S.* when he came from *Rome*, or when he marries, and ten years after *J. S.* marries, or comes from *Rome*, the right of action accrues from the happening of the contingency; from which time the ſtatute ſhall be a bar, and not from the time of the promiſe. *Godb.* 437.

So in an action on the caſe wherein the plaintiff declared, that in conſideration that he would forbear to ſue the defendant for ſome ſheep killed by the defendant's dog, the defendant promiſed to make him ſatisfaction upon requeſt, and that at ſuch a time he requeſted, &c. it was held, that the right of action accrued from the requeſt, not from the time of killing the ſheep; that therefore the defendant could not plead the ſtatute of Limitations, the requeſt being within ſix years, though the killing the ſheep and promiſe of ſatisfaction was long before. *Godb.* 437: See 1 *Lev.* 48: 1 *Sid.* 66: 1 *Keb.* 177.

So if a note or bill of exchange is given, payable at a certain time after date, the cauſe of action does not accrue until after the expiration of the time ſpecified; and if an action is brought within ſix years after that time, the ſtatute is not a bar. But if the ſuit is not commenced within ſix years after that time, the defendant may plead that the cauſe of action *did not accrue* within ſix years, but he muſt not plead that he did *not promiſe* within ſix years, *i. e.* if he is the perſon firſt liable to the payment, becauſe the *promiſe* is made at the time of making the note, &c. It may be otherwiſe in the caſe of an indorſer, who is not liable until default made by the drawer of the note, or accepter of the bill; but in his caſe, *Non accrevit infra ſex annos*, is a ſafe and good plea. For ſimilar caſes, ſee 2 *Salk.* 422: 1 *Vent.* 191: 3 *Keb.* 613: *Cro. Car.* 245-6, 333: 1 *Jon.* 252: 3 *Mod.* 110, &c.: *Allen* 62: 2 *Salk.* 420: *Comb.* 26.

Where a party has been guilty of any fraud in his dealings or accounts, the Courts of Law and Equity have determined, that he ſhall only protect himſelf by the ſtatute of Limitations from the time his fraud is diſcovered. 3 *P. Wms.* 143: *Doug.* 630.

It is clearly agreed, that the ſtatute of Limitations is a good plea in a Court of Equity. *March* 129: 1 *Salk.* 424.

But it has been agreed, that the ſtatute of Limitations is no plea in the Court of Admiralty, or Spiritual Court, where they proceed according to their law, and in a matter in which they have cogniſance. 6 *Mod.* 25, 26: 2 *Salk.* 424: 3 *Keb.* 366, 392.

Therefore, for a ſuit upon a contract *ſuper altum mare*, no prohibition ſhould go upon their refuſal of a plea of the ſtatute of Limitations. 6 *Mod.* 26.

So it has been held not to be pleadable to a proceeding in the Spiritual Court, *pro violenta manuum injectione in clericum*, becauſe the proceeding is *pro reformatione morum*, not for damages. 2 *Salk.* 424.

It was formerly doubted, whether to a ſuit in the Admiralty for mariners wages, this ſtatute is a good plea; becauſe it is ſaid, that this is a matter properly determinable at Common Law; and the allowing the Admiralty juriſdiction therein, only a matter of indulgence. 2 *Salk.* 424: 6 *Mod.* 25.

But this is now ſettled by *ſtat.* 4 & 5 *Ann. cap.* 16, by which it is enacted, That all ſuits and actions in the Court of Admiralty for Seamen's wages, ſhall be commenced and ſued within ſix years next after the cauſe of ſuch ſuits or actions ſhall accrue, and not after.

IV. 1. The ſtatute 21 *Jac.* 1. *c.* 16, being general, infants had been included, had they not been particularly excepted. 1 *Lev.* 31.

It hath been holden, that if an infant, during his infancy, by his guardian, bring an action, the defendant cannot plead the ſtatute of Limitations; although the cauſe of action accrued ſix years before, and the words of the ſtature are, that after his coming of age, &c. 2 *Saund.* 121.

It hath been held in Chancery, that if one receives the profits of an infant's eſtate, and ſix years after his coming of age, he brings a bill for an account, the ſtatute of Limitations is as much a bar to ſuch a ſuit, as if he had brought an action of account at Common Law; for this receipt of the profits of an infant's eſtate is not ſuch a truſt as, being a creature of the Court of Equity, the ſtatute ſhall be no bar to; for he might have his action of account againſt him at law, and therefore no neceſſity to come into this court for the account; for the reaſon why bills for an account are brought here, is from the nature of the demand, and that they may have a diſcovery of books, papers, and the party's oath, for the more eaſy taking of the account, which cannot be ſo well done at law; but if the infant lies by for ſix years after he comes of age, as he is barred of his action of account at law, ſo ſhall he be of his remedy in this court. 1 *Abr. Eq.* 304. *c.* 10: *Pre. Ch.* 518.

2. It hath been a matter of much controverſy, whether the exception relative to merchants' accounts extends to all actions and accounts relating to merchants and merchandize, or to actions of account open and current only; the words of the ſtatute being, "All actions of treſpaſs, &c. all actions of account and upon the caſe, other than ſuch actions as concern the trade of merchants;" ſo that by the words, *other than ſuch actions*, not being ſaid actions of account, it has been inſiſted that all actions concerning merchants are excepted. But it is now ſettled, that accounts open and current only are within the ſtatute; that therefore if an account be ſtated and ſettled between merchant and merchant, and a ſum certain agreed to be due to one of them, if in ſuch caſe he to whom the money is due, does not bring his action within the limited time, he is barred by the ſtatute. See 1 *Jon.* 401: 2 *Saund.* 124, 125: 1 *Lev.* 287,

298:

298: 2 *Keb.* 622: 1 *Vent.* 90: 1 *Mod.* 270: 2 *Mod.* 312: 2 *Vern.* 456.

So it hath been adjudged, that by the exception in the statute concerning merchants accounts, no other actions are excepted but actions of account. *Carth* 226.

Also it hath been adjudged, that bills of exchange for value received, are not such matters of account as are intended by the exception in the statute of Limitations. *Carth.* 226.

An open current account, between tradesmen or others, is not within the statute, supposing the last article of the debt in the account was contracted within six years; otherwise, in such case, the statute is a bar. *J. M.*

This exception does not extend to a tradesman's account with his customer; for in this case there are not mutual dealings: and the tradesman is barred by the statute from recovering for more than those articles which have been sold within six years. *Bull. N. P.* 149.

3. The clause of the statute as to persons beyond sea, extends only to such as are actually so. For where to *non assumpsit infra sex annos*, the plaintiff replied, that when the cause of action accrued, he was resident in foreign parts out of the kingdom of *England*, viz. *Glasgow* in *Scotland*; this was held ill on demurrer; *Scotland* not being a foreign part within the meaning of the statute, the express words of which are, *beyond the seas*. Therefore a foreigner, or person resident abroad, shall never be barred from bringing his action, from any length of time while out of the kingdom, for the statute does not begin to run until he has come into it; though any of the persons who are under the disabilities mentioned in the statute, *may* nevertheless, during the time such disabilities exist, bring their actions. *Espinasse, N. P.* 149, 150.

It seems to have been agreed, that the exception extends only *where the creditors or plaintiffs are so absent*, and not to debtors or defendants, because the first only are mentioned in the statute; and this construction has the rather prevailed, because it was reputed the creditor's folly, that he did not file an original, and outlaw the debtor, which would have prevented the bar of the statute. *Cro. Car.* 245, 333: 1 *Jon.* 252: 1 *Lev.* 143: 3 *Mod.* 311: 2 *Lutw.* 950: 1 *Salk.* 420.

But as the creditor's being beyond sea is saved by *stat.* 21 *Jac.* 1. *cap.* 16, so now by *stat.* 4 & 5 *Ann. cap.* 16, it is enacted, That if any person or persons, *against whom there is or shall be any cause of suit or action* for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, action *sur trover* or replevin, for taking away goods or chattels, or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding and imprisonment, or any of them, be, or *shall be, at the time of any such cause of suit or action given or accrued*, fallen or come, *beyond the seas*; that then such person or persons, who is or shall be *entitled to any such suit or action*, shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas, *within such times as are limited for the bringing of the said actions by stat.* 21 *Jac.* 1. *c.* 16.

If one only of a number of partners lives abroad, if the others be in *England*, the action must be brought within six years after the cause of action arises. 4 *Term Rep.* 516.

4. *A.* received money belonging to a person who before died intestate, and to whom *B.* after such receipt took out administration, and brought an action against *A.* to which he pleaded the statute of Limitations; the plaintiff replied, and shewed that administration was committed to him such a year, which was *infra sex annos*; though six years were expired since the receipt of the money, yet not being so since the administration committed, the action not barred by the statute. 1 *Salk.* 421: *Skin.* 555: 4 *Mod.* 376: *Latch* 335.

It is said in general, that where one brings an action before the expiration of six years, and dies before judgment, the six years being then expired, this shall not prevent his executor. 2 *Salk.* 424-5.

But if an executor sues upon a promissory note to the testator, and dies before judgment, and six years from the original cause of action are actually expired, and the executor brings a new action in four years after the first executor's death, the statute of Limitations shall be a bar to such action; for though the debt does not become irrecoverable, by an abatement of the action after the six years elapsed by the plaintiff's death; yet the executor should make a recent prosecution, to which the clause in the statute, § 4, that provides *a year* after the reversal of a judgment, &c. may be a good direction, or shew that he came as early as he could, because there was a contest about the will, or right of administration; for the statute was made for the benefit of the defendants, to free them from actions when their witnesses were dead, or their vouchers lost. 2 *Stra.* 907: *Fitzgib.* 81.

Under the equity of the above-mentioned section, in all cases of executors, if the six years be not elapsed at the time of the testator's death, and the executor takes out proper process within the year, it will save the bar by reason of the Limitation, even though the six years, within which the demand accrued, be elapsed before process sued out. *Bull. N. P.* 150, *Carver* v. *James*, *Trin.* 15 *Geo.* 2. *C. B.*

If there be no executor against whom the plaintiff may bring his action, he shall not be prejudiced by the statute of Limitations, nor shall any laches in such case be imputed to him. 2 *Vern* 695.

5. It seems agreed, that there being no Courts, or the Courts of Justice being shut, is no plea to avoid the bar of the statute of Limitations; as where after the Civil War an *assumpsit* was brought, and the defendant pleaded the statute of Limitations; to which the plaintiff replied, that a civil war had broke out, and that the government was usurped by rebels, which hindered the course of justice, and by which the courts were shut up, and that within six years after the war ended he commenced his action; this replication was held ill, for the statute being general, must work upon all cases which are not exempted by the exception. 1 *Keb.* 157: 1 *Lev.* 31: *Carth.* 157: 2 *Salk.* 420.

It is clearly agreed, that the defendant's being a Member of Parliament, and entitled to privilege, will not save a bar of the statute; because the plaintiff might have filed an original without being guilty of any breach of privilege. 1 *Lev.* 31, 111: *Carth.* 136, 7.

It is said, that if a man sues in Chancery, and pending the suit there, the statute of Limitations attaches on his demand, and his bill is afterwards dismissed, the matter being

being properly determinable at Common Law; in such case the Court will preserve the plaintiff's right, and will not suffer the statute to be pleaded in bar to his demand. 1 *Vern.* 73, 74.

If the statute of Limitations be pleaded to an action, the plaintiff to save his action may reply, that he had commenced the suit in an inferior Court within the time of Limitation, and that it was removed to *Westminster* by *habeas corpus*; and this shall be allowed by a favourable construction of the statute of Limitations; although in strictness the suit is commenced in the Court above, when it is removed by *habeas corpus*. 1 *Sid.* 228: 3 *Keb.* 263: 1 *Lev.* 143: also *vide* 2 *Salk.* 424: 2 *Stra.* 719: *Bull. N. P.* 151. See *post.* 6.

6. It is clearly agreed, that the suing out an original will save a bar of the statute of Limitations, and that thereupon the defendant may be outlawed; and that if beyond sea at the time of the outlawry, though it shall be reversed after his return, yet the plaintiff may bring another original by *journies accounts*, and thereby take advantage of his first writ. *Carth.* 136: 1 *Salk.* 420: 3 *Mod.* 311.

Also it is agreed, that the suing out a *latitat* is a sufficient commencement of a suit, to save the Limitation of time, because the *latitat* is the original in *B. R.* and may be continued on record as an original writ. 1 *Sid.* 53, 60: *Carth.* 233: 1 *Salk.* 421: see *ante* II. 2.

Also it hath been ruled, that to a plea of the statute of Limitations the plaintiff may reply, that he sued out a *latitat*, and continued it down by a *vicecomes non misit breve*, without concluding *prout patet per recordum*; for the *latitat* roll is only for the private use of the Court, and no record. 2 *Keb* 46. The same is law, as to a bill of *Middlesex*. See *Sty.* 156, 178: 2 *Ld. Raym.* 880: 1 *Stra.* 550: 2 *Stra.* 736: 2 *Ld. Raym.* 1441; and 2 *Burr.* 961.

But if the suing out of a *latitat* be replied to a plea of the statute of Limitations, the defendant, in order to maintain that plea, may aver the real time of suing it out in opposition to the *teste*. 2 *Bur.* 950.—And though the suing out an original, or *latitat*, will be a sufficient commencement of a suit, yet the plaintiff, in order to make it effectual, must shew that he hath continued the writ to the time of the action brought. *Carth.* 144: 2 *Salk.* 420: 1 *Lutw.* 101, 254: 3 *Mod.* 33. That the attorney's writing the continuances on the writ in his chambers is sufficient, see 1 *Sid.* 53: 1 *Keb.* 140. Also *vide Carth.* 144: 2 *Salk.* 420: 1 *Salk.* 421. The continuances may be entered up, at any time, before the plaintiff replies. The process sued and filed, and the continuances thereon, must be set forth by the plaintiff in his replication. *J. M.* See 3 *Term Rep.* 662: 1 *Wils.* 167: *Esp. N. P.* 153.

7. It is clearly agreed, that if after the six years the debtor acknowledges the debt, and *promises payment thereof*, that this revives it, and brings it out of the statute; as if a debtor by promissory note, or simple contract, promises within six years of the action brought that he will pay the debt; though this was barred by the statute, yet it is revived by the promise; for as the note itself was at first but an evidence of the debt, so that being barred, the acknowledgment and promise is a new evidence of the debt; and being proved, will maintain an *assumpsit* for recovery of it. 1 *Salk.* 28, 29: *Carth.* 470: 5 *Mod.* 425, 426: 2 *Show.* 126: 2 *Vent.* 151.

Also it hath been adjudged, that a conditional promise will revive a debt barred by the statute of Limitations; as where to an *assumpsit* by an executor for goods sold and delivered by the testator, the defendant pleaded the statute, and upon evidence it appeared, that the defendant within six years, being applied to by the executor for the debt, said, "If you prove that I have the goods, I will pay you;" which being fully proved at the trial, it was held that this conditional promise revived the debt; and that though made to the executor, after the death of the testator, it was sufficient to maintain the issue; because the promise did not give any new cause of action, but only revived the old cause, and was of no other use, but to prevent the bar by the statute of Limitations. *Carth.* 470: 1 *Salk.* 29: 5 *Mod.* 425.

So it hath been held that *a bare acknowledgment* of the debt within six years of the action, is sufficient to revive it, and prevent the statute, though no promise was made. *Carth.* 470.

If an *indebitatus assumpsit* for goods sold, be brought against four persons, who plead the statute of Limitations, and it be found that one of them promised within six years, there can be no judgment against him; for the contract being intire, it must be found that they all promised. 2 *Vent.* 151.—But where there are two or more drawers of a joint and several promissory note, the acknowledgment of one may be given in evidence in a separate action against another, and will defeat the effect of the statute. *Dougl.* 629.

It seems to be the doctrine of the Courts of Equity, that if a man by will or deed subject his lands to the payment of his debts, debts barred by the statute of Limitations shall be paid, for they are debts in equity, and the duty remains; and the statute hath not extinguished that, though it hath taken away the remedy. 1 *Salk.* 154: 2 *Vern.* 141.

Also it hath been ruled in equity, that if a man has a debt due to him by note, or a book debt, and has made no demand of it for six years, so that he is barred by the statute of Limitations; yet if the debtor, or his executor, after the six years, puts out an advertisement in the Gazette, or any other news-paper, that all persons who have any debts owing to them, may apply to such a place, and that they shall be paid; this (though general, and therefore might be intended of legal subsisting debts only) yet amounts to such an acknowledgment of that debt which was barred, as will revive the right, and bring it out of the statute again. *Abr. Eq.* 305.

Any acknowledgment of the existence of the debt, however slight, will take it out of the statute, and the Limitation will then run from that time: and where an expression is ambiguous, it shall be left to the consideration of the Jury, whether it amounts or not to such acknowledgment. 2 *Term Rep.* 760.

One of two makers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under his commission, on account of the note; this will prevent the other maker from availing himself of the statute of Limitations, in an action brought against him for the remainder of the money due on the note; the dividend having been received within six years before the action brought. 2 *H. Black. Rep.* 340.

If there be a *mutual account* of any sort between a plaintiff and defendant, for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance so as to take the case out of the statute. 6 *Term Rep.* 189.

8. Where the cause of action is to arise from an *executory consideration*, as some act to be performed, and a promise to pay in consequence of it, there *non assumpsit infra sex annos* is not the proper plea; for the assumpsit does not arise till the consideration is performed, it should be *actio non accrevit infra sex annos*. Espinasse N. P. 156. See 2 *Salk*. 422: *Bull. N. P.* 151.

It seems to be admitted, that the statute of Limitations must be pleaded positively by him that would take advantage thereof; and that the same cannot be given in evidence, especially in an *assumpsit*, because the statute speaks of a time past, and relates to the time of making the promise. 1 *Lev.* 111: 1 *Sid.* 253; and see *Cro. Jac.* 115. See *ante* II. 2.

But in debt for rent, upon *nil debet* pleaded, the statute of Limitations may be given in evidence; for the statute has made it no debt at the time of the plea pleaded, the words being in the present tense. 1 *Salk.* 278.

In replevin the defendant pleaded Not guilty, *De capt' prædict' infra sex annos jam ultimo elapsos*; and though it was urged, that this was the same with pleading *non cepit*, and if he did not take, he could not be guilty of the detainer; and if this way of pleading were not allowed, the statute would be entirely evaded as to this action; yet the plea was held ill, because he ought to have answered to the detainer, as well as to the taking; also a thing may be lawfully distrained, although unlawfully kept; as by being put into a castle, &c. by which means it could not be replevied. 1 *Sid.* 81: 1 *Keb.* 279; and see *Raym.* 86: 1 *Lev.* 110: 1 *Keb.* 566.

If a debt be set off by way of plea, the statute of Limitations may be replied to it. 2 *Stra.* 1271.

LIMITATION OF THE CROWN, See this Dictionary, title *King* I.

LIMITATION OF ESTATE; A modification or settlement of an Estate, determining how long it shall continue; or is rather a qualification of a precedent Estate. A Limitation is denominated by *Littleton*, a *condition in law*. *Litt.* § 380: 1 *Inst.* 234.—It is generally made by such words as *durante vita, quamdiu, dum,* &c. And if there be not a performance according to the Limitation, it shall determine an Estate without entry or claim; which a condition doth not. 10 *Rep.* 41: 1 *Inst.* 204. See this Dictionary, title *Condition* I. 2.

Limitation is also taken for the compass and time of an Estate; as where one doth give lands to a man, to hold to him and his heirs male, and to him and the heirs female, &c. here the daughters shall not have any thing in it so long as there is a male, for the Estate to the heirs-male is first limited. *Co. Lit.* 3, 13.

If a Limitation of an Estate be uncertain, the Limitation is void; and the Estate shall remain as if there had been no such Limitation. *Cro. Eliz.* 216. But a thing that is limited in a will by plain words, shall not be afterwards made uncertain by general words which follow. *Hil.* 23 *Car. B. R.* Where a devise is to the eldest son, upon condition that he pays such legacies; and if he refuses, the land shall remain to the legatees: on his refusal, the legatees may enter by way of Limitation. *Noy*, 51. And in all cases, where, after a condition, an interest is granted to a stranger, it is a Limitation. 1 *Leon.* 269: *Cro. Eliz.* 204. See title *Condition* I. 2.

As to the origin and progress of the Limitation of Estates, See 1 *Inst.* 271. *b. in n*; and this Dictionary under title *Conveyance*:—See also titles *Estate*; *Deed*; *Feoffment*; *Gift*; *Grant*; *Lease and Release*; *Trusts*; *Uses*; *Powers*, &c. From the note above cited has been extracted the following summary with respect to the Limitations and modifications of landed property, unknown to the Common Law; which have been introduced under the Statute of Uses, *stat.* 27 *H.* 8. *c.* 10.

The principal of these are known by the general appellation of springing or secondary uses. No Estate could be limited upon or after a fee, though it were a base or qualified fee; nor could a fee or estate of freehold be made to cease as to one person and to vest in another, by any Common-law conveyance. But there are instances where even by the Common Law these secondary Estates seem to have been allowed, when limited, or rather when declared by way of use. See *Jenk. Cent.* 8. *ca.* 52. After the Statute of Uses the Judges seem to have long hesitated whether they should receive them. In *Chudleigh's Case*, (1 *Rep.* 120: *Jenk.* 276: *Poph.* 70: 1 *And.* 309,) it was strongly contended that it would be wrong to make any Estate of freehold and inheritance, lawfully vested, to cease as to one, and to vest in others against the rule of law; and that no Estates should be raised by way of use, but those which could be raised by livery of seisin at the Common Law. The Courts however admitted them. After they were admitted it was found necessary to circumscribe them within certain bounds: because when an Estate in fee-simple is first limited, there is no method by which the first taker can bar or destroy the secondary Estate; as it is not affected either by a Fine or Common Recovery.

It is now settled, that when an Estate in fee-simple is limited, a subsequent Estate may be limited upon it, if the event upon which it is to take place be such, that, if it does happen, it must necessarily happen within the compass of one or more life or lives in being, and 21 years and some months over; [*i. e.* as many months as it is possible a child may be legitimately born after the death of its father:] it was long before the Courts agreed on this period; which was not arbitrarily prescribed by our Courts of Justice with respect to these secondary fees, but wisely and reasonably adopted in analogy to the cases of freehold and inheritance, which cannot be limited by way of remainder, so as to postpone a complete bar of the entail, by Fine or Recovery for a larger space.

But the reason which induced the Courts to adopt this analogy, with respect to these Estates when limited upon an Estate in fee-simple, does not hold when they are limited upon or after an Estate in tail; because in this latter case, the tenant intail, by suffering a Common Recovery before the event takes place, bars or defeats the secondary Estate, and acquires the fee-simple absolutely discharged from it. See *Page* v. *Haywood*, 2 *Salk.* 570, and 1 *Lev.* 35: *Goodman* v. *Cook*, 2 *Sid.* 102. Hence, if these secondary Estates are limited upon or after an Estate in tail, they may be limited generally, without restraining or confining the event or contingency

contingency upon which they are to take place to any period.

Thus, if an Estate be limited to *A.* and his heirs; and if *B.* (a person *in esse*) dies without leaving any issue of his body living at the time of his decease; or having such issue if *all* of them die before any of them attain the age of 21 years, then to *C.* and his heirs: here the Limitation to *C.* is limited after a previous Limitation in fee-simple, and it is a good Limitation; because the event upon which it is to take place, must, if it does happen at all, necessarily happen within the period of a life in being, and 21 years and a few months. But if the Estate were limited to *A.* and his heirs; and, after the decease of *B.*, and a total failure of heirs or heirs-male of the body of *B.*, to *C.* and his heirs; here as the secondary use is limited after a previous Limitation in fee-simple, and the event on which the fee limited to *C.* is to take place, is not such as must necessarily happen within the period prescribed by law (for *B.* may have issue, and that issue not fail till many years after the expiration of 21 years after *B*'s decease), the Limitation to *C.* and his heirs is void. But suppose the Estates were limited to *A.* for life, then to trustees and their heirs, during his life, for preserving contingent remainders, then to *A*'s first and other sons successively in tail-mail, with several remainders over; with a proviso, that if *B.* dies, and there should be a total failure of heirs or heirs-male of his body, the uses limited to *A.* and his sons, and the remainders over, shall determine; and the lands remain and go over to *C.* and his heirs: here the Limitation to *C.* and his heirs is limited upon or after previous Limitations for life or in tail; and the event upon which it is so to take effect, may possibly not happen till after a period of one or more life or lives in being and 21 years: but so far as it is limited on an event which may happen during the continuance either of one or more life or lives in being, it is within the bounds mentioned; and so far as it is limited on an event which may happen during the continuance of the Estate of the tenants in tail, or after them, the first tenant in tail in possession, by suffering a recovery before the event happens, may bar the Limitations over, and thereby acquire an Estate in fee-simple: and therefore the Limitation to *C.* and his heirs is good.

LIMOGIA, Enamel; *opus de limogia*, or *opus limocenum*, is enamelled work. *Monast.* 3 *tom.* 331.

LINARIUM, A flax plat, where flax is sown. *Pat.* 22 *Hen.* 4. *par.* 1 *m.* 33.

LINCOLN, In attaint of a verdict of the city of *Lincoln*, the jury shall be impannelled of the county of *Lincoln*, See *stats.* 13 *Rich.* 2. *stat.* 1. *c.* 18: 3 *Hen.* 5. *st.* 2. *c.* 5.

LINCOLN'S INN FIELDS, To be inclosed by trustees, who may employ artificers. &c. And yearly rates shall be made on all houses there, not exceeding 2*s.* 6*d.* in the pound: this square and back streets are to be a distinct ward, as to the scavengers rates and watch; and persons annoying the fields by filth, to forfeit 20*s.*; and assembling to use sports, or breaking fences, &c. incur a forfeiture of 40*s.* levied by a Justice of Peace's warrant. *Stat.* 8 *Geo.* 2. *c.* 26.

LINDESFERN, A place often mentioned in our ancient histories; being formerly a Bishop's See, now *Holy Island.*

LINEAL CONSANGUINITY, Is that which subsists between persons, of whom one is descended in a direct line from the other.—See titles *Descent*; *Kindred.*

LINEAL DESCENT, The descent of estates, from ancestor to heir, *i. e.* from one to another, in a right line. See title *Descent.*

LINEAL DESCENT OF THE CROWN, See title *King* I.

LINEAL WARRANTY, Is where the heir derives, or may by possibility derive his title to land warranted, either from or through the ancestor who makes the warranty. See title *Warranty.*

LINEN, No person shall put to sale any piece of doulas Linen, &c. unless the just length be expressed thereon, on pain to forfeit the same. *Stat.* 28 *H.* 8. *c.* 4. Using means whereby Linen cloth shall be made deceitfully, incurs a forfeiture of the Linen and a month's imprisonment. *Stat.* 1 *Eliz. c.* 12. And Linen of all sorts made of flax or hemp, of the manufacture of this kingdom, may be exported duty free. *stat.* 3 *Geo.* 1. *c.* 7. See *stat.* 29 *Geo.* 2. *c.* 15; and this Dictionary, title *Navigation Acts.* Stealing of Linen, &c. from whitening grounds or drying houses, to the value of 10*s.* is felony. *Stat.* 4 *Geo.* 2 *c.* 16. See titles *Larceny*; *Felony.* By the *Stat.* 17 *Geo.* 2. *c.* 30, Affixing on foreign Linens any stamp put upon *Scotch* or *Irish* Linens, or affixing a counterfeit stamp on *British* or *Irish* Linens, incurs a penalty of 5*l.*—By *stat.* 18 *Geo.* 2. *c.* 24, the stamp-master is to be sworn to the true execution of his office; and Linens to be stampt, must be sworn to be the manufacture of *Scotland* or *Ireland*, and a penalty of 5*l.* each piece is laid on false stamps. For encouraging the Linen manufactory in *Scotland*; see *stat.* 24 *Geo.* 2. *c.* 31: 26 *Geo.* 2. *c.* 20.

Printed Linens, Cottons, Muslins, &c; By *Stat.* 27 *Geo.* 3. *c.* 38, proprietors of new patterns shall have the sole right of printing them for *two months.* See this Dictionary, title *Literary Property.*

LINSEED, All persons may import Linseed into this kingdom, without paying any custom for it. *Stat.* 3 *Geo.* 1. *c.* 7. § 38. See title *Navigation Acts.*

LIQUORICE, Is among the drugs liable to certain duties on importation, under the laws relative to the *Customs.*

LITERA, From the Fr. *litiere*, or *lictiere*, Lat. *lectum.*] Litter; it was anciently used for straw for a bed, even the King's bed. It is now only in use in stables among horses: *tres carectatas literæ*, three cart-loads of straw or *litter. Mon. Angl. tom.* 2. *p.* 33.

LITERATURA, *Ad literaturam ponere*, Signifies to put children out to school; which liberty was anciently denied to those parents who were servile tenants, without the consent of the lord: and this prohibition of educating sons to learning, was owing to this reason; for fear the son being bred to letters might enter into orders, and so stop or divert the services which he might otherwise do as heir to his father. *Paroch. Antiq.* 401.

LITERÆ *Ad faciendum attornatum pro sectâ faciendâ*; *Reg. Orig.* 192. See *Attorney.*

LITERÆ, *Canonici ad exercendum jurisdictionem loco suo. Reg. Orig.* 305.

LITERÆ, *Per quas dominus remittit curiam suam Regi, Reg. Orig.* 4.

LITERÆ *De requestu, Reg. Orig.* 129. See these in their proper places.

LITERÆ SOLUTORIÆ, Where magical characters supposed to be of such power, that it was impossible for any one to bind those persons who carried these about them. *Bede, lib.* 4. *c.* 22.

LITERARY PROPERTY.

The Property that the Author, or his assignee, hath in the copy of any work.

The right which an Author may be supposed to have in his own original literary compositions, so that no other person without his leave may publish or make profit of the copies, is classed by *Blackstone* among the species of property acquired by occupancy; being grounded on labour and invention. He expresses however some doubt whether it subsists by the Common Law; and this being still, after all the determinations on the subject, in some measure, *vexata quæstio*, the following extracts deserve the attention of the Student. See 2 *Comm.* 405.

When a man by the exertion of his rational powers, has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases; and any attempt to vary the disposition he has made of it, appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the *sentiment* and the *language*. The same conceptions clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition, to the ear or the eye of another, *by recital*, [See *post*, the case of *Colman* v. *Wathen*,] by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man, it hath been thought, can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership: it being then a present to the publick, like building a church or bridge, or laying out a new highway. But in case the author sells a single book, or totally grants the copy-right, it hath been supposed, in the one case, that the buyer hath no more right to multiply copies of that book for sale, than he hath to imitate for the like purpose the ticket, which is bought for admission to an opera or a concert; and, in the other, that the whole property with all its exclusive rights, is perpetually transferred to the grantee. On the other hand it is urged; that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the Author *before* it is printed or published; yet from the instant of publication, the exclusive right of an Author, or his assigns to the sole communication of his ideas, immediately vanishes and evaporates; as being a right of too subtle and unsubstantial a nature, to become the subject of property at the Common Law, and only capable of being guarded by positive statutes and special provisions of the Magistrate. 2 *Comm.* 406.

The Roman law adjudged, that if one man wrote any thing on the paper or parchment of another, the writing should belong to the owner of the blank materials, meaning thereby the mechanical operation of writing; for which it directed the scribe to receive a satisfaction: for in works of genius and invention, as in painting on another man's canvas, the same law gave the canvas to the painter. As to any other property, in the works of the Understanding, that law is silent; though the sale of literary copies, for the purposes of recital or multiplication, is certainly as ancient as the times of Terence, Martial, and Statius. 2 *Comm.* 407.

But whatever inherent copy-right might have been supposed to subsist by the Common Law, the statute 8 *Ann. c.* 19, hath now declared, that the Author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer*; [the words of the statute]; and hath protected that property by additional penalties and forfeitures: directing farther, that if at the end of that term the Author himself be living the right shall then return to him, for another term of the same duration. A similar privilege is extended to the new inventors of *Prints* and *Engravings*, by *stats.* 8 *Geo.* 2. *c.* 13: 7 *Geo.* 3. *c.* 38: 17 *Geo.* 3. *c.* 57.——The above parliamentary protections appear to have been suggested by the exception in the statute of monopolies, 21 *Jac.* 1. *c.* 3; which allows a Royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same: by virtue whereof it is held, that a temporary property therein becomes vested in the King's patentee. [See this Dictionary title *Patents.*] 1 *Vern.* 62: 2 *Comm.* 407.

Whether the productions of the mind could communicate a right of property, or of exclusive enjoyment, in reason and nature; and if such a moral right existed, whether it was recognized and supported by the Common Law of *England*; and whether the Common Law was intended to be restrained by the statute of Queen *Anne*, are questions upon which the learning and talents of the highest legal characters in this kingdom have been powerfully and zealously exerted. These questions have, by the supreme Court of Judicature in the kingdom, been so determined, that an Author has no right at present beyond the limits fixed by that statute. See the case of *Donaldson* v. *Beckett*, *Bro. P. C.*

As that determination, however, was contrary to the opinion of *Lord Mansfield*, of the learned Commentator, and of several other Judges, Mr. *Christian* has remarked, that every person may still be permitted to indulge his own opinion upon the propriety of it, without incurring the imputation of arrogance; and he proceeds to deliver his sentiments in the following manner.

Nothing is more erroneous than the common practice of referring the origin of moral rights, and the system of natural equity to that savage state, which is supposed to have preceded civilized establishments; in which literary composition, and of consequence the right to it, could have no existence. But the true mode of ascertaining a moral right, seems to be to inquire whether it is such as the reason, the cultivated reason of mankind, must necessarily assent to. No proposition seems more conformable to that criterion, than that every one should enjoy the reward of his labour, the harvest where he has sown, or the fruit of the tree which he has planted. And if any private right ought to be preserved more sacred and inviolate than another, it is that where the most extensive benefit flows to mankind from the labour by which it is acquired. Literary Property, it must be admitted,

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is very different in its nature from a property in substantial and corporeal objects; and this difference has led some to deny its existence as property; but whether it is *sui generis*, or under whatever denomination of rights it may more properly be classed, it seems founded upon the same principle of general utility to Society, which is the basis of all other moral rights and obligations. Thus considered, an author's copy-right ought to be esteemed an inviolable right, established in sound reason and abstract morality: no less than eight of the twelve Judges were of opinion, that this was a right allowed and perpetuated by the Common Law of *England*: but six held, either that it did not exist, or that the enjoyment of it was abridged by the statute of Queen *Ann*: and that all remedy for the violation of it was taken away after the expiration of the terms specified in the Act; and agreeable to that opinion was the final judgment of the House of Lords. 1 *Comm.* 407. *in n.*

For the arguments at length of the Judges of the *King's Bench*, and the opinions of the rest, see the case of *Millar* v. *Taylor*. 4 *Burr.* 2303: 1 *Blackst. Rep.* 675. In that case the Court of *King's Bench* determined that an exclusive and permanent copy-right did actually subsist in Authors by the Common Law. But the effect of their opinion was contradicted by the determination of the House of Lords, in *Donaldson* v. *Beckett*, as above stated.

In *Ireland*, there is yet no statute to protect the copyright of authors. The following is a general abstract of the *English* statutes relative to this interesting subject, and of some points determined on their construction.

The *stat.* 8 *Ann. c.* 19, enacts, That the author of any book, and his assigns, shall in future have the sole liberty of printing it for fourteen years, to commence from the day of publishing thereof: and if any person within the said time shall print, reprint, or import any such book without the consent of the proprietor in writing, or shall knowingly publish it without such consent, the offender shall forfeit the books and sheets to the proprietor, and also 1*d.* for every sheet found in his custody, either printed or printing; half to the Crown, and half to him who will sue in any Court at *Westminster*. § 1.

No bookseller, printer, or other person, shall be liable to these forfeitures, unless the title to the copy of the book, [the whole book and every volume thereof, *stat.* 15 *Geo.* 3. *c.* 53, § 6,] shall before such publication be entered in the register book of the Company of *Stationers*, at their Hall in *London*, and unless the consent of the proprietor be entered, paying 6*d.* for each entry; § 2.; nor unless nine copies of each book be delivered to the Company's warehouse-keeper before publication, for the use of the Royal library, the libraries of the university of *Oxford* and *Cambridge*, of the four universities in *Scotland*, of *Sion College* in *London*, and of the advocates at *Edinburgh*, § 5. and see *stat.* 15 *Geo.* 3. *c.* 53, § 6.

But an action may be brought, or an injunction obtained in a Court of Equity, though the publication be not entered in the register of the Stationers' Company. 2 *Black. Rep.* 330.

If the Clerk of the Stationers Company shall neglect to make such entry, or to give a certificate thereof, then notice being given in the *Gazette*, the proprietor shall have the same benefit as if an entry were actually made: and the clerk shall forfeit 20*l.* *stat.* 8 *Ann. c.* 19, § 3.

The above statute particularly provided, by § 9, that the right of the Universities or any other person, to the printing or reprinting of any book already printed, should not be either *prejudiced* or *confirmed*: after the determination of the case of *Donaldson* v. *Beckett*, the Universities were so much alarmed at the decision, that they applied for and obtained an Act, *stat.* 15 *Geo.* 3. *c* 53; which secured to the two Universities in *England*, the Colleges or Houses of learning within the same, the four Universities in *Scotland*, and the colleges of *Eton*, *Westminster*, and *Winchester*, a perpetuity in the copy-right of all books given, or to be given, or devised to, or in trust for, them by the authors; which was sanctioned by the same penalties as those contained in the *stat.* 8 *Ann*, so long as the books or copies belonging to the said Universities or Colleges are printed only at their own printing presses, within the Universities or Colleges, and for their sole benefit. § 8.

Musical Compositions have been held to be within the meaning and protection of the statute. *Cowp.* 623. A fair and *bona-fide Abridgment* of any book, is considered as a new work: and however it may injure the sale of the original, yet it is not deemed in law to be a piracy, or violation of the author's copy-right. 1 *Bro. C. R.* 451: 2 *Atk.* 141.

Where an Author transfers all his right or interest in a publication to another; and happens to survive the first fourteen years, the second term will result to his assignee, and not to himself. 2 *Bro. C. R.* 80.

Evidence that the defendant acted a piece on the Stage, of which the plaintiff had bought the copy-right, is not evidence of a publication by the defendant, within the meaning of the statute. *Colman* v. *Wathen*, 5 *Term Rep.* 245. But no one has a right to take down a play in short hand, and to print it before it is published by the Author. *Ambl.* 694.

The two following statutes were also made, with a view still further to secure the property in books, and also to encourage printing in this country. The *stat.* 12 *Geo.* 2. *c.* 36, (in force by *stat.* 29 *Geo.* 3. *c.* 55. § 5, till *September* 29, 1795, and from thence to the end of the then next session); provided, that if any book be originally written or printed and published in this country, and afterwards (within twenty years) reprinted abroad, and imported and exposed to sale here, the importer and seller should forfeit all such books to be cancelled, and for every offence should forfeit also 5*l.* and double the value of the books to be recovered with costs. The *stat.* 34 *Geo.* 3. *c.* 20. § 57, extends the penalty to 10*l.* and double the value of the books; and renders all persons having such books in their possession for sale, liable to the forfeiture; and empowers Custom-house or Excise officers to seise them, who shall be rewarded accordingly.

Under these statutes it seems immaterial whether the author's copy-right is extinct or not, if the book has been reprinted in *England* within twenty years. 1 *Comm.* 407, *in n.* Every distinct sale of one book or a parcel, is a distinct offence, by which a new penalty is incurred, though the sales be on the same day. 3 *Term Rep.* 509.

It is worthy of remark, that the determination of the House of Lords in *Donaldson* and *Beckett*, which was supposed, at the time, to have given a mortal blow to the property and prosperity of Authors and Booksellers, has

in fact, been one great means of increasing both. Few books are now republished without considerable alterations, additions, or annotations, by means of which they become, in fact, new works; and it is not worth any body's while then to pirate them in their original state. This has proved a spur to the industry of Authors, and the liberality of Booksellers; and perhaps no period ever produced so many new publications of acknowledged utility, as that which has elapsed since the memorable decision above alluded to; which for the moment cast a melancholy gloom over those who now enjoy its beneficial effects.

The following are the principal features and distinctions of the three statutes relative to *Prints* and *Engravings*. The *stat.* 8 *Geo.* 2. *c.* 13, gives an exclusive privilege of publishing, to those who invent or design any print, for fourteen years only. The *stat.* 7 *Geo.* 3. *c.* 28, extends the term to twenty-eight years absolutely, to all who either invent the design, or make a print from another's design or picture; and those who copy such prints within that time, forfeit all their copies to be destroyed; and 5*s.* for each copy. The *stat.* 17 *Geo* 3. *c.* 57, gives the proprietor an action to recover damages and double costs for the injury he has sustained by the violation of his right.

The assignee of a print may maintain an action on this last statute against any person who pirates it; and in such an action it is not necessary to produce the plate itself in evidence; one of the prints taken from the original plate is good evidence. 5 *Term Rep.* 41.

In analogy also to the above doctrine of Literary Property, the *stat.* 27 *Geo.* 3. *c.* 38, gives to the proprietors of new patterns in printed linens, cottons, muslins, &c. the sole right of printing them for *two months*; and gives the proprietor injured his remedy by an action for damages.

LITH OF PICKERING, In the county of *York*, *viz.* the liberty, or a member of *Pickering*, from the Saxon, *lid*, i. e. *membrum*.

LITIGIOUS. The litigiousness of a church, is where several persons have, or pretend to, several titles to the patronage, and present several clerks to the Ordinary; it excuses him from refusing to admit any of them, till a trial of the right by *jure patronatûs*, or otherwise. *Jenk. Cent.* 11.

LITMUS, To what duties liable. See *stat.* 4 *W.* & *M. c.* 5. § 2.

LITTERA, Litter.—*Tres carectas litteræ*, three cart loads of straw or litter. *Mon. Angl.* 2. *par. fol.* 33. *b.*

LITTLETON, Was a famous lawyer in the days of King *Edward* the Fourth, as appeareth by *Staundf. Prær. c.* 21. *fol.* 72. He wrote a book of great account, called *Littleton's Tenures*. See title *Law-books*.

LIVERY, from *livre*, i. e. *insigne gestamen*; or *livver, traders*.] Hath three significations. In one sense, it was used for a suit of clothes, cloak, gown, hat, &c. which a nobleman or gentleman gave to his servants or followers, with cognisance or without; mentioned in *stat.* 1 *R.* 2. *c.* 7, and divers other statutes. Formerly great men gave liveries to several who were not of their family, to engage them in their quarrels for that year; but afterwards it was ordained, that no man of any condition whatsoever should give any livery, but to his domestics, his officers, or counsel learned in the law. By *stat.* 1 *R.* 2, it was prohibited on pain of imprisonment; and the *stat.* 1 *Hen.* 4. *c.* 7, made the offenders liable to ransom at the King's will, &c. which statute was farther confirmed and explained, *annis* 2 & 7 *Hen.* 4, and by *stat.* 8 *Hen.* 6. *c.* 4: and yet this offence was so deeply rooted, that *Ed.* IV. was obliged to confirm the former statutes, and further to extend the meaning of them, adding a penalty of 5*l.* to every one that gave such Livery, and the like on every one retained for maintenance either by writing, oath, or promise, for every month. *Stat.* 8 *Ed.* 4. *c.* 2. But most of the above statutes are repealed by *stat.* 3 *Car.* 1. *c.* 4.

Livery, in the second signification, meant a delivery of possession to those tenants who held of the King *in capite*, or Knights service; as the King by his prerogative hath *primer seisin* of all lands and tenements so holden of him. *Staundf. Prærog.* 12.

In the third sense, Livery meant the writ which lay for the heir of age, to obtain the possession or seisin of his lands at the King's hands. *F. N. B.* 155. By the statute 12 *Car.* 2. *c.* 24, all wardships, Liveries, &c. are taken away. See title *Tenures*.

LIVERY i. e. DELIVERY, OF SEISIN; *Liberatio seisinæ*.] A delivery of possession of lands, tenements, and hereditaments, unto one that hath a right to the same; being a ceremony in the Common Law used in the conveyance of lands, &c. where an estate of fee-simple, fee-tail, or other freehold passeth. *Bract. lib.* 2. *c.* 18. And it is a testimonial of the willing departing of him who makes the Livery, from the thing whereof the Livery is made; and of the willing acceptance of the other party receiving the Livery; first invented, that the common people might have knowledge of the passing or alteration of estates from man to man, and thereby be better able to try in whom the right of possession of lands and tenements were, if the same should be contested, and they should be impanelled on Juries, or otherwise have to do concerning the same. *West. Symb. par.* 1. *lib.* 2.

The Common-law conveyance by feoffment is by no means perfected by the mere words of the deed; this ceremony of *Livery of Seisin* is very material to be performed, for without this the feoffee has but a mere estate at will. *Lit.* § 66. This Livery of Seisin is no other than the pure feodal investiture or delivery of corporeal possession of the land or tenement, which was held absolutely necessary to complete the donation. 2 *Comm. c.* 20. *p.* 311. See this Dictionary, title *Feoffment* III; *Conveyance*; *Deed*; *Estate*; *Tenures*.

Investitures, in their original rise, were probably intended to demonstrate in conquered countries, the actual possession of the *Lord*; and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute; but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of the by-standers, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such as claimed title by other means might know against whom to bring their actions. 2 *Comm.* 311.

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In all well-governed nations some notoriety of this kind has been ever held requisite in order to acquire and ascertain the property of lands. And even in ecclesiastical promotions where the freehold passes to the person promoted, corporal possession is required at this day to vest the property completely in the new proprietor: who, according to the canonists, acquires the *jus ad rem*, or inchoate and imperfect right by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by installment; in rectories and vicarages by induction; without which no temporal rights accrue to the Minister; though every ecclesiastical power is vested in him by institution. So also even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir has not *plenum dominium*, or full and complete ownership, till he has made an actual corporal entry into the lands; for if he dies before entry made, *his* heir shall not be entitled to take the possession, but the heir of the person who was last actually seised. 2 *Comm.* 312; see title *Descent*.

The corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed, by transferring something near at hand, in the presence of credible witnesses; which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. With our *Saxon* ancestors the delivery of a turf was a necessary solemnity to establish the conveyance of lands. And to this day the conveyance of our copyhold estates is usually made from the seller to the Lord or his steward, by delivery of a rod or verge; and then from the Lord to the purchaser, by redelivery of the same in the presence of a jury of tenants. 2 *Com.* 313.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten and misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and incumbering estates, and of making them liable to a multitude of conditions and minute designations, for the purposes of raising money without an absolute sale of the land; and sometimes the like proceedings were found useful, in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere simple corporal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. Written deeds were therefore introduced in order to specify and perpetuate the peculiar purposes of the party who conveyed: yet still, for a very long series of years, they were never made use of, but in company with the more ancient and notorious method of transfer by delivery of corporal possession. 2 *Comm.* 314.

Livery of Seisin, by the Common Law, is necessary to be made upon every grant of an estate *of freehold*, in hereditaments corporeal; whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made, for they are not objects of the senses; and in Leases for years, or other chattel-interests, it is not necessary; the solemnity being appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they cannot, at the Common Law, be made but by Livery of Seisin; which Livery, being an actual manual tradition of the land, must take effect *in præsenti*, or not at all. 2 *Comm.* 314. See this Dictionary, titles *Limitation of Estate*; *Remainder*.

On the creation of a *freehold* remainder, at one and the same time with a particular estate for years at the Common Law, Livery must be made to the particular tenant, without which nothing passeth to him in remainder; it being for the benefit of him in remainder, and not the lessee, who hath only a term: and if the lessee entereth, before Livery and Seisin made to him, the Livery shall be void. *Lit.* 60: 1 *Inst.* 49. But if such a remainder be created afterwards, expectant on a lease for years now in being, the Livery must not be made to the lessee for years, for then it operates nothing: *nam quod semel meum est, amplius meum esse non potest*; but it must be made to the remainder-man by consent of the lessee for years: for without his consent no Livery of the possession can be given; partly because such forcible Livery would be an ejectment of the tenant from his term; and partly for reasons connected with the doctrine of attornments. 2 *Comm.* 314, 5. See 1 *Inst.* 48, 9.

A lease for years is granted to *A. B.* with remainder to his right heirs, whereon Livery is made; the remainder is void, because there is not any person *in esse*, who can presently take by the Livery. 4 *Leon.* 67. There was a Lease made to a man and his wife, and their daughter, to hold from *Michaelmas* next, and the lessor made Livery after *Michaelmas*; this was adjudged good, being made by the lessor himself; but it had been otherwise, if it had been to be done by attorney, or if the lessor had made Livery before *Michaelmas*. 2 *Rol. Rep.* 109. Lease for twenty years to a man to commence from a time past; and after the expiration of the said term, then to him and his wife, and their son, for their lives, and the longest liver of them, with a letter of attorney to make Livery and Seisin, &c. It is a good lease for years, with remainder for life, if Livery and Seisin be made by the attorney at the time of executing the Lease; but if the Livery and Seisin be made by the attorney some time afterwards, in such case it is said the Livery is void. *Moor* 14.

A man may make a letter of attorney to deliver seisin by force of the deed, which may be contained in the same deed; and a letter of attorney may be likewise made to receive Livery and Seisin. 5 *Rep* 91: 1 *Inst.* 49, 52.

This *Livery of Seisin* is either in *deed* or in *law*: the distinctions between which are stated and explained in this Dictionary, title *Feoffment* III. Anciently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed: according to the rule of the feodal law, *pares debent interesse investiturae feudi, & non alii*: for which this reason is expresly given; because the peers or vassals of the Lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though afterwards the ocular attestation of the *pares*

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was held unneceſſary, and Livery might be made before any credible witneſſes, yet the trial, in caſe it was diſputed (like that of all other atteſtations) was ſtill reſerved to the *pares*, or Jury of the county: and this is the reaſon why, if lands conveyed by feoffment lie in ſeveral counties, there muſt be as many Liveries of ſeiſin as there are counties. 2 *Comm.* 315, 6. See title *Feoffment* III. In addition to what is there ſaid, the following determinations afford information on the ſubject.

Where a houſe and lands are conveyed, the houſe is the principal, and the lands acceſſory; and there the Livery muſt be made, and not upon the land. 2 *Rep.* 31: 4 *Leon.* 374.

If a houſe or lands belong to an office, by grant of the office by deed, the houſe or land paſſeth without Livery: and by a fine, which is a feoffment of record, by a leaſe and releaſe, bargain and ſale by deed inrolled, exchange, &c. a freehold paſſeth without Livery; and ſo in a deed of feoffment to uſes, by virtue of the ſtatute of uſes. 1 *Inſt.* 49. So that Livery and Seiſin is not ſo commonly uſed as formerly: neither can an eſtate be created now by Livery and Seiſin only, without writing. *Stat.* 29 *Car.* 2. *c.* 3. See titles *Conveyance*; *Eſtate*.

If a deed of feoffment be delivered upon the land, "in the name of ſeiſin of all the lands," it will be a good Livery and Seiſin; but the bare delivery of a deed upon the land, though it may make the deed, it ſhall not amount to Livery and Seiſin, without thoſe words. 1 *Inſt.* 52, 181. If one makes a feoffment to four perſons, and Seiſin is delivered to three of them, in the name of all; the eſtate is veſted in all of them. 3 *Rep.* 26.

No perſon ought to be in the houſe, or upon the land, when Livery is made, but the feoffor and feoffee; all others are to be removed from it: if the leſſor feoffor, makes Livery and Seiſin, the leſſee being upon the land contradicting it, the Livery is void. *Cro. Eliz.* 321. A leſſor enfeoffed a ſtranger, and came to make Livery and ſeiſin, the leſſee's wife being in the houſe, the leſſor enters, and by force turns the wife into the backſide, which was part of the land let, and then he makes Livery in the houſe, in the name of all the lands let; as the woman was remaining all the while upon the land, and contradicting the Livery, the Livery was held void; but if ſhe had voluntarily gone out of the houſe, upon part of the land; or the leſſor had turned her into the ſtreet, ſo that ſhe had not been upon any part of the land, it had been good. *Daliſ. Rep.* 94.

If a man agrees to make a feoffment upon condition, and after makes a charter of feoffment without any condition, and then makes Livery and ſeiſin, *ſecundum formam chartæ*, this is abſolute without any condition; for the Livery is not made according to the agreement, but according to the charter. 34 *Aſſ.* 4. But if a perſon enfeoffs another, as a ſecurity for the payment of money, and afterwards makes Livery of ſeiſin to him and his heirs generally, the eſtate hath been holden to be upon condition; ſince the intent of the parties was not changed, but continued at the time of the Livery. 1 *Inſt.* 222. And where a charter of feoffment is made, and in the deed there is no condition; but when the feoffor would make a Livery of ſeiſin to the feoffee, by force of the deed, he, expreſſing the eſtate, makes Livery of ſeiſin upon condition, the feoffment is of force as if it had not been made. *Lit. Sect.* 359: 2 *Danv. Abr.* 13.

Form of Livery and Seiſin indorſed on the deed.

MEMORANDUM, That on the day and year within written, full poſſeſſion and ſeiſin was had and taken of the meſſuage or tenement, and premiſes within granted, by A. B. *one of the attornies within named, and by him delivered over unto the within named* C. D. *To hold to him, his heirs*, &c. *according to the contents and true meaning of the within written indenture, in the preſence of*, &c.

LIVERY AND OUSTER LE MAIN. Where by inqueſt before the Eſcheator, it was found that nothing was held of the King; then he was immediately commanded by writ, to put from his hands the lands taken into the King's hands. *Stat.* 29 *Ed.* 1: 28 *Ed* 3. *c.* 4. See *Ouſter le Main*.

LIVERY-MEN OF LONDON. In the Companies of *London*, Livery-men are choſen out of the freemen, as aſſiſtants to the maſters and wardens, in matters of council, and for better government; and if any one of the Company refuſe to take upon him the office, he may be fined, and an action of debt will lie for the ſum. 1 *Mod.* 10. See title *London*.

LIVRE, The denomination of a *French* coin, valued at ten-pence-halfpenny.

LOBBE, A large kind of *North*-ſea fiſh. See *ſtat.* 31 *Ed.* 3. *ſt.* 3. *c.* 2. And *loich* comprehends lob, ling, and cod.

LOBSTERS May be imported by natives or foreigners, and in any veſſels, notwithſtanding *ſtat.* 10 & 11 *W.* 3. *c.* 24; 1 *Geo.* 1. *ſtat.* 2. *c.* 18. No perſon ſhall, with trunks, hoop-nets, &c. take any lobſters on the ſea-coaſt of *Scotland*, from the 1ſt of *June* to the 1ſt of *September* yearly, on pain of 5*l.* to be recovered before two Juſtices. *Stat.* 9 *Geo.* 2. *c.* 33. See titles *Fiſh*; *Navigation Acts*.

LOCAL, *localis*.] Tied or annexed to a certain place: Real actions are Local, and to be brought in the county where the lands lie; but a perſonal action, as of treſpaſs or battery, &c. is tranſitory, not local; and it is not material that the action ſhould be tried, or laid in the ſame county where the fact was done; and if the place be ſet down, it is not needful that the defendant ſhould traverſe the place, by ſaying he did not commit the battery in the place mentioned, &c. *Kitch.* 230. See titles *Action*; *Venue*. A thing is Local that is fixed to the freehold. *Kitch.* 180.

LOCKMAN. In the *Iſle of Man*, the Lockman is an officer to execute the orders of the governor, much like our under-ſheriff. *King's Deſcrip. Iſle of Man* 26.

LOCKS, In navigation: To deſtroy any ſluice or lock on a navigable river, is made felony without benefit of clergy, and the offender may be tried, as well in an adjacent county, as in that wherein the act is committed. *Stat.* 8 *Geo.* 2. *c.* 20, made perpetual by *ſtat.* 27 *Geo.* 2. *c.* 16.

LOCULUS, A coffin. *Sim. Dunelm. c.* 6.

LOCUS IN QUO, The place where any thing is alleged to be done in pleadings, &c. 1 *Salk.* 94. See title *Treſpaſs*.

LOCUS PARTITUS, A diviſion made between two towns or counties, to make trial where the land, or place in queſtion lieth. *Flet. lib.* 4. *c.* 15.

LOCUTORIUM. The Monks and other religious in monasteries, after they had dined in their common hall, had a withdrawing room, where they met and talked together among themselves, which room, for that sociable use and conversation, they called *locutorium, à loquendo*; as we call such a place in our houses *parlour*, from the French *parler*: and they had another room which was called *locutorium forinsecum*, where they might talk with laymen. *Walsing.* 257.

LODE-MANAGE, The hire of a pilot, for conducting a vessel from one place to another. *Cowell.* The pilot receives Lode-manage of the master for conducting the ship up the river, or into port; but the Loadsman is he that undertakes to bring a ship through the haven, after being brought thither by the pilot, to the quay or place of discharge: and if through his ignorance, negligence, or other fault, the ship or merchandise receive any damage, action lies against him at the Common Law. *Roughton, fol.* 27.

LODE MEREGE, Mentioned in the laws of *Oleron*, is expounded to be the skill or art of navigation. *Cowell. Quere*, if it is not a corruption of *Lode-manage*.

LODE-SHIP, A kind of fishing vessel, mentioned in *stat.* 31 *Ed.* 3. *c.* 2.

LODGERS AND LODGINGS. Stealing furniture from lodgings, felony, *stat.* 3 & 4 *W.* & *M. c.* 9. See titles *Felony*; *Larceny*.

LOGATING, An unlawful game, mentioned in *stat.* 33 *H.* 8. *c.* 9; now disused.

LOGIA, A little house, lodge, or cottage. *Mon. Angl. tom.* 1. *p.* 400.

LOGWOOD, *lignum tinctorium.*] Wood used by dyers brought from foreign parts; prohibited by *stat.* 23 *Eliz. c.* 9. But allowed to be imported by *stat.* 14 *Car.* 2. *c.* 11. See title *Navigation Acts*.

LOITH, or LOYCH FISH, A large North-sea-fish, mentioned in *stat.* 31 *Ed.* 3. *st.* 3. *c.* 2. Vide *Lobbe*.

LOLLARDS, Had their name from one *Walter Lolbard*, a *German* at the head of them, who lived about the year 1315. And they were certain Hereticks, (in the opinion of those times) that abounded here in *England*, in the reigns of King *Edward* III. and *Hen.* V. whereof *Wickliffe* was the chief in this nation. *Stow's Annals*, 425. *Spotswood*, in his *History of Scotland*, says, The intent of these Lollards was to subvert the Christian faith, the law of God, the church and the realm; and so said the *stat.* 2 *Hen.* 5. *c.* 7. But that statute was repealed 1 *Ed.* 6. *c.* 12. Several decrees were made by our archbishops against those Sectarists, as well as statutes; and the High Sheriff of every county was anciently bound by his oath to suppress them. 3 *Inst.* 41. See title *Heresy*. These *Lollards* were in fact the founders of the *Protestant religion*.

LOLLARDY, The doctrine and opinion of the Lollards. See *stat.* 1 & 2 *P.* & *M. c.* 6.

LOMBARDS. The company shall be answerable for their debts. 25 *Ed.* 3. *stat.* 5. *c.* 23. See titles *Bills of Exchange*.

LOMBE, (Sir THOMAS,) How recompensed for discovering the art of making, and working, the three capital *Italian* engines, for making organzine silk. See *stat.* 5 *Geo.* 2. *c.* 8.

LONDON.

THE METROPOLIS of this kingdom, formerly called *Augusta*, has been built above three thousand years, and flourished for fifteen hundred years. Its Exchange, where merchants of all nations meet, is not to be equalled; and for stateliness of buildings, extent of bounds, learning, arts and sciences, traffick and trade, this city gives place to none in the world. *Stow.*

London is a County of itself. 4 *Inst.* 248. See this Dictionary, title *Counties-Corporate*. So it is a corporation by prescription, known by several names. 2 *Inst.* 330, *Quo Warranto, passim.*

During the violent proceedings that took place in the latter end of the reign of King *Charles* II. it was, among other things, thought expedient to new-model most of the corporation towns in the kingdom: for which purpose many of those bodies were persuaded to surrender their charters; and informations in the nature of *Quo Warranto* were brought against others, upon a supposed, or frequently a real forfeiture of their franchises by neglect or abuse of them; and the consequence was, that the liberties of most of them were seised into the hands of the King, who granted them fresh charters, with such alterations as were thought expedient; and during their state of anarchy the Crown named all their magistrates. This exertion of power, though perhaps, *in summo jure*, it was for the most part strictly legal, gave a great and just alarm; the new-modelling of all corporations being a very large stride towards establishing arbitrary power; and therefore it was thought necessary, at the Revolution, to bridle this branch of the prerogative, at least so far as regarded the metropolis, by *stat.* 2 *W.* & *M. st.* 1. *c.* 8; which enacts, that the franchises of the city of *London* shall never hereafter be seised or forejudged for any forfeiture or misdemeanor whatsoever. The *Quo Warranto* against *London* issued in Trinity term, 35 *C.* 2, on which judgment was given in *B. R.* that the charter and franchises of the said city should be seised into the King's hands as forfeited. This judgment was reversed by the above *stat.* 2 *W.* & *M.* and all officers and companies restored, &c.; and the act provided, that the Mayor, Commonalty, and Citizens of the city of *London* should for ever thereafter be, and *prescribe to be*, a Body Corporate and politic, &c.; and enjoy all their franchises, &c. See 3 *Comm.* 263, 4. Before this, by *Magna Carta*, *c.* 9, it was provided, that the city of *London* should have all their ancient usages, liberties, and customs which they had used to enjoy; which is confirmed by *stat.* 14 *Ed.* 3. *st.* 1. *c.* 1.

It is divided into twenty-six *Wards*, over each of which there is an Alderman; and is governed by a Lord Mayor, who is chosen yearly, and presented to the King, or in his absence to his Justices, or the Barons of the Exchequer at *Westminster*. *Chart. K Hen.* III.

Before the time of *Henry* III, the city was divided into twenty-four Wards. By Parliament *Anno* 17 *R.* 2, *Farringdon-without* was severed from *Farringdon-within*, and made a distinct ward. By charter 1 *Ed.* 3, and patent 4 *Ed.* 6, the King granted to the citizens and their successors, the villa, manor, and borough of *Southwark*; whereupon, by an order of the Court of Mayor and Aldermen, confirmed by the Common Council, *Southwark* was made the 26th ward, by the name of the *Bridge-Ward-without*; on the last day of *July*, 4 *Ed.* 6. See *Com. Dig.* title *London* (A).

Before

Before and since the Conquest, to the time of *Ric. I. London* was governed by a Port-Reeve, and 1 *R.* 1. by two bailiffs, and afterwards by a Mayor appointed by the King; but King *John*, in the 10th of his reign, granted them liberty to chuse a Mayor. 2 *Inst.* 253. See 2 *Stow.* 450: *Com. Dig.* title *London* (C). The presenting and swearing of the Lord Mayor at *Westminster*, to be on the 9th of *November*, New Style. 24 *Geo.* 2. *c.* 48. § 11; to be admitted and sworn at *Guildhall, London*, the day preceding. *Stat.* 25 *Geo.* 2. *c.* 30. § 4.

The Lord Mayor of *London*, for the time being, is Chief Justice of gaol-delivery; Escheator within the liberties, and Bailiff of the river *Thames*, &c. He is a high officer in the city, having all Courts for distribution of justice under his jurisdiction, *viz.* The Court of Hustings, Sheriff's Court, Mayor's Court, Court of Common Council, &c. 2 *Inst.* 380.

There are three ways to be a freeman of *London*: by servitude of an apprenticeship; by birthright, as being the son of a freeman; and by redemption, *i. e.* by purchase, under an order of the Court of Aldermen. 4 *Mod.* 145.

The child of a freeman, when of age, may, in consideration of a present fortune, bar herself of her customary part. 2 *Strange* 947. An agreement on marriage, that the husband shall take up the freedom of *London*, binds the distribution of his effects. 1 *Strange* 455. See title *Executor* V. 9.

King *Henry* IV. granted to the Mayor and Commonalty of *London* the assise of bread, beer, ale, &c. and victuals, and things saleable in the city. In *London* every day, except *Sunday*, is a market overt, for the buying and selling of goods and merchandise. 5 *Rep.* 85. But no person, not being a freeman of *London*, shall keep any shop or other place to put to sale by retail any goods or wares, or use any handicraft trade for hire, gain or sale within the city, upon pain of forfeiting 5*l.* 8 *Rep.* 124: *Chart. Car.* I.

Persons making ill and unserviceable goods in *London*, the chief officers of the company to which such persons do or ought to belong, may seize and carry them to the *Guildhall*, and have the goods tried by a Jury; and if found defective, they may break them, &c. *Trin.* 34 *Car.* 2. *B. R.* A person must be a freeman of *London* to be entitled to carry on merchandise there. *Chart. Car.* I.

By charter *Henry* I. all the men of *London*, and all their goods shall be free from scot and lot, dane-gilt and murder; and from all toll, passage and Lestage, and all other customs through all *England* and the ports of the sea. So by charters 11 *Hen.* 3, and 50 *H.* 3. See 4 *Inst.* 252. But he who claims these privileges must not only be a freeman, but an inhabitant of *London*. 1 *H. Black. Rep.* 206: 4 *Term Rep.* 144.

The customs of *London* are many and various.—They are against the Common Law, but made good by special usage, and confirmed by act of Parliament. 4 *Inst.* 249: 8 *Rep.* 126. In setting forth a custom or usage in the city of *London*, it must be said *antiqua civitas*, or it will not be good. 2 *Leon.* 99.

There is a custom in *London* to punish by information in the Mayor's Court, in the name of the common serjeant of the city, assaults on Aldermen, and affronting language, &c. 7 *Mod.* 28, 29.

Where a woman exerciseth a trade in *London*, wherein her husband doth not intermeddle, by the custom she shall have all advantages, and be sued as a feme sole merchant: but if the husband meddle with the trade of the wife, or carry on the same trade, it is otherwise. 1 *Cro.* 63: 3 *Keb.* 902. See titles *Baron and Feme*; *Bankrupt*.

An arrest may be made in *London* on the plaintiff's entering his plaint in either of the Compters, and a serjeant of *London* need not shew his mace when he arrests one; and the liberties of the city extend to the suburbs and *Temple Bar*. *Jenk. Cent.* 291.

The *customs* of the city of *London* shall be tried by the certificate of the Mayor and Aldermen, certified by the mouth of their Recorder, upon a surmise from the party alleging it, that the custom ought to be thus tried; else it must be tried by the county. 1 *Inst.* 74: 4 *Burr.* 248: *Bro. Abr.* title *Trial. pl.* 96. As, the custom of distributing the effects of freemen deceased; (see this Dictionary, title *Executor* V. 9.) of enrolling apprentices: or that he who is free of one trade may use another; if any of these or other similar points come in issue. But this rule admits of an exception where the corporation of *London* is party, or interested in the suit: as in an action brought for a penalty inflicted by the custom: for there the reason of the law will not endure so partial a trial; but this custom shall in such case be determined by a Jury. *Hob.* 85. In some cases the Sheriff of *London's* certificate shall be the final trial; as if the issue be whether the defendant be a citizen of *London* or foreigner, in case of privilege pleaded to be sued only in the city Courts. 1 *Inst.* 74. See this Dictionary, title *Customs of London*.

Upon the customs of *London* concerning the payment of wharfage, &c. by every freeman to the corporation, the trial shall not be by the mouth of the recorder, as customs generally are, but by the country, and a Jury from *Surry* adjoining. *Moor. c.* 129.

The Mayor of *London* is to cause errors, defaults, and misprisions there to be redressed, under the penalty of 1000 marks; and the constable of the *Tower* shall execute process against the Mayor for default, &c. 28 *Ed.* 3. *c.* 10. See *stats.* 17 *R.* 2. *c.* 12: 1 *H.* 4. *c.* 15, by which latter the fine is to be at the discretion of the Justices.

The several *Courts* within the city of *London* (and other cities and corporations throughout the kingdom) held by prescription, charter, or act of parliament, are of a private and limited species. The chief of those in *London* are the *Sheriff's Courts*, holden before their Steward or Judge; from which a writ of error lies to the *Court of Hustings*, before the Mayor, Recorder, and Sheriffs; and from thence to Justices appointed by the King's Commission, who used to sit in the church of St. *Martin-le-grand*. *F. N. B.* 32. And from the judgment of those Justices a writ of error lies immediately to the House of Lords. 3 *Comm.* 80, *n.* See this Dictionary, titles *Courts*; *Court of Hustings*; *Inferior Courts*, &c.

The *Court of Requests*, or Court of Conscience for the recovery of debts not exceeding 40*s.* was first established in *London*, so early as the reign of *Henry* VIII. by an act of their Common Council; which however was certainly insufficient for that purpose, and illegal, till confirmed by *stat.* 3 *Jac.* 1. *c.* 15, which has since been explained and amended by *stat.* 14 *Geo.* 2. *c.* 10; 3 *Com.* 81. See this Dictionary, title *Courts of Conscience*; and the *Addenda* at the end of this volume.

The gaol-delivery for the county of *Middlesex*, as well as that for *London*, being held at the Old Bailey in the

the city of *London*, eight times in the year, it is by *stat.* 25 *Geo.* 3. *c.* 18, provided, that when such Session shall have begun before the Essoin-day of any Term, it may continue to be held, and be concluded notwithstanding the sitting of the Court of King's Bench. And this Act, by *stat.* 32 *Geo.* 3. *c.* 48, is extended to the *Middlesex* Sessions. See title *Justices of Gaol Delivery.*

After the fire of *London*, a Judicature was erected for determining differences relating to houses burnt; and several rules were laid down for rebuilding the city, the several streets, lanes, &c. The Lord Mayor and Aldermen were to set out markets; the number of parishes and churches was ascertained, and a duty granted on coals for rebuilding of the churches, &c. See *stats.* 19 *Car.* 2. *cc.* 2, 3: 22 *Car.* 2. *cc.* 11, 14: 25 *C.* 2. *c.* 10.

A great variety of statutes have been passed to regulate various concerns of the city of *London*, besides those already alluded to: the following is a very short abstract of the purport of those most material.

By *stat. Civ. London*, 13 *E.* 1. *st.* 5, None shall walk the streets armed after *curfeu*; unless noblemen or their servants with lights; taverns and alehouses shall be shut at *curfeu*; fencing schools for buckler shall not be kept in *London*; none but freemen shall keep inns in the city; none shall be brokers in *London* but those who are admitted and sworn by the Mayor and Aldermen; (see *post*, *Brokers*;) the officers of the city shall not be punished for false imprisonment, unless it appear to be of malice.

Proceedings on a foreign voucher and recoveries. *Stat. Glouc.* 6 *Ed.* 1. *cc.* 11, 12: *Artic. St. Glouc. correct.* 9 *E.* 1. Damages shall be assessed by the assize in novel disseisin, and amercements shall be affered before the Barons of the Exchequer. *Stat. Glouc. c.* 14. Wines sold contrary to the assize shall be presented to the Barons. *Stat. Glouc. c.* 15.

The manner of proceeding for arrears of rents and services. *Stat. de Gavelet*, 10 *E.* 2.

Merchants of *London* free to pack their cloths. *Stat.* 1 *H.* 4. *c.* 16.

Freemen of *London* may carry their goods to any Fair; or market notwithstanding their bye-laws. *Stat.* 3 *H.* 7. *c.* 9.

All vintners, victuallers, fishmongers, butchers, and poulterers to be under the rule of the Mayor and Aldermen. *Stats.* 31 *E.* 3. *st.* 1. *c.* 10: 7 *R.* 2. *c.* 11.

The 2d of *September* to be observed annually as a public Fast; in commemoration of the dreadful fire in 1666. *Stat.* 19 *Car.* 2. *c.* 3.

See this Dictionary under the several titles following, and the statutes referred to, for further information.

Aldermen; not to be elected yearly, but remain till they are put out for reasonable cause. *Stat.* 17 *R.* 2. *c.* 11. Their negative in Common Council established; *stat.* 11 *Geo.* 1. *c.* 18. § 15. Repealed; *stat.* 19 *Geo.* 2. *c.* 8.

Attaint; proceedings in, regulated. *Stats.* 11 *H.* 7. *c.* 21. § 2: 37 *H.* 8. *c.* 5. § 3.

Ballastage; See *stats.* 6 *Geo.* 2. *c.* 29: 3 *Geo.* 2. *c.* 16.

Blackwell-Hall; market for the sale of woollen cloth, to be held there every *Thursday*, *Friday*, and *Saturday*; and regulations relating thereto. *Stat.* 8 & 9 *W.* 3. *c.* 9; and see *stats.* 4 & 5 *P.* & *M.* *c.* 5. § 26: 39 *Eliz.* *c.* 20. § 12: 1 *Geo.* 1. *c.* 15.

Bowyers; See *stat.* 8 *Eliz.* *c.* 10.

Bridges; See *stat.* 29 *Geo.* 2. *c.* 40, for pulling down the houses on *London-Bridge*, and regulating the passing of carriages thereon, those passing from *London* on the East side, those passing to it on the West; and see *Lamps*.

Brokers; to pay 40*s.* *per ann.* on their admission by the Court of Aldermen. *Stat.* 6. *Ann.* *c.* 16. See *Pawnbrokers*.

Buildings; regulated and divided into seven rates or classes; their height, party-walls, &c. determined. Preventions against fire, (see *Fire*,) &c. *Stat.* 14 *Geo.* 3. *c.* 78.

Butchers; not to slay beasts within the walls of the city. *Stat.* 4 *H.* 7. *c.* 3.

Carriers; regulation of their charges. *Stat.* 21 *Geo.* 2. *c.* 28.

Carts; penalty on drivers riding on their carts, 10*s.* or 20*s.* if owner of the cart. *Stat.* 1 *Geo.* 1. *st.* 2. *c.* 57: 24 *Geo.* 2. *c.* 43: 30 *Geo.* 2. *c.* 22: Owner's name and number to be put on them. *Stats.* 18 *Geo.* 2. *c.* 33: 30 *Geo.* 2. *c.* 22: 7 *Geo.* 3. *c.* 44: 24 *Geo.* 3. *st.* 2. *c.* 27; which also contain regulations for the behaviour of the drivers.

Cattle; salesmen not to buy cattle on the road. *Stat.* 31 *Geo.* 2. *c.* 40. Regulations as to driving cattle. *Stat.* 21 *Geo.* 3. *c.* 67.

Churches; see *stat.* 1 *Ann.* *st.* 2. *c.* 12: Buildings erected on any part of *St. Paul's* church-yard, (except the chapter-house) to be deemed common nuisances. See also *stats.* 9 *Ann.* *c.* 22: 10 *Ann.* *c.* 11: 1 *Geo.* 1. *c.* 23, &c. as to building 50 new churches by a duty on coals.

Coaches and Chairs; See this Dictionary, title *Coaches*.

Coals; See this Dictionary, title *Coals*.

Coopers' Company; regulated by *stat.* 23 *H.* 8. *c.* 4. and see *stat.* 31 *Eliz.* *c.* 8.

Corn; See this Dictionary, title *Corn*.

Dyers; regulations as to journeymen, servants, and labourers. *Stat.* 17 *Geo.* 3. *c.* 33. Controul of the *Dyers'* Company to prevent frauds in dying woollen goods. *Stat.* 23 *Geo.* 3. *c.* 15.

Elections; of Aldermen and Common Council-men, are to be by freemen householders, paying scot and lot, and having houses of the value of 10*l.* a-year; and none shall vote at election of members of parliament, but liverymen that have been twelve months on the livery, not discharged from payment of taxes, nor having received alms, &c. And freemen of *London* may dispose of their personal estates *by will* as they think fit, notwithstanding the custom of the city; but which custom remains in force as to Intestates, and in case of marriage agreements. *Stat.* 11 *Geo.* 1. *c.* 18. See this Dictionary, titles *Executor* V. 9; *Marriage*.

Fish; for regulating *Billingsgate* market, see *stat.* 10 & 11 *W.* 3. *c.* 24; powers given to the Fishmongers' Company, *stat.* 9 *Ann.* *c.* 26. As to the power of the Court of Mayor and Aldermen as Conservators of the river *Thames*; and of their deputy the *Water-bailiff*; See *stat.* 30 *Geo.* 2. *c.* 21. Forestalling fish, see *stats.* 29 *Geo.* 2. *c.* 39: 33 *Geo.* 2. *c.* 27: 2 *Geo.* 3. *c.* 15.

Fuel, and Billet-wood; regulations as to assising and making. *Stats.* 9 *Ann.* *c.* 15: 10 *Ann.* *c.* 6.

Hay; regulating the weight and sale of. *Stats.* 2 *W.* & *M.* *st.* 2. *c.* 8: 8 *W.* 3. *c.* 17: 31 *Geo.* 2. *c.* 40: 11 *Geo.* 3. *c.* 15.

Horners; See *stat.* 4 *Ed.* 4. *c.* 8, repealed by *stat.* 1 *Jac.* 1. *c.* 25; but revived by *stat.* 7 *Jac.* 1. *c.* 14.

Insurance; See this Dictionary, title *Insurance*; as to the Courts for trial of insurance causes, and the establishment of the Insurance Companies.

Leather; regulations for the sale and manufacture of, see *stats.* 5 & 6 *E.* 6. *c.* 15: 1 *Mar. st.* 3. *c.* 8: 1 *Jac.* 1. *c.* 22: 13 & 14 *Car.* 2. *c.* 7; (under which the market at *Leadenhall* for Leather is held every *Tuesday*;) 1 *W.* & *M. st.* 1. *c.* 33.

Militia, embodying and regulating; See *stats.* 13 & 14 *Car.* 2. *c.* 3: 26 *Geo.* 3. *c.* 107: 34 *Geo.* 3. *c.* 81: 35 *Geo.* 3. *c.* —; and this Dictionary, title *Militia.*

Oath of a freeman, altered by *stat.* 11 *Geo.* 1. *c.* 18. § 19.

Oil; under the regulation of the Tallow-chandlers' Company. *Stat.* 3 *H.* 8. *c.* 14.

Orphans' Fund; established, regulated, and applied; See *stats.* 5 & 6 *W.* & *M. c.* 10: 21 *Geo.* 2. *c.* 29: 7 *Geo.* 3. *c.* 37.

Painters, regulated, *stat.* 1 *Jac.* 1. *c.* 20.

Paving, lighting, cleansing, and watching; the provisions of the statutes for these purposes are various and minute. See *stats.* 10 *Geo.* 2. *c.* 22: 11 *Geo.* 3. *c.* 29: And as to the *Sunday* toll at *Blackfriars*-bridge. *Stat.* 26 *Geo.* 3. *c.* 37.

Physicians, apothecaries, and surgeons, subjected to the controul of the College of Physicians in *London*, and exempted from offices. See *stats.* 3 *H.* 8. *c.* 11: 5 *H.* 8. *c.* 6: 14 & 15 *H.* 8. *c.* 5: 32 *H.* 8. *c.* 40: 34 & 35 *H.* 8. *c.* 8: 1 *Mary, st.* 2. *c.* 9: 6 *Will.* 3. *c.* 4. The Companies of Barbers and Surgeons united, *stat.* 32 *H.* 8. *c.* 42. The union dissolved, and regulations made for the Surgeons' Company. *Stat* 18 *Geo.* 2. *c.* 15.

Poor; Guardians of the work-houses appointed, and regulations as to the infant poor. *Stat.* 13 & 14 *Car.* 2. *c.* 12: 22 & 23 *Car.* 2. *c.* 18: 2 *Geo.* 3. *c.* 22.

Sewers, in *London* subjected to the Commissioners of Sewers. *Stat.* 3 *Jac.* 1. *c.* 14.

Shoemakers; regulated. *Stat.* 9 *Geo.* 1. *c.* 27.

Silk-throwers and weavers, regulation of their wages. *Stats.* 13 & 14 *Car.* 2. *c.* 15: 20 *Car.* 2. *c.* 6: 13 *Geo.* 3. *c.* 68.

SOUTHWARK, regulations as to its market. *Stats.* 28 *Geo.* 2. *cc.* 9, 23: 30 *Geo.* 2. *c.* 31. As to paving and lighting, &c. *Stats.* 6 *Geo.* 3. *c.* 24: 11 *Geo.* 3. *c.* 17.

Spices; See this Dictionary, title *Garbler.*

Stillyard; See *stat.* 19 *H.* 7 *c.* 23.

Streets; Scavengers are to be elected in *London*, and within the bills of mortality, in each parish, by the constable, churchwardens, &c. to see that the streets be kept clean; and housekeepers are to sweep and cleanse the streets every *Wednesday* and *Saturday*, under penalties. *Stat.* 2 *W.* & *M. st.* 2. *c.* 8. Further regulations are also made by *stats.* 8 & 9 *W.* 3. *c.* 37: 6 *Geo.* 1. *c.* 6. § 1: 18 *Geo.* 2. *c.* 33. §§ 2, 3.

Taylors; their wages regulated in *London* and *Westminster*. *Stat.* 7 *Geo.* 1. *c.* 13.

Thames; rules for the conservation of. *Stats.* 4 *H.* 7. *c.* 15: 27 *H.* 8. *c.* 18.

Tithes; of the parishes in *London*, settled by *stat.* 37 *H.* 8. *c.* 12, according to a decree of the archbishop, &c.

The tithes of the parishes in *London*, the churches whereof were burnt, were appointed; none less than 100*l. per ann.* nor above 200*l. per ann.* to be assessed and levied quarterly. *Stat.* 22 & 23 *Car.* 2. *c.* 15.

Water-works; to supply the city with water. See *stat.* 35 *H.* 8. *c.* 10: and 3 *Jac.* 1. *c.* 18: 4 *Jac.* 1. *c.* 12; as to the New River; and 7 *Jac.* 1. *c.* 9, as to *Chelsea* Waterworks.

Commissioners appointed for supplying the city of *London* with water from the river *Thames*, &c. An casting filth into water-courses, incurs 40*s.* penalty. *Stat.* 8 *Geo.* 1. *c.* 26.

Watermen; for regulating their fares, and the Company of Watermen, and their conduct as to apprentices, their privilege from being pressed, &c. See *stats.* 2 & 3 *P.* & *M. c.* 16: 8 *Eliz. c.* 13: 1 *Jac.* 1. *c.* 16: 11 & 12 *W.* 3. *c.* 21: 4 & 5 *Ann. cc.* 13, 19: 2 *Geo.* 2. *c.* 26: 4 *Geo.* 2. *c.* 24: 10 *Geo.* 2. *c.* 31: 2 *Geo.* 3. *c.* 28, the last act as to selling liquors, &c. to seamen, and embezzling ships stores, &c.

Wharfage; regulations of rates of wharfage and cranage, and the situation of wharfs, are settled by *stat.* 22 *Car.* 2. *c.* 11.

Weights and Measures; inspectors of, appointed in the parish of *St. Mary-le-bone*. *Stat.* 10 *Geo.* 3. *c.* 23. § 81 —132.

WESTMINSTER. Several acts have been passed for the internal regulation of this district of the metropolis, *viz.* a private statute passed in 27 *Eliz.* continued and confirmed by *stat.* 16 *Car.* 1 *c.* 4, for the nomination and appointment of burgesses and chief burgesses. The *stats.* 29 *Geo.* 2. *c.* 25: 31 *Geo.* 2. *c.* 17, as to the appointment of Constables and Annoyance-Juries, and the sealing weights and measures. *Stat.* 31 *Geo.* 2. *c.* 25, (never carried into execution,) for a free market. As to paving, cleansing, and lighting the streets, squares, lanes, &c. in *Westminster*, and parts adjacent; See *stats* 2 *G.* 3. *c.* 21: 3 *Geo.* 3. *c.* 23: 4 *Geo* 3. *c.* 39: [5 *Geo.* 3. *c.* 13: 26 *Geo.* 3. *c.* 102, imposing certain street-tolls for those purposes]: 5 *Geo* 3. *c.* 50: 11 *Geo* 3. *c.* 22: The *stat.* 14 *Geo.* 3. *c.* 90, was passed for regulating the nightly watch within the same precincts or boundaries.

Wills. By *stat.* 11 *Geo.* 1. *c.* 18. §§ 17, 18, Freemen of *London* were empowered to dispose of their personal estates by will, as they think fit, notwithstanding the custom of the city; but which remains as before in cases of intestacy, and of agreements in consideration of marriage. See this Dictionary, titles *Executor* V. 9; *Marriage.*

LONDON ASSURANCE; See *Insurance.*

LONGELLUS, A word used in *Thorn's Chronicle*, it signifies a coverlet. *Cowell.*

LONGITUDE of a place, In geography, is an arch of the equator intercepted between the first meridian, and the meridian passing through the proposed place; which is always equal to the angle at the pole, formed by the first meridian, and the meridian of the place.

The first meridian may be placed at pleasure, passing through any place, as *London*, *Paris*, *Teneriffe*, &c. but with us it is generally fixed at *London*; and the degrees of Longitude counted from it, will be either East or West, according as they lie on the east or west side of that meridian.

In other words, to explain the subject in a familiar manner, to those wholly unacquainted with it, as by the Latitude we learn the distance North or South, so by knowing the Longitude, we know the distance from any given place, East or West; allowing for the difference of

a degree

a degree of Longitude at the equator (or middle of the globe) and at the Arctic Circle, &c.

The Longitude is, as before described, in other words, the distance of a place, East or West, from that imaginary line drawn from North to South, through a place fixed on for that purpose, and called the first meridian, *i. e*, the meridian or boundary from whence we reckon, East or West; so that by ascertaining the Latitude and Longitude of a place, its situation on the [illegible] or artificial globe, with respect to all other p[illegible]

By *stats* 12 *Ann st.* 2. *c.* 15: 26 [illegible] *Geo.* 3. *c.* 14, the Lord Admiral and [illegible] the Admiralty were appointed Commi[illegible] proposals for the discovery of a meth[illegible] Longitude at sea: and were empowered [illegible] give rewards accordingly. Under *stat.* 5 *Geo.* 3. *c.* 2[illegible] the Commissioners may construct and publish [illegible] which none must publish without their li[illegible] feiture of 20*l.* And by *stat.* 14 *Geo.* 3. *c.* [illegible] former acts, except such claim[illegible] of t[illegible] authority of the Commissioners,) r[illegible] 7,500*l.* and 10,000*l.* are offered to [illegible] method to find the Longitude; in the [illegible] termined within one degree, in the se[illegible] n within [illegible] thirds, and in the last if within half a degre[illegible] And this statute, and *stats.* 21 *Geo.* 2. *c.* 52; 30 *Geo.* 3. *c.* 14, the Commissioners may also grant smaller rewards for less useful discoveries on the same account, not exceeding 5,000*l.* under each statute.

Also by *stat.* 16 *Geo.* 3. *c.* 6, if any ship discovers a passage between the *Atlantic* and *Pacific* oceans beyond the 52d degree of North latitude, the owner or commander, if a King's ship, shall receive 20,000*l.*; and 5,000*l.* shall be given in like manner to the first ship that shall approach within one degree of the North Pole.

LOQUELA, An imparlance; *loquela sine die*, a respite in law to an indefinite time. *Paroch. Antiq.* 210.

LORD, *dominus.*] A word or title of honour, diversely used, being attributed not only to those who are noble by birth or creation, otherwise called Lords of Parliament, and Peers of the realm; but to such, so called by the curtesy of *England*, as all the sons of a duke, and the eldest son of an earl; and to persons honourable by office, as the Lord Chief Justice, &c. and sometimes to a private person, that hath the fee of a manor, and consequently the homage of the tenants within his manor; for by his tenants he is called Lord. In this last signification, it is most used in our law-books; where it is divided into *Lord Paramount*, and *Lord Mesne*; and *Very Lord*, &c. *Old. Nat. Br.* 79. See titles *Mean*; *Nobility*; *Parliament*; *Peers.*

LORD HIGH ADMIRAL; See *Admiral.*

LORD IN GROSS, *F. N. B. fol.* 3. Is He that is Lord, having no manor, as the King in respect of his Crown. *Ibid. fol.* 5; and there is a case wherein a private man is Lord in gross, *viz*, A man makes a gift in tail of all the land he hath, to hold of him, and dieth; his heir hath but a seigniory in gross. *F. N. B.* 8.

LORD OF A MANOR; See *Copyhold.*

LORD AND VASSAL. In the time of the feodal tenures, the grantor of land was called the Proprietor; or Lord; being the person who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use of possession, according to the term of the grant, was stiled the Feudatary or Vassal, which was only another name for the tenant or holder of the lands; though, on account of the prejudices we have justly conceived against the doctrines which were afterwards grafted on this system, we now use the word *vassal*, opprobriously as synonymous to slave or bondman. 2 *Comm.* 53. See this Dictionary, title *Tenures.*

LORDS MARCHERS; See *Wales.*

LORIMERS, Fr. *Lormiers*, from Lat. *lorum.*] One of the companies of *London*, that make bits for bri[illegible]s, spurs, and [illegible] like small iron ware, mentioned in *stat.* 1 *R.* 2. *c.* 12.

LOSINGA, A flatterer, or sycophant. *Brompt. Chron. pag.* 991.

LOT, A contribution, or duty. See *Scot.*

L[illegible]T or LOTH, The thirteenth dish of lead in the mines of *D*[illegible], which belongs to the King. *Esbeat.* [illegible] 1. See *Cope.*

L[illegible]THERWITE, or LEYERWIT, A liberty or privilege to take amends of him that defileth a bondwoman without licence; *Rastall's Exposition of Words*; so that it is an amends for lying with a bond-woman. *Cowell.* See *Lairwite.*

LOTTERIES. Several statutes have been from time to time made for raising money for the use of Government, by way of Lottery. These *State Lotteries* are publicly drawn, by commissioners appointed, according to schemes, which vary with almost every year.

It has been a disputed point among politicians, whether the benefits of a Lottery arising from the large sum thus *voluntarily* subscribed to the exigencies of the Government, are not more than counterbalanced by the evils through this means introduced, formerly by private Lotteries, and, of late years, by the more pernicious mode of gambling by *insurance* of numbers. Repeated attempts have been made to repress this fatal mischief, and the measure of treating the persons taking money for insurance as *rogues* and *vagabonds*, seems to have been attended with the most success. The following is a short summary of the acts now in force on this subject. See also this Dictionary, titles *Advertisements*; *Gaming.*

Statute 10 & 11 *W.* 3. *c.* 17, Declares ALL Lotteries *public nuisances*; and all *patents* for Lotteries *void*, and *against law*; (the State Lotteries are all managed under annual acts of parliament passed for each;) imposes a penalty of 500*l.* on every proprietor of a private *Lottery*, and 20*l.* on each adventurer.

Stat. 9 *An. c.* 6, Commands Justices of Peace to assist in suppressing private Lotteries.

Stat. 10 *An. c.* 26, Imposes the like penalty of 500*l.* on persons keeping offices for illegal insurances on marriages, &c. under various pretexts.

Stat. 5 *Geo.* 1. *c* 9, puts the sale of *Chances* on the footing of private Lotteries, and imposes a penalty of 100*l.* (above all other penalties), recoverable by the persons possessed of the ticket, the chance of which was sold; and the offender may also be committed to the county gaol for a year.

Stat. 8 *Geo.* 1. *c.* 2, imposes a penalty of 500*l.* on persons keeping offices for the disposal of *houses, lands, advowsons*, &c. by Lottery; and adventurers to forfeit double the sum contributed.

 This

This statute and those of 10 & 11 *W.* 3, and 9 *Ann.* above mentioned, are explained and rendered more effectual by *stat.* 12 *Geo.* 2. *c.* 28, which imposes 10*l.* penalty on Justices neglecting their duy under those acts; and prohibits the games of *Ace of Hearts*, *Pharoah*, *Basset*, and *Hazard*, as *Lotteries*, and imposes 50*l.* penalty on the players: and see *stat.* 13 *Geo.* 2. *c.* 19, as to the game of *Passage* and other games with dice.

Stats. 9 *Geo.* 1. *c.* 19, and 6 *Geo.* 2. *c.* 35, impose a penalty of 200*l.* and a year's imprisonment, on persons selling tickets in, or publishing schemes of, any *foreign* Lottery. *Ireland* is excepted under *stat.* 22 *Geo* 3. *c.* 47. *Stat.* 29 *Geo.* 2. *c.* 7. provides that offences against the *English* acts against private Lotteries, though committed in *Ireland*, shall be liable to all the penalties imposed, as if they were committed in *England*; [but *qu.* how far this act is in force since *stat.* 23 *Geo.* 3. *c.* 28? See this Dictionary, title *Ireland*.]

By *stat.* 22 *Geo.* 3. *c.* 47, All Lottery-office keepers must take out a licence from the Stamp-office, for which they pay 50*l.* Offices to be open only from eight in the morning to eight in the evening (except the *Saturday* evening preceding the drawing). The sale of *chances* (and shares of tickets not their own), prohibited under 50*l.* penalty; shares to be stamped.

By *stat.* 27 *Geo.* 3. *c.* 1, All unlicensed Lottery-office keepers, and all persons, directly or indirectly, as principals or servants, selling chances, or insuring or causing any person to insure for or against the drawing of any ticket in any State Lottery, shall be deemed *rogues* and *vagabonds* within the strict letter of *stat.* 17 *Geo.* 2. *c.* 5, and other statutes relating to vagabonds. But the proprietor of *a whole ticket* may insure it, for its value only, with a licensed office-keeper for the *whole* time of drawing, (from the time of the insurance,) under a *bonâ fide* agreement (without stamps). Persons convicted as vagabonds are discharged from the pecuniary penalties.

LOVE. Provoking unlawful Love, was one species of the crime of witchcraft, punishable by *stat.* 1 *Jac.* 1. *c.* 12, now repealed.

LOURCURDUS, A ram or bell-wether. *Cowell.*

LURGULARY, The casting any corrupt or poisonous thing in the water, was styled *lowrgulary*, and felony. *Stat. pro Stratis London, Anno* 1573.

LOWBELLERS, Such persons as go out in the night-time with a light and a bell, by the sight and noise whereof birds sitting upon the ground become stupified, and so are covered and taken with a net: the word is derived from the Sax. *low*, which signified a flame of fire. *Antiq. Warwick. p.* 4.

LOWBOTE, A recompence for the death of a man killed in a tumult, or, as we say, by the mob. *Cowell.*

LUDI DE REGE & REGINA, Playing at cards, so called, because there are Kings and Queens in the pack. *Cowell.*

LUMINARE, A lamp or candle, set burning on the altar of any church or chapel; for the maintenance whereof lands and rent-charges were frequently given to parish churches, &c. *Kennet's Gloss.*

LUNATICK, See this Dictionary, title *Idiots and Lunaticks.*

LUNDA, A weight or measure formerly used here. —*Lunda anguillarum constat de* 10 *Sticis. Fleta, lib.* 2. *cap.* 12.

LUNDRESS, A sterling silver penny, which had its name from being coined only at *London*, and not at the country mints. *Lowndes's Essay on Coin, p.* 17.

LUPANATRIX, A bawd or strumpet: and by the custom of *London*, a constable may enter a house, and arrest a common strumpet and carry her to prison. 3 *Inst.* 206, &c: *Claus.* 4 *Ed* 1. *p.* 1. *m.* 16.

LUPINUM CAPUT GERERE, Signified to be outlawed, and have one's head exposed like a wolf's, with a reward to him that should bring it in. *Plac. Coron.* 4 *Johan. Rot.* 2. See *Outlawry.*

LUPLICETUM, *Lat.*] A hop-garden, or place where hops grow. 1 *Inst.* 4.

LUSHBURGHS or LUXENBURGHS, A base sort of foreign coin, made of the likeness of *English* money, and brought into *England* in the reign of King *Edw.* III. to deceive the King and his people: on account of which, it was made treason for any one wittingly to bring any such money into the realm, knowing it to be false. *Stat.* 25 *Ed.* 3. *st.* 5. *c.* 2: 3 *Inst.* 1.

LUSTRINGS, A company was incorporated for making, dressing, and lustrating Alamodes and Lustrings in *England*, who were to have the sole benefit thereof, confirmed by the following statute; by which no foreign silks known by the name of Lustrings or Alamodes are to be imported, but at the port of *London*, &c. *Stat.* 9 & 10 *W.* 3. *c.* 43. See titles *Silk*; *Navigation Acts.*

LUXURY. There were formerly various laws to restrain excess in apparel, all repealed by *stat.* 1 *Jac.* 1. *c.* 25. But as to excess in diet, there still remains one ancient statute unrepealed, *viz.* 10 *Ed.* 3. *st.* 3, which ordains, that no man shall be served at dinner, or supper, with more than two courses; except upon some great holydays there specified, in which he may be served with three. 4 *Comm.* 170, 1.

LYEF-YELD, (*i. e.* GELD,) LEF-SILVER, A small fine or pecuniary composition, paid by the customary tenant, to the lord for leave to plow or sow, &c. *Somn. of Gavel-kind.*

LYING-IN-HOSPITALS; See *Hospitals.*

LYMPUTTA, A lime-pit. *Cowell.*

LYNDEWODE, Was a doctor both of the civil and canon laws, and dean of the arches. He was ambassador for *Henry* V, into *Portugal, anno* 1422, as appeareth by the preface to his Commentary upon the Provincials. *Cowell.*

LYNN, An act for regulating worsted-weavers and their apprentices in the town of *Lynn*, &c. See *stat.* 14 & 15 *H.* 8. *c.* 3.

M.

M, Is the letter with which persons convicted of Manslaughter are marked on the brawn of the left thumb. See *stat.* 4 *H.* 7. *c.* 13.

MACE; See *Spices*; *Navigation Acts*.

MACE-GRIEFE, or MACE-GREFFS, *Machecarii.*] Such as willingly buy and sell stolen flesh, knowing the same to be stolen. *Britton, c.* 29: *Crompton's Justice of Peace, fol.* 193. Vide *Leges Inæ, c.* 20.

MACE-CARIA, MACHEKUNA, *Macella.*] The flesh-market or shambles. *Cowell.*

MACHECARIUS, A butcher. *Cowell. Leg. Ed. Reg. c.* 39.

MACHECOLLARE or MACHECOULARE, from the Fr. *Maschecoulis.*] To make a warlike device, especially over the gate of a castle, resembling a grate, through which scalding water or offensive things may be thrown on pioneers or assailants. 1 *Inst.* 5. *a.*

MACIO, A mason. *Cowell.*

MACKAREL, May be sold on *Sunday*; *stat.* 10 & 11 *W.* 3. *c.* 24. § 29.

MADDER, To be imported unmixed. 13 & 14 *Car.* 2. *c.* 30; repealed 15 *Car.* 2. *c.* 16. § 3. Tithes of Madder settled, *stats.* 31 *Geo.* 2. *c.* 12: 5 *Geo.* 3. *c.* 18. See title *Tithes*. Penalty of stealing, or destroying Madder-roots. *Stat.* 31 *Geo.* 2. *c.* 35: to make satisfaction to the owner, and pay 10*s.* to the poor; and for the second offence to be imprisoned three months.

MADNING-MONEY, Old *Roman* coins, sometimes found about *Dunstable*, are so called by the country people: they seem to retain this name from *Magintum*, used by the Emperor *Antoninus*, in his Itinerary, for *Dunstable*. *Camden.*

MADRIGALS, An old word, signifying country songs. *Cowell.*

MAEREMIUM, from Fr. *Meresme.*] Properly signifies any sort of timber, fit for building; *seu quodvis materiamen. Claus.* 16 *Ed.* 2. *m.* 3.

MAGBOTE or MÆGBOTE, from the Sax. *Mæg.* i. e. *Cognatus & bote, compensatio.*] A compensation for the slaying or murder of one's kinsman, in ancient times, when corporal punishments for murder, &c. were sometimes commuted into pecuniary fines, if the friends and relations of the party killed were so satisfied. *Leg. Canuti, c.* 2.

MAGICK, *Magia, Necromantia.*] Witchcraft and Sorcery. See *Conjuration.*

MAGISTER. This title, often found in old writings, signified that the person to whom attributed had attained some degree of eminency *in scientia aliqua, præsertim literaria*; and formerly those who are now called *doctors*, were termed *magistri.*

MAGISTRATE. *magistratus.*] A Ruler; and he is said to be *custos utriusque tabulæ*: the keeper or preserver of both tables of the law. If any magistrate, or minister of justice, is slain in the execution of his office, or keeping of the peace, it is murder for the contempt and disobedience to the King and his laws. 9 *Co.*

The most universal public relation by which men are connected together is that of government; namely, as governors and governed, or in other words as *Magistrates* and *People*. Of Magistrates some also are *supreme*, in whom the Sovereign Power of the State resides: others are subordinate, deriving all their authority from the supreme Magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere. In all tyrannical Governments the Supreme Magistracy, or the right of both *making* and *enforcing* laws, is vested in one and the same man, or one and the same body of men: and wherever these two powers are united together, there can be no public liberty. The Magistrate, [or Magistracy,] may enact tyrannical laws, and execute them in a tyrannical manner: since he is possessed, in quality of dispenser of justice, with all the power which as legislator he thinks proper to give himself. But where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the Subject. In *England*, therefore, this *Supreme Power* is divided into two branches; the one *Legislative*, to wit, the *Parliament*, consisting of King, Lords, and Commons; the other *Executive*, consisting of the *King* alone.

His Majesty's Great Officers of State, the *Lord Treasurer*, *Lord Chamberlain*, and principal *Secretaries*, or the like, are not, in the capacity of subordinate Magistrates, in any considerable degree the object of our laws; nor have they any very important share of Magistracy conferred upon them; except that the *Secretaries of State* are allowed the power of commitment in order to bring offenders to trial: 1 *Leon.* 70: 2 *Leon.* 175: *Comb.* 143: 5 *Mod.* 84: *Salk.* 347: *Carth.* 291. See this Dictionary, titles *Commitment*; *Arrest*. As to the office and authority of the Lord *Chancellor* and the other *Judges* of the superior Courts of Justice; see this Dictionary under those titles. The rights and dignities of *Mayors* and *Aldermen*, or other Magistrates of particular Corporations, are more private and strictly municipal rights, depending entirely upon the domestic Constitution of their respective franchises. The Magistrates and Officers whose rights and duties are most generally in use, and have a jurisdiction and authority dispersedly throughout the kingdom, are principally these, *Sheriffs*; *Coroners*; *Justices of the Peace*; *Constables*; Surveyors of the *Highways*; and Overseers of the *Poor*. See all those titles in this Dictionary; and 1 *Comm. c.* 2.

The

The negligence of public officers entruſted with the adminiſtration of juſtice, makes the offender liable to be fined, and in very notorious caſes will amount to a forfeiture of the office, if it be a beneficial one. 4 *Comm.* 140. See further this Dictionary, titles *Office*; *King*; *Parliament*; *Conſtable*; &c.

MAGNA ASSISA ELIGENDA, A writ directed to the Sheriff, to ſummon four lawful Knights before the Juſtices of Aſſiſe, there upon their oaths to chooſe twelve Knights of the vicinage, *&c.* to paſs upon the great aſſiſe, between *A. B.* plaintiff, and *C. D.* defendant, *&c.* *Reg. Orig.* 8. See titles *Jury*; *Aſſiſe*.

MAGNA CHARTA,

(Or, as it is always ſpelt by *Blackſtone*, MAGNA CARTA:)

The GREAT CHARTER OF LIBERTIES granted in the ninth year of King *Henry* III.—It is ſo called, either for the excellency of the laws therein contained, or becauſe there was another Charter called the *Charter of the Foreſt*, eſtabliſhed with it, which was the leſs of the two; or in regard of the great troubles in obtaining it, and the remarkable ſolemnity in denouncing excommunication and anathemas againſt the breakers thereof: *Spelman* calls it, *Auguſtiſſimum Anglicarum Libertatum Diploma*; *&* *Sacra Anchora*.

Edward the Confeſſor granted to the Church and State ſeveral privileges and liberties by Charter; and ſome were granted by the Charter of King *Hen.* I. Afterwards *Stephen*, and *Hen.* II. confirmed the Charter of *Hen.* I; and *Rich.* I. took an oath at his coronation to obſerve all juſt laws, which was an implicit confirmation of that Charter; and King *John* took the like oath: this King, likewiſe, after a difference between him and the Pope, and being imbroiled in wars at home and abroad, particularly confirmed the aforementioned Charter, with further privileges, but ſoon after broke it, and thereupon the Barons took up arms againſt him, and his reign ended in wars. To him ſucceeded *Hen.* III. who in the 37th year of his reign, after it had been ſeveral times confirmed by him, and as often broken, came to *Weſtminſter-Hall*, and in the preſence of the Nobility and Biſhops, with lighted candles in their hands, *Magna Charta* was read: the King all that while laying his hand on his breaſt, and at laſt ſolemnly ſwearing faithfully and inviolably to obſerve all things therein contained, as he was a Man, a Chriſtian, a Soldier, and a King: then the Biſhops extinguiſhed the candles, and threw them on the ground; and every one ſaid, *Thus let him be extinguiſhed, and ſtink in hell, who violates this Charter:* upon which the bells were ſet on ringing, and all perſons by their rejoicing approved of what was done.

But, notwithſtanding this very ſolemn confirmation of this Charter, the very next year King *Henry* invaded the rights of his People, till the Barons levied war againſt him; and after various ſucceſs, he confirmed this Charter, and the *Charter of the Foreſt*, in the parliament of *Marlbridge*, and in the 52d year of his reign. His ſon, *Edw* I, confirming theſe Charters, in the 25th year of his reign, made an explanation of the liberties therein granted to the People; adding ſome which are new, called *Articuli ſuper Chartas*; and *Magna Charta* was not confirmed then only, but more than thirty times ſince. *Co. Litt.* 81. See this Dictionary, title *Liberty*.

This excellent ſtatute, or rather body of ſtatutelaw, at that time ſo beneficial to the Subject, and of ſuch great equity, is the moſt ancient written law of the land. It is divided into thirty-eight chapters; the 1ſt of which, after the ſolemn preamble of its being made for the honour of God, the exaltation of Holy Church, and amendment of the kingdom, *&c.* ordains, That the Church of *England* ſhall be free, and all eccleſiaſtical perſons enjoy their rights and privileges. The 2d is of the nobility, knights-ſervice, reliefs, *&c.* The 3d concerns heirs, and their being in ward. The 4th directs guardians for heirs within age, who are not to commit waſte. The 5th relates to the cuſtody of lands, *&c.* of heirs, and delivery of them up when the heirs are of age. The 6th is concerning the marriage of heirs. The 7th appoints dower to women, after the death of their huſbands, a third part of the lands, *&c.* The 8th relates to ſheriffs and their bailiffs, and requires that they ſhall not ſeize lands for debts where there are goods, *&c.* the ſurety not to be diſtrained, where the principal is ſufficient. The 9th grants to *London*, and all cities and towns, their ancient liberties. The 10th orders, that no diſtreſs ſhall be taken for more rent than is due, *&c.* By the 11th the court of Common Pleas is to be held in a certain place. The 12th gives aſſiſes for remedy, on diſſeiſin of lands, *&c.* The 13th relates to aſſiſes of darrein preſentment, brought by eccleſiaſtics. The 14th enacts, that no freeman ſhall be amerced for a fault, but in proportion to the offence; and by the oaths of lawful men. The 15th, no town ſhall be diſtrained to make bridges, *&c.* but ſuch as of ancient times have been accuſtomed. The 16th is for repairing of ſea-banks and ſewers. The 17th prohibits ſheriffs, coroners, *&c.* from holding pleas of the Crown. The 18th enacts, that the King's debtor dying, the King ſhall be firſt paid his debt, *&c.* The 19th directs the manner of levying purveyance for the King's houſe. The 20th concerns caſtleward, where a knight was to be diſtrained for money for keeping his caſtle, on his neglect. The 21ſt forbids ſheriffs, bailiffs, *&c.* to take the horſes or carts of any perſon to make carriage without paying for it. By the 22d the King is to have lands of felons a-year and a day, and afterwards the lord of the fee. The 23d requires wears to be put down on rivers. The 24th directs the writ *præcipe in capite*, for lords againſt tenants offering wrong, *&c.* The 25th declares that there ſhall be but one meaſure throughout the land. The 26th, inquiſition of life and member, to be granted freely. The 27th relates to knight's-ſervice, petit-ſerjeanty, and other ancient tenures; (taken away together with wardſhip, *&c.* by *ſtat.* 12 *Car.* 2. *c.* 24. See title *Tenures.*) The 28th directs, that no man ſhall be put to his law, on the bare ſuggeſtion of another, but by lawful witneſſes. The 29th, no freeman ſhall be diſſeiſed of his freehold, impriſoned and condemned, but by *judgment of his peers, or by the law of the land.* The 30th requires that merchant ſtrangers be civilly treated, *&c.* The 31ſt relates to tenures coming to the King by eſcheat. By the 32d no freeman ſhall ſell land, but ſo that the reſidue may anſwer the ſervices. The 33d, patrons of abbeys, *&c.* ſhall have the cuſtody of them in the time of vacation. The 34th, a woman to have an appeal for the death of her huſband. The 35th directs the keeping of the county-court monthly, and alſo the times of holding the ſheriff's torn, and view of frank-pledge. The 36th makes it unlawful

unlawful to give lands to religious houses in *Mortmain*. The 37th relates to escuage, and subsidy, to be taken as usual. And the 38th ratifies and confirms every article of this great charter of liberties.

The following is *Blackstone*'s summary of this celebrated statute, and its occasion and effect.

In King *John*'s time, and that of his son *Henry* III. the rigours of the feodal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the Barons or principal Feudataries; which at last had this effect, that at first King *John*, and afterwards his son, consented to the two famous Charters of *English* liberties, *Magna Carta* and *Carta de Foresta*. Of these the latter was well calculated to redress many grievances and encroachments of the Crown in the exertion of Forest Law; and the former confirmed many liberties of the Church, and redressed many grievances incident to feodal tenures, of no small moment at the time; though now, unless considered attentively, and with this retrospect, they seem but of trifling concern.

But besides these feodal provisions, care was also taken by *Magna Carta* to protect the Subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses, or other process for debts or services due to the Crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges, so as to oppress the neighbourhood. With respect to private rights, it established the testamentary power of the Subject over part of his personal estate, the rest being distributed among his wife and children: It laid down the law of Dower as it hath continued ever since; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern, it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant-strangers; and forbade the alienation of lands in mortmain. With regard to the administration of justice, besides prohibiting all denials or delays of it, it fixed the Court of Common Pleas at *Westminster*, that the suitors might no longer be harassed with following the King's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assises to be taken in the proper counties, and establishing annual circuits. It also corrected some abuses then incident to the trials by wager of law and of battel; directed the regular awarding of inquests, for life or member; prohibiting the King's inferior Ministers from holding pleas of the Crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the Exchequer; and regulated the time and place of holding the inferior tribunals of justice, the County Court, Sheriff's Tourn, and Court-leet. It confirmed and established the liberties of the city of *London*, and all other cities, boroughs, towns, and ports of the kingdom. And lastly, (by which alone it would have merited the title that it bears, of the *Great* Charter,) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land. 4 *Comm. c.* 33. *p.* 423, 4.

The following are the words of the celebrated 29th chapter of *Magna Charta*, the foundation of the liberty of Englishmen.

"*Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terræ.—Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.*" See this Dictionary, title *Liberty*.

MAGNA PRECARIA, A great or general reap-day. And in 21 *R.* 2, the lord of the manor of *Harrow on the Hill, in Com. Middlesex*, had a custom that by summons of his bailiff on a general reap-day, then called *Magna precaria*, the tenants should do a certain number of days work for him; every tenant that had a chimney, being obliged to send a man. *Phil. Purvey. p.* 145.

MAGNUM CENTUM, The great hundred, or six score. *Chart.* 20 *H.* 2.

MAGNUS PORTUS, The town and port of *Portsmouth*.

MAHEMIATUS, Maimed or wounded.

MAHOMERIA, The temple of *Mahomet*; and because the gestures, noise, and songs there, were ridiculous to the *Christians*, therefore they called antic dancing, and any thing of ridicule a momerie. *Mat. Paris.*

MAIDS. Taking them away unmarried, without consent of father or mother or their guardians, is punishable by *stat.* 4 & 5 *P.* & *M. c.* 8. See this Dictionary, title *Guardian*, I. 1; *Marriage*; *Rape*.

MAIDEN ASSISES, Is when at any assises no person is condemned to die.

MAIDEN RENTS, A noble paid by every tenant in the manor of *Builth, in Com. Radnor*, at their marriage; anciently given to the lord for his omitting the custom of *Marcheta*, (see title *Marchet.*) More probably a fine for a licence to marry a daughter.

MAIGNAGIUM, Fr. *maignen*, i. e. *faber ærarius*.] A brasier's shop; though some say it signifies a house. *Lib. Ramef.* § 265.

MAIHEM or MAYHEM, *maihemium*, from the Fr. *mehaigne*, i. e. *membri mutilatio*.] A *Maim*, wound, or corporal hurt, by which a man loseth the use of any member, proper for his defence in fight. As if a man's skull be broke, or any bone broken in any other part of the body; a foot, hand, finger, or joint of a foot, or any member be cut off; if by any wound the sinews be made to shrink; or where any one is castrated; or if an eye be put out, or any fore-tooth bro[illegible] &c. But the cutting off an ear or n[illegible], the breaking of the hinder teeth, and such like, w[illegible] held no Maihem by the Common Law; as they were [illegible] a weakening of a person's strength, but a disfigur[illegible] and deformity of the body. *Glanv. lib.* 4. *c.* 7: *Bra*[illegible] *lib.* 3. *tract.* 2: *Britton, c.* 25: *S. P. C. lib.* 1 *c.* 41.

Maihem is accurately thus defined; the violently depriving another of the use of such of his members, as may render him the less able in fighting, either to defend himself, or to annoy his adversary. *Brit. l.* 1. *c.* 25: 1 *Hawk. P. C c.* 44.

By the Ancient Law of *England*, he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like pa[illegible] *membrum pro membro*, 3 *Inst.* 118: *Brit. c.* 25. But this went afterwards out of use; partly

partly becaufe the law of retaliation is at beft an inadequate rule of punifhment, and partly becaufe on a repetition of the offence, the punifhment could not be repeated: fo that by the Common Law, as it for a long time ftood, Maihem was only punifhable by fine and imprifonment. 1 *Hawk. P. C. c.* 44. § 3. Unlefs perhaps the offence of Maihem by caftration, which all our old writers held to be felony; and this although the Maihem was committed upon the higheft provocation, fuch as the party maimed being caught in adultery with the wife of the offender. See *Bract. fo.* 144: 3 *Inft.* 62: *S. P. C.* 32: *H. P. C.* 133.

But fubfequent ftatutes have put the crime and punifhment of Maihem more out of doubt. For firft, by *ftat.* 5 *H.* 4. *c.* 5, to remedy a mifchief which then prevailed, of beating, wounding, or robbing a man, and then cutting out his *tongue*, or putting out his *eyes*, to prevent him from being an evidence againft the offenders, this offence is declared to be felony, if done of malice prepenfe; that is, as *Coke* explains it, voluntarily, and of fet purpofe, though done upon a fudden occafion. Next in order of time, is *ftat.* 37 *H.* 8. *c.* 6; which directs that if a man fhall malicioufly and unlawfully cut off the *ear* of any of the King's fubjects, he fhall not only forfeit treble damages to the party grieved, to be recovered by action of trefpafs at Common Law, as a civil fatisfaction; but alfo 10*l.* by way of fine to the King, which was his criminal amercement. The laft ftatute, but by far the moft fevere and effectual of all, is *ftat.* 22 & 23 *C.* 2. *c.* 1, called the *Coventry Act*; being occafioned by an affault on Sir *John Coventry* in the ftreet, and flitting his nofe, in revenge (as was fuppofed) for fome obnoxious words uttered by him in Parliament. By this ftatute it is enacted, that if any perfon fhall, of malice aforethought, and by lying in wait, unlawfully cut out or difable the *tongue*, put out an *eye*, flit the *nofe*, cut off a nofe or *lip*, or cut off or difable any limb or member of any other perfon, *with intent to maim or disfigure him*, fuch perfon, his counfellors, aiders, and abettors, fhall be guilty of felony, without benefit of clergy: though no attainder of fuch felony fhall corrupt the blood, or forfeit the dower of the wife, or lands or goods of the offender.

If a man attack another, of malice aforethought, in order to murder him, with a bill, or any fuch like inftrument, which cannot but endanger the maiming him, and in fuch attack, happen not to kill, but only to maim him, he may be indicted of felony on this ftatute; and it fhall be left to the jury on the evidence, whether there was a defign to murder by maiming, and confequently a malicious intent to maim as well as kill, in which cafe the offence is within the ftatute. 1 *Hawk. P. C. c.* 44. § 6: *Woodburn* and *Cooke's Ca.* 6 *St. Trials*, 212.

If the Maim comes not within any of the defcriptions of the Act, yet it is indictable at Common Law, and may be punifhed by fine and imprifonment. Or an appeal may be brought for it at the Common Law, in which the party injured fhall recover his damages. See *poft*; and title *Appeal of Maihem*. 1 *Hawk. P. C. c.* 44. § 6, *in n.*

In a cafe where a gentleman had apprehended a pickpocket, an accomplice followed and gave the gentleman a wound acrofs the nofe with a knife; this was held to be a *flitting of the nofe*, and a maiming within the ftatute. *Carrol's Ca. Leach*, 83. It has been determined that if a man deliberately watches an opportunity, and carries his intention into execution, he may be faid to lie in wait; but where a perfon went up to a man ftealing turneps, who immediately cut him in the face, this was thought not to be a lying in wait within the ftatute. *Tickner's Ca. Leach*, 170. A wound or incifion in the throat has been held not to be a Maiming. *Lee's Ca. Leach*, 49.

Maihem may be punifhed by indictment or appeal, or a remedial action of trefpafs, *vi et armis*, may be brought to recover damages for the injury.

When upon an appeal of Maihem, the iffue joined is whether it be Maihem or no Maihem, this fhall be decided by the Court, upon infpection; for which purpofe they may call in the affiftance of furgeons. 2 *Ro. Abr.* 578. And by analogy to this it is, that in an action of trefpafs for Maihem, the Court (upon view of fuch Maihem as the plaintiff has laid in his declaration, or which is certified by the Judges who tried the caufe, to be the fame as was given in evidence to the Jury) may increafe the damages at their own difcretion. 1 *Sid.* 108. As may alfo be the cafe upon view of an atrocious battery. *Hard.* 408: See 1 *Wilf.* 5: 1 *Barnes*, 106: See *Appeal of Maihem*.

A perfon who maims himfelf that he may have the more colour to beg, may be indicted and fined. 1 *Inft.* 127. And by the like reafon, a perfon who difables himfelf that he may not be impreffed for a foldier. *Burn. J.*

MAII INDUCTIO, An ancient cuftom for the prieft and people of country villages to go in proceffion to fome adjoining wood on a *May-day* morning; and return with a may-pole, boughs, flowers, garlands, and other tokens of the fpring. This may-game, or rejoicing at the coming of the fpring, was for a long time obferved, and ftill is in fome parts of *England*; but it was condemned and probibited in the diocefe of *Lincoln*, by bifhop *Grofthead*.

MAIL, *macula*.] A coat of mail, fo called from the Fr. *maille*, which fignifies a fquare figure, or the hole of a net: fo *maille de haubergeons* was a coat of mail, becaufe the links or joints in it refemble the fquares of a net. Mail is likewife ufed for the leathern bag wherein letters are carried by the poft, from *bulga*, a budget.

MAILE, Anciently a kind of money; and filver halfpence were termed Mailes. 9 *Hen.* 5. By indenture in the Mint, a pound weight of old fterling filver was to be coined into three hundred and fixty fterlings or pennies, or feven hundred and twenty Mailes or half-pennies, or one thoufand four hundred and forty farthings. *Lownds's Eff. on Coin*, 38. See title *Black-mail*.

MAIMING; See *Maihem*.

MAINAD, A falfe oath, or perjury. *Leg. Inæ*, *c.* 34.

MAINE-PORT, *In manu portatum*.] A fmall tribute, commonly of loaves of bread, which in fome places the parifhioners pay to the rector of their church, in recompence for certain tithes. *Cowell*.

This mainport bread was paid to the vicar of *Blyth*. See *Antiq. of Nottinghamfhire*, *p.* 473.

MAINOVRE, or *Mainœuvre*, from the Fr. *main*, i. e. *manus*, and *œuvrer*, *operari*.] Handy-work; fome trefpafs committed by a man's hand. See *ftat.* 7 *R.* 2, *c.* 4: *Brit.* 62: and the fucceeding article.

MAINOUR, or MANOUR, or MEINOUR; from the Fr. *manier*, i. e. *manu tractare*] In a legal fenfe denotes the thing taken away, found in the hand of the thief

thief who taketh away, or ſtealeth. Thus to be taken with the *Mainour*, *Pl. Cor. fol.* 179, is to be taken with the thing ſtolen about him: And again, *fol.* 194; It was preſented, that a thief was delivered to the ſheriff or viſcount, together with the *Mainour*; and again, *fol.* 186, If a man be indicted, that he feloniouſly ſtole the goods of another, where, in truth, they are his own goods, and the goods be brought into the court as the *Mainour*; and it be demanded of him, what he ſaith to the goods, and he diſclaim them; though he be acquitted of the felony, he ſhall loſe the goods. *Cowell.*

Thus the Court of *Attachments* in the Foreſt may attach all offenders againſt vert and veniſon, by their bodies, if taken with the *Mainour*, that is, in the very act of killing veniſon, or ſtealing wood, or preparing ſo to do; or by freſh and immediate purſuit after the act is done; elſe they muſt be attached by their goods. *Carth.* 79: 4 *Inſt.* 289.

One mode of proſecution, by the Common Law, without any previous finding by a Jury, was when a thief was taken with the *Mainour*; that is, with the thing ſtolen upon him, *in manu*; for he might, when ſo detected, *flagrante delicto*, be brought into Court, arraigned and tried without indictment. But this proceeding was taken away by ſeveral ſtatutes in the reign of *Edward* III. though in *Scotland* a ſimilar proceſs remains to this day. See 2 *Hal. P. C.* 149: 4 *Comm. c.* 23. *p.* 307, and title *Court-Leet.*

MAINPERNABLE, That may be let to bail; and what perſons are mainpernable appears by *ſtat. Weſt.* 1, 3 *Ed.* 1. *c.* 15: See titles *Bail*; *Mainprize.*

MAINPERNORS, *manucaptores.*] Are thoſe perſons to whom a man is delivered out of cuſtody or priſon, on their becoming bound for his appearing, &c. which, if he do not do, they ſhall forfeit their recognizances; and they are called *Manucaptores*, becauſe they do as it were *manu capere & ducere captivum è cuſtodia vel priſona.*

MAINPRISE, *manucaptio*, from the Fr. *main*, i. e. *manus*, & pris, *captus.*] The taking or receiving of a perſon into friendly cuſtody, who otherwiſe might be committed to priſon; upon ſecurity given that he ſhall be forth-coming, at a time and place aſſigned. Thus to let one to Mainpriſe is to commit him to thoſe that undertake he ſhall appear at the day appointed. *Old Nat. Br.* 42: *F. N. B.* 249.

Manwood makes this difference between *Mainpriſe* and *Bail*: He that is *mainpriſed* is ſaid to be at large, after the day he is ſet to *Mainpriſe*, until the day of his appearance; but where a man is let to *bail*, by any Judge, &c. until a certain day, there he is always accounted by the law to be in their ward for the time; and they may, if they will, keep him in priſon, ſo that he that is ſo bailed ſhall not be ſaid to be at large, or at his own liberty. *Manwood, p.* 167.

A man under Mainpriſe is ſuppoſed to go at large, under no poſſibility of being confined by his ſureties or mainpernors, as in caſe of bail. 4 *Inſt.* 179. Mainpriſe is an undertaking in a certain ſum; bail anſwers the condemnation in civil caſes, and in criminal, body for body. *Sed. qu.* If this, as to body for body, is now law? If it is, it is never put in force.

Mainpriſe may be where one is never arreſted, or in priſon; but no man is bailed but he that is under arreſt, or in priſon; ſo that Mainpriſe is more large than bail. *H P. C.* 96: *Wood's Inſt.* 582, 618. Upon a *capias* or exigent awarded againſt a man, he ſhall find Mainpriſe for his appearance: and if the defendant make default, his manucaptors are to be amerced, &c. And a bill of Mainpriſe, acknowledged and put into Court, is good, though it be not inrolled. *Jenk Cent.* 129.

There is an ancient writ of Mainpriſe, whereby thoſe who are bailable, and have been refuſed the benefit of it, may be delivered out of priſon. *Reg. Orig.* 269: *F. N. B.* 250.

The writ of Mainpriſe, *Manucaptio*, is a writ directed to the Sheriff, (either generally when any man is impriſoned for a bailable offence, and bail hath been refuſed; or eſpecially, when the offence or courſe of puniſhment is not properly bailable below,) commanding him to take ſureties for the priſoner's appearance, uſually called *Mainpernors*, and to ſet him at large. *F. N. B.* 250: 1 *Hal. P. C.* 141: *Co. Bail & M. c.* 10: And ſee 2 *Hawk. P. C. c.* 15. § 30.

Mainpernors differ from bail, in that a man's bail may impriſon or ſurrender him up before the ſtipulated day of appearance; mainpernors can do neither, but are barely ſureties for his appearance at the day. Bail are only ſureties that the party be anſwerable for the ſpecial matter for which they ſtipulate; Mainpernors are bound to produce him to anſwer all charges whatſoever. 3 *Comm. c.* 8. *p.* 128. cites *Co. Bail & M. c.* 3: 4 *Inſt.* 179.

Of the writ of Mainpriſe little notice is taken in the late books; yet the law relating to it ſeems to be ſtill in force in many caſes: and conſequently in ſuch caſes thoſe who are bailable, and have been refuſed the benefit of bail, may ſtill, by virtue thereof, be delivered out of priſon; (upon their finding ſureties to the Sheriff that they will appear and anſwer to the crimes alleged againſt them, before the Juſtices, in the writ mentioned, &c.) as thoſe who are impriſoned for a ſlight ſuſpicion of felony, or indicted of larceny before the Steward of a leet, or of treſpaſs before Juſtices of peace; and many other perſons. 2 *Hawk. P. C. c.* 15. § 29.

MAINSWORN; See *Male-ſworn.*

MAINTAINORS, Are thoſe that maintain or ſecond a cauſe depending between others, by diſburſing money, or making friends, for either party, &c. not being intereſted in the ſuit, or attornies employed therein. *Stat.* 19 *H.* 7. *c.* 14. See title *Maintenance.*

MAINTENANCE, *manutenentia.*] The unlawful taking in hand, or upholding of a cauſe or perſon; metaphorically drawn from the ſuccouring a young child that learns to go by one's hand; and in law is taken in the worſt ſenſe. See *ſtat.* 32 *H.* 8. *c.* 9. Alſo it is uſed for the buying or obtaining of pretended rights to lands. *Stat. Ibid.*

Maintenance is an offence that bears a near relation to *Barretry*; being an officious intermeddling in a ſuit that no way belongs to one, by maintaining or aſſiſting either party with money, or otherwiſe, to proſecute or defend it; a practice that was greatly encouraged by the firſt introduction of Uſes. 4 *Comm. c.* 10. *p.* 134.

Maintenance is either *ruralis*, in the country; as where one aſſiſts another in his pretenſions to lands, by taking or holding the poſſeſſion of them for him; or where one ſtirs up quarrels or ſuits in the country: or it is *curialis*, in a court of juſtice; where one officiouſly intermeddles in a ſuit depending in any court, which no way belongs to him, and he hath nothing to do with, by aſſiſting the plaintiff or defendant with money or otherwiſe, in the

prosecution or defence of any such suit. *Co. Lit.* 368: 2 *Inst.* 213: 2 *Rol. Abr.* 115. And he who fears that another will maintain his adversary, may, by way of prevention, have an original writ grounded on the statutes, prohibiting him so to do. 1 *Hawk. P. C. c.* 83. § 42: *Reg. Orig.* 182.

Who are guilty of Maintenance—Not only he who lays out his money to assist another in his cause, but he that by his friendship or interest saves him that expence which he might otherwise be put to, is guilty of Maintenance. *Bro. Mainten.* 7, 14, 17, &c. And if any person officiously give evidence, or open the evidence without being called upon to do it; speak in the cause, as if of counsel with the party; retain an attorney for him, &c. or shall give any public countenance to another in relation to the suit; as where one of great power and interest says that he will spend twenty pounds on one side, &c. or such a person comes to the bar with one of the parties, and stands by him while his cause is tried, to intimidate the Jury; if a Juror solicits a Judge to give judgment according to the verdict, after which he hath nothing more to do, &c. these acts are Maintenance. 1 *Hawk. P. C. c.* 83. But counsel may speak as *amicus curiæ*.—A man cannot be guilty of Maintenance, in respect of any money given by him to another, before any suit is actually commenced: nor is it such to give another advice, as to what action is proper to be brought, what method to be taken, or what counsellor or attorney to be employed; or for one neighbour to go with another to his counsel, so as he do not give him any money: and money may be lawfully given to a poor man, out of charity, to carry on his suit, and be no Maintenance: Attornies may lay out their money for their clients, to be repaid again; but not at their own expence, on condition of no purchase no pay, if they carry the cause or lose it. *Fitz. Mainten.* 18: 3 *Rol. Abr.* 118: 2 *Inst.* 564.

A man may maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. 4 *Comm.* 134. See 1 *Hawk. P.C. c.* 83. § 20, 35. Whether an attorney's laying out money for his client be Maintenance, See *Freem.* 7 1; 81.

It is said that if a man of great power, not learned in the law, tells another who asks his advice, that he hath a good title, it is Maintenance. 1 *Hawk. P. C. c.* 83. § 9. In case any person who is no lawyer, and that hath no interest in the cause, shall take upon him to do the part of a lawyer, this will be unlawful Maintenance. And after a suit is begun, no man may encourage either of the parties, or yield them any aid or help, by money, or the like, but he that hath interest therein: but to lend another money to maintain his law-suit, is not Maintenance. 22 *H.* 6. 6: 19 *E.* 4. 3: 2 *Shep. Abr.* 406. If a person hath any interest in the thing in dispute, though in contingency only, he may lawfully maintain an action relating to it; as if tenant in tail, or for life, be impleaded, he in reversion or remainder, &c. may maintain the defence of the suit, with his own money; and a lessor may lawfully maintain his lessee. 2 *Rol. Abr.* 115. A lord may justify maintaining a tenant, in defence of his title; and the tenant may maintain his lord: one bound to warrant lands, may lawfully maintain the tenant impleaded; and a man may maintain those who are enfeoffed of lands in trust for him, concerning those lands, &c. An heir apparent, or the husband of such an heir, may maintain the ancestor in an action concerning the inheritance of the land whereof he is seised in fee; a master may maintain his servant, and assist him with money, but not in a real action, unless he hath some of his wages in his hands; and a servant by reason of relation may maintain his master in all things, except laying out his own money in the master's suit. 1 *Hawk. P. C. c.* 83: 1 *Inst.* 368.

How punishable.—By the Common Law, persons guilty of Maintenance may be prosecuted by indictment, and be fined and imprisoned; or be compelled to make satisfaction by action, &c. And a Court of Record may commit a man for an act of Maintenance done in the face of the Court. *Hetl.* 79: 1 *Inst.* 368.

By *stat. Westm.* 1. 3 *Ed.* 1. *c.* 25, None of the King's officers shall maintain pleas, or suits, in the King's court, for lands, &c. under covenant to have part thereof, or any profit therein. And clerks of Justices are not to take part in quarrels, or delay right, on pain of treble damages. By *stat.* 1 *Ed.* 3. *st.* 2. *c.* 14; further enforced by *stat.* 20 *E.* 3. *c.* 4, None of the King's ministers, nor no great man of the realm, by himself nor by any other, by sending of letter or otherwise, nor none other person, great or small, shall take upon them to maintain quarrels, to the let and disturbance of the Common Law. The King's counsellors, officers or servants, or any other person whatsoever, shall not sustain quarrels by Maintenance, upon pain to lose their offices and services, and of imprisonment and ransom. *Stat.* 1 *R.* 2. *c.* 4. No person whatsoever shall unlawfully maintain any suit concerning lands, or retain any person for Maintenance, by letters, rewards, or promises, under the penalty of 10*l.* for every offence, to be divided between the King and the prosecutor. *Stat.* 32 *H.* 8. *c.* 9.

What rights and titles, &c. are within the meaning of the law.—Maintaining suits in the Spiritual court, is not within the statutes relating to Maintenance. *Cro. Eliz.* 594. Though Maintenance in a Court-baron, is as much within the purview of the *stat.* 1 *R.* 2, as Maintenance in a Court of Record.—A pretended right to copyhold lands sold, is within the statute of 32 *H.* 8. *c.* 9. 4 *Rep.* 26. If *A.* be owner of land in possession, and another who hath no right granteth the land; although the grant upon it be void, yet the grantor and grantee are liable to this statute. 1 *Inst.* 369. So where he that hath a pretended right, and none in truth, shall get the possession wrongfully, and then sell the land, &c. But a remainder-man in fee may obtain the pretended title of a stranger. 1 *Inst.* 369: 3 *Inst.* 76, 77. And a person who hath good right and title, at the time of the bargain or lease, will not be within the above statute, although neither he nor his ancestors have been in possession thereof, &c. for a year before. *Plowd.* 47: *Dyer*, 74.

If a person make a lease to try a title in ejectment, unless it be to a great man, it is out of the statute. 1 *Inst.* 369: *Dyer*, 374. A lessor having good right to land, but not in possession, made a lease of it, and did not seal it on the land; it was adjudged within the *stat.* 32 *Hen.* 8. *c.* 9: 1 *Leon.* 166.

The law will not suffer any thing in action, entry, &c. to be granted over; this is to prevent titles being granted to men of substance, to oppress the meaner sort of people. 1 *Inst.* 214. Where a bond was given for performance of covenants in a lease, and after the covenants

nants being broken, the lessee assigned both the lease and bond to another, and then the assignee put the bond in suit; this was held Maintenance; so it would have been if the lessee had assigned the bond and not the lease, and afterwards the covenants were broken, and the bond put in suit. *Godb.* 81: 2 *Nels. Abr.* 1142. See further on this subject, 1 *Hawk. P. C. c.* 83: *Vin. Abr.* title *Maintenance*: and this Dictionary, titles *Champerty*; *Embracery*, &c.

MAJORITY. The only method of determining the acts of many, is by a Majority: the major part of members of parliament enact laws, and the Majority of electors choose members of parliament; the act of the major part of any corporation, is accounted the act of the corporation; and where the majority is, there, by the law, is the whole. See *Stat.* 19 *Hen.* 7. *c.* 7: *Stud. Compan.* 25.

MAIOR, A mayor, doth not come from the Lat. *major*, but from an old *English* word *maier*, i. e. *potestas*. *Cowell*.

MAISNADA, A family, *quasi mansionata*. *Meigne*; *Mon. Angl.* 2. 219.

MAISON DE DIEU, A monastery, hospital, or alms-house. All hospitals, *Maisons de Dieu*, and abiding places for poor, lame and impotent persons, erected by the statute 39 *Eliz. c.* 5, or at any time since founded, according to the intent of that statute, shall be incorporated and have perpetual succession, &c. *Stat.* 21 *Jac.* 1. *c.* 1. See title *Hospitals*; *Corporation*.

MAISURA, A house or mansion; a farm; from the Fr. *maison*. *MS. Antiq.*

MAJUS JUS, Is a writ or law proceeding in some customary manors, in order to a trial of right of land: and the entry in the old books is thus: *Ad hanc curiam venit* A. B. *in propria persona sua et dat Domino*, &c. *ad vidend. Rotul. Curiæ. Et petit inquirend' utrum ipse habeat* Majus jus, *in uno messuagio*, &c. *Et super hoc homag. dicunt*, &c. *Ex libro MS. Episcop. Heref. temp. Ed.* 3.

MAKE, *Facere*.] To perform or execute; as to *make his law*, is to perform that law which he hath formerly bound himself to: that is, to clear himself of an action commenced against him, by his oath, and the oaths of his neighbours. *Old Nat. Brev.* 161: *Kitchen*, 192. This ancient law seems to have been borrowed from the *Feudists*, who call those men that came to swear for another in this case *sacramentales*. See *Hotoman*. The formal words used by him that *made his law*, were commonly these, *Hear, O ye justices, that I do not owe this sum of money demanded, neither in all nor any part thereof, in manner and form declared. So help me God, and the contents of this book*. Hence probably, To make oath, is to take oath.

MAKE SERVICES AND CUSTOMS, To perform them. *Old Nat. Br.* 14.

MALA, A *male*, or *port-mail*, A bag to carry letters, &c. *Old N. B.* 14.

MALANDRINUS, A thief or pirate. *Walsing.* 388.

MALBERGE, *Mons placiti*, A hill where the people assembled at a court, like our assises; which by the *Scots* and *Irish* are called *Parley-hills*. *Du Cange*.

MALECREDITUS, One of bad credit, who is suspected, and not to be trusted. *Fleta, lib.* 1. *c.* 38.

MALEDICTION, *maledictio*.] A curse which was anciently annexed to donations of lands made to churches and religious houses, against those who should violate their rights. *Si quis autem (quod non optamus) hanc nostram donationem infringere temptaverit, perpessus sit gelidis glacierum flatibus et malignorum spirituum; terribiles tormentorum cruciatus evasisse non quiescat, nisi prius in regius pœnitentiæ gemitibus, et pura emendatione emendaverit. Chart. Reg. Athelstani Monast. de Wiltune, Anno* 933. And we read in a Charter of *William de Warren*, Earl of *Surry*: *Venientibus contra hæc et destruentibus ea, occurrat Deus in gladio iræ et furoris et vindictæ et* Maledictionis *æternæ*: *Servantibus autem hæc et defendentibus ea, occurrat Deus in pace, gratia et misericordia et salute eterna.* Amen, Amen, Amen.

MALESWORN, More accurately perhaps *Malsworn*; sometimes, more corruptly still, *Mainsworn*. In the North signifies forsworn. *Brownl.* 4: *Hob.* 8.

MALETENT, Is interpreted to be a toll for every sack of wool, by statute: Nothing from henceforth shall be taken for sacks of wool, by colour of Maletent, &c. *Stat.* 25 *Ed.* 1. *c.* 7.

MALFEASANCE; from the Fr. *malfaire, i. e.* to offend.] Is a doing of evil, or transgressing. 2 *Cro.* 266.

MALICE, Is a formal design of doing mischief to another; it differs from hatred. 2 *Inst.* 42. In murder, it is Malice makes the crime. See title *Homicide*.

MALICIOUS MISCHIEF; See *Mischief*.

MALIGNARE, To malign, to slander; it has been interpreted to maim; See *Leg. Hen.* 1. *cap.* 11.

MALIGNUS, i. e. *Diabolus*.

MALO GRATO, In spite; unwillingly. Hence the *French malgré*, and the old *English maugre*. *Libertatem ecclesiæ*, &c. malo grato *stabilierunt, i. e.* he being unwilling. *Mat. Paris*, 1245.

MALT. Bad Malt shall not be mingled with good, under penalties. Malt is to be three weeks in making and drying; except in *June*, *July* and *August*, and in those months not less than seventeen days; and half a peck of dust must be taken out of every quarter, by skreening, &c. before it shall be offered to sale, on pain of forfeiting 20*d. per* quarter. Where bad Malt is made, or bad Malt shall be mixed with good, a constable, by the direction of a Justice of Peace, may search for the same, and order it to be sold at a reasonable price, &c. *Stat.* 2 & 3 *Ed.* 6. *c.* 10. By *stat.* 12 *An. st.* 1. *c.* 2, No Malt shall be imported, on pain of forfeiting the same, and the value thereof. And by the same statute, a duty of 6*d.* a bushel is laid upon all Malt made in *England*; which duty is under the management of the Commissioners of Excise, and has been continued by *annual* acts ever since. An additional *perpetual Excise* was also imposed by several acts, which were all repealed by the Consolidation-Act, *Stat.* 27 *Geo.* 3. *c.* 13: and in lieu of them a duty of 9½*d.* was laid upon every bushel of Malt in *England*, and half as much in *Scotland*. See also *stats.* 33 *Geo.* 2. *c.* 7: 1 *Geo.* 3. *c.* 3: and this Dictionary, title *Taxes*.

Various regulations are made by statute to enforce the payment, and to avoid the evasion, of these duties.

Maltsters are, once a month, to make an entry at the Excise Office of all Malt made, under the penalty of 10*l.* and to pay the duty in three months, or forfeit double value: and if any maltsters alter their steeping vessels without giving notice, or shall use any private cistern, they shall forfeit 50*l.* Also concealing Malt from the

sight

sight of the gauger, is liable to a penalty of 10*s.* per bushel; and wetting barley any where but in the cistern, incurs a forfeiture of 2*s.* 6*d.* a bushel, &c. But Justices of Peace have power to mitigate the penalties and forfeitures. *Stat.* 12 *Ann. st.* 1. *c.* 2. See also *Stats.* 1 *Geo* 1. *st.* 2. *c.* 2: 12 *Geo.* 1. *c.* 28: 2 *Geo.* 2. *c.* 1: 33 *Geo* 2. *c* 7: 1 *Geo.* 3. *c.* 3: 3 *Geo.* 3. *c.* 13. Malt made for exportation is discharged from duty; yet must be entered, and kept secrete (separate) from other Malt, on pain of 50*l.* and when made shall be put into storehouses with two locks, and not delivered out without presence of an officer, &c. *Stat.* 12 *Geo.* 1. *c.* 4: and see *stats.* 33 *Geo.* 2. *c.* 7: 1 *Geo.* 3. *c.* 3. Every maltster is to take out a licence, and pay for the same from 5*s.* to 3*l.* in proportion to the quantity of Malt made by him. *Stat.* 24 *Geo.* 3. *c.* 41.

Obstructing any Officer of Excise in the execution of his duty, incurs a penalty of 10*l.* *Stat* 1 *Geo.* 1. *st.* 2. *c.* 2.

MALT-MULNA, A quern or malt-mill. *Mat. Paris's Lives of the Abbots of St. Albans*, &c.

MALT-SHOT, *Malt-shot*, Some payment for making Malt. *Somner of Gravelkind, p.* 27.

MALVEILLES, from Fr. *malvoillance.*] Is used in our ancient records, for crimes and misdemeanors, or malicious practices. *Record.* 4 *Ed.* 3.

MALVEISA, A warlike engine to batter and beat down walls. *Matt. Paris.*

MALVEISIN. Fr. *mauvais voisin, malus vicinus.*] An ill neighbour.

MALVEIS PROCURORS, Are understood to be such as use to pack Juries, by the nomination of either party in a cause, or other practice. *Artic. super Chart. cap.* 10.

MALUM IN SE, Our Law-books make a distinction between *malum in se* and *malum prohibitum. Vaugh.* 332. All offences at Common Law generally are *mala in se*; but playing at unlawful games, and frequenting of taverns, &c. are only *mala prohibita* to some persons, and at certain times, and not *mala in se.* 2 *Rol. Abr.* 355: See 1 *Comm. Introd.* § 2. and *Christian*'s notes there.

MAN, Isle of. An Island off the coast of *Cumberland, Westmorland,* and *Lancashire,* in the Channel that parts *Ireland* from *England.*

This Island was a distinct territory from *England*, and out of the power of our Chancery, or of original writs which issue from thence. And in the case of the Earl of *Derby*, it was adjudged, that no man had any inheritance in this Isle, but the Earl and the Bishop; and that they are governed by laws of their own, so that no statute made in *England* did bind there without express words, in the same manner as in *Ireland*, 1 *Inst.* 9: 4 *Inst.* 284: 7 *Rep.* 21: 2 *And.* 115.

According to *Blackstone*, it seems that this distinction is still preserved; he states that it *is* a distinct territory from *England*, and *is not* governed by our laws; neither *doth* any Act of Parliament extend to it, unless it be particularly named therein; and then an Act of Parliament is binding there. 1 *Comm.* 105: *Introd.* § 4: cites 4 *Inst.* 284: 2 *And.* 116.

It was formerly a subordinate feudatory kingdom, subject to the Kings of *Norway*; then to King *John* and *Henry* III. of *England*; afterward to the Kings of *Scotland*; and then again to the Crown of *England*: and at length we find King *Henry* IV. claiming the Island by right of conquest, and disposing of it to the Earl of *Northumberland*, upon whose attainder it was granted (by the name of the Lordship of *Man*) to Sir *John de Stanley*, by letters patent, 7 *Hen.* 4. In his lineal descendants it continued for eight generations, till the death of *Ferdinando*, Earl of *Derby, A. D.* 1594; when a controversy arose concerning the inheritance thereof, between his daughters and *William* his surviving brother; upon which, and a doubt that was started concerning the validity of the original patent, the Island was seized into Queen *Elizabeth*'s hands, and afterwards various grants were made of it by King *James* I. All which being expired or surrendered, it was granted afresh in 7 *Jac.* 1. to *William* Earl of *Derby* and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by Act of Parliament, with a restraint of the power of alienation by the said Earl and his issue male. On the death of *James* Earl of *Derby, A. D.* 1735, the male line of Earl *William* failing, the Duke of *Athol* succeeded to the Island, as heir-general by a female branch. In the mean time, though the title of *King* had long been disused, the Earls of *Derby*, as Lords of *Man*, had maintained a sort of royal authority therein, by assenting to or dissenting from laws, and exercising an appellate jurisdiction; yet though no *English* writ or process from the Courts of *Westminster* was of any authority in *Man*, an appeal lay from a decree of the Lord of the Island, to the King of *Great Britain* in council. 1 *P. Wms.* 329. But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue, (it affording a commodious asylum for debtors, outlaws, and smugglers,) authority was given to the Treasury, by *stat.* 12 *Geo.* 1. *c.* 28, to purchase the interest of the then proprietors for the use of the Crown; which purchase was at length completed in the year 1765, and confirmed by *stats.* 5 *Geo.* 3. *cc.* 26, 39. the first of which is called the Vesting Act, the latter the Regulating Act; whereby, in consideration of the sum of 70,000*l.* the whole Island and all its dependencies so granted as aforesaid, (except the landed property of the *Athol* family, their manerial rights and emoluments, and the patronage of the bishopric, and other ecclesiastical benefices,) are unalienably vested in the Crown, and subjected to the regulations of the *British* Excise and Customs. 1 *Comm. Introd.* § 4. *p.* 104, 6: See also *stats.* 5 *Geo.* 3. *cc.* 30, 43.

The bishopric of *Man*, or *Sodor*, or *Sodor* and *Man*, was formerly within the province of *Canterbury*, but annexed to that of *York*, by *stat.* 33 *H.* 8. *c.* 31.

The *stat.* 6 *Geo.* 3. *c.* 50, extends the *stat.* 29 *Car.* 2, relating to taking affidavits in the country, to the *Isle of Man*, and empowers the King to appoint ports therein for landing and shipping goods. The *stat.* 7 *Geo.* 3. *c.* 45, encourages and regulates the trade and manufactures of *Man. Stat.* 11 *Geo.* 3. *c.* 52, provides for repairing its harbours; and *stat.* 12 *Geo.* 3. *c.* 58, was passed for encouraging the herring-fishery there.

For further particulars relative to the Isle of *Man*, see *Com. Dig.* title *Navigation* (F 2.).

MANA, An old woman. *Gerv. of Tilb. cap.* 95.

MANAGIUM, from the Fr. *manage* or *manance*, a dwelling or inhabiting.] Is a mansion-house or dwelling-place.—*Concessi capitale* managium *meum cum pertinentiis*, &c. *Mon. Angl. tom.* 2, *p.* 82: *Blount*: *Cowell*

MANBOTE,

MANBOTE, *Sax.*] A compensation or recompence for *homicide*; particularly due to the lord for killing his man or vassal. *Spelm. de Conc. vol* 1. *pag.* 622. See *Lambard* in his *Explication of Saxon Words*, verbo *Æstimatio*, and *Hoveden, in parte posterior annal. suor. fol.* 344. and this Dictionary, title *Bote*.

MANCA, Was a square piece of gold coin, commonly valued at thirty pence; and *mancusa* was as much as a mark of silver, having its name from *manu-cusa*, being coined with the hand *Leg. Canut.* But the *manca* and *mancusa* were not always of that value; for sometimes the former was valued at six shillings, and the latter, as used by the *English Saxons*, was equal in value to our half-crown. Manca *sex solidis æstimetur. Leg. H.* 1 *c.* 69 *Thorn* in his Chronicle says, Mancusa *est pondus duorum solidorum & sex denariorum*; and with him agrees *Du Cange*, who says that twenty *mancæ* make fifty shillings. *Manca* and *mancusa* are promiscuously used in the old books for the same money. *Spelm.*

MANCH, Is sixty shekels of silver, or seven pounds and ten shillings; and one hundred shekels of gold, or seventy-five pounds. *Merch. Dict.*

MANCHESTER, Its collegiate church, how visitable. *Stat.* 2 *Geo.* 2. *c.* 29.

MANCIPLE, *manceps*] A Clerk of the kitchen, or caterer; an officer in the *Inner Temple* was anciently so called, who is now the steward there, of whom *Chaucer*, our ancient poet, sometime a student of that house, thus writes:

A Manciple there was within the Temple,
Of which all catours might take ensample.

This officer still remains in colleges, in the universities. *Cowell.*

MANDAMUS.

A Prerogative Writ, introduced to prevent disorder from a failure of justice and defect of police; and therefore ought to be used on all occasions where the law has established no specific remedy; and where in justice and good government there ought to be one. 3 *Burr.* 1265: See 1 *Black. Rep.* 352, 552: *Cowp.* 378.

This writ is granted to prevent failure of justice, and for the execution of the Common Law, or of a statute, or of the King's charter; but not as a private remedy to the party: unless in case of a member or officer of a corporation; if deprived of his office or franchise without sufficient cause, to whom this remedy by *Mandamus* is given, by *stat.* 9 *Ann. c.* 20: (see *post*) *Hardw.* 99.

A Writ of *Mandamus* (considered as a remedy for the refusal or neglect of Justice) is, in general, a *command*, issuing in the King's name from the Court of King's Bench, and directed to any Person, Corporation, or inferior Court of Judicature, within the King's dominions; requiring to do some *particular* thing therein specified, which appertains to their office and duty; and which the Court of King's Bench has previously determined, or at least supposes to be consonant to right and justice. 3 *Comm. c.* 7. *p.* 110.

It is a high prerogative writ of a most extensive remedial nature, and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office; but it issues in all cases where the party hath a right to have any thing done, and hath no other specific means of compelling its performance. A *Mandamus*, therefore, lies to compel the admission or restoration of the party applying, to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, &c. It lies for the production, inspection, or delivery of public books and papers; for the surrender of the regalia of a Corporation; to oblige Bodies Corporate to affix their common seal; to compel the holding of a Court; and for an infinite number of other purposes, which it is impossible to recite minutely. But on this part of the subject it is to be particularly remarked, that it issues to the Judges of any inferior Court, commanding them to do justice according to the powers of their office, wherever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the Crown or Legislature have invested them; and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice. A *Mandamus* may therefore be had to the Courts of the city of *London* to enter up Judgment, (*Raym.* 214:) to the Spiritual Courts to grant an administration, to swear a churchwarden, and the like. 3 *Comm.* 110.

This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below; whereupon, in order more fully to satisfy the Court that there is a probable ground for such interposition, a rule is made, (except in some general cases where the probable ground is manifest,) directing the party complained of to show cause why a writ of *Mandamus* should not issue: and if he shows no sufficient cause, the writ itself is issued at first in the alternative either to do thus, or signify some reason to the contrary; to which a return or answer must be made at a certain day; and if the inferior Judge or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place *a peremptory Mandamus*, to do the thing absolutely, to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior Judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But if he at the first returns a sufficient cause, although it should be false in fact, the Court of King's Bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no farther on the *Mandamus*. But then the party injured may have an action against him for his false return; and (if found to be false by the Jury) shall recover damages equivalent to the injury sustained; together with a *peremptory* Mandamus to the defendant to do his duty. 3 *Comm.* 111.

This writ of *Mandamus* is also (as has already been hinted) made, by *stat.* 9 *Ann c.* 20, a most full and effectual remedy, in the first place, for refusal of admission where a person is entitled to an office or place in any corporation. and secondly, for wrongful renewal when a person is legally possessed. There are injuries, for which, though redress for the party interested may be had by assise or other means, yet as the franchises concern the Public, and may affect the administration of justice, this prerogative writ also issues from the Court of King's Bench,

Bench, commanding, upon good cause shown to the Court, the party complaining to be admitted or restored to his office. And the statute requires that a return be immediately made to the first writ of *Mandamus*; which return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue or demur, and the same proceedings may be had as if an action on the case had been brought for making a false return: and after judgment obtained for the prosecutor he shall have a peremptory writ of *Mandamus* to compel his admission or restitution: which latter, in case of an action, is effected by a writ of restitution. 11 *Rep.* 79. So that now the writ of *Mandamus*, in cases within this statute, is in the nature of an action; whereupon the party applying and succeeding may be entitled to costs in case it be the franchise of a citizen, burgess, or freeman. *Stat.* 12 *Geo.* 3. *c.* 21. Also in general a writ of error may be had thereupon. 1 *P. Wms.* 351: 3*Comm. c.* 17. *p.* 265.

This writ of *Mandamus* may also be issued in pursuance of *stat.* 11 *Geo.* 1. *c.* 4, in case within the regular time no election shall be made of the Mayor or other chief officer of any city, borough, or town-corporate; or being made it shall afterwards become void; requiring the electors to proceed to election, and proper Courts to be held for admitting and swearing in the magistrates so respectively chosen. 3 *Comm.* 265.

This is a writ of right, which the superior Court is obliged to issue, in the ordinary form, without imposing any terms on him who demands it. 3 *New Abr.*

But though it be a writ of right, yet the Court seldom grants it, without giving the party to whom it is prayed, a day to shew cause why it should not issue; also such matter must be laid before the Court, by which it may appear, that the party is entitled to it. 3 *New Abr.* And though the Court of King's Bench be intrusted with this jurisdiction of issuing out writs of *Mandamus*, yet they are not obliged to do so in all cases wherein it may seem proper, but herein may exercise a discretionary power, as well in refusing as granting such writ; as where the end of it is merely to try a private right; where the granting it would be attended with manifest hardships and difficulties, &c. So even since the statute 11 *Geo.* 1. *c.* 4, for obliging corporations to elect officers, it hath been held, that this Court hath a discretionary power of refusing a writ for that purpose, but may first receive information about the election, and, if dissatisfied about the right, may send the parties to try it in an information. 2 *Stra.* 1003. *The King* v. *Mayor and Burgesses of Tintagel in Cornwall.*

A *Mandamus* lies to restore a mayor, alderman, or capital burgess of a corporation; a recorder, town-clerk, attorney turned out of an inferior Court, steward of a Court, constable, &c. 11 *Rep.* 99: *Raym.* 153: 1 *Keb.* 549: 2 *Nels. Abr.* 1148, 1149.

By some opinions it doth not lie, to restore a Common Council-man. 2 *Cro.* 540. But see 1 *Vent.* 302. A *Mandamus* may be had to restore a freeman; and also to admit one to the freedom of the city, having served an apprenticeship. *Sid* 107. To restore a fellow of the College of Physicians, it lies; though not for a fellow of a college in the universities, if there is a visitor. 1 *Lev.* 19, 23.

It hath been resolved, that a *Mandamus* shall not be granted to restore a fellow or member of any college of scholars or physic, because these are private foundations. *Carthew's Rep.* 92. This writ lieth not for the deputy of an office, &c. yet he who hath power to make such deputy, may have it: *Mod. C.* 18: 1 *Lev.* 306; and he may have it to admit his deputy. *Stra.* 893, 5. It lies not, generally, to elect a man into any office; nor for a clerk of a company, which is a private office; or to restore a barrister expelled a society; a proctor, &c. 2 *Lev.* 14, 18: 2 *Nels.* 1150, 1151. But a *Mandamus* may lie to remove persons as well as restore them; by virtue of any particular statute, or breach thereof. 4 *Mod.* 233.

If Justices of Peace refuse to admit one to take the oaths, to qualify himself for any place, &c. *Mandamus* lies; so to a bishop or archdeacon, to swear a churchwarden; to grant a probate of a will, and to admit an executor to prove a will, or an administrator; to a rector, vicar, or churchwarden, to restore a sexton. *Wood's Inst.* 568. *Mandamus* lieth to admit a man to take the oath of allegiance, &c. and subscribe according to the act of toleration, in order to be qualified to be a dissenting minister. *Mod. Cas.* 310. Also a *Mandamus* will lie to the bishop, to grant a licence for a parson to preach, where it is denied, and he is in orders for it: and this writ lies to restore a person to university degrees. 2 *Ld. Raym.* 1206, 1334. But after a man is restored on a peremptory *Mandamus*, he may be displaced again, for the same matters for which he was before removed, and others. *Ib.* 1283.

The general jurisdiction and superintendancy of the King's Bench, over all inferior Courts, to restrain them within their bounds, and to compel them to execute their jurisdiction, whether such jurisdiction arises from a modern charter, subsists by custom, or is created by act of parliament, yet, being *in subsidium justitiæ*, is now exercised in a vast variety of instances. But though these kind of writs are daily awarded to Judges of Courts, to give judgment, or to proceed in the execution of their authority, yet they are never granted to aid a jurisdiction, but only to enforce the execution of it; nor are they ever granted where there is another proper remedy. *Dict.*

To enumerate, with any degree of particularity, the various offices and situations to which a person may be admitted or restored by this writ, would take up more space than the nature of our work allows. The following however is a summary of so general a nature as, with what has already been said, may give an idea of the extensive use and nature of this remedy. It has been granted to admit and restore, a Mayor, Alderman, Jurat, Common Council-man, Recorder, High Steward, Town Clerk, Livery-man, Member of the Court of Assistants, Burgess, Bailiff, Serjeant, or Freeman of a Company or a Corporation; and it lies where the persons complaining have the right, though they never had the possession; and to admit one in reversion after the death of another. It lies for any ancient office, being a freehold, and for every public officer who has no other remedy to be restored, as Steward of a Court Leet or Court Baron, Attorney of any Court, Treasurer of a Public Company, Scavenger, Clerk of the Peace, Master or Fellow of a College where no visitor is appointed, Chaplain, Fellow of the College of Physicians, Master, Under-Master or Usher of a School, Registrar or Deputy-Registrar in the Ecclesiastical Court, Sexton or Parish Clerk,

Clerk, Clerk to Commiſſioners of Land Tax, Ale-taſter, Director of a chartered Company, Prebendary, Conſtable, Churchwarden, Overſeer, Surveyor of the Highways, Diſſenting Miniſter, Teacher and Paſtor, Curate, *&c. &c.* See *Com. Dig.* title *Mandamus* (A).

A *Mandamus* will be granted to inferior juriſdictions of all kinds, to compel them to do their duty; as to a Lord, to hold a Court Baron; to a Steward and Homage of a Manor, to hold Courts; to enforce the attendance of tenants of a Manor to make a Court; to Juſtices of Peace, to grant warrants, make rates, ſwear officers, *&c.* See *Com. Dig. ub. ſup.*

Two writs of *Mandamus* may be granted on the application of different parties for the ſame election. *Hardw.* 178. But the Court will not grant croſs or concurrent writs with at ſpecial reaſons. 2 *Burr.* 782.

On applications for a *Mandamus* to be reſtored, the party applying muſt ſhew that he has complied with all the requiſites, to give him a *primâ facie* title; becauſe, if properly admitted, he may bring an action for money had and received for the profits 3 *Term Rep.* 578.

Although the caſes are ſo various and numerous in which writs of *Mandamus* have been granted, yet the inſtances in which they have been refuſed are almoſt equal in number; and the caſes are ſometimes contradictory, particularly as relates to Fellows of Colleges, and ſome other conteſted caſes; which, in fact, have frequently been governed by ſo many private circumſtances as ſcarcely to afford precedents.

One general rule is, that a *Mandamus* does not lie for a *private* office, as Steward of a Court Baron, Proctor in the Spiritual Court, Clerk of a private Company in *London*, on the ground generally of a private juriſdiction over ſuch officers. It does not lie to any of the Inns of Court to compel them to admit a perſon to the bar; the only appeal in this caſe being to the twelve Judges. It lies to a viſitor of a college only, under ſpecial circumſtances, as to hear an appeal and give *ſome* judgment. It does not lie for an office not known, unleſs it be ſpecially deſcribed. See *Com. Dig.* title *Mandamus* (B).

It does not lie to reſtore a perſon where it is confeſſed he was *rightly* removed, though he had no notice at the time to appear and defend himſelf. *Cowp.* 523. Nor to reſtore to an office, though the party was irregularly ſuſpended; if it appear by his own ſhowing that there was good ground for the ſuſpenſion if the proceedings had been regular. 2 *Term Rep.* 177. If a rule to ſhow cauſe is obtained, and it appears in affidavits that the caſe was not proper for a *Mandamus*, the Court may diſcharge the rule with coſts. 1 *Term Rep.* 396.

Where an action will lie for a complete ſatisfaction equivalent to a ſpecific relief, a *Mandamus* will not lie. It will therefore not be granted againſt the Bank to transfer ſtock, becauſe a ſpecial action of aſſumpſit will lie. *Dougl.* 526, (508).

If an election is doubtful, it ſhould be tried by information in the nature of a *Quo Warranto*, not on *Mandamus.* 3 *Burr.* 1452.

A writ of *Mandamus* may not be directed to one perſon, or to a Mayor and Aldermen, *&c.* to command another to do any act; it muſt be directed to thoſe only who are to do the thing required, and obey the writ. 2 *Salk.* 446, 701. Under *ſtat.* 11 *Geo.* 1. *c.* 4, it may be granted to proceed to the election of any *annual* officer, as well as of the Mayor or head officer. 2 *Term Rep.* 732. This writ is not to be teſted before granted by the Court; and if the corporation to which the *Mandamus* is ſent, be above forty miles from *London*, there ſhall be fifteen days between the day of the teſte and the return of the firſt writ of *Mandamus*; taking both days incluſive; but if but forty miles, or under, eight days only; and the *alias* and *pluries* may be made returnable *immediatè*: alſo at the return of the *pluries*, if no return be made, and there is affidavit of the ſervice, attachment ſhall go forth for the contempt, without hearing counſel to excuſe it. 2 *Salk.* 434: *Stra.* 407.

A motion was made for an attachment, for not returning an *alias Mandamus*; and, by *Holt*, Chief Juſtice, in caſe of a *Mandamus* out of Chancery, no attachment lies till the *pluries*, for that is in nature of an action to recover damages for the delay; but upon a *Mandamus* out of *B R.* the firſt writ ought to be returned, though an attachment is not granted without a peremptory rule to return the writ, and then it goes for the contempt, *&c.* 2 *Salk.* 429.

There is to be judgment upon the return of the writ, before any action on the caſe can be brought for a falſe return of a *Mandamus.* 2 *Lev.* 238. Returns upon writs of *Mandamus* muſt be certain for the Court to judge upon. 11 *Rep.* 99, and muſt be made by thoſe to whom the writ is directed. See *Com. Dig.* title *Mandamus* (D).

If the return conſiſts of ſeveral independent matters not inconſiſtent with each other, but part of them good in law and part bad; the Court may quaſh the return as to ſuch part only as is bad, and put the proſecutor to plead to or traverſe the reſt. 2 *Term Rep.* 456.

A caſe has happened, and others of the like kind may happen, where an action could not be brought, nor the return pleaded to, or traverſed under the ſtatute 9 *Ann. c.* 20. In ſuch caſe it may perhaps be adviſeable to move the Court of King's Bench, for an information againſt the perſon or perſons making a falſe return, or ſuch a return as will lay the party, who moved for the *Mandamus*, under the dilemma mentioned above. *Rex* v. *Pettiward et al. Juſtices of Peace for Surry.* 4 *Burr.* 2452.

It has been held, that ſeveral perſons cannot have one *Mandamus*; nor can ſeveral join in an action on the caſe for a falſe return. 2 *Salk.* 433. But there has been an inſtance to the contrary, where the circumſtances of the caſe were ſuch, that it required a variety of perſons to join in the application, *viz.* on the highway act, to compel the Juſtices to nominate a ſurveyor out of the liſt returned by the inhabitants. 4 *Burr.* 2452. For further matter on this ſubject ſee *Vin. Abr.* and *Com. Dig.* title *Mandamus*; and alſo this Dictionary, title *Quo Warranto.*

MANDAMUS, Was alſo a writ that lay after the year and day, (where in the mean time the writ, called *diem clauſit extremum*, had not been ſent out) to the Eſcheator, on the death of the King's tenant *in capite*, &c. commanding him to enquire of what lands holden by knight's ſervice, the tenant died ſeized. *F. N. B.* 561: *Dy.* 209. *pl.* 19: 248. *pl.* 81: *Lamb.* 36.

Mandamus was likewiſe a writ or charge to the Sheriff, to take into the hands of the King all the lands and tenements of the King's widow, that againſt her oath formerly given, marrieth without the King's conſent. *Reg. fo.* 295.

MANDATARY, *Mandatarius.*] He to whom a charge or commandment is given. Also he that obtains a benefice by *Mandamus.*

MANDATE, *Mandatum.*] A commandment judicial of the King or his Justices to have any thing done for dispatch of justice: whereof there is great variety in the table of the *Register Judicial*; *verbo Mandatum.* The Bishop of *Durham's* Mandates to the Sheriffs are mentioned in *stat.* 31 *Eliz. c.* 9. *Cowell. edit.* 1727.

MANDATI DIES. *Mandie* or *Maunday Thursday*; the day before *Good Friday*, when they commemorate and practice the commands of our Saviour in washing the feet of the poor, *&c.* And our Kings of *England*, to shew their humility, long executed the ancient custom on that day, of washing the feet of poor men, in number equal to the years of their reign, and giving them shoes, stockings, and money.

MANDATO, PANES DE; Loaves of bread given to the poor upon *Maunday Thursday. Chartular Glaston. MS. fol.* 29.

MANENTES, Was anciently used for *tenentes* or tenants; *qui in solo alieno manent*; and it was not lawful for them or their children, to depart without leave of the Lord. *Concil. Synodal. apud Cloversho. anno* 822.

MANGONARE, To buy in the market. *Leg. Æthelred. c* 24.

MANGONELLUS, A warlike instrument made to cast small stones against the walls of a castle. *Cowell.*

It differs from a *petrard* as follows, *viz.*

Interea grossos petraria *mittit ad intus*
Assidue lapides mangonellus *que minores.*

Vide *Spelm Gloss. voc. Manga, Manganum.*

MANIPULUS, An handkerchief which priests always had in their left hands. *Blount.*

MANNER, from the Fr. *manier*, or *mainer*, i. e. *manu tractare.*] To be taken with the Manner, is where a thief having stolen any thing, is taken with the same about him, as it were in his hands; which is called *flagrante delicto. S. P. C.* 179. See *Mainour.*

MANNING, *manopera.*] A day's work of a man; and in ancient deeds there were sometimes reserved so much rent, and so many *mannings.*

MANNIRE, To cite any one to appear in court, and stand to judgment there: it is different from *bannire*; for though both of them signify a citation, one is by the adverse party, and the other by the Judge. *Leg. H.* 1. *c.* 10. *Du Cange.*

MANNOPUS, *manopera.*] Goods taken in the hands of an apprehended thief. *Cowell.*

MANNUS, A horse, a pad or saddle horse. In the laws of *Alfred*, we find *man' theof*, for a horse-stealer. *Cowell.* See *Mantheof.*

MANOR, *manerium.*] Seems to be derived of the Fr. *manoir*, *habitatio*, or rather from *manendo*, of abiding there, because the Lord did usually reside there. It is called *manerium*, *quasi manurium*, because it is laboured by handy work: it is a noble sort of fee, granted partly to tenants for certain services to be performed, and partly reserved to the use of the Lord's family, with jurisdiction over his tenants for their farms. That which was granted out to tenants, we call *tenementales*; those reserved to the Lord, were *dominicales*: the whole fee was termed a Lordship, of old a Barony; from whence the Court, that is always an appendant to the Manor, is called *The Court-baron.* See *Skene de verb. signif.*

Touching the original of Manors, it seems that in the beginning, there was a circuit of ground, granted by the King to some Baron or man of worth, for him and his heirs to dwell upon, and to exercise some jurisdiction more or less within that compass, as he thought good to grant; performing such services, and paying such yearly rent for the same, as he by his grant required; and that afterwards this great man parcelled his land to other meaner men, enjoining them such services and rents as he thought good, and so, as he became tenant to the King, the inferiors became tenants to him. See *Perkin's Reservations*, 670: *Horne's Mirror of Justices, lib.* 1. *cap. de Roy Alfred*; *Fulbeck, fol.* 18. And according to this our custom, all lands holden in fee throughout *France* were divided into *fiefs* and *arriere fiefs*, whereof the former were such as were immediately granted by the King; the second such as the King's *feudatories* did grant to others. *Gregorii Syntagm. lib.* 6. *c.* 5. *num.* 3.

In these days, a Manor rather signifieth the jurisdiction and royalty incorporeal, than the land or site. For a man may have a Manor in gross, (as the law termeth it) that is, the right and interest of a court-baron, with the perquisites thereunto belonging, and another or others have every foot of the land. *Kitchen, fol.* 4. *Broke, hoc titulo per totum. Bracton, lib.* 4. *cap.* 31. *n.* 3, divideth *Manerium* into *capitale & non capitale.* See *Fee.*

A Manor may be compounded of divers things, as of a house, arable land, pasture, meadow, wood, rent, advowson, court-baron, and such like; and this ought to be by long continuance of time beyond the memory of man; for at this day a Manor cannot be made, because a court-baron cannot now be made, and a Manor cannot be without a court-baron, and suitors or freeholders, two at the least; for if all the freeholds except one escheat to the Lord, or if he purchase all except one, there his Manor is gone *causâ quâ supra*, although in common speech it may be so called. *Cowell. Vide Co. Lit.* 58, 108; *Lit.* 73: 2 *Rol. Abr.* 121.

By a grant of the demesnes and services, the Manor passeth: and by grant and render of the demesnes only, the Manor is destroyed, because the services and demesnes are thereby severed by the act of the party; though it is otherwise, if by act of law, as by partition. 6 *Rep.* 63. There are two coparceners of a Manor; the demesnes are assigned to one, and the services to the other, the Manor is gone; but if one die without issue, and the Manor descends to her who had the services, the Manor is revived again, for the severance was by act in law. 1 *Inst.* 122: 8 *Rep.* 79: 3 *Salk.* 25, 40.

A new Manor may arise and revive by operation of law. 1 *Leon.* 204.

It may contain one or more villages or hamlets; or only great part of a village, *&c.* And there are capital Manors, or Honours, which have other Manors under them, the Lords whereof perform customs and services to the superior Lords. 2 *Inst.* 67: 2 *Rol. Abr.* 72. See title *Honour.* There may be also customary Manors, granted by copy of court-roll, and held of other Manors. 4 *Rep.* 26: 11 *Rep.* 17. But it cannot be a Manor in law, if it wanteth freehold tenants; nor be a customary Manor, without copyhold tenants. 1 *Inst.* 58: *Lit.* 73: 2 *Rol. Abr.* 121. But it is said, if there be but one freehold

freehold tenant, the seigniory continues between the Lord and that one tenant. 1 *And.* 257: 1 *Nelf. Abr.* 524. The custom remains, where tenements are divided from the rest of the manor, the tenants paying their services: and he who hath the freehold of them, may keep a court of survey, &c. *Cro. Eliz.* 103. See title *Copyhold.*

MANORS, says *Blackstone*, are in substance as antient as the *Saxon* Constitution, though perhaps differing a little in some immaterial circumstances from those that exist at this day. *Co. Cop.* § 2, 10.

The *tenemental* lands of ancient Manors were, from the different modes of tenure, distinguished by two different names. First, *book land*, or charter-land, which was held by deed under certain rents and free-services, and in effect differed nothing from free socage lands. *Co. Cop.* § 3. And from hence have arisen most of the freehold tenants who hold of particular Manors, and owe suit and service to the same. The other species was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk, or people, at the pleasure of the Lord, and resumed at his discretion; being indeed land held in villenage. See this Dictionary, title *Villenage*. The residue of the Manor being uncultivated, was termed the Lord's Waste, and served for public roads, and for common of pasture to the Lord and his tenants.

Manors were formerly called Baronies, as they still are Lordships; and each Lord or Baron was empowered to hold a domestic Court, called the Court-baron, for redressing misdemesnors and nusances within the Manor, and for settling disputes of property among the tenants. This Court is an inseparable ingredient of every Manor; and if the number of suitors should so fail as not to leave sufficient to make a Jury or Homage, that is, two tenants at the least, the Manor itself is lost.

In the early times of our legal constitution, the King's greater Barons, who had a large extent of territory held under the Crown, granted out frequently smaller Manors to inferior persons, to be holden of themselves, which do therefore now continue to be held under a superior Lord, who is called in such cases the Lord paramount over all these Manors: and his seignory is frequently termed an Honour, not a Manor, especially if it hath belonged to an antient feudal Baron, or hath been at any time in the hands of the Crown. (See this Dictionary, title *Honour.*) In imitation whereof, these inferior Lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*; till the superior Lords observed, that by this method of subinfeudation they lost all their feudal profits, of wardships, marriages, and escheats, which fell into the hands of these mesne or middle Lords, who were the immediate superiors of the *terre-tenant*, or him who occupied the land; and also that the mesne Lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the 32d *cap.* of *Magna Carta*, 9 *Hen.* 3; (which is not to be found in the first charter granted by that prince, nor in the Great Charter of King *John*;) that no man should either give or sell his land, without reserving sufficient to answer the demands of his Lord; and afterwards the statute of *Westm.* 3, or *quia emptores*, 18 *Ed.* 1. *c.* 1; which directs that upon all sales or feoffments of lands, the feoffee shall hold the same not of his immediate feoffor, but of the chief Lord of the fee of whom such feoffor himself held it. But these provisions not extending to the Kings own tenants *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 *E.* 2. *c.* 6: 34 *E.* 3. *c* 15; by which last all subinfeudations, previous to the reign of King *Edward* I. were confirmed: but all subsequent to that period were left open to the King's prerogative. (See this Dictionary, title *Tenures.*) From hence it is clear, that all Manors existing at this day, must have existed as early as King *Edward* I. for it is essential to a Manor, that there be tenants who hold of the Lord; and by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common Lord since the statute of *quia emptores*, could create any new tenants to hold of himself. 2 *Comm.* *c.* 6. *p.* 90—92.

MANSE, *mansa.*] An habitation, or farm and land. *Spelm.* See *Mansum.*

MANSER, A bastard. *Cowell.*

MANSION, *mansio*; *à manendo.*] Among the ancient *Romans*, was a place appointed for the lodging of the prince, or soldiers in their journey; and in this sense we read *primam mansionem*, &c. It is with us most commonly used for the Lord's chief dwelling-house within his fee; otherwise called the capital messuage, or manor-place. *Skene.*

Some say it is a dwelling of one or more houses without a neighbour: see *Bract. lib.* 5. *p.* 1: and mansion-house is taken in law for any house or dwelling of another; in cases of committing burglary, &c. 3 *Co. Inst.* 64.

The *Latin* word *mansia*, according to Sir *Edward Coke*, seems to be a certain quantity of land: *bida vel mansia*, and *mansa*, are mentioned in some old writers and charters. *Fleta, lib.* 6. And that which in ancient *Latin* authors was termed *bida*, was afterwards called *mansus*.

MANSLAUGHTER; See title *Homicide.*

MANSTEALING; See title *Kidnapping.*

MANSUM CAPITALE, The manor-house or *manse*, or court of the Lord. *Kennet's Antiq.* 150.

MANSURA AND MASURA, Are used in *Domesday* and other ancient records, for *Mansiones vel habitacula villicorum. Cowell.*

MANSUS, Anciently a farm. *Seld. of Tithes*, 62.

MANSUS PRESBYTERI, The *manse* or house of residence of the parish priest; being the parsonage or vicarage-house. *Paroch. Antiq.* 431.

MANTHEOF, from the Lat. *mannus*, a nag, and Sax. *theoff.* i. e. thief.] An horse-stealer. *Leg Alfred.* See *Mannus.*

MANTILE, A long robe; from the Fr. word *manteau*; mentioned in *stat.* 24 *H.* 8. *c.* 13.

MANUALIA BENEFICIA, Were the daily distributions of meat and drink to the canons and other members of cathedral churches, for their present subsistence. *Lib. Statutor. Eccles. Sancti Pauli London. MS.*

MANUALIS OBEDIENTIA, Is used for sworn obedience, or submission upon oath.

MANUCAPTIO, A writ that lies for a man taken on suspicion of felony, &c. who cannot be admitted to bail by the Sheriff, or others having power to let to mainprise. *F. N. B.* 249. See *Mainprise.*

MANUAL, *manualis.*] Signifies what is employed or used by the hand, and whereof a present profit may be made: as such a thing in the Manual occupation of one, is where it is actually used or employed by him. *Staundf. Prerog.* 54.

MANUFACTURES AND MANUFACTURERS. These are regulated by a vast variety of statutes adapted to the particular nature of each business, to which they are applied, to guard against the frauds and negligence of journeymen and workmen concerned therein. The following, here noticed, contain the most general provisions. For a reference to the several statutes relative to every particular branch, see this Dictionary under the several appropriate titles.

By *stat.* 3 *Edw.* 4. *c.* 4, the Masters and Wardens of every craft in every city, town, and village, and the Mayor or Bailiff of every such city, &c. are empowered to search at fairs and markets, shops open, and warehouses, all such wares pertaining to their proper crafts which shall be made within *England:* and if such wares be not lawful and duly wrought, to seize them as forfeit.

By *stat.* 1 *Ann. st.* 2. *c.* 18, made perpetual by *stat.* 9 *Ann. c.* 30, if any person employed in the working up the *woollen, linen, fustian, cotton,* or *iron* manufactures shall embezzle or purloin any materials which he shall be intrusted with to work, or if any person shall receive such embezzled materials, the offender shall forfeit double the value to the poor, or be committed to the House of Correction, and there whipped and kept to hard labour for fourteen days. This statute was further enforced by *stat.* 13 *Geo.* 2. *c.* 8, which made a second offence liable to a forfeiture of four times the value. These provisions were however found insufficient.

By *stats.* 22 *Geo.* 2. *c.* 27: 17 *Geo.* 3. *c.* 56, any person employed in working up any woollen, linen, silk, leather, or iron manufacture, who shall purloin, embezzle, secrete, sell, pawn, exchange, or unlawfully dispose of any of the materials, shall be committed to the House of Correction for not less than fourteen days, nor more than three months, and whipped; and for a second offence to be committed, for not less than three months nor more than six, and whipped. The receiver to forfeit from 40*l.* to 20*l.* or be whipped; and for a second offence from 100*l.* to 50*l.* or be whipped. These statutes also empower Justices to grant warrants to search for embezzled materials, and to seize them, giving an opportunity to owners to prove the property, and also to compel workmen entrusted with materials, to work up the same within eight days, and to prevent their engaging in more than one service at a time. The provisions in *stat.* 12 *Geo.* 1. *c.* 34, against unlawful clubs and societies of woolcombers, &c. to regulate the trade, are by the *stat.* 22 *Geo.* 2. *c.* 27, extended to dyers, hotpressers, hatmakers, and all journeymen in the manufactures of silk, mohair, fur, hemp, flax, linen, cotton, fustian, iron, or leather. The said *stat.* 17 *Geo.* 3. *c.* 56, also contains many other provisions against receivers of embezzled manufactures, and prohibits journeymen *dyers* in particular from receiving goods to dye without the consent of their employers.

By the said *stat.* 1 *Ann. st.* 2. *c.* 18, all payments to workmen in the manufactures therein mentioned, shall be by lawful coin, and not by cloth, victuals, or commodities; and this humane provision against oppression and injustice, is extended by *stat.* 13 *Geo.* 2. *c.* 8, to the manufacturers in leather; and by *stat.* 19 *Geo.* 3. *c.* 49, to the lace-manufacturers also.

By the said *stat.* 1 *Ann. st.* 2. *c.* 18, all wool delivered out to be wrought up shall be delivered with the declaration of the true weight; and all wages, demands, and defaults of labourers in the woollen, linen, fustian, cotton, and iron manufactures, shall be heard and determined by two Justices of Peace, with an appeal to the Quarter Sessions.

To prevent the destruction of our home manufactures, *by transporting and seducing our artists* to settle abroad, it is provided by *stat.* 5 *Geo.* 1. *c.* 27, that if any entice or seduce any artificer in wool, iron, steel, brass, or other metal, clockmaker, watchmaker, or other artificer, such seducer shall be fined 100*l.* and be imprisoned three months; and for the second offence shall be fined at discretion, and be imprisoned a year; and the artificers so going into foreign countries, and not returning, within six months after warning given them by the *British* Ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. By *stat.* 23 *Geo.* 2. *c.* 13, the seducers of the artists above specified, or of those in mohair, cotton, or silk, incur for the first offence a forfeiture of 500*l.* for each artificer contracted with to be sent abroad, and imprisonment for 12 months; and for the second 1000*l.* and are liable to two years imprisonment: and by the same statute, connected with *stat.* 14 *Geo.* 3. *c.* 71, if any person export any *tools* or *utensils* used in the silk, linen, cotton, or woollen manufactures; (except wool cards to *North America*, *stat.* 15 *Geo.* 3. *c.* 5;) he forfeits the same, and 200*l*; and the captain of the ship, having knowledge thereof, 100*l*: and if any captain of a King's ship, or officer of the Customs, knowingly suffers such exportation, he shall forfeit 100*l.* and his employment; and is for ever made incapable of bearing any public office; and every person collecting such tools or utensils in order to export the same, shall, on conviction at the assises, forfeit such tools, and also 200*l.* By *stat.* 21 *Geo.* 3. *c.* 37, if any person shall put on board any ship, not bound to any place in *Great Britain* or *Ireland*, or shall have in his custody, with intent to export, any engine, tool, or implement used in the woollen, cotton, linen, or silk manufactures, he shall forfeit the same, and also the sum of 200*l.* and shall be imprisoned 12 months, and till the forfeiture is paid. And every captain and Custom-house officer who shall knowingly receive such an article, or take an entry of it, shall forfeit 200*l.* By *stat.* 22 *Geo.* 3. *c.* 60, if any person shall entice or encourage any artificer employed in *printing callicoes*, cottons, muslins, or linens, to leave the kingdom, he shall forfeit 500*l.* and be imprisoned one year: and persons who export, or attempt to export, any engines or instruments used in that manufacture, shall forfeit 500*l*: and captains of ships and Custom-house officers conniving at these offences forfeit 100*l.* and become incapable of holding any office under the Crown. By *stats.* 25 *Geo.* 3. *c.* 67: 26 *Geo.* 3. *c.* 89, persons who attempt to export any instruments, specified by name in those acts, (the latter of which particularly regulates the exportation thereof to the *West Indies*,) shall forfeit 200*l.* and be imprisoned one year: and captains and Custom-house officers conniving at the offence are subject to the same penalty, and become incapable of exercising any public employment.

MANUMISSION, *manumissio.*] The freeing a villein or slave out of bondage; which was formerly done several ways: Some were *manumitted* by delivery to the sheriff, and proclamation in the county, *&c.* others by charter; one way of Manumission was for the lord to take the bondman by the head, and say, *I will that this man be free*, and then shoving him forward out of his *hands*. And there was a Manumission implied, when the lord made an obligation for payment of money to the bondman, or sued him where he might enter without suit, *&c.* The form of manumitting a person in the time of *Will.* 1. called *The Conqueror*, is thus set down.—*Si quis velit servum suum liberum facere, tradat eum vicecomiti per* manum *dextram, in pleno comitatu, et quietum illum clamare debet à jugo servitutis suæ per* manumissionem, *et ostendat ei liberas portas et vias, et tradat illi libera arma, scilicet lanceam et gladium, et deinde liber homo efficitur. Lamb. Archai.* 126. See title *Villeins.*

MANU OPERA, Stolen goods taken upon a thief, apprehended in the fact. See *Mannopus*; *Mainour.*

MANUOPERA, Cattle or any implements used to work in husbandry. *Mon. Angl. tom.* 1. *p.* 977: *Fleta.*

MANUPASTUS. A domestic. *Spelm. Leg. Hen.* 1. *c.* 66.

MANUPES, A foot of full and legal measure. *Cowell.*

TO MANURE, *colo, melioro.*] To till, plough, or *manure* land. *Lit. Dict.*

MANUS, Anciently used for the person taking an oath, as a compurgator. And it often occurs in old records; *Tertia, quarta, &c.* manu *jurare*; that is, *the party was to bring so many, to swear with him, that they believed what he vouched was true*: and in case of a woman accused of adultery; *Mulieri hoc neganti purgatio* sexta manu *extitit indicta*, i. e. she was to vindicate her reputation upon the testimony of six compurgators. *Reg. Eccl. Christ. Cant.* If a person swore alone, it was *propriâ* manu *et unicâ*. The use of this word came probably from laying the hand upon the New Testament, on taking the oath.

MANUS MEDIÆ & INFIMÆ HOMINES, Men of a mean condition, of the lowest degree. *Radulphus de Diceto sub annis* 1112, 1138, 1185.

MANUTENENTIA, The writ used in case of maintenance. *Reg. Orig. fol.* 182 & 189. See *Maintenance.*

MAN-WORTH, The price or value of a man's life, or head; for of old every man was rated at a certain price, according to his quality, which price was paid to the lord in satisfaction for killing him. *Cowell.* See *Manbote.*

MAPS AND PRINTS. See *Stat.* 8 *Geo.* 2. *c.* 13; & this Dictionary, title *Literary Property.*

MARA, A mere, lake, or great pond, that cannot be drawn dry. *Mon. Angl. tom.* 1. *p.* 666: *Par. Antiq.* 418.

MARCA; See *Mark.*

MARCATUS, The rent of a mark by the year, anciently reserved in leases, *&c. Et unum* marcatum *redditûs de, &c. Mon. Angl. tom.* 1. *p.* 341.

MARCH, Earldom of, grants of its lands are to be under the Great Seal. *Stat.* 4 *Hen.* 7. *c.* 14.

MARCHERS or LORDS MARCHERS, Were those noblemen that lived on the *Marches* of *Wales* or *Scotland*; who in times past (according to *Camden*) had their laws, and *potestatem vitæ, &c.* like petty Kings; which are abolished by *stat.* 27 *H.* 8. *c.* 26. See also *stat.* 1 *Ed.* 6. *c.* 10; and this Dictionary, title *Wales.* In old records the Lords *Marchers* of *Wales* were styled *Marchiones de Marchia Walliæ.*

MARCHES, *marchia*, from the Germ. *march*, i. e. *limes*; or from the Fr. *marque, signum*; being the notorious distinction between two countries, or territories.] The limits between *England* and *Wales*, or *Scotland*, when those were considered as enemies' countries; which last are divided into *West* and *Middle Marches.* See *stats.* 4 *Hen.* 5. *c.* 7: 22 *Ed.* 4. *c.* 8: 24 *Hen.* 8. *c.* 9. There was formerly a Court called the Court of the *Marches* of *Wales*, where pleas of debt or damages, not above the value of fifty pounds, were tried and determined; and if the Council of the *Marches* held plea for debts above that sum, *&c.* a prohibition might be awarded. *Cro. Car.* 384.

MARCHET, *marchetum.*] *Consuetudo pecuniaria, in mancipiorum filiabus maritandis. Bract. lib.* 2. *cap.* 8. This custom, with some variation, is observed in some parts of *England* and *Wales*, as also in *Scotland*, and the isle of *Guernsey*: and in the manor of *Dinevor*, in the county of *Carmarthen*, every tenant at the marriage of his daughter pays ten shillings to the lord, which in the *British* language is called *Gwabr Merched*, i. e. a maid's fee. The custom for the lord to lie the *first night* with the bride of his tenant was very common in *Scotland*, and the *North of England*; but it was abrogated by *Malcolm* the Third, at the instance of his Queen; and instead thereof a mark was paid to the lord by the bridegroom: from whence it is denominated *mercheta mulieris.* See titles *Maiden-Rents*; *Borough-English.*

MARCHIARE, To adjoin to, or border upon. *Cowell.*

MARCULUS, A hammer, a mallet. *Cowell.*

MARDEN, alias *Mawarden* in *Herefordshire*, its meadow and pasture, how provided for. *Stat.* 3 *Jac.* 1. *c.* 11.

MARES; See *Horses.*

MARESCHALL, or MARESHAL; See *Marshal.*

MARETUM, Fr. *maret*, a fen or marsh.] Marshy ground, overflowed by the sea or great rivers. *Co. Lit.* 5.

MARINARIUS, A mariner or seaman: and *marinariorum capitaneus* was the Admiral or warden of the ports; which offices were commonly united in the same person; the word Admiral not coming into use, till the latter end of the reign of King *Ed.* 1. before which time the King's letters ran thus:—*Rex capitaneo* marinariorum *et eisdem* marinariis salutem. *Paroch. Antiq.* 322. See title *Admiral.*—For the various regulations on the subject of Mariners, see this Dictionary, titles *Insurance*; *Navy*; *Seamen.* As to Mariners wandering up and down, see title *Vagrants.*

MARINE FORCES, While on shore are regulated and subjected to martial law by annual acts. See title *Soldiers.*

MARINE SOCIETY. The estate and property of the trustees of *Westminster Fish-market*, (see *stat.* 22 *Geo.* 2. *c.* 49,) vested in the *Marine Society. Stat.* 30 *Geo.* 3. *c.* 54.

MARISCUS, A marshy or fenny ground. *Domesday.*

MARITAGIO AMISSO PER DEFALTAM, A writ for the tenant in frank-marriage, to recover lands, *&c.* whereof he is deforced by another. *Reg. fol.* 171.

MARITAGIUM, That portion which is given with a daughter in marriage. See *Glanvil, lib.* 2. *c.* 18. As

a fruit of tenure, under which *Maritagium*, strictly taken, is that right which the lord of the fee had to dispose of the daughters of his vassals in marriage; See title *Tenure* II. 4: and title *Marriage*.

MARITAGIUM HABERE, To have the free disposal of an heiress in marriage; a favour granted by the Kings of *England*, while they had the custody of all wards or heirs in minority. *Cowell*. See title *Tenure*.

MARITIMA ANGLIÆ, The profit and emolument arising to the King from the sea, which anciently was collected by sheriffs; but it was afterwards granted to the Lord Admiral. *Ricardus de Lucy dicitur habere maritimam Angliæ*. *Pat.* 8 *H.* 3. *m.* 4.

MARK, *marca*, Sax. *mearc*.] Of silver, is now thirteen shillings and fourpence: though in the reign of *Hen.* 1. it was only six shillings and a penny in weight; and some were coined, and some only cut in small pieces; but those that were coined, were worth something more than the others. In former times, money was paid, and things valued oftentimes by the mark. We read of a mark of gold of eight ounces, of 6*l.* in silver; or as others write 6*l.* 13*s.* 4*d.* *Stow's Annal.* 32. *Rot. Mag. Pipæ, Ann.* 1 *Hen.* 2.

MARK TO GOODS, Is what ascertains the property or goodness thereof, &c. And if one man shall use the mark of another, to the intent to do him damage, upon injury proved, action upon the case lieth. 2 *Cro.* 471. The penalty of counterfeiting the marks on wax, appointed by *stat.* 23 *Eliz.* *c.* 8. is 5*l.* or pillory and imprisonment.

MARKET, *mercatus*; from *mercando*, buying and selling.] The liberty by grant or prescription, whereby a town is enabled to *set up and open shops*, &c. at a certain place therein, for buying and selling, and better provision of such victuals as the Subject wanteth; it is less than a fair; and usually kept once or twice a week. *Bract.* *lib.* 2. *cap.* 24: 1 *Inst.* 220.

The establishment of public marts, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging, is enumerated by *Blackstone* as one of the King's prerogatives. These can only be set up by virtue of the King's grant, or by long and immemorial usage and prescription, which presupposes such a grant. 2 *Inst.* 220.

According to *Bracton*, one Market ought to be distant from another, *sex leucas, vel milliar. et dimidiam, et tertiam partem dimidiæ*. If one hath a Market by charter or prescription, and another obtains a Market near it, to the nuisance of the former, the owner of the former may avoid it. 1 *Inst.* 406: *F. N. B.* 184: 2 *Ro. Ab.* 140 But in order to make this out to be a nusance, it is necessary —1. That the prosecutor's Market or Fair be the elder, otherwise the nuisance lies at his own door: 2. That the second Market be erected within the third part of 20 miles from the other; (*i. e.* as above expressed, six miles and a half, and one-third of half a mile:) for the *dieta*, or reasonable day's journey mentioned by *Bracton*, (*l.* 3. *c.* 16.) is construed by *Hale* to be 20 miles. See 2 *Inst.* 567. So that if the new Market be not within the distance abovementioned of the old one, it is no nusance; as it is held reasonable that every man should have a Market within one-third of a day's journey from his own house; that the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such Market or Fair be on the same day with the old one, it is *primâ facie* a nusance to that, and there needs no proof of it, but the law will intend it to be so; but if it be on another day, it *may be* a nusance, though whether it *is* so or not, cannot be intended or presumed, but must be proved to a Jury. 3 *Comm.* *c* 13. *p.* 218. Also where a man has a Fair or Market, and one erects another to his prejudice, an action will lie. *Rol.* 140: 1 *Mod.* 69.

The Fair or Market is taken for the place where kept: and formerly it was customary for Fairs and Markets to be kept on *Sundays*; but by *stat.* 27 *H.* 6. *c.* 5, no Fair or Market is to be kept upon any *Sunday*, or upon the feasts of the *Ascension*, *Corpus Christi*, *Good Friday*, *All Saints*, &c. except for necessary victuals, and in time of harvest: and they ought not to be held in church-yards, *stat.* 13 *Ed.* 1. *c.* 6. All Fairs are Markets: and there may be a Market without an owner; though where there is an owner, a butcher cannot prescribe to sell meat in his own house upon a Market-day; for the Market must be in an open place, where the owner may have the benefit of it. 4 *Inst.* 272. No Market shall be held out of the city of *London* within seven miles: though all butchers, victuallers, &c. may hire stalls and standings in the Markets there, and sell meat and provisions, on four days in a week, &c. *Cit. lib.* 101.

Property may, in some cases, be transferred by sale, though the vendor hath *none at all* in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must be soon at an end. The general rule of law, therefore, is, that all sales and contracts of any thing vendible in Fairs or Markets *overt*, (that is, open,) shall not only be good between the parties, but also binding on all those that have any right or property therein. 2 *Inst.* 713. And for this purpose the *Mirror* says, tolls were established, *viz.* to testify the making of contracts; for every private contract was discountenanced by law: insomuch that our *Saxon* ancestors prohibited the sale of any thing above the value of 20*d.* unless in open Market; and directed every bargain and sale to be made in the presence of credible witnesses. *Mirr.* *c.* 1. § 3: *Ll. Ethel.* 10. 12: *Ll. Eadg. Wilk.* 80. Market *overt* in the country is only held on the special days provided for particular towns by charter or prescription; but in *London* every day except *Sunday* is Market-day. *Cro. Jac.* 68. The Market-place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only Market *overt*. *Godb.* 131. But in *London* every shop in which goods are exposed publicly to sale, is Market *overt*; for such things only as the owner professes to trade in. 5 *Rep.* 83: 12 *Mod.* 521: though if the sale be in a warehouse, and not publicly in the shop, the property is not altered. 5 *Rep.* 83: *Moor*, 300. But if goods are stolen from one, and sold out of Market *overt*, the property is not altered, and the owner may take them wherever he finds them. And it is expressly provided by *stat.* 1 *Jac.* 1. *c.* 21, that the sale of any goods, wrongfully taken, to any pawn-broker in *London*, or within two miles thereof, shall not alter the property; for this being usually a clandestine trade, is therefore made an exception to the general rule. And even in Market *overt*, if the goods be the property of the King, such sale, though regular in all other respects,

will

will in no case bind him; though it binds infants, femes-covert, idiots or lunatics, and persons beyond sea, or in prison. 2 *Inst.* 713. If the goods be stolen from a common person, and then taken by the King's officer from the felon, and sold in open Market, still if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods. *Bac. Use of the Law*, 158. So likewise if the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme-covert not usually trading for herself; if the sale be not originally and wholly made in the Fair or Market, or not at the usual hours, the owner's property is not bound thereby. 2 *Inst.* 713, 4: 5 *Rep.* 83. If a man buys his own goods in a Fair or Market, the contract of sale shall not bind him, so that he shall render the price; unless the property had been previously altered by a former sale. *Perk.* § 93. And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice. 2 *Inst.* 713. But the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from any one who has purchased them, and sold them again, even with notice of the theft before the conviction. 2 *Term Rep.* 750. By these regulations the Common Law has secured the right of the proprietor in personal chattels from being divested, so far as is consistent with that other necessary policy, that purchasers *bona fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller. 2 *Comm.* 449, 450.

Persons that dwell in the country, may not sell wares by retail in a Market-town, but in open fairs: but countrymen may sell goods in gross there. *Stat.* 1 & 2 *P. & M. c.* 7.

All contracts for any thing vendible in Markets, &c. shall be binding, and sales alter the property, if made according to the following rules, *viz.* 1. The sale is to be in a place that is open, so that any one that passeth by may see it, and be in a proper place for such goods. 2. It must be an actual sale, for a valuable consideration. 3. The buyer is not to know that the seller hath a wrongful possession of the goods sold. 4. The sale must not be fraudulent, betwixt two, to bar a third person of his right. 5. There is to be a sale, and a contract, by persons able to contract. 6. The contract must be originally, and wholly, in the Market overt. 7. Toll ought to be paid, where required by statute, &c. 8. The sale is not to be in the night, [or on a *Sunday*,] but between sun and sun; (though if the sale be so made it may bind the parties.) A sale thus made shall bind the parties, and those that are strangers, who have a right. 5 *Rep.* 83.

The statutes which ordain, that toll-takers shall be appointed in Markets and Fairs, to enter in their books the names of the buyers, sellers, vouchers, and prices of horses sold, and deliver a note thereof to the buyer, &c. secure the property of stolen horses to the owner, although sold in a Fair or Market, if he repays what was *bonâ fide* paid for the horse. *Stats.* 2 & 3 *P. & M. c.* 7: 31 *Eliz. c.* 12. See title *Horses*.

Every one that hath a Market, shall have toll for things sold, which is to be paid by the buyer, and by ancient custom may be paid for standing of things in the Market, though nothing be sold; but not otherwise. A piepowder court is incident as well to a Market as a Fair; (see title *Court of Piepowders*;) and proprietors of Markets ought to have a pillory, and tumbrel, &c. to punish offenders. 1 *Inst.* 281: 2 *Inst.* 221; 4 *Inst.* 272. Keeping a Fair or Market, otherwise than it is granted, as by keeping them upon two days, when only one is granted; or on any other day than appointed; extorting toll or fees where none are due, &c. are causes of forfeiture. *Finch* 164. If a person erects stalls in a Market, and does not leave room for the people to stand and sell their wares, so that they are thereby forced to hire such stall, the taking money for the use of them, in that case, is extortion. 1 *Ld. Raym.* 149. See further titles *Fair*; *Clerk of the Market*.

MARKET TOWNS; See *Market*.

MARKETZELD, or MARKETGELD, Toll of the Market. *Cod. MS. in Bibl. Cotton.*

MARKPENNY, Was a penny anciently paid at the town of *Maldon*, by those who had gutters laid or made out of their houses into the streets. *Hil.* 15 *Ed.* 1.

MARLBOROUGH, Duke of. The honour of *Woodstock* granted to the Duke of *Marlborough*, and *Blenheim-house* built by the Parliament, in reward of the victory at *Blenheim*, &c. *Stat.* 3 & 4 *Ann. c.* 6. The honour settled upon his posterity, *stat.* 5 *Ann. c.* 3. An annuity from the post-office settled on the Duke of *Marlborough*, 5 *Ann. c.* 4. For paying the arrears due for building *Blenheim-house*. *Stat.* 1 *Geo.* 1. *st.* 1. *c.* 12. § 34.

MARLE, *marla*, from the Sax. *margel*, i. e. *medulla*.] Otherwise called *Malin*; A kind of earth or mineral, which in divers counties of this kingdom is used to fertilize land. See *stat.* 17 *Ed.* 4. *c.* 4.

MARLEBERG, Statutes made there, 52 *Hen.* 3.

MARLERIUM, or MARLETUM, A marle pit. *Chart. Antiq.*

MARQUE, from the Saxon *mearc*, *signum*.] A mark or sign; but in our ancient statutes it signifies Reprisals. See title *Letters of Marque*.

MARQUESS, or MARQUIS, *Marchio*.] Is now a title of honour before an Earl, and next to a Duke; and by the opinion of *Hotoman*, the name is derived from the *German* March, signifying originally *Custos Limitis*, or *Comes et præfectus limitis*. In the reign of King *Rich.* II. came up first the title of *Marquis*, which was a governor of the marches; for before that time, those that governed the marches were called commonly *Lords Marchers*, and not *Marquesses*, as Judge *Doderidge* has observed in his law of *Nobility* and *Peerage*. *Selden's Mare claus. lib.* 2. *c.* 19. A *Marquis* is created by patent; and anciently by *cincture* of sword, mantle of state, &c. See titles *Lords Marchers*; *Peers*; *Nobility*.

MARRIAGE,

MARITAGIUM.] A civil and religious contract, whereby a man is joined and united to a woman, for the purposes of civilized society: *Maritagium*, in the feudal law, signified the interest of bestowing a ward or widow in marriage by the Lord. *Mag. Chart. c.* 6. See title *Tenures* II. 4.

Maritagium

Maritagium is likewise applied to land given in Marriage; and is that portion which the husband receives with his wife. *Bract. lib.* 2. *c.* 34: *Glanv. lib.* 7. *c.* 1. In this sense there are divers writs, *De Maritagio*, &c. *Reg.* 171.

There is further a term called *Duty of Marriage*, signifying an obligation to marry; imposed on women who formerly held lands, charged with personal services, in order to render them by their husbands. *Cowell.* See *Tenure*, title II. 4.

Marriage is generally the conjunction of man and woman, in a constant society, and agreement of living together; until the contract is dissolved by death or breach of faith, or some notorious misbehaviour, destructive of the end for which it was intended. It is one of the rights of human nature; and was instituted in a state of innocence, for preservation thereof: and nothing more is requisite to a complete Marriage, by the laws of *England*, than a full, free, and mutual consent between parties, not disabled to enter into that state by their near relation to each other, infancy, pre-contract, or impotency. *Dict.* See *post. stat.* 26 *Geo.* 2. *c.* 33.

As to the solemnization of Marriage, this is regulated by the laws and Customs of the nation where we reside; and every State allows such privileges to the parties as it deems expedient, and denies legal advantages to those who refuse to solemnize their Marriage, in the manner the State requires; but they cannot dissolve a Marriage celebrated in another manner, Marriage being of divine institution, to which only a full and free consent of the parties is necessary. Before the time of Pope *Innocent* III. there was no solemnization of Marriage in the church; but the man came to the house where the woman inhabited, and led her home to his own house, which was all the ceremony then used. See 1 *Rol. Abr.* 359: 1 *Sid.* 64.

Marriages by *Romish* priests, whose orders are acknowledged by the church of *England*, are deemed to have the effects of a legal Marriage in some instances; but Marriages ought to be solemnized according to the rites of the church of *England*, to entitle the parties to the privileges attending legal Marriage, as dower, thirds, &c. And by *stat.* 3 *Jac.* 1. *c.* 5. § 13, Popish Recusants convict, married otherwise than according to the orders of the church of *England*, by a minister lawfully authorised, and in some open church, &c. shall be disabled, the man to be tenant by the curtesy, and the woman to claim her dower, jointure, or widow's estate, &c.

Marriage at Common Law is either in right, or in possession; and Marriage *de facto*, or in reputation, as among Quakers, &c. is allowed to be sufficient to give title to a personal estate. 1 *Leon.* 53: *Wood's Inst.* 59. But in the case of a Dissenter, married to a woman by a minister of the congregation, who was not in orders; it was held that when a husband demands a right to himself as husband, by the Ecclesiastical Law, he ought to prove himself a husband by that law, to entitle him to it: and notwithstanding the wife, and the children of this Marriage, may entitle themselves to a temporal right by such Marriage; yet the husband shall not, by the reputation of the Marriage, unless he hath a substantial right: and this Marriage is not a mere nullity, because by the law of nature the contract is binding; for though the positive law of man ordains Marriage to be made by a priest, that law only makes this Marriage irregular, and not expresly void. 1 *Salk.* 119. But this is, in some cases, altered by the Marriage-act, *stat.* 26 *Geo.* 2. *c.* 33: the substance of which see *post*.

The Marriages that are made in an ordinary course, are to be by asking in the church, and other ceremonies appointed by the book of Common Prayer. *Stat.* 2 & 3 *Ed.* 6. *c.* 21. By the ordinances of the church, when persons are to be married, the banns of matrimony shall be published in the church where they dwell three several *Sundays* or holidays, in the time of divine service; and if, at the day appointed for their Marriage, any man do alledge any impediment; as pre-contract, consanguinity, or affinity, want of parent's consent, infancy, &c. why they should not be married, (and become bound with sufficient sureties to prove his allegation,) then the solemnization must be deferred until the truth is tried. *Rubrick.* And no minister shall celebrate matrimony between any persons without a faculty or licence, except the banns of Marriage have been first published as directed, according to the book of Common Prayer, on pain of suspension for three years; nor shall any minister, under the like penalty, join any persons in Marriage, who are so licensed, at any unseasonable times, or in any private place, &c. *Canon* 62. Also on the granting of licences, oath is made, and bond is to be taken, that there are no impediments of pre-contract, consanguinity, &c. nor any suit or controversy depending in any Ecclesiastical Court, touching any contract of Marriage of either of the parties with any other; that neither of them are of better estate than is suggested; and that the Marriage be openly solemnized in the parish church where one of the parties dwelleth, or the church mentioned in the licence, between the hours of eight and twelve in the morning. Licences to the contrary shall be void; and the parties marrying are subject to punishment as for clandestine Marriages. *Can.* 102.

But, by special licence or dispensation from the Archbishop of *Canterbury*, Marriages, especially of persons of quality, are frequently in their own houses, out of canonical hours, in the evening, and often solemnized by others in other churches than where one of the parties lives, and out of time of divine service, &c.

Marriages are prohibited in Lent, and on fasting days, because the mirth attending them is not suitable to the humiliation and devotion of those times; yet persons may marry with licences in *Lent*, although the banns of Marriage may not then be published. Formerly, during the establishment of the Catholic religion in these kingdoms, priests were restrained from Marriage, and their issue accounted bastards, &c. and the *stat.* 31 *H.* 8. *c.* 14, made such Marriages felonious. But on the Reformation, laws were made, declaring that the Marriage of priests should be lawful, and their children legitimate; though the preambles to those statutes set forth, that it would be better for priests to live chaste, and separate from the company of women, that they might with the more fervency attend the ministry of the Gospel. See *stat.* 2 & 3 *E.* 6. *c.* 21. But this statute, like all other reforms in the church, was repealed by Queen *Mary*, and was not revived again till by *stat.* 1 *Jac.* 1. *c.* 25; though the thirty-nine articles had passed in convocation in 5th year of Queen *Elizabeth*, the 32d of which declares,

clares, that it is lawful for the bishops, priests, and deacons, as for all other Christian men, to marry at their own discretion. The Clerks in Chancery, though laymen, were not allowed to marry, till *stat.* 14 & 15 *H.* 8. *c.* 8. And no lay-doctor of civil law if he was married, could exercise any ecclesiastical jurisdiction, till *stat.* 37 *H.* 8. *c.* 7.

Taking Marriage in the light of a civil contract, the law treats it as it does all other contracts: allowing it to be good and valid in all cases where the parties at the time of making it were in the first place *willing* to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law. 1 *Comm. c.* 15. *p.* 433.

First, They must be *willing* to contract; "*Consensus non concubitus facit nuptias*," is the maxim of the Civil Law in this case; and it is also adopted by the Common Lawyers. 1 *Inst.* 33.

Secondly, They must be *able* to contract. In general all persons are able to contract themselves in Marriage, unless they labour under some particular disabilities and incapacities. What those are we shall therefore inquire.

These disabilities are of two sorts: first, such as are *canonical*, and therefore sufficient by the Ecclesiastical Laws to avoid the Marriage in the Spiritual Court; but these in our law only make the Marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract, consanguinity, or relation by blood; affinity, or relation by Marriage; and some particular corporeal infirmities. These canonical disabilities are either grounded upon the express words of the divine laws, or are consequences plainly deducible from thence; it therefore being sinful in the persons who labour under them, to attempt to contract matrimony together, they are properly the object of the Ecclesiastical Magistrates' coercion; in order to separate the offenders and inflict penance for the offence, *pro salute animarum*. But such Marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For after the death of either of them the Courts of Common Law will not suffer the Spiritual Court to declare such Marriages to have been void; because that declaration cannot now tend to the reformation of the parties. 1 *Inst.* 33: 2 *Inst.* 614. Therefore when a man had married his first wife's sister, and after her death the Bishop's Court was proceeding to annul the Marriage, and bastardize the issue, the Court of King's Bench granted a prohibition *quod hoc*; but permitted them to proceed to punish the husband for incest. *Salk.* 548.

These canonical disabilities being entirely within the province of the Ecclesiastical Courts, our books are perfectly silent concerning them. But there are a few statutes which serve as directories to those Courts, of which it will be proper to take notice. By *stat.* 32 *H.* 8. *c.* 38, it is declared, that all persons may lawfully marry but such as are prohibited by God's law: and that all Marriages contracted by lawful persons in the face of the church, and consummate with bodily knowledge and fruit of children, shall be indissoluble. And (because in the times of popery a great variety of degrees of kindred were made impediments to Marriage, which impediments might however be bought off for money) it is declared by the same statute, that nothing, God's law except, shall impeach any Marriage, but within the Levitical degrees, the farthest of which is, that between uncle and niece. *Gilb. Rep.* 158.

By the same statute all impediments, arising from pre-contracts to other persons, were abolished, and declared of none effect, unless they had been consummated with bodily knowledge; in which case the Common Law holds such contract to be a Marriage *de facto*. But this branch of the statute was repealed by *stat.* 2 & 3 *E.* 6. *c.* 23. How far that clause of the Marriage-Act, *stat.* 26 *Geo.* 2. *c.* 33, which prohibits all suits in Ecclesiastical Courts to compel a Marriage in consequence of any contract, may collaterally extend to revive this clause of *stat.* 32 *Hen.* 8, and abolish the impediment of pre-contract, deserves the consideration of the canonists. See 1 *Comm. c.* 15. *p.* 434, 5. A contract *per verba de præsenti tempore*, used to be considered in the Ecclesiastical Courts *ipsum matrimonium*; and if either party had afterwards married, this, as a second Marriage, would have been annulled in the Spiritual Courts, and the first contract enforced. See an instance, 4 *Co.* 29. But as this pre-engagement can no longer be carried into effect as a Marriage, it seems undoubted that it will never more be an impediment to a subsequent Marriage actually solemnized and consummated. 1 *Comm.* 435, *in n.*

In the above *stat.* 32 *H.* 8. *c.* 38, the prohibitions by God's law are not specified; but in *stats.* 25 *H.* 8. *c.* 22: 28 *H.* 8. *c.* 7, the prohibited degrees are particularized. It is doubtful whether these two last statutes are in force. 2 *Burr. Eccl. L.* 405. But so far they seem to be only declaratory of the Levitical Law. The former declared null and void the Marriage between *Henry* VIII. and *Catherine* of *Arragon*, widow of his eldest brother, Prince *Arthur*, for which a dispensation had been obtained from the Pope. 1 *Comm.* 435, *in n.*

The prohibited degrees are all which are under the 4th degree of the Civil Law, except in the ascending and descending line; and by the course of nature it is scarcely a possible case, that any one should ever marry his issue in the 4th degree: but between collaterals it is universally true, that all who are in the fourth or any higher degree are permitted to marry: as first cousins are in the fourth degree, and therefore may marry: a nephew and great aunt, or niece and great uncle, are also in the fourth degree, and may intermarry; and though a man may not marry his grandmother, it is certainly true that he may marry her sister. *Gibs. Cod.* 413. The same degrees by affinity are prohibited. Affinity always arises by the Marriage of one of the parties so related; as a husband is related by affinity to all the *consanguinei* of his wife; and, *vice versâ*, the wife to the husband's *consanguinei*: for the husband and wife being considered one flesh, those who are related to the one by blood, are related to the other by affinity. *Gibs. Cod.* 412. Therefore a man after his wife's death cannot marry her sister, aunt, or niece. But the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife. Hence two brothers may marry two sisters; or father and son a mother and daughter. If a brother and sister marry two persons not related, and the brother and sister die, the widow and widower may intermarry; for though I am related to my wife's brother by affinity,

I am

I am not so to my wife's brother's wife, whom, if circumstances would admit, it would not be unlawful for me to marry. 1 *Comm.* 435, *in n.* See 1 *Inst.* 235, *a. in n.*

The son of a father by another wife, and daughter of a mother by another husband, cousins german, &c. may marry with each other: a man may not marry his brother's wife, or wife's sister; an uncle his niece, an aunt her nephew, &c. But if a man take his sister to wife, they are baron and feme, and the issue are not bastards, till a divorce. *Levit. c.* 18, 20: 2 *Inst.* 683: 1 *Rol. Abr.* 340, 357: 5 *Mod.* 448.

A person may not marry his sister's daughter: and a sister's bastard daughter is said to be within the Levitical law of affinity; it being morally as unlawful to marry a bastard as one born in wedlock, and it is so in nature; and if a bastard doth not fall under the prohibition *ad proximum sanguinis non accedas*, a mother may marry her bastard son. 5 *Mod.* 168: 2 *Nelf. Abr.* 1161.

There are persons within the reason of the prohibition of Marriage, though not mentioned, and must be prohibited; as the father from marrying his daughter, the grandson from marrying the grandmother, &c. *Vaugh.* 321.

The other sort of disabilities are those which are created, or at least enforced by the *Municipal Laws.* And though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniencies they draw after them. These civil disabilities make the contract void *ab initio*, and not merely voidable: not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all; they do not put asunder those who are joined together, but they previously hinder the junction. And if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial, union. 1 *Comm.* 436.

The *first* of these *legal* disabilities is *a prior marriage*, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second Marriage is to all intents and purposes void. *Br. Ab.* title *Bastardy, pl.* 8. See this Dictionary, title *Bigamy.*

The next legal disability is *want of age.* If a boy under 14 or girl under 12 years of age marries, this Marriage is only inchoate and imperfect; and when either of them comes to that age, which is for this purpose termed their age of consent, they may disagree and declare the Marriage void, without any divorce or sentence in the Spiritual Court. This is founded on the Civil Law. But the Common Law pays a greater regard to the constitution than the age of the parties; for if they are *habiles ad matrimonium*, it is a good Marriage, whatever their age may be. And in law it is so far a Marriage, that if at the age of consent they agree to continue together, they need not be married again. *Co. Lit.* 79. If the husband be of years of discretion, and the wife under 12, when she comes to years of discretion, he may disagree as well as she may; for in contracts the obligation must be mutual; both must be bound or neither; and so it is, *vice versâ*, when the wife is of years of discretion, and the husband under. *Co. Litt.* 79.

If persons are married before the age of consent, they may at that age disagree and marry again, without any divorce: though if they once give consent when at age, they cannot afterwards disagree; and when they are married before, there needs not a new Marriage, if they agree at that age. 1 *Inst.* 33: 2 *Inst.* 182. A woman cannot disagree within her age of twelve years, till which the Marriage continues; and before that time her disagreement is void. 1 *Danv.* 699. Though if a man marries a woman under that age, and afterwards she, within her age of consent, disagrees to the Marriage, and at her age of twelve years marries another; now the first Marriage is absolutely dissolved, so that he may take another wife; for although the disagreement within the age of consent was not sufficient, yet her taking another husband at the age of consent, and cohabiting with him, affirms the disagreement, and so the first Marriage is avoided. *Moor*, 575, 764. If after disagreement of the parties, at the age of consent they agree to the Marriage, and live together as man and wife, the Marriage hath continuance, notwithstanding the former disagreement; but if the disagreement had been before the Ordinary, they could not afterwards agree again to make it a good Marriage. 1 *Danv. Abr.* 699. But now the agreement after 12 or 14 would not be binding on the infant, if the Marriage was *without banns*; or by licence, and without consent of parents, guardians, &c. and the infant was not a widow or widower; for the Marriage-Act makes all such Marriages void. See *stat.* 26 *Geo.* 2. *c.* 33: 1 *Inst.* 79, *b. in n.*

If either party be under seven years of age, contracts of Marriage are absolutely void; but Marriages of Princes made by the State in their behalf, at any age, are held good; though many of those contracts have been broken through. *Swinb. Matrimon. Contr.* See *Ward's Law of Nations.*

The above proposition, "that in contracts the obligation must be mutual," has been censured as too generally expressed; for there are various contracts between a person of full age and a minor, in which the former is bound and the latter is not. The authorities seem decisive, that it is true with regard to the contract of Marriage, referred to the ages of 14 and 12; but it has also long been clearly settled, that it is not true with regard to contracts of Marriage, referred to the minority under 21. For where there are mutual promises to marry between two persons, one of the age of 21, and the other under that age, the first is bound by the contract, and on the side of the minor it is voidable; or for a breach of the promise on the part of the person of full age, the minor may maintain an action, and recover damages; but no action can be maintained for a similar breach of the contract on the side of the minor. *Stra.* 937: *Fitzgibb.* 175, 275.

Another incapacity arises from *want of consent of parents and guardians.* By the Common Law, if the parties themselves were of the age of consent, there wanted no other concurrence to make the Marriage valid; and this was agreeable to the Canon Law; but by several statutes, *viz. stats.* 6 & 7 *W.* 3. *c.* 6: 7 & 8 *W.* 3. *c.* 35, penalties of 100*l.* are laid on every clergyman who marries a couple either without publication of banns (which may give notice to parents or guardians) or without a licence, to obtain which, the consent of parents or guardians must be sworn to; and the man so married forfeits 10*l.* and the parish clerk, &c. assisting 5*l.* These statutes are confirmed by *stat.* 10 *Ann. c.* 19, and extended to privileged places; so that if a parson offending be a prisoner in any place, on conviction he shall be removed

to the county gaol, there to remain in execution charged with the said penalty of 100*l.* &c. Before these statutes, an information was exhibited against certain persons for combination in procuring a clandestine Marriage in the night, without banns or licence, between a maid-servant and a young gentleman who was heir to an estate, the person being in liquor; and they were fined 100 marks, and ordered to be committed till paid; but it doth not appear that the Marriage could be made void. *Cro. Car.* 557.

But the evil of clandestine and improper Marriages is more fully restrained by the following statute commonly known by the name of *The Marriage Act.*

By *stat.* 26 *Geo.* 2. *c.* 33, all Marriages are to be either in pursuance of banns published, of a licence, or of a special licence. A Marriage in pursuance of banns must be solemnized in one of the churches or chapels where the banns were published. A Marriage in pursuance of a licence (except a special licence) must be solemnized in such church or chapel as in the licence shall be named; all Marriages solemnized in any other place than a church or such chapel, unless by special licence, or without publication of banns or a licence of Marriage from a person having authority to grant the same, shall be void; and all Marriages solemnized by licence, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, which shall be had without the consent of father, guardian, &c. shall be void. No parson, vicar, &c. shall be obliged to publish banns of matrimony, unless the persons to be married shall seven days before the time required for the first publication, deliver to him a notice in writing of their true names, and of the house or houses of their respective abode within such parish, &c. and of the time they have dwelt in such house or houses. All banns shall be published upon three *Sundays*, or holidays, next preceding the Marriage in the parish church, &c. where the persons to be married shall dwell. If they dwell in divers parishes, then in the parish church, &c. where each of them shall dwell; if in an extra-parochial place, then in the parish church, &c. adjoining.

After solemnization of any Marriage under a publication of banns, it shall not be necessary, in support of such Marriage, to give any proof of the actual dwelling of the parties in the respective parishes, &c. wherein the banns of Marriage were published, nor shall any evidence be received to the contrary, in any suit touching the validity of such Marriage.

No licence of Marriage shall be granted by any archbishop, bishop, &c. to solemnize any Marriage in any other church, &c. than in the parish church, &c. within which the usual place of abode of one of the parties shall have been, for four weeks immediately before the granting such licence: if both or either of the parties shall dwell in an extra-parochial place, then in some parish church adjoining. Nothing herein contained shall extend to prevent the archbishop of *Canterbury* from granting special licences.

Where any Marriage is by licence, it shall not be necessary to give any proof, that the usual place of abode of one of the parties, for four weeks as aforesaid, was in the parish, &c. where the Marriage was solemnized; nor shall any evidence be received to the contrary, in any suit touching the validity of such Marriage. All Marriages by licence, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, which shall be had without the consent of his or her father if living, or if dead, of his or her guardian, and if no guardian, of his or her mother if living and unmarried, and if no mother living and unmarried, then of the guardian appointed by the Court of Chancery, shall be void. If guardian or mother, or any of them where consent is made necessary, be *non compos mentis*, beyond sea, or refuse to consent, and the Lord Chancellor shall declare it to be a proper Marriage, that shall be as effectual as if the guardian or mother had consented.

All Marriages shall be solemnized in the presence of two or more witnesses besides the minister. No minister, &c. solemnizing Marriage between persons, both or one of whom shall be under the age of twenty-one years, after banns published, shall be punishable by ecclesiastical censure for solemnizing such Marriage without consent of parents or guardians, whose consent is required by law, unless such parson, &c. shall have notice of such dissent. And in case such parent or guardian shall openly declare in the church, &c. at the time of such publication, his dissent to such Marriage, such publication of banns shall be void.

If any person shall solemnize matrimony in any other place than a church, &c. where banns have been usually published, unless by special licence, or shall solemnize matrimony without publication of banns, unless licence of Marriage be first had and obtained from some person having authority to grant the same, every such person knowingly so offending, shall be transported for fourteen years. The prosecution to be within three years.

To make a false entry in a Marriage Register; to alter it when made; to forge or counterfeit such entry, or a Marriage licence; to cause, or procure, or act, or assist in such forgery; to utter the same as true, knowing it to be counterfeit; or to destroy, or procure the destruction of any register in order to vacate any Marriage, or subject any person to the penalties of this act; all these offences knowingly and wilfully committed, subject the party to the guilt of felony without benefit of clergy.

No suit shall be in any Ecclesiastical Court to compel a celebration of Marriage, by reason of any contract, whether *per verba de presenti*, or *de futuro*. This act not to extend to Jews, Quakers, or *Scotland*, nor to the Marriages of any of the Royal Family; as to which latter see this Dictionary, title *King* II.

The effect of the above act, as relates to the consent of parents, &c. may be thus shortly stated: The party under age marrying by licence, if a Minor, and not having been married before, must have the consent of a father if living; if he be dead, of a guardian *lawfully appointed*; if there be no such guardian, then of the mother if she is unmarried; if there be no mother, then of a guardian appointed by the Court of Chancery. The guardian, whose consent is interposed between that of the father and that of the mother, must either be a testamentary guardian appointed by the father's will, or a guardian appointed by Chancery; or if there is no such guardian, and the Minor is under the age of 14, and has lands by descent, perhaps the consent of a socage guardian would be sufficient; though it might not be prudent to rely upon it alone, and such an early Marriage now seldom happens. 1 *Comm.* 438, *in n.*

In reading this statute it should be attended to; that the clause for annulling the Marriages of infants without the consent of parents or guardians, is restricted to Marriages by licence; so that the Marriage of an infant without such consent may still be good where banns are regularly published, unless a dissent is openly declared by the parent or guardian in the church or chapel at the time of publishing, in which latter case the statute makes the banns void. As to the Marriages without either licence or banns, which are usually termed *clandestine*, they are universally annulled by this statute. *Scotland* being expressly excepted out of this statute, in consequence of this, so much of the act as was calculated to defeat the Marriages of Minors without the consent of parents or guardians, hath been frequently evaded, by going into *Scotland* to be married there, and returning to *England* immediately afterwards. Indeed the validity of such Marriages was once questioned; and though, in general, Marriages are governed by the laws of the country in which they are celebrated, yet it was doubted whether the *lex loci* ought to be applied to a case, accompanied with circumstances so strongly marking the intent to evade the law of *England*. See 2 *Burr.* 1079. But this point seems now fully settled in favour of the *Scotch* Marriages by a decision of the Court of *Arches*, which was afterwards confirmed in the Court of Delegates. However, it may not be amiss to recollect, that there have been persons of authority, who will not allow such cases of apparent evasion of the law of any country to fall within the principle on which the *lex loci* is indulged. See 1 *Inst.* 796, *in n.*

The Marriage of a female bastard with the consent of her putative father is sufficient to gain a settlement although she was under age at the time of the Marriage. *Const's Bott.* ii. 85. *pl.* 121. On the same principle, a Marriage between two infants solemnized by means of a procured licence, and without the consent of either parents or guardians, is not sufficient to gain a settlement, although both the parties are illegitimate, for such Marriage is void by the Marriage-act. 1 *Term Rep.* 96.

As the above act requires that the Marriage should be celebrated in some parish church or public chapel where banns had been usually published (*i. e.* before 25 *Mar.* 1754); the Court of K. B. were obliged to declare a Marriage void which had been solemnized in a chapel erected in 1765. *Doug.* 659. And as there were many Marriages equally defective, an act of parliament immediately passed, which legalized all Marriages celebrated in such churches or chapels since the passing the Marriage-act, and indemnifying the clergyman from the penalties incurred. *Stat.* 21 *Geo.* 3. *c.* 53.

A fourth legal incapacity of contracting Marriage is *want of reason*, without a competent share of which, as no other so neither can the matrimonial contract be valid. 1 *Rol. Abr.* 257. See title *Idiots and Lunatics* IV.

Lastly, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made *per verba de præsenti*, or in words of the present tense, and, in case of cohabitation, *per verba de futuro* also, between persons able to contract, was, before the Marriage-act above stated, deemed a valid Marriage to many purposes, and the parties might be compelled in the Spiritual Courts to celebrate it *in facie ecclesiæ*. But these verbal contracts are now of no force to compel a future Marriage. It is held to be also essential to a Marriage, that it be performed by a person in orders. *Salk.* 119. See *Burr. Set. Ca.* 232: 1 *Wils.* 74; though the intervention of a priest to solemnize this contract is merely *juris positivi*, and not *juris naturalis aut divini*; it being said that the Pope *Innocent* III. was the first who ordained the celebration of Marriage in the church, before which it was totally a civil contract. *Moor*, 170. And in the times of the Grand Rebellion all Marriages were performed by the Justices of the Peace; and those Marriages were declared valid, without any fresh solemnization, by *stat.* 12 *Car.* 2. *c.* 33.

On the whole, as the law now stands, it may be collected, that no Marriage by the Temporal Law is, *ipso facto*, *void*, that is celebrated—by a person in orders—in a parish church or public chapel; (or elsewhere by special dispensation;)—in pursuance of banns or a licence—between single persons—consenting—of sound mind—and of the age of 21 years—or of the age of 14 in males, and 12 in females, with consent of parents or guardians; or without, in case of widowhood. And no Marriage is voidable by the Ecclesiastical Law after the death of either of the parties; nor during their lives unless for the canonical impediments of pre-contract; (if that indeeds still exists;) of consanguinity, and of affinity, or corporeal imbecility subsisting previous to the Marriage. 1 *Comm.* 440.

In this place it will not be inapplicable to notice the offence of the *Forcible Abduction* and *Marriage of Women*; a crime vulgarly called *Stealing an Heiress*. By *stat.* 3 *H.* 7. *c.* 2, it is enacted, that if any person shall for lucre take any woman, being maid, widow, or wife, and having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such misdoer, or by his consent to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such woman, shall be deemed principal felons: and by *stat.* 39 *Eliz.* *c.* 9, the benefit of clergy is taken away from all such felons who shall be principals, procurers, or accessories *before* the fact. In the construction of this statute it hath been determined, 1st, That the indictment must alledge that the taking was for lucre, for such are the words of the statute. 1 *Hawk. P. C. c.* 42. 2d, In order to show this, it must appear that the woman has substance either real or personal, or is an heir apparent. 1 *Hal. P. C.* 660: 1 *Hawk. P. C. c.* 42. 3dly, It must appear that she was taken away against her will. 4thly, It must also appear, that she was afterwards married, or defiled. And though possibly the Marriage or defilement might be by her subsequent consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking were against her will. 1 *Hal. P. C.* 660. And so, *vice versa*, if the woman be originally taken away with her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for, till the force was put upon her she was in her own power. 1 *Hawk. P. C. c.* 42. It is held, that a woman, thus taken away and married, may be sworn and give evidence against the offender, though he is her husband *de facto*, contrary to the general rule of law; because

because he is no husband *de jure*, in case the actual Marriage was also against her will. 1 *Hal. P. C.* 661. In cases indeed where the actual Marriage is good, by the consent of the inveigled woman obtained after her forcible abduction, *Hale* seems to question how far her evidence should be allowed: but other authorities seem to agree that it should, even then, be admitted; esteeming it absurd that the offender should thus take advantage of his own wrong; and that the very act of Marriage, which is a principal ingredient of his crime, should, by a forced construction of law, be made use of to stop the mouth of the most material witness against him. See *Cro. Car.* 488: 3 *Keb.* 193: 5 *State Tr.* 455; and this Dictionary, title *Baron and Feme* I. 2.

An inferior degree of the same kind of offence, but not attended with force, is punished by *stat.* 4 & 5 *P. & M.* *c.* 8, which enacts, that if any person above the age of 14, unlawfully shall convey or take away any woman child unmarried; (which is held to extend to bastards as well as legitimate children, *Stra.* 1162;) within the age of 16 years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned two years, or fined at the discretion of the Justices; and if he deflowers such maid or woman child, or without the consent of parents contracts matrimony with her, He shall be imprisoned five years or fined at the discretion of the Justices, and She shall forfeit all her lands to her next of kin during the life of her said husband. But this latter part of the act is now rendered almost useless by the provisions of the Marriage Act, which make the Marriage [unless by banns] totally void. See 4 *Comm. c.* 15. *pp.* 208, 9.

These stolen Marriages under the age of 16 being usually upon mercenary views, this last act, besides punishing the seducer, wisely removed the temptation; [as to *lands*.] It has been decided in the Court of Exchequer that the woman in this case forfeits her lands only during the life of her husband. *Ambl.* 73. Though the more natural construction of the statute seems to be, that the next heir shall retain them during the life of the wife, even after the death of the husband. 1 *Bro. C. R.* 23.

An ancient *stat.* 31 *H.* 6. *c* 9, still appears on our Statute-books, to invalidate bonds and securities taken from women under duress of imprisonment by threats of forcible Marriage, &c.

Matrimonial causes, or injuries respecting the rights of Marriage, are one branch of the Ecclesiastical jurisdiction: though if Marriages are considered in the light of mere civil contracts, they do not seem to be very properly of spiritual cognisance. This, however, was effected by the usurpation of the church under the Catholic system; and causes matrimonial are now so peculiarly ecclesiastical, that the Temporal Courts will never interfere in controversies of this kind, unless in some particular cases: as, if the Spiritual Court do proceed to call a Marriage in question after the death of either of the parties; this the Courts of Common Law will prohibit, because it tends to bastardize and disinherit the issue; who cannot so well defend the Marriage as the parties themselves, when both of them living, might have done.

Of matrimonial causes one of the first and principal is, *causâ jactitationis matrimonii*; when one of the parties boasts or gives out, that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground the party injured may libel the other in the Spiritual Court; and unless the defendant undertakes and makes out a proof of the actual Marriage, he or she is enjoined perpetual silence on that head; which is the only remedy Ecclesiastical Courts can give for this injury. Another species of matrimonial causes was when a party contracted to another, brought a suit in the Ecclesiastical Court to compel a celebration of the Marriage in pursuance of such contract; but this branch of causes is now cut off entirely by the Marriage-Act above stated. The suit for restitution of conjugal rights is also another species of matrimonial causes; which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it contrary to the inclination of the other. See 3 *Comm. c.* 7. *p.* 93, 4. *Divorces* and suits for *Alimony* are also subjects of ecclesiastical jurisdiction, as to which see this Dictionary, titles *Baron and Feme* XI: *Divorce*.

The Temporal Courts by the *stat.* 28 *Hen.* 8. *c.* 7, are to determine what Marriages are within or without the Levitical degrees; and prohibit the Spiritual Courts if they impeach any persons for marrying within these degrees. And it is said, were it not for that statute, we should be under no obligation to observe the Levitical degrees. *Vaugh.* 206: 2 *Vent.* 9.

Although matrimonial causes have been for a long time determinable in the Ecclesiastical Courts, they were not so from the beginning; for as well causes of matrimony as testamentary were civil causes, and appertained to the jurisdiction of the civil magistrate, until Kings allowed the clergy cognisance of them. *Davis's Rep.* 51. If persons married are *infra annos nubiles*, the Ecclesiastical Judges are to judge as well of the assent, whether sufficient, &c. as of the first contract; and where they have cognisance, the Common-Law Judges ought to give credit to their sentences, as they do to our judgments. 7 *Rep.* 23. See the *Dutchess of Kingston's Ca.* 11 *St. Tr.* 198.

Loyalty or lawfulness of Marriage is always to be tried by the Bishop's certificate: or inquisition taken before him, on examination of witnesses, &c. *Dyer*, 303. If the right of Marriage come naturally in question, as in dower, &c. the lawfulness of Marriage is to be tried by the Bishop's certificate: but in a personal action, where the right of Marriage is not in question, it is triable by a Jury at Common Law. 1 *Lev.* 41. Whether a woman is married, or she is the wife of such a person, is triable by a Jury: and in personal actions it is right to lay the matter upon the fact of the Marriage, to make it issuable and triable by a Jury, and not upon the right of the Marriage, as in real actions and appeals. 1 *Inst.* 112: 3 *Salk.* 64. If the Marriage of the husband is in question, Marriage, in right ought to be, and that shall be tried by certificate. 1 *Leon.* 53. But if on covenant to do such a thing to another upon the Marriage of a man's daughter, the party alledges that he did marry her, &c. this shall be tried *per pais*; for the Marriage is only in issue, and not whether he was lawfully espoused. *Cro. Car.* 102.

Conditions against marrying generally are void in law; and if a condition is annexed to a legacy, as where

money

money is given to a woman, on condition that she marries with consent of such a person, &c. such a condition is void by the Ecclesiastical Law, because the Marriage ought to be free without coercion; yet it is said it is not so at the Common Law. 2 *Nelf. Abr.* 1162: *Poph.* 58, 59: 2 *Lill.* 192. See title *Condition*; *Legacy.*

Of the Effect of Marriage, by operation of law.—By Marriage with a woman the husband is entitled to all her estate real and personal; and the effects of Marriage are, that the husband and wife are accounted one person, and he hath power over her person as well as estate, &c. 1 *Inst.* 357.

The wife doth partake of the name, so of the nature and condition of the husband by the Marriage; for if she be an Earl's wife, she is a Countess; if a Knight's wife, a Lady; and if he be an alien and made a denizen, the wife is so likewise. 39 *H.* 6. 45: 4 *H.* 7. 31: *Bro.* 499.

There being divers advantages by Marriage, to the man and the woman; therefore on promise of Marriage, damages may be recovered, if either party refuse to marry; but the promise must be mutual on both sides, to ground the action. 1 *Salk.* 24. And if there be reciprocal promises of Marriage, as the woman's promise to the man is a good consideration to make his obligatory; so his promise to her is a sufficient consideration to make hers binding: and though no time for Marriage be agreed on, if the plaintiff prove tender and offer to marry defendant, and refusal by defendant, or if defendant marry another, whereby performance of the promise is, in law, rendered impossible, action lies, and damages are recoverable. *Carthew,* 467. These promises are not affected by the provisions of the Marriage Act, as relates to actions brought for their non-performance.

If a man and a woman make mutual promises of Intermarriage, and the man gives the woman 100*l.* which she accepts, in satisfaction of his promise of Marriage, it is a good discharge of the contract. *Mod. Caf.* 156. By the Statute of Frauds, *stat.* 29 *Car.* 2. *c.* 3, no action shall be brought upon any agreement on consideration of Marriage, except it be put in writing, and signed by the party to be charged, &c. And where an agreement relating to Marriage must be in writing after a year, and when it need not, *vide Skinn.* 353. Observe the words, they are upon any agreement on *consideration of Marriage,* which is essentially different from mutual promises of the parties to marry each other. And which latter are not within the statute. See title *Assumpsit* II. A promise of a father by letter to give money in Marriage with his daughter, is a sufficient promise in writing, within the statute. 2 *Vent.* 361. Where a person promises to give his daughter wedding clothes on the Marriage, she shall have two suits, one for the wedding day, and the other for the time of feasting afterwards, according to the dignity of the person. *Cro. Car.* 53.

Contracts and bonds for money to procure Marriage between others, have been held void in equity: and wherever a parent or guardian insists upon private gain on the Marriage of children, covenant or obligation for it, shall be set aside in *Chancery* as extorted. 3 *Lev.* 411: 1 *Salk.* 156.

If a man before Marriage gives bond and judgment to the wife, to leave her worth 1000*l.* at his death, in consideration of a Marriage portion, this shall be made good out of the husband's estate, and be satisfied before any debts; provided a judgment be not obtained against him with her consent. An intended husband, in consideration of a Marriage, covenanted with the intended wife, that if she would marry him, and she should happen to survive him, he would leave her worth 500*l.* The Marriage took effect, and the wife survived, and he did not leave her worth that money; she married a second husband, and he brought an action of debt against the administrator of the first husband for the 500*l.* To which it was objected, that this being a personal action, it was suspended by the Marriage, which was a release in law, and so extinct; but the plaintiff had judgment, for the action is not suspended, because during the coverture there was no cause of action: nothing in this case is due whilst the coverture takes place, and the debt arises by the death of the husband. *Palm.* 99: 2 *Sid.* 58.

A bond was given by a man, reciting, he was to marry *A. S.* and that if the Marriage took effect, and he did survive her, then, within three months after her decease, he would pay to the obligee 300*l.* for such uses as the said *A. S.* by any writing under hand and seal, subscribed and published in the presence of two witnesses, should direct and appoint; this Marriage-bond was adjudged good. 3 *Cro.* 376: *Yelv.* 226, 227.

In case articles are entered into before Marriage, and afterwards a settlement is made different therefrom, the Court of Chancery will set up the articles against it; but where both are finished before the Marriage had, at a time when all parties are at liberty, such settlement will be taken as a new agreement between them: this is the general rule, unless the deed of settlement is expressly mentioned to be made in pursuance of the Marriage articles, &c. whereby the intent may still appear to be the same. *Talb.* 20. Articles of Marriage were made for settling lands on the husband and wife, and the heirs male and female of the body of the husband by the wife, &c. and a settlement was drawn contrary to these articles, long after which the husband suffered a recovery, and devised the land to others; it was here held to be no bar to the heirs female, who were decreed to have the land. 2 *P. Williams,* 349, 355. Yet it is said, where relief is to be given in equity on a settlement, it must be only to the persons who claim as purchasers, as the first and other sons; and all remainders after to the husband's heirs of his body, or his right heirs, are voluntary and not to be aided. *Abr. Caf. Eq.* 385.

Though a term to raise daughters portions, payable at the age of eighteen, or day of Marriage, in a Marriage settlement, is limited in remainder, to commence after the death of the father generally; or if it be in case he die without issue male of his wife, and she dies first without such issue, leaving a daughter, &c. In equity the term is saleable during the life-time of the father, when the daughter is eighteen years old, or married; because every thing hath happened and is past which is contingent, for it is impossible there should be issue male of the wife when she is dead; and as to the father's death, that is not contingent, but certain, by reason *all men must die:* but if there is a contingency not yet happened, as if the daughters are to be unmarried, or not provided for at the time of the father's death, &c. it is otherwise. 1 *Salk.* 159.

Upon

Upon Marriages, the Settlements generally made of the estate of the husband, &c. are to the husband for life, after his death to the wife for life for her jointure, and to their issue in remainder, with limitations to trustees to support contingent uses, and leases to trustees for terms of years, to raise daughters portions, &c. And they are made several ways, by lease and release, fine and recovery, covenant to stand seised to uses, &c. See the form of a complete Marriage Settlement in the *Appendix* to *Blackstone's Analysis*, with other useful forms relative thereto: See the same also, in the *Appendix* to the second volume of his *Commentaries*.

These settlements the law is ever careful to preserve, especially that part of them which relates to the wife, of which she may not be divested, but by her own fine: and if a woman about to marry, to prevent her husband's disposal of her land, conveys it to friends in trust, and they with the husband, after Marriage, make sale of the same, the Court of Chancery will decree the purchaser to reconvey to her. *Vern.* 43.

Where a woman on Marriage, by the man's consent, makes over her estate, to be at her own disposal, the product or increase thereof she can also dispose of: and if the wife has a separate maintenance settled on her by the husband, she may, by writing in the nature of a will, give away what she saves, if she dies before the husband; and shall have the same herself, in case she outlives him, and it shall not be liable to his debts. *Preced. Canc* 255, 44. But where a settlement is made on the wife, in consideration of her whole fortune and equivalent to it; here the wife's portion, though it be out on bonds, &c. which upon the death of the husband by law survive to the wife, shall in equity be subject to the husband's bond-debts, after his decease, to ease the real estate of the heir. *Ibid.* 63. And it has been likewise held, that if after the wife's death, debts of her's appear, the husband shall be answerable for the debts of the wife, so far as he had any money or estate of hers. *Ibid.* 256.

If a man in mean circumstances marry a woman of fortune, upon suggestion and proof of lunacy in the wife by her friends, the Court will order her estate to be so settled, that she may not be wrought on by her husband to give it to him from her children, by him or any other husband, &c. *Skin.* 110.

Marriage is dissolved by the natural death of the husband or wife, or by divorce; and where a Marriage is dissolved by the death of the husband, dower survives to the wife, where no settlement is made of the husband's lands. See this Dictionary, titles *Baron and Feme*; *Chancery*; *Bankrupt*; *Dower*; *Jointure*; &c.

MARROW, Was a Lawyer of great account in *Henry* VIIth's days, whose learned readings are extant, but not in print. *Lamb. Eirenarch, lib.* 1. *cap.* 10.

MARSHAL, *Marescallus*, Fr. *Mareschal.*] It seems to signify as much as *Tribunus militum*, with the ancient *Romans*: it has also been derived from the *German marschalk*, i. e. *Equitum magister*, which *Hotoman* in his Feuds, under *verb. Marchalcus*, derives from the old word *march*, which signifies a horse; others make it of the *Sax. mar*, i. e. *Equus*, & *scalch*, *præfectus*.

With us there are several officers of this name; the chief whereof is the Earl Marshal of *England*, mentioned in *stats.* 1 *H.* 4. *c.* 14: 8 *R.* 2. *c.* 5; 13 *R.* 2. *st.* 1. *c.* 2, &c. whose office consists especially in matter of war and arms, as well in this kingdom as in other countries This office is very ancient, having formerly greater power annexed to it than now; it has been long hereditary in the family of the Duke of *Norfolk*. Vide *Lupanus de Magistratibus Franciæ, lib.* 1. *c. Marishallus*; and *Tilius, lib.* 2. *c. De Constabili Mariscallo*, &c. and this Dictionary, titles *Constable*; *Court of Chivalry*; *Court Martial*.

The next is the Marshal of the King's house, otherwise called Knight Marshal; his authority is exercised in the King's palace, in hearing and determining all pleas of the Crown, and suits between those of the King's house and other persons within the verge, and punishing faults committed there, &c. See the ancient *stats.* 18 *Ed.* 3. *c.* 7: 27 *Ed.* 3. *st.* 2. *c.* 6: 2 *H.* 4. *c.* 13: *Cromp. Jurisd.* 192.

Fleta mentions a Marshal of the King's hall, to whom it belongs, when the tables are prepared, to call out those of the household and strangers, according to their rank and quality, and properly place them. *Fleta, lib.* 2. *cap.* 15.

There are other inferior officers called Marshal, as Marshal of the Justice in Eyre. *Anno* 13 *Ed.* 1. *cap.* 19. Marshal of the King's Bench; see *stat.* 5 *Ed.* 3. *cap.* 8. who hath the custody of the prison called the King's Bench prison in *Southwark*. This officer gives attendance upon the Court, and takes into his custody all prisoners committed by the Court; he is fineable for his absence; and non-attendance is a forfeiture of his office. *Hil.* 21 & 22 *Car.* 2. By *stat.* 8 & 9 *W.* 3. *c.* 27, Grants of the King's Bench and Fleet prisons to be inrolled: and the office of Marshal and Warden of the King's Bench and Fleet, is to be executed by those who have the inheritance of those prisons. The power of appointing the Marshal of the King's Bench, which had been granted in fee by K. *James* I. was revested in the Crown by *stat.* 27 *Geo.* 2. *c.* 17. and the office subjected to the controul of the Court of King's Bench.

There is also a Marshal of the Exchequer, to whom that Court commits the custody of the King's debtors, for securing the debts; he likewise assigns to sheriffs, customers and collectors, their auditors, before whom they shall account. *Stat.* 51 *Hen.* 3. *stat.* 5.

MARSHAL AND STEWARD OF THE KING's HOUSHOLD AND MARSHALSEA. Of what things they shall hold plea. *Art. super Cartas*, 28 *Ed.* 1. *stat.* 3. *c.* 3: 8 *R.* 2. *c.* 5.

MARSHALSEA, *Marescaltia.*] The court or seat of the Marshal; of whom see *Cromp. Jur.* 120. It is also used for the prison in *Southwark*; the reason whereof may be, because the Marshal of the King's house was wont perhaps to sit there in judgment, or keep his prison. See *stats.* 9 *Rich.* 2. *c.* 5: 2 *Hen.* 4. *c.* 23. King *Charles* the First erected a court by letters patent under the great seal, by the name of *Curia Hospitii Domini Regis*, &c. which takes cognizance more at large of all causes than the Marshalsea could; of which the Knight Marshal or his Deputy are Judges. *Cowell.* See title *Court of Marshalsea*.

MARSHES AND FENS, Laws concerning them. See title *Fens*.

MART, A great fair for buying and selling goods, holden every year. 2 *Inst.* 221. See titles *Fair*; *Market*.

MARTIAL LAW, The law of war, that depends upon the just but arbitrary power and pleasure of the King, or his Lieutenant; for though the King doth not make any laws

laws but by common consent in Parliament, yet in time of war, by reason of the necessity of it, to guard against dangers that often arise, he useth absolute power, so that his word is a law. *Smith de Repub. Angl. lib.* 2. *c.* 4. This power, however, is now regulated by Act of Parliament. See this Dictionary, title *Court Martial.*

MARTILAGIUM, For *Martyrologium. Monast.* ii. 322.

MARTYROLOGY, *Martyrologium.*] A book of Martyrs, containing the lives, &c. of those men who died for their religion. Also a calendar or register kept in religious houses, wherein were set down the names and donations of their benefactors, and the days of their death, that upon every anniversary they might commemorate and pray for them: such benefactors usually made it a condition of their beneficence, to be inserted in the Martyrology. *Paroch. Antiq.* 189.

MASAGIUM, Anciently used for *messuagium*, a messuage. *Pat.* 16 *R.* 2.

MASKS. The penalty of selling or keeping visor masks. See the ancient *stat.* 3 *Hen.* 8. *c.* 9.

MASONS. To plot confederacies amongst Masons, was, by an obsolete *stat.* 3 *H.* 6. *c.* 1, declared felony; and such as assembled thereon were to suffer imprisonment, and make fine and ransom. This was when the nature and secrets of Masonry were known only to few. They are now known to many thousands who are members of the Society, and dispersed all over the Christian world. Many of the principal men of this and other countries are of the fraternity. Masons taken prisoners by the *French* in former wars, have met with great indulgencies from their brethren in foreign parts; though enemies in a national respect, as Masons they were friends. *Dict.*

MASS; See *Papist.*

MASSER, A priest that says mass. *Blount.*

MASS-PRIEST. In former times secular Priests, to distinguish them from the regulars, were called Mass-Priests, and they were to officiate at the Mass, or in the ordinary service of the church: hence *Messe Preost* in many of our *Saxon* canons, for the parochial minister; who was likewise sometimes called *Messe Thegne*, because the dignity of a priest in many cases was thought equal to that of a *Thein*, or lay lord. But afterwards the word Mass-Priest was restrained to stipendiaries retained in chantries, or at particular altars, to say so many Masses for the souls of the dead.

MAST, *Glans, pessona.*] The acorns and nuts of the oak, or other large tree.—*Glandis nomine continentur glans, castanea, fagina, ficus et nuces, et alia quæque quæ edi et pasci poterunt præter herbam. Bract. lib.* 4. *Tempus pessonæ* often occurs for Mast-time, or the season when Mast is ripe; which in *Norfolk* they call Shacking-time. —*Quod habeat decem porcos in* tempore de pesson *in bosco meo. Mon. Angl.* ii. 113, 231. There is a tree called Mast-tree. For *Masts*; see *Ships* and *Stores.*

MASTER, *Magister.*] Signifies in general a governor, teacher, &c. and also in many cases an officer. See *Servant.*

MASTER AND SERVANT. The relation between a Master and a Servant, from the superiority and power which it creates on the one hand, and duty, subjection, and, as it were, allegiance on the other, is, in many instances, applicable to other relations, which are in a superior and subordinate degree; such as lord and bailiff, principal and attorney, owners and masters of ships, merchants and factors, and all others having authority to enforce obedience to their orders, from those whose duty it is to obey them, and whose acts, being conformable to their duty and office, are esteemed the acts of their principals. See this Dictonary, title *Servant*; as also titles *Apprentice*; *Labourer.*

MASTER OF THE ARMORY, *Magister Armorum et Armaturæ Regis.*] An officer who hath the care of his Majesty's arms and armory, mentioned in the ancient *stat.* 39 *Eliz. c.* 7.

MASTER OF THE CEREMONIES, *Magister Admissionum.*] One who receives and conducts ambassadors and other great persons to audience of the King, &c. This office was instituted by King *James* I. for the more magnificent reception of ambassadors and strangers of the greatest quality.

MASTER OF, OR IN CHANCERY, *Magister Cancellariæ.*] In the Chancery there are Masters, who are assistants to the Lord Chancellor or Lord Keeper, and Master of the Rolls: of these there are some ordinary, and some extraordinary; the Masters in ordinary are twelve in number, of whom the Master of the Rolls is chief; and some sit in Court every day during term, and have referred to them interlocutory orders for stating accounts, computing damages, and the like; they also administer oaths, take affidavits, and acknowledgments of deeds and recognizances: they also examine, on reference, the propriety of Bills in Chancery; which if they report to be scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs. The extraordinary Masters are appointed to act in the country, in the several counties of *England*, beyond ten miles distance from *London*, by taking affidavits, recognizances, acknowledgments of deeds, &c. for the ease of the suitors of the Court.

By the *stat.* 13 *Car.* 2. *st.* 1, in the *Appendix*, a public Office was ordained to be kept near the Rolls, for the Masters in Chancery; in which they, or some of them, are constantly to attend, for the administring oaths, caption of deeds, and dispatch of other business: and their fees for taking affidavits, acknowledgment of deeds, exemplifications, reports, certificates, &c. are ascertained by that act; and to take more, incurs disability for such Master to execute his office, and a forfeiture of 100*l.* &c.

See *stat.* 5 *Geo.* 3. *c.* 28, to impower the High Court of Chancery to lay out upon government securities, a sum of money therein mentioned, out of the common and general cash in the Bank of *England*, belonging to the suitors of the said Court; and to apply the interest arising therefrom, towards augmenting the incomes of the Masters of the said Court: as also *stat.* 32 *Geo.* 3. *c.* 42, for building offices for them. See also this Dictionary, titles *Chancellor*; *Chancery.*

MASTER OF THE COURT OF WARDS AND LIVERIES, The chief officer of that Court, assigned by the King; to whose custody the seal of the Court was delivered, &c. as appears by the *stat.* 33 *H.* 8. *c.* 33. But as this Court was abolished by *stat.* 12 *Car.* 2. *c.* 24, this office of course dropped with it.

MASTER OF THE FACULTIES, *Magister facultatum.*] An officer under the Archbishop of *Canterbury*, who grants licences and dispensations, &c.

MASTER

MASTER OF THE HORSE, He who hath the ordering and government of the King's stables; and of all horses, racers, and breeds of horses belonging to his Majesty: he has the charge of all revenues appropriated for defraying the expence of the King's breed of horses, of the stable, litters, sumpter-horses, coaches, *&c.* and has power over the equerries and pages, grooms, coachmen, farriers, smiths, sadlers, and all other artificers working for the King's stables, to whom he administers an oath to be true and faithful; but the accounts of the stables, of liveries, wages, *&c.* are kept by the Avener; and by him brought to be passed and allowed by the Court of Green Cloth.

The office of Master of the Horse is of high account, and always bestowed upon some great nobleman; and this officer only has the privilege of making use of any horses, footmen, or pages belonging to the King's stables: at any solemn cavalcade he rides next to the King, with a led horse of state. He is the third great officer of the King's household, being next to the Lord Steward and Lord Chamberlain; and is mentioned in *stats.* 39 *Eliz. c.* 7: 1 *Ed.* 6. *c.* 5.

MASTER OF THE JEWEL OFFICE, An officer of the King's household, having the charge of all plate used for the King or Queen's table, or by any great officer at Court; and also of all the royal plate remaining in the Tower of *London*, and of chains and jewels not fixed to any garment. See *stat.* 39 *Eliz c.* 7.

MASTER OF THE HOUSEHOLD, *Magister Hospitii Regis.*] Otherwise called Grand Master of the King's Household, now stiled Lord Steward of the Household; which title this officer hath borne ever since *Anno* 32 *H.* 8. But under him there is a principal officer still called Master of the Household, who surveys the accounts, and has great authority.

MASTER OF THE KING's MUSTERS, A martial officer in the King's armies, to see that the forces are complete, well armed and trained; and to prevent frauds, which would otherwise waste the Prince's treasure, and weaken the forces, *&c.*

MASTER OF THE MINT, An officer who receives the silver of the goldsmiths, and pays them for it, and oversees every thing belonging to the Mint; he is at this day called Warden of the Mint.

MASTER OF THE ORDNANCE, A great officer to whose care all the King's ordnance and artillery is committed. See *stat.* 39 *Eliz. c.* 7.

MASTER OF THE POSTS, Was an officer of the King's Court, who had the appointing, placing, and displacing of all such through *England*, as provided post-horses for the speedy passing of the King's messages, letters, pacquets, and other business; and was to see that they kept a certain number of good horses of their own, and upon occasion that they provided others for furnishing those persons who had a warrant from him to take and use post-horses, either from or to the seas, or other places within the realm; he likewise paid their wages, settled their allowances, *&c.* See *stat.* 2 *Ed.* 6. *c.* 3.

This office is now superseded by the establishment of a regular *Post-office*; see that title. It has been thought necessary, however, to provide by the *stat.* 22 *Geo.* 2. *c.* 25, That any person may let to hire chaises, or furnish horses for chaises at any stage upon any post-road, notwithstanding *stat.* 9 *Ann. c.* 10.

MASTER OF THE REVELS, An officer to regulate the diversions of dancing and masking, used in the palaces of the King, Inns of Court, *&c.* and in the King's Court, is under the Lord Chamberlain.

MASTER OF THE ROLLS, *Magister Rotulorum.*] An Assistant to the Lord Chancellor in the High Court of Chancery, who in his absence heareth causes there, and also at the Chapel of the Rolls, and makes orders and decrees. *Crompt. Jurisd.* 41. His title in his patent is, *Clericus parvæ Bagæ, Custos Rotulorum, &c.* And he has the keeping of the Rolls of all patents and grants which pass the Great Seal, and the records of the Chancery. He is called Clerk of the Rolls, *stat.* 12 *R.* 2. *c.* 2. and in *Fortescue, c.* 24; and no-where Master of the Rolls, until the *stat.* 11 *H.* 7. *c.* 20. In which respect, Sir *Thomas Smith* says, he may not unfitly be stiled *Custos Archivorum.* Master of the Rolls enabled to grant leases of the houses belonging to the Rolls; *st.* 12 *Car.* 2. *c.* 26. Construction of the power; *st.* 20 *Geo.* 2. *c.* 34. His judicial authority confirmed; *st.* 3 *Geo.* 2. *c.* 30; see title *Decree.* In his disposition are the offices of the Six Clerks, and the Clerks of the Petty Bag, Examiners of the Court, and Clerks of the Chapel. 14 & 15 *H.* 8. *c.* 1. See *stat.* 23 *Geo.* 2. *c.* 25, whereby 1200*l. per Annum* is directed to be paid to the Master of the Rolls. See tit. *Chancery.*

MASTER OF A SHIP; See *Insurance.*

MASTER OF THE TEMPLE. The Founder of the order of the Knights Templars, and his successors, were called *Magni Templi Magistri*; and probably from hence he was the spiritual guide and director of the *Temple.* The Master of the *Temple* here was summoned to Parliament *Anno* 49 *H.* 3. The chief Minister of the *Temple* Church in *London*, is now called Master of the *Temple. Dugd. Warw.* 706.

MASTER OF THE WARDROBE, *Magister Garderobe.*] A considerable officer at Court, who has the charge and custody of all former Kings' and Queens' ancient robes remaining in the Tower of *London*; and all hangings, bedding, *&c.* for the King's houses: he hath also the charge and delivery out of all velvet or scarlet cloth allowed for liveries, *&c.* Of this officer mention is made in *stat.* 39 *Eliz. c.* 7. The Lord Chamberlain has the oversight of the officers of the Wardrobe.

MASTINUS, *Mastivus.*] A great dog; a mastiff. *Knyght, lib.* 2. *c.* 15.

MASTS; See *Ships and Stores.*

MASURA, An old decayed house. *Domesd.*

MASURA TERRÆ, Fr. *masure de terre.*] A quantity of ground, containing about four oxgangs. *Domicilium cum fundo*; or *fundus cum domicilio competenti.* See *Domesday.*

MATERIA, A great beam, or timber proper for building. *Mon. Angl.* i. 821.

MATRICULA, A register; as in the ancient church there was *matricula clericorum*, which was a catalogue of the officiating clergy; and *matricula pauperum*, a list of the poor to be relieved: hence to be entered in the register of the Universities, is to be matriculated, *&c.*

MATRIMONIAL CAUSES, Or injuries respecting the rights of marriage, are a branch of the ecclesiastical jurisdiction. See title *Marriage.*

MATRIMONIUM, Is sometimes taken for the inheritance descending to a man *ex parte matris. Blount.*

MATRIMONY; See *Marriage.*

MATRIX ECCLESIA, The mother church; and is either a cathedral, in respect of the parochial churches within the same diocese; or a parochial church, with respect to the chapels depending on it, and to which the people resort for sacraments and burials. *Leg. H.* 1. *c.* 19.

MATRONS, Jury of. When a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspected to be intended; then, upon the writ *de ventre inspiciendo*, a Jury of Women is to be impanelled to try the question, whether with child or not. *Cro. Eliz.* 566. So if a woman is convicted of a capital offence, and being condemned to suffer death, pleads in stay of execution, that she is pregnant, a Jury of Matrons is impanelled to inquire into the truth of the allegation; and if they find it true, the convict is respited until after her delivery. See titles *Ventre inspiciendo*; *Execution of Criminals*.

MATS and COVERLETS, &c. In the county of *Norfolk*, by what persons made; see the obsolete *stat.* 5 & 6 *Ed.* 6. *c.* 4.

MATTER IN DEED, AND MATTER OF RECORD, Are often mentioned in law proceedings, and differ thus: the first seems to be nothing else but some truth or matter of fact to be proved by some specialty, and not by any record; and the latter is that which may be proved by some record. For example; if a man be sued to an exigent, during the time he was abroad in the service of the King, &c. this is Matter in Deed, and he that will alledge it for himself, must come before the *scire facias* for execution be awarded against him; but after that, nothing will serve but Matter of Record, that is, some error in the process appearing upon the Record. There is also a difference between Matter of Record and Matter in Deed, and nude matter; the last being a naked allegation of a thing done, to be proved only by witnesses, and not either by record or specialty. *Old Nat. Br.* 19: *Kitch.* 216.

MAUGRE, from the Fr. *Mal*, and *gre*, i. e. *Animo iniquo*.] Signifies as much as to say with an unwilling mind, or in despite of another; as where it is said, that the wife shall be remitted, *maugre* the husband, that is, whether the husband will or not. *Litt.* § 672: See *Malo grato*.

MAUM, A soft brittle stone in some parts of *Oxfordshire*; and in *Northumberland* they use the word Maum for soft and mellow. *Plot's Nat. Hist. Oxfordsh. p.* 63.

MAUND, A kind of great basket or hamper, containing eight bales, or two fats: it is commonly a quantity of eight bales of unbound books, each bale having one thousand pounds weight. *Old Book of Rates, pag.* 3.

MAUNDY THURSDAY, The *Thursday* before *Easter*. See *Mandati Dies*.

MAUPIGYRNUM, An old sort of broth or pottage. *Cowell*.

MAXIMS IN LAW, Positions and theses, being conclusions of reason, and universal propositions, so perfect, that they may not be impugned or disputed. *Cowell*; *Co. Litt.* 343.

A Maxim is a sure foundation or ground of art, and a conclusion of reason; so called *quia maxima est ejus dignitas et certissima authoritas, atque quid maxime probetur*, so sure and uncontroulable as that it ought not to be questioned; and what is elsewhere called a principle, and is all one with a rule, a common ground, *postulatum* or *axiom*. *Co. Lit.* 10. *b*; 11. *a*.

Maxims are the foundations of the law, and conclusions of reason; therefore ought not to be impugned, but always to be admitted; but they may by reason be conferred and compared the one with the other though they do not vary, or it may be discussed by reason which thing is nearest the Maxim, and the mean between the Maxims, and which is not; but the Maxims can never be impeached or impugned, but ought always to be observed, and held as firm principles and authorities of themselves. *Plowd.* 27. *b*.

The alterations of any of the Maxims of the Common Law are dangerous. 2 *Inst.* 210.

Maxims are principles and authorities, and part of the general customs or Common Law of the land; and are of the same strength as acts of parliament, when the Judges have determined what is a Maxim; which belongs to the Judges, and not a Jury. *Terms de Ley*: *Doct. & Stud. Dial.* 1. *c.* 8. A Maxim in law is said to be a proposition of all men confessed and granted, without argument or discourse. Maxims of the Law are holden for law; and all other cases that may be applied to them, shall be taken for granted. 1 *Inst.* 11, 67: 4 *Rep*: See 1 *Comm. c.* 68.

The Maxims in our books, which are many and various, are such as the following, *viz.* It is a Maxim, that land shall descend from the father to the son, &c. It is a Maxim, that as no estate can be vested in the King without matter of record, so none can be divested out of him but by matter of record; for things are dissolved as they are contracted. *Rep.* 1, *Cholmey's* case. Another, that an obligation, or other matter in writing, cannot be discharged by an agreement by word. *Co. Lit.* 141.

It is also a Maxim, that if a man have issue two sons by divers venters, and the one of them purchase lands in fee, and die without issue, the other brother shall never be his heir, &c. See title *Descent*.

Committere agnum lupo. St. Hibern. 14 *H.* 3.

Qui cadit à syllabâ cadit à totâ causâ; the Maxim condemned; *stat. Wal.* 12 *Ed.* 1.

Qui pro alieno facto non est puniendus; *stat. West.* 2: 13 *Ed.* 1. *c.* 35.

De transgressione certæ personæ factâ, altera persona commodum aut emendas ne consequatur, *st. de Vast.* 20 *Ed.* 1. *stat.* 2.

That allegiance is due more by reason of the Crown, than of the person of the King, condemned; *Exil. Hug. le Despenser*, 15 *Ed.* 2. *st.* 2.

Necessary alliances among the peers to pursue evil counsellors, not to be punished by rigour of law. *St. ne quis occas. pro felon'* &c. 15 *Ed.* 2. *st.* 3.

The King cannot pardon the suit of others, statute revoking the pardon, &c. 15 *Ed.* 2. *st.* 4.

The father to the bough, and the son to the plough, in *Kent*; *Prærog. Reg.* 17 *Ed.* 2. *st.* 1. *c.* 16.

Every man is bound to do to the King, as his Liege Lord, all that pertaineth. 1 *Ed.* 3. *st.* 2. *c.* 15.

Franchises restraining the freedom of selling merchandize, are to the common prejudice of the King and his people, 25 *Ed.* 3. *st.* 4. *c.* 2.

Laws without great penalty are more often obeyed. 1 *Mar. st.* 1. *c.* 1. § 1.

MAYHEM. See *Maihem.*

MAYOR, *Præfectus urbis*, anciently *meyr*; comes from the Brit. *miret*, i. e. *custodire*; or from the old *English* word *maier*, viz. *potestas*; and not from the Lat. *major.*] The Chief Governor or Magistrate of a city or town-corporate, as the Mayor of *London*, the Mayor of *Southampton*, &c. King *Rich.* I. *anno* 1189, changed the bailiffs of *London* into a Mayor; and from that example King *John* made the bailiff of *King's Lynn* a Mayor, *anno* 1204. Though the famous city of *Norwich* obtained not this title for its chief magistrate, till the seventh year of King *Hen.* V. *anno* 1419, since which there are few towns of note, but have had a Mayor appointed for government. *Spelm. Gloss.*

Mayors of Corporations are Justices of Peace *pro tempore*, and they are mentioned in several statutes; but no person shall bear any office of magistracy concerning the government of any town, corporation, &c. who hath not received the sacrament according to the church of *England*, within one year before his election; and who shall not take the oaths of supremacy, &c. *Stat.* 13 *Car.* 2. *st.* 1. *c.* 1. See title *Oaths*; *Dissenters*; *Conventicle.* If any one intrudes into, and thereupon executes, the office of Mayor, a *quo warranto* information may be brought against him; and he shall be ousted and fined, &c. See title *Quo Warranto.*

A distinction is made in cases relative to Corporations between a mere Usurper, and an Officer *de facto*; though not *de jure.* An Usurper is a man who, without any colour of election, gets possession of the office, and acts in it: and the mere circumstance of being sworn into the office, makes no difference; but to make an officer *de facto*, at least the *form* of an election is necessary, though on legal objections it may afterwards be overturned. Notwithstanding this distinction, however, in point of form, it is doubtful whether there be any in the effect. Some acts, it is admitted, may be good if done by a *Mayor de facto*, or under his authority; but it does not appear whether the same acts would be good if done by a mere Usurper: some acts are certainly void if done by an Usurper; and probably so, if done by a Mayor *de facto.* Those acts which are good if done by a Mayor *de facto*, or under his authority, are such as he may be *compelled* to do in favour of a person who has a precedent right to have them done. All *voluntary* acts *not necessary* to carry on the business of the corporation seem to be void, whether done by an Usurper, or a Mayor *de facto*, or under the authority of either: some *necessary* acts are also void in both cases. See *Andr.* 116, 117, 163, 388: *Hardw.* 147—152: *Lutw.* 519: 2 *Stra.* 1090; 1109: 5 *Burr.* 2601, and *Kyd's Law of Corporations*, *c.* 3. § 7. But the above does not apply to acts in which strangers are interested. See *Kyd.*

Where an *Infant* is *actually* Mayor, or other Chief Officer of a Corporation, this shall not avoid the acts of the Corporation with respect to Strangers, because these acts are not the acts of the particular persons, but of the Body-corporate. But it seems, that where neither the provisions of the charter, nor the usage of the Corporation *expressly* authorize the election of an Infant into this or any other corporate office, an *Infant* is not capable of being elected; because, as Lord *Hardwicke* observed, "if an Infant is not fit to manage for himself, he is improper to be a Mayor for the Publick." See *Hardw.* 8: *Cowp.* 220.

The powers and duties of a Mayor, or other head officer of a Corporation depend in general on the provisions of the charters, or prescriptive usage, of the Corporation, or the express provisions of an act of Parliament. It is commonly one of his duties, as well as of his particular privileges, to preside at the corporate assemblies: but whether, in a Corporation by charter, this be necessarily incident to his office, *where no express provision is made for that purpose*, has been made a question, but never solemnly decided; and indeed all cases of *such* nature must chiefly depend on their own peculiar circumstances. See 3 *Mod.* 14: 2 *Ld. Raym.* 1237: 2 *Burr.* 370. In the case of a Corporation by prescription, this question can hardly ever arise; because there must necessarily be some usage one way or the other, to show what is the power and duty of the Mayor in this respect, in every such particular Corporation, independently of any general principle. In every other respect it may be safely asserted, that the Mayor, as well as the Aldermen, and other select bodies, have no other powers, authorities, or privileges, than those which they possess by charter, prescription, or act of Parliament. See *Kyd on Corporations.*

Where the Mayor's presence is necessary at a corporate assembly, his departure before a business regularly begun be concluded, will not invalidate that particular business: but the assembly cannot proceed to any thing else. 1 *Barnard.* 385. And on the death of the Mayor, or during the vacation of the office, the Corporation can do no corporate act, but that of choosing a new Mayor. 21 *Ed.* 4. 58. *a.*

By the provisions of some charters the *Mayor* or other chief officer is elected for a year, and till another be chosen; in which case, if no successor be chosen at the end of the year, the Mayor of the preceding year is said to hold over. But where a particular day is appointed for the election of a successor, which is generally the case, and a power of holding over is not expressly given, it does not exist by implication. *Stra.* 394. And the preamble of the *stat.* 11 *Geo.* 1. *c.* 4, (see *post*,) manifestly shows, that the Legislature thought it was not implied; for it proceeds on the supposition, that for want of an election of a new Mayor on the charter day, the Corporation was dissolved; which could not have been the case if the Mayor of the preceding year had had a right of holding over. *Kyd on Corporations.*

Where there was a clause of holding over, it had become a practice with the Mayor and other Head Officers of the Corporations to avoid holding an election on the charter day; by which means they continued in office for several years together: In order to put an end to this practice, the *stat.* 9 *Ann. c.* 20. § 8, after reciting the inconvenience which had arisen from Head Officers of Corporations, to whom it belonged to preside at the election, and make return of Members to serve in Parliament, being elected for two years successively, enacted, "that no person or persons who had been or should be in *such* annual office for one whole year, should be capable of being chosen into the same office for the year immediately ensuing; and that where any such annual officer or officers was or were to continue for a year, and until some other person or persons should be chosen and

 sworn

sworn into such office, if any such officer or officers should voluntarily and unlawfully obstruct and prevent the choosing of another person, to succeed into such office, at the time appointed for making another choice, he should forfeit 100*l*." See 8 *Mod.* 111, 127, 132; and *Kyd on Corporations.*

By *stat.* 11 *Geo.* 1. *c.* 4, if no Mayor or other Chief Officer be elected in a Corporation on the day appointed by charter, by the proper officers, or such election being made, it shall afterwards become void; the next in place is to hold a Court, and elect one the day following, &c. or, in default thereof, the Court of King's Bench may compel the electors to choose one, &c. by writ of mandamus, requiring the members who have a right to vote, to assemble themselves on a day prefixed, and proceed to election, or shew cause to the contrary; and Mayors, &c. voluntarily absenting on the day of election, shall be imprisoned six months, and be disabled to hold any office in the Corporation. See titles *Mandamus*; *Quo Warranto.*

The authority of Mayors, as to matters not relating to their Corporation, extends to the following other particulars:—The statute 2 *Ed.* 3. *c.* 3, gives power to Mayors to arrest persons carrying offensive weapons in fairs, markets, &c. to make affrays, and the disturbance of the peace.

By *stat.* 23 *H.* 8. *c.* 4, Mayors, &c. have power to set the price of ale and beer:—and they are authorised to convict persons selling ale without licence; and also to levy penalties on the offender by distress, &c. *Stat.* 3 *Car.* 1. *c.* 3;—and they are to cause quart and pint pots for the selling of ale, to be examined whether they hold their full measure; and to mark them, under the penalty of 5*l.* *Stat.* 11 & 12 *W.* 3. *c.* 15.—Mayors, bailiffs, and lords of leets, are to regulate the assise of bread, and examine into the goodness thereof: and if bakers make unlawful bread, they may give it to the poor, and pillory the offenders, &c. 5 *Hen.* 3 *st.* 6. See title *Bread and Beer.*

Mayors, &c. are empowered to make enquiry into offences committed against *stat.* 1 *Eliz.* *c.* 2, which requires that the common prayer be read in churches; and that the churchwardens do their duty in presenting the names of such persons as absent themselves from church on *Sundays*, &c. Head officers of Corporations are to appoint and swear overseers or searchers to examine into defects of northern cloth, &c. and the overseers shall fix a seal of lead to cloths, expressing the length and breadth; and if they find any faulty, or sealed with a false seal, &c. they are to present the same at the next quarter sessions. Mayors, &c. neglecting their duty, are liable to a penalty of 5*l.* *stat.* 39 *Eliz.* *c.* 20. Mayors may determine whether coin offered in payment be counterfeited or not; and tender an oath to determine any question relating to it. *Stat.* 9 & 10 *W.* 3. *c.* 21.

By *stat.* 23 *Eliz.* *c.* 9, Mayors, &c. may call before them and examine dyers, suspected to use logwood in dying; and, if they find cause, may bind them over to the quarter sessions, where, on conviction, they are liable to a forfeiture of 20*l.*—Under various statutes Mayor and Head Officers of Corporations are to punish drunkenness. See title *Drunkenness.*

Head Officers and Justices of Peace in Corporations, may enquire of forcible entries, commit the offenders, and cause the tenements to be seized, &c. within their franchises, in like manner as Justices of Peace in the county, *Stat.* 8 *H.* 6. *c.* 9. See title *Forcible Entry* II.

Mayors, &c. shall enquire into unlawful gaming, against the *stat.* 33 *H.* 8. *c.* 9. They are to search places suspected to be gaming-houses, and levy penalties, &c. and they have power to commit persons playing at unlawful games. See title *Gaming.*

Horses stolen, found in a Corporation, may be redeemed by the owner, making proof before the Head Officer of the Corporation of the property, &c. *Stat.* 31 *Eliz.* *c.* 12. See title *Horses.*

Mayors and Head Officers in corporate and market-towns, and lords of liberties and their stewards, are to appoint and swear two skilful persons yearly, to be searchers and sealers of leather; and they are to appoint triers of insufficient leather, and of leather wares: searchers not doing their duty to forfeit 40*s.* and triers, 5*l.* *Stat.* 1 *Jac.* 1. *c.* 22. See title *Leather.*

Persons robbing orchards, hedge-breakers, &c. are punishable by Mayors; and a person on conviction by the oath of one witness, shall pay to the person injured such damage as the Mayor, &c. shall think fit, or be whipped. *Stat.* 43 *Eliz.* *c.* 7. See title *Trespass.*

Mayors, &c. on receipt of precepts from sheriffs, (when writs are issued for elections) requiring them to choose burgesses or members of Parliament, by the citizens, &c. are to proceed to election, and make returns by indenture between them and the electors; and making a false return, shall forfeit 40*l.* to the King, and the like sum to the party chosen, not returned, &c. *Stat.* 23 *H.* 6. *c.* 14. See *stat.* 2 *Geo.* 2. *c.* 24; and this Dictionary, title *Parliament.*

In time of sickness, a tax may be laid on inhabitants of Corporations, for relieving such persons as have the plague, by Mayors, &c. who are to appoint searchers and buriers of the dead: and if any infected persons shall go abroad with sores upon them, after an Head Officer hath commanded them to keep at home, it is felony; and if they have no sores about them, they are punishable as vagrants. *Stat.* 1 *Jac.* 1. *c.* 31. See title *Plague.*

The *stat.* 43 *Eliz.* *c.* 2, which directs that the father, grandfather, mother, grandmother, and children, of every *poor* person, shall be assessed towards their relief by Justices, and which impowers Justices of Peace to order a poor's rate or tax, and overseers of the poor, &c. to place forth apprentices, and sets forth the office of overseers; gives the like authority to the Head Officers in corporate towns, as Justices of Peace have in their counties; which said Justices are not to intermeddle in Corporations for the execution of this law. See titles *Poor*; *Justices of the Peace.*

Mayor , Bailiffs, and other Head Officers of corporate towns, &c. are to make proclamation for rioters to disperse as follows: *Our Sovereign Lord the King charges and commands all persons assembled, immediately to disperse themselves, and peaceably depart to their habitations, upon pain of imprisonment*, &c. And if the rioters, being twelve in number, do not disperse within an hour after, it is felony without benefit of clergy, &c. *Stat.* 1 *Geo.* 1. *st.* 2. *c.* 5. See title *Riots.*

Matters relating to servants, and apprentices, may be determined by Mayors; who have power to compel persons to go to service, &c. *Stat.* 5 *Eliz.* *c.* 4. See titles *Servants*; *Labourers*; *Apprentices.* Mayors may arrest soldiers departing without licence; and they are to be

present

present at musters; quarter and billet soldiers, &c. See title *Soldiers*. *Stats*. 18 *Hen*. 6. *c*. 18: 1 *Geo* 1. *c*. 47, &c. Persons using games on a *Sunday* forfeit 3*s*. 4*d*. to the use of the poor; carriers, &c. travelling on that day 20*s*. and persons doing any worldly labour thereon 5*s*. all leviable by warrant from Mayors and Head Officers of Corporations, as well as other Justices. See *stats*. 1 *Car*. 1. *c*. 1: 3 *Car*. 1. *c*. 2: 29 *Car*. 2. *c*. 7: and see this Dictionary, titles *Holidays*; *Sundays*.

In every city, town, &c. there is to be a common balance and sealed weights, under divers penalties: there is also to be a common bushel sealed. *Stat*. 8 *Hen*. 6. *c*. 5: 11 *Hen*. 6. *c*. 8. And Mayors, &c. are to provide a mark for the sealing of weights and measures, being allowed 1*d*. for sealing every bushel and hundred weight; and a halfpenny for every other measure and half hundred weight, &c. Mayors and Head Officers of Corporations, &c. shall view all weights and measures once a year, and punish offenders using false weights; and they may break or burn such weights and measures, and inflict penalties, &c. If they permit persons to sell by measures not sealed, they shall forfeit 5*l*. Sealing weights not agreeable to the standard, is liable to the same penalty; and refusing to seal weights and measures, subjects them a forfeiture of 40*s*. See *stat*. 31 *Geo*. 2. *c*. 17. § 9; and this Dictionary, title *Weights* and *Measures*. Mayors, &c. are to inspect and order the size of faggot, billet, tale-wood, &c. 43 *Eliz*. *c*. 14. See title *Fuel*; *Wood*.

For the various offences which *Mayors*, Justices, &c. have jurisdiction to punish, part of which are above enumerated, see the titles of the offences, this Dictionary, *passim*; and the statutes imposing the several penalties; too long and numerous to be referred to, under this title. See also titles *Corporation*; *Justices of Peace*; *Officers*; *Oaths*; *Mandamus*; *Quo Warranto*; &c.

MEAD AND METHEGLIN, are liable to certain duties of *Excise*. See that title.

MEAL, May be exported duty free. 11 & 12 *W*. 3. *c*. 20. See title *Navigation Acts*.

MEAL-RENTS, Certain rents heretofore paid in Meal by the tenants of the honour of *Clun*, to make meat for the Lord's hounds; they are now payable in money.

MEALS. The shelves of land, or banks on the sea-coasts of *Norfolk*, are called the *Meals* and the *Males*. *Cowell*.

MEAN OR MESNE, *medius*.] The middle between two extremes; and that either in time or dignity. In time it is the interim betwixt one act another, and is applied to Mean profits of lands between a disseisin and recovery, &c. See title *Ejectment*. As to dignity, there is a Lord Mean or Mesne, that holds of another Lord; and Mean tenant, &c. All the land in the kingdom is, by a fiction arising from the feudal origin of the *English* tenures, supposed to be holden mediately or immediately of the King, who is stiled the *Lord Paramount*, or above all. Such tenants as held under the King immediately, when they granted out portions of their lands to inferior persons, became also Lords with respect to those inferior persons, as they were still tenants with respect to the King; and thus partaking of a middle nature were called *Mesne*, or middle Lords. So that if the King granted a manor to *A*. and he granted a portion of the lands to *B*, now *B*. was said to hold of *A*., and *A*. of the King; or in other words, *B*. held his lands immediately of *A*. and mediately of the King. The King was therefore styled *Lord Paramount*: *A*. was both tenant and Lord, or was a *Mesne* Lord, and *B*. was called *Tenant paravail*, or the lowest tenant, being he who was supposed to make avail or profit of the land. 1 *Inst*. 296: 2 *Comm*. *c*. 5. *p*. 59. See this Dictionary, title *Tenures*.

The *Writ of Mesne* is in the nature of a writ of right, and lies when, upon any subinfeudation, the Mean or middle Lord suffers his under-tenant, or tenant paravail, to be distrained upon by the *Lord Paramount*, [whether the King or another,] for the rent due to him from the Mesne Lord. *Booth*, 136: *F*. *N*. *B*. 135.

In such case the tenant shall have judgment to be acquitted or indemnified by the *Mesne Lord*; and if he makes default therein, or does not appear originally to the tenant's writ, he shall be forejudged of his mesnalty, and the tenant shall hold immediately of the Lord Paramount himself. 2 *Inst*. 374.

FORM of a WRIT OF MESNE.

GEORGE *the Third*, &c. *To the Sheriff of* S. *Command* A. B. *that justly*, &c. *he acquit* C. D *of the service which* E. F. *exacts from him of his freehold that he holds of the said* A. B. *in* W. *whereof the said A. who is Mesne betwixt the said* E. *and* C. *ought to acquit him*; *and whereupon he complains, that for his default he is distrained*; *and unless*, &c.

If a man bring a writ of Mesne where he is not distrained, yet it is maintainable, but then he shall not have damages; for it is brought only to be acquitted, &c. And tenant for life, where the remainder is over in fee, shall have this writ against the Mesne. 7 *H*. 4. 12: 15 *H*. 6: *New Nat*. *Br*. 330. One brought a writ of Mesne against a man, because he did not acquit the plaintiff of a rent-charge demanded, &c. when he by his deed bound himself and his heirs to warrant and acquit him; and it was held good: and if a man have judgment to recover in this writ, if he be not afterwards acquitted, he may have a *distringas ad acquietandum* against the Mesne; and *scire facias* against the Lord. *Stat*. *Westm*. 2. 13 *E*. 1. *c*. 9: 14 *Ed*. 3.

MEAN PROCESS; See *Mesne Process*.

MEASE, *messuagium*.] A messuage or dwelling-house. *Kitchen*, 139: *F*. *N*. *B*. 2: *Stat*. *Hiberniæ*, 14 *H*. 3: *Stat*. 21 *H*. 8. 13. Also a measure of herrings, containing five hundred; the half of a thousand is called *Mease* or *Mese*. *Merch*. *Dict*.

MEASON-DUE, In Fr. *Maison de Dieu*, *Domus Dei*; a house of God, a monastery, religious house or hospital; the word is mentioned in *stat*. 39 *El*. *c*. 5. See *Hospital*.

MEASURE, *mensura*.] A certain quantity or proportion of any thing sold; and, in many parts of *England*, it is synonimous with a Bushel.

The regulation of Weights and Measures, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But as weight and Measure are things in their

nature arbitrary and uncertain, it is therefore expedient that they be reduced to ſome fixed rule or ſtandard; which ſtandard it is impoſſible to fix by any written law, or oral proclamation; for no man can, by words only, give another an adequate idea of a foot rule, or a pound weight. It is therefore neceſſary to have recourſe to ſome viſible, palpable, material ſtandard; by forming a compariſon with which, all weights and Meaſures may be reduced to one uniform ſize: and the prerogative of fixing this ſtandard, our ancient law veſted in the Crown; as in *Normandy* it belonged to the Duke. This ſtandard was originally kept at *Wincheſter*: and we find in the laws of King *Edgar*, *c.* 8, near a century before the Conqueſt, an injunction that the one Meaſure, which which was kept at *Wincheſter*, ſhould be obſerved throughout the realm. Moſt nations have regulated the ſtandard of Meaſures of length by compariſon with the parts of the human body; as the palm, the hand, the ſpan, the foot, the cubit, the *ulna*, (or arm, ell,) the pace, and the fathom. But as theſe are of different dimenſions in men of different proportions, our ancient hiſtorians informs us, that a new ſtandard of longitudinal meaſure was aſcertained by King *Henry* the Firſt; who commanded that the *ulna* or ancient ell, which anſwers to the modern yard, ſhould be made of the exact length of his own arm. And, one ſtandard of Meaſures of length being gained, all others are eaſily derived from thence; thoſe of greater length by multiplying, thoſe of leſs by ſubdividing, that original ſtandard. Thus, by the ſtatute called *compoſitio ulnarum et perticarum*, five yards and a half make a perch: and the yard is ſubdivided into three feet, and each foot into twelve inches; which inches will be each of the length of three grains of barley.

Superficial Meaſures are derived by ſquaring thoſe of length; and Meaſures of capacity by cubing them.

The ſtandard of *Weights* was originally taken from corns of wheat, whence the loweſt denomination of weights we have is ſtill called *a grain*; thirty-two of which are directed by the ſtatute called *compoſitio menſurarum*, to compoſe a penny-weight, whereof twenty make an ounce, twelve ounces a pound, and ſo upwards. And upon theſe principles the firſt ſtandards were made; which, being originally ſo fixed by the Crown, their ſubſequent regulations have been generally made by the King in Parliament. Thus, under King *Richard* I. in his Parliament holden at *Weſtminſter*, *A. D.* 1197, it was ordained, that there ſhould be only one weight and one Meaſure throughout the kingdom; and that the cuſtody of the aſſiſe or ſtandard of weights and Meaſures ſhould be committed to certain perſons in every city and borough; from whence the ancient office of the King's *Aulnager* ſeems to have been derived, whoſe duty it was, for a certain fee, to meaſure all cloths made for ſale, till the office was aboliſhed by *ſtat.* 11 & 12 *W.* 3. *c.* 20.

In King *John*'s time this ordinance of King *Richard* was frequently diſpenſed with for money; which occaſioned a proviſion to be made for inforcing it, in the great charters of King *John* and his ſon. *Stat.* 9 *Hen.* 3. *c.* 25. Theſe original ſtandards were called *pondus regis*, and *menſura domini regis*; and are directed by a variety of ſubſequent ſtatutes to be kept in the Exchequer, and all weights and Meaſures to be conformable thereto. But, as Sir *Edward Coke* obſerves, though this hath ſo often by authority of Parliament been enacted, yet it could never be effected; ſo forcible is cuſtom with the multitude. 1 *Comm.* 274, *&c.*

Magna Charta, *c.* 25, ordains, "that there ſhall be but one meaſure throughout *England*, according to the ſtandard in the Exchequer:" which ſtandard, was formerly kept in the King's palace; and in all cities, market towns and villages, it was kept in the churches. 4 *Inſt.* 273. By *ſtat.* 16 *Car.* 1. *c.* 19, there is to be one weight and Meaſure, and one yard according to the King's ſtandard; and whoever ſhall keep any other weight or meaſure, whereby any thing is bought or ſold, ſhall forfeit for every offence 5*l.* And by *ſtat.* 22 *Car* 2. *c.* 8, water Meaſure, as to corn or grain, or ſalt, is declared to be within the *ſtat.* 16 *Car.* 1. *c.* 19. And by *ſtats.* 22 *Car.* 2. *c.* 8: 22 & 23 *Car.* 2. *c.* 12, if any ſell or buy grain, or ſalt, *&c.* by any other buſhel, or Meaſure, than what is agreeable to the ſtandard in the Exchequer, commonly called *Wincheſter* Meaſure, he ſhall forfeit 40*s.* *&c. and alſo* the value of the grain or ſalt ſo ſold or bought; half to the poor and half to the informer. Notwithſtanding theſe ſtatutes, in many places and counties, there are different Meaſures of corn and grain; and the buſhel in one place is larger than in another; but the lawfulneſs of it is not well to be accounted for, ſince cuſtom or preſcription is not allowed to be good againſt a ſtatute. *Dalt.* 250.—And now it is ſettled that no practice or uſage can countervail the *ſtats.* 22 *Car.* 2. *c.* 8: 22 & 23 *Car.* 2. *c.* 12, above mentioned. 4 *Term Rep.* 750: 5 *Term Rep.* 353.

There are three different Meaſures, *viz.* one for wine, one for ale and beer, and one for corn: in the Meaſure of wine, eight pints makes a gallon, eight gallons a firkin, ſixteen gallons a kilderkin half barrel or rundlet, four firkins a barrel, two barrels a hogſhead, two hogſheads a pipe, and two pipes make a tun. *Stats.* 15 *R.* 2. *c.* 4: 11 *H.* 7. *c.* 4: 12 *H.* 7. *c.* 5.

In meaſure of corn eight pounds or pints of wheat make the gallon, two gallons a peck, four pecks a buſhel, four buſhels a ſack, and eight buſhels a quarter, *&c.*

And in other Meaſure; three barley corns in length make an inch, twelve inches a foot, three feet a yard, three feet and nine inches an ell, and five yards and a half, which is ſixteen feet and a half, make the perch, pole, or rod. *Stat.* 27 *Ed.* 3. *c.* 10.

Selling by falſe Meaſures, being an offence by the Common Law, may be puniſhed by fine, *&c.* upon an indictment at Common Law, as well as by ſtatute. See the *ſtat.* 11 *Hen.* 7. *c.* 4, which inflicts particular fines for offences; pillory, *&c.* The eaſier and more uſual way of puniſhment is, by levying, on a ſummary conviction by diſtreſs and ſale, the forfeiture impoſed by the ſeveral acts of Parliament adapted to particular frauds.

The reſpective contents of a barrel of beer and ale, *ſtats.* 12 *Car.* 2. *c.* 23. § 20: *c.* 24. § 34: 1 *W.* & *M.* *c.* 24. § 5. The buſhel of corn and ſalt aſcertained, *ſtats:* 22 *Car.* 2. *c.* 8: 22 & 23 *Car.* 2. *c.* 12: 5 *W.* & *M.* *c.* 7. § 18.—A Meaſure of braſs ſhall be chained in every market; and conſtables to ſearch for unſealed meaſures, *ſtat.* 22 *Car.* 2. *c.* 8.—Where there is not a clerk of the market, the Mayor, *&c.* ſhall ſeal Meaſures, 22 & 23 *Car.* 2. *c.* 12. § 4.—Collectors of the exciſe to

provide

provide quarts and pints of brass for ale in every market town, *stat.* 11 & 12 *W.* 3. *c.* 15. § 3.—Contents of *Winchester* Measure, *stat.* 1 *Ann. st.* 2. *c.* 3. § 10.—Water Measure of fruit ascertained, *stat.* 1 *Ann. st.* 1. *c.* 15.—Wine Measure, *stat.* 5 *Ann. c.* 27. § 17.—See further title *Weights.*

MEASURER OR METER of woollen cloth, and of coals, &c. An Officer in the city of *London*; the latter of great account. *Chart. Jac.* I See *Alnager. Coals*

MEASURING-MONEY. The letters patent, whereby some persons exacted for every cloth made, certain money, besides alnage, called Measuring-Money, revoked. *Rot. Parl.* 11 *Hen.* 4.

MEDERIA, A mead house, or place where mead or metheglin is made. *Cartular Abb. Glast. MS.* 29.

MEDFEE, A bribe or reward; and used for a compensation where things exchanged are not of equal value. It is said to come from the word *Meed*, merit. *Vide Cowell.*

MEDIÆ & INFIMÆ MANUS HOMINES, Men of a mean and base condition, of the lower sort. *Blount.*

MEDIANUS, Middle size; *medianus homo*, a man of middle fortune.

MEDIATORS OF QUESTIONS, Were six persons authorised by statute, who, upon any question arising among merchants, relating to unmerchantable wool, or undue packing, &c. might before the Mayor and officers of the Staple upon their oath certify and settle the same; to whose order and determination therein, the parties concerned were to give entire credence, and submit. *Stat. Antiq.* 27 *Ed.* 3 *st.* 2. *c.* 24.

MEDIETAS LINGUÆ; A Jury *de Medietate Linguæ*, signifies a Jury or Inquest impanelled, whereof the one half consists of natives, and the other foreigners; and is used in pleas wherein the one party is a foreigner, the other a denizen: this manner of trial was first given by the *stat.* 28 *Ed.* 3. *c.* 13; before which, this was obtained by the King's grant. *Staundf. P. C. lib.* 3. *c.* 7. He that will have the advantage of trial *per medietatem linguæ*, must pray it; for, it is said, he cannot have the benefit of it by way of challenge. *S. P. C.* 158: 3 *Inst.* 127. In petit treason, murder, and felony, *medietas linguæ* is allowed; but for high treason, an alien shall be tried by the Common Law, and not *per medietatem linguæ*. *H. P. C.* 261. And a Grand Jury ought not to be *de medietate linguæ*, in any case. *Wood's Inst.* 263. It was thought necessary to exclude *Egyptians*, expressly by statute, from the benefit of this trial. See *stats.* 22 *H.* 8. *c.* 10: 1 & 2 *P.* & *M. c.* 4: and this Dictionary, title *Egyptians*. But we read, That *Solomon de Standford*, a Jew, had a cause tried before the Sheriff of *Norwich*, by a Jury which were *sex probos et legales homines, et sex legales Judæos de Civitate Norwici*, &c. *Pasch.* 9 *Ed.* 1.

A Jury *de medietate* is also allowed in some other cases; by analogy to this rule *de medietate linguæ*. As on a *Jus Patronatus*, the Jury must be of 6 clergymen, and 6 laymen. See that title. So also under the *stat.* 8 *H.* 6 *c.* 12, against embezzling records, the Jury shall consist of 6 persons, officers of any of the superior Courts, and 6 common Jurors. See title *Records*. So on a criminal trial in the University Courts, the Jury must be half freeholders of the county, and half matriculated laymen of the University. See 4 *Comm.* 278. See further title *Jury* II.

MEDIO ACQUIETANDO, A judicial writ to distrain a Lord for the acquitting of a mean Lord from a rent, which he formerly acknowledged in Court not to belong to him. *Reg. Judic.* 129. See *Mean.*

MEDITERRANEAN, Passing through the midst of the earth: applied to the sea, which stretcheth itself from West to East, dividing *Europe*, *Asia*, and *Africa*, which is hence called *The Mediterranean Sea*. The counterfeiting of Mediterranean passes for ships to the coast of *Barbary*, &c. or the seal of the Admiralty Office to such passes, is felony without benefit of clergy. *Stat.* 4 *Geo.* 2. *c.* 18. See title *Navigation Acts.*

MEDLEFE, MEDLETA, MEDLETUM. Fr. *Mesler*, to meddle.] A sudden scolding at, and beating one another. *Bract. l.* 3. *c.* 35.

MEDSYPP, A harvest-supper, or entertainment given to labourers at harvest-home. *Plac.* 9 *Ed.* 1. *Cow.*

MEDWAY-RIVER, Pilots thereon how to be licensed, 5 *Geo.* 2. *c.* 20. It was called *Vaga* by the *Britons*; the *Saxons* added *Med.*

MEER, *merus*.] Though an adjective, is used as a substantive to signify Meer right; *Old Nat. Brev.* 2, in these words; "This writ hath but two issues, *viz.* joining the Mise upon the Meere, and that is to put himself in the Great Assise of our Sovereign Lord the King; or to join battle. *Cowell.* See *Mise.*

MEIGNE, See *Maisnada.*

MEINY, Fr. *Mesnie.*] As the King's Meiny, the King's family, or household servants. See *stat.* 1 *R.* 2. *c.* 4.

MELASSES, See *Navigation Acts.*

MELDFEOH, from Sax. *meld*, *indicium delaturæ*; and *feoh*, *præmium pecuniæ*. *Spelm.*] Was the recompence due and given to him who made discovery of any breach of penal laws, committed by another person; called the promoter's or informer's fee. *Leg. Inæ. c.* 20.

MELIUS INQUIRENDUM, A writ that lieth for a second inquiry, where partial dealing is suspected; and particularly of what lands or tenements a man died seised, on finding an office for the King. *F. N. B.* 255. It has been held, that where an office is found against the King, and a *melius inquirendum* is awarded, and upon that *melius*, &c. it is found for the King; if the writ be void for repugnancy, or otherwise, a new *melius inquirendum* shall be had; but if upon the first *melius* it had been found against the King, in such case he could not have a new *melius*, &c. for then there would be no end of these writs. And if an office be found for the King, the party grieved may traverse it; and if the traverse be found against him, there is an end of that cause; and if for him, it is conclusive. 8 *Rep.* 169: 2 *Nelf.* 1008. If there is any defect in the points which are found in an inquisition, there may not be a *melius inquirendum*; but if the inquisition finds some parts well, and nothing is found as to others, that may be supplied by *melius inquirendum*. 2 *Salk.* 469. A *melius inquirendum* shall be awarded out of *B. R.* where a coroner is guilty of corrupt practices; directed to special commissioners. 1 *Vent.* 181. See 15 *Vin. Abr.* title *Melius inquirendum*, and this Dictionary, title *Inquest.*

MEMBERS OF PARLIAMENT, The Members of the House of Commons, are usually so stiled; though in fact the Peers are, strictly speaking, Members of Parliament; which consists of King, Lords, and Commons. See title *Parliament.*

MEMORIES. Some kind of remembrances or obsequies for the dead; mentioned in injunctions to the clergy. *Anno* 1 *Ed* 6.

MEMORY, Time of.] Hath been long ago ascertained by the law to commence from the reign of *Richard* the First; and any custom may be destroyed by evidence of its non-existence in any part of the long period, from his days to the present. 2 *Comm.* 31, *&* *n.* See title *Limitation.*

MENAGIUM, A family. *Trivett's Chronicle, p.* 677: *Walsingham, p.* 66.

MENDLEFE, Mentioned in *Cromp Justice of Peace,* 193. Is that which *Bracton* calleth *Medletum*; quarrels, scuffling, or brawling; *Cowell.* See *Medlefe.*

MENIALS, from *mænia*, the walls of a castle, house, or other place.] Household servants who live under their Lord or master's roof; mentioned in the ancient *stat.* 2 *Hen.* 4. *c.* 21.

MENSA, Comprehends all patrimony, or goods and necessaries for livelihood.

MENSALIA, Such parsonages or spiritual livings, as were united to the tables of religious houses, and called *mensal beneficcs* among the Canonists. And in this sense it is taken, where mention is made of appropriations, *ad mensam suam. Blount.*

MENSURA, A bushel of corn, *&c.* See *Measure.*

MENSURA REGALIS, The King's Standard Measure, kept in the Exchequer, according to which all others are to be made. See *stat.* 16 *Car.* 1. *c.* 19; and this Dictionary title *Measure.*

MER or MERE, Words which begin or end with those syllables, signify fenny places. *Cowell.* See *Mara,* or *Mere*; a lake or great pond.

MERA NOCTIS, Midnight. *Cowell.*

MERCENARIUS, A hireling or servant. *Cartular. Abbat. Glaston. p.* 115.

MERCENLAGE, See *Merchenlage.*

MERCHANT, *Mercator.*] One who buys and trades in any thing: and as merchandize includes all goods and wares exposed to sale in fairs or markets; so the word Merchant formerly extended to all sorts of traders, buyers, and sellers. But every one who buys and sells is not at this day under the denomination of a Merchant; only those who traffic in the way of commerce, by importation or exportation, or carry on business by way of emption, vendition, barter, permutation, or exchange; and who make it their living to buy and sell, by a continued assiduity, or frequent negotiation, in the mystery of merchandising, are esteemed Merchants. Those who buy goods, to reduce them by their own art or industry, into other forms, and then to sell them, are Artificers, not Merchants. Bankers, and such as deal by exchange, are properly called Merchants. *Lex Mercat.* 23.

Merchants were always particularly regarded by the Common Law; though the municipal laws of *England,* or indeed of any one realm, are not sufficient for the ordering and determining the affairs of traffic, and matters relating to commerce; merchandise being so universal and extensive that it is impossible; therefore of the Law Merchant (so called from its universal concern) all nations take special knowledge; and the common and statute laws of this kingdom leave the causes of Merchants in many cases to their own peculiar law. *Lex Mercat.* See 1 *Comm.* 75; and this Dictionary, title *Bill of Exchange*; *Insurance*; *Custom of Merchants.*

The custom of Merchants is part of the Common Law of this kingdom, of which the Judges ought to take notice; and if any doubt arise about the custom, they may send for merchants to know the custom; *per Hobart,* Ch. J.: *Winch.* 24.

The *Lex mercatoria* is allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuilibet in sua arte credendum est.*" See 1 *Comm.* 75.

The law of *England,* as a commercial country, pays a very particular regard to foreign Merchants in innumerable instances. By *Magna Charta, c.* 30, it is provided, That all merchants (unless publicly prohibited beforehand) shall have safe-conduct to depart from, to come into, to tarry in, and to go through, *England,* for the exercise of merchandize, without any unreasonable imposts, except in time of war; and, if a war breaks out between us and their country, they shall be attached (if in *England*) without harm of body or goods, till the King or his chief justiciary be informed how our Merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours. This seems to have been a common rule of equity among all the Northern Nations; but it is somewhat extraordinary, that it should have found a place in *Magna Charta,* a mere interior treaty between the King and his natural-born subjects; which occasions the learned *Montesquieu* to remark with a degree of admiration, "that the *English* have made the protection of foreign merchants, one of the articles of their national liberty." But indeed it well justifies another observation which he has made, that the *English* know better than any other people upon earth, how to value at the same time these three great advantages, RELIGION, LIBERTY, and COMMERCE. 1 *Comm.* 260. See also *stats.* 2 *E.* 3. *c.* 9: 25 *E.* 3. *st.* 4. *c.* 2: 27 *E.* 3. *st.* 2. *cc.* 13, 17, 19, 20: 28 *E.* 3. *c.* 13: 36 *E.* 3. *c.* 7: 2 *Ric.* 2. *c.* . : 11 *R.* 2. *c.* 7: 14 *R.* 2. *c.* 9: 5 *H.* 4. *c.* 9: 7 *H.* 4. *c.* 9; in all which, provisions are contained, for the accommodation of Merchants-strangers; which are now by long use become the known law of the land, allowing for the variations inevitably introduced by time and commerce.

In the reign of King *Ed.* IV. a Merchant-stranger made suit before the King's Privy Council, for several bales of silk feloniously taken from him, wherein it was moved, that this matter should be determined at Common Law; but was answered by the Lord Chancellor, that as this suit was brought by a Merchant, he was not bound to sue according to the law of the land. 13 *Ed.* 4. In former times it was conceived, that those laws that were prohibitory against foreign goods, did not bind a Merchant-stranger; but it has been a long time since ruled otherwise; for in the leagues that are now established between nation and nation, the laws of either kingdom are excepted; so that as the *English* in *France,* or any other foreign country in amity, are subject to the laws of that country where they reside; so must the people of *France,* or any other kingdom, be subject to the laws of *England* when resident here. 19 *Hen.* 7.

English Merchants are not restrained to depart the kingdom without licence, as all other Subjects are; they may depart, and live out of the realm, and the King's obedience; and the same is no contempt, they being excepted out of the statute 5 *R.* 2. *st.* 2. And by the Com-

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mon Law, they might paſs the ſeas without licence; though not to merchandiſe. *Dyer* 206.

If any diſturbance or abuſe be offered them, or any other Merchant in a Corporation, and the Head Officer there do not provide a remedy, the franchiſe ſhall be ſeized; and the diſturber ſhall anſwer double damages and ſuffer one year's impriſonment, *&c.* by *ſtat.* 9 *Ed.* 3. *ſt.* 1. *c.* 1.—All Merchants (except enemies) may ſafely come into *England* with their goods and merchandiſe. *Stat.* 14 *Ed.* 3. *ſt.* 2. *c.* 2.—Merchant-ſtrangers may come into this realm, and depart at their pleaſure; and they are to be friendly entertained. *ſtat.* 5 *R.* 2. *ſt.* 2. *c.* 1. And Merchants alien ſhall be uſed in this kingdom, as denizens are in others. *Stat.* 5 *H.* 4. *c.* 7.

If a difference ariſe between the King and any foreign State, alien Merchants are to have forty days notice, or longer time, to ſell their effects and leave the kingdom. 27 *Ed.* 3. *ſt.* 2. *c.* 17. All Merchants may buy merchandiſes of the ſtaple: and any Merchant may deal in more merchandiſes than one; he may buy, ſell, and tranſport all kinds of merchandiſe. *Stat.* 27 *E.* 3. *ſt.* 2. *c.* 2: 38 *Ed.* 3. *ſt.* 1. *c.* 2.

All the King's Subjects are to have a free trade to and from *France*, *Spain*, and *Portugal.* 3 *Jac.* 1. *c.* 6; and ſee *ſtat.* 4 *Jac.* 1. *c.* 9.

Various reſtraints are laid on Merchants, eſpecially to prevent their carrying of gold and ſilver out of the nation, *&c.* by the ſtatute law. See *ſtats.* 38 *E.* 3. *c.* 2: 14 *R.* 2. *c.* 1: 4 *H.* 4. *c.* 15: 8 *H.* 6. *c.* 24: 3 *H.* 7. *c.* 8: 4 *H.* 7. *c.* 23: 1 *R.* 3. *c.* 9: 1 *Eliz.* *c.* 11.

By *ſtat.* 6 *H.* 4. *c.* 4, Merchant-ſtrangers, ſhall not carry out of the realm, any merchandizes brought within the realm by Merchant-ſtrangers.

If a perſon who is otherwiſe no Merchant, being beyond ſea, takes up money and draws a bill upon a Merchant, he cannot, in an action brought upon this bill againſt him as the drawer thereof, plead that he was no Merchant; for the very taking up the money and drawing the bill makes him a Merchant to this purpoſe. *Comb.* 152. See title *Bill of Exchange.*

Merchant includes all ſorts of traders as well and as properly as Merchant-adventurers. *Dy.* 279. *b.* cites *Spelm. Guilda.* A Merchant taylor is a common term; *per Holt.* Ch J.: 2 *Salk.* 445.

There are Companies of Merchants in *London* for carrying on conſiderable joint trades to foreign parts, *viz.* The Merchant-Adventurers, (ſee title *Hamburgh Company*;) the Company eſtabliſhed in *England* for the improvement of commerce; which was erected by patent by King *Ed.* I. merely for the exportation of wool, *&c.* before we knew the value of that commodity, and at a time when we were in a great meaſure ſtrangers to trade. The next Company was that of the *Barbary* Merchants, incorporated in the reign of King *Hen.* VII. A Company of Merchants trading to the North, called the *Muſcovy* or *Ruſſia Company*, was eſtabliſhed by King *Ed.* VI, and encouraged with additional privileges, by Queen *Mary*, Queen *Elizabeth*, &c. See title *Ruſſia Company.* The *Barbary* Merchants decaying towards the latter end of Queen *Elizabeth*'s reign, out of their ruins aroſe the *Levant* or *Turkey* Company; who firſt trading with *Venice*, and then with *Turkey*, furniſhed *England* that way with the *Eaſt-India* commodities: this Company hath very conſiderable factories, at *Conſtantinople*, *Smyrna*, *Aleppo*, &c. See title *Turkey Company.* From the flouriſhing ſtate of the *Levant* or *Turkey* Company, in the reign likewiſe of Queen *Elizabeth* ſprung the old *Eaſt-India* Company, who having fitted out ſhips of force, brought from thence at the beſt hand, the *Indian* commodities, formerly ſold to *England* by diſtant *Europeans*; and they having obtained many charters, and grants from the Crown, in their favour, were ſole maſters of that advantageous traffick; until at laſt a new Company was incorporated by King *Will.* *Anno* 9 *W.* 3, on their lending Government two millions of money; and both theſe Companies, after the expiration of a certain term, were by articles united. See title *Eaſt-India Company.*

In the 21ſt year of Queen *Elizabeth*, the *Eaſtland* Company of Merchants was erected; and in King *Charles* the Second's time, that Company was confirmed, with full power to trade in *Norway*, *Sweden*, *Poland*, and other *Eaſtland* countries. See title *Eaſtland Company.* The Royal *African* Company had their charter granted to them in the 14th year of King *Charles* II. And by *ſtat.* 9 & 10 *W.* 3. *c.* 26, they are to maintain all forts, *&c.* See title *African Company.*—King *Charles* II. alſo by commiſſion under the Great Seal of *England*, conſtituted his Royal Highneſs *James* Duke of *York*, (afterwards King *James* II.) *Edward* Earl of *Clarendon*, and others, to be a Council for the Royal Fiſhery of *England*, and declared himſelf to be the protector of it; and in the 29th year of his reign, he incorporated them into a Company. King *William* III. in the fourth year of his reign, eſtabliſhed a *Greenland* Company. See that title.

By *ſtat.* 9 *Ann.* *c.* 21, to pay the debts of the army, navy, *&c.* amounting to near ten millions, the *South Sea Company* of Merchants was erected; who having advanced that money, the duties upon wines, vinegar, tobacco, *&c.* were appropriated as a fund for payment of the intereſt, after the rate of 6*l.* *per cent.* *&c.* The Company was granted the ſole trade to the *South Seas*; and others trading thither ſhall forfeit their ſhips and goods, and double value; and the corporation is to continue *for ever*; but the funds are ſubject to redemption by Parliament. This Company had their capital ſtock very much enlarged in the reign of King *George* I. And to raiſe money lent, were empowered to make calls or take in ſubſcriptions, *&c.* as they thought fit; and on this foundation, the *South Sea* ſcheme was executed in 1720: but, to retrieve credit, afterwards part of the ſtock of the *South Sea* Company was ingrafted into the capital ſtock of the *Eaſt India* Company and the *Bank of England*; and after that half the ſtock was converted into annuities at 4*l.* *per cent.* Since which a farther reduction thereof hath been made. See title *South Sea Company.*

This ſhort Hiſtory of our Companies of Merchants, which have ever had many and great privileges, and are at length become of double uſe, to enlarge commerce and ſupply the neceſſities of the State, in ſome meaſure ſhews the progreſs and increaſe of our trade, and the wealth of the nation: though it muſt nevertheleſs be obſerved that they are a kind of monopolies erected by law; which if they become prejudicial, are generally reſtrained by Parliament, as has been the caſe with many of the Companies already ſpecified; and if the power granted them is abuſed, it becomes of fatal conſequence;

for which we need only instance the ever memorable year 1720, when the Sub-governor and Directors of the *South Sea* Company incurred a forfeiture of their estates by statute, and were disabled to hold any offices, &c. for their vile conduct, which tended to the ruin of the public. Over and above these Companies, there are the *Dutch* Merchants; those who trade to the *West Indies*; the *Canary* Merchants; *Italian* Merchants, who trade to *Leghorn*, *Venice*, *Sicily*, &c. the *French* and *Spanish* Merchants, &c. See the several titles through this Dictionary, and particularly title *Navigation Acts*; which see also for the several regulations of *Importation* and *Exportation* by Merchants.

MERCHENLAGE, *Merciorum Lex.*] The law of the ancient kingdom of *Mercia*. *Camden* in his *Britannia* says, That in the year 1016, this kingdom was divided into three parts; whereof the *West Saxons* had one, governing it by the laws called *West Saxon-lage*, which contained *Kent*, *Sussex*, *Surry*, *Berks*, *Hampshire*, *Wilts*, *Somerset*, *Dorset*, and *Devon*: The *Danes* had the second, containing *York*, *Derby*, *Nottingham*, *Leicester*, *Lincoln*, *Northampton*, *Bedford*, *Bucks*, *Hertford*, *Essex*, *Middlesex*, *Norfolk*, *Suffolk*, *Cambridge*, and *Huntingdon*; which was governed by the laws called *Dane-lage*: and the third part was in the possession of the *Mercians*, whose law was called *Merchenlage*; and contained *Gloucester*, *Worcester*, *Hereford*, *Warwick*, *Oxford*, *Chester*, *Salop*, and *Stafford*; from which three, King *Wil.* I. chose the best, and with other laws ordained them to be the laws of the kingdom. *Camd. Brit.* 94. See *Molmutian laws*.

MERCHET, *Merchetum.*] A fine or composition paid by inferior tenants to the Lord, for liberty to dispose of their daughters in marriage. No baron or military tenant, could marry his sole daughter and heir, without such leave purchased from the King, *pro maritandâ filia*. And many of our servile tenants could neither send their sons to school, nor give their daughters in marriage, without express licence from the superior Lord. See *Kennet's Glossary* in *Maritagium*, and this Dict. *Marchet*. *Borough English*.

MERCIA, Is used in many places in the *Monasticon* for amerciament.

MERCIMONIATUS ANGLIÆ, Was of old time used for the impost of *England* upon merchandise.

MERCURIES, Or vendors of printed books or papers. Vide *Hawkers*.

MERCY; See *Misericordia*.

MERGER, Is where a greater estate and a less coincide and meet in one and the same persons, without any intermediate estate; in which case the less is immediately annihilated, or in the law phrase is said to be merged, that is sunk or drowned, in the greater: as, if the fee comes to tenant for years or life, the particular estates are merged in the fee. 2 *Rep.* 60, 61: 3 *Lev.* 437. If a lessor, who hath the fee, marries with the lessee for years; this is no Merger, because he hath the inheritance in his own, and the lease in right of his wife. 2 *Plowd.* 418. And where a man hath a term in his own right, and the inheritance descends to his wife, as he hath a freehold in her right, the term is not merged or drowned. *Cro. Car.* 275. So if tenant for years dies and makes him, who hath the reversion in fee, his executor, whereby the term of years rests also in him, the term shall not Merge; for he hath the fee in his own right, and the term of years in right of the testator, and subject to his debts and legacies. See *Plowd.* 418: *Cro. Jac.* 275: *Co. Lit.* 338.

An estate-tail is an exception to this rule, for a man may have in his own right both an estate tail, and a reversion in fee; and the estate tail, though a less estate, shall not merge in the fee. 2 *Rep.* 61: 8 *Rep.* 74. For estates-tail are protected and preserved from Merger by the operation and construction, though not by the express words, of the statute *de donis*; which operation and construction have probably arisen upon this consideration; that in the common cases of Merger of estates for life or years, by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate. *Cro. Eliz.* 302. But in an estate-tail the case is otherwise; the tenant for a long time had no power at all over it, so as to bar or destroy it; and now can only do it by certain special modes, by a fine, a recovery, and the like. It would therefore have been strangely improvident to have permitted the tenant in tail by purchasing the reversion in fee to Merge his particular estate, and defeat the inheritance of his issue; and hence it has become a maxim, that a tenancy in tail, which cannot be surrendred, cannot also be merged in the fee. 2 *Comm.* c. 11. p. 178.

MERSCUM, A lake; from the Sax. *mere*, *lacus*. "*Maneria, molendina, mersca, et merisca.*" *Ingulph.* p. 861.

MERSE-WARE, Sax. *Incola paludum.*] The inhabitants of *Romney Marsh* in *Kent* were anciently so called. *Cowell*.

MERTLAGE, Seems to be a corruption of, or a law *French* word for martyrology. See *Hil.* 9 *Hen.* 7. 14. *b*, where it seems to mean a church kalendar or rubrick. *Cowell*.

MERTON, Statutes made there, 20 *Hen.* 3.

MESNE, *Medius.*] He who is Lord of a Manor, and so hath tenants holding of him, yet himself holds of a superior Lord. *Cowell*. See *Mean*.

MESNE PROCESS. Such Process as issues pending the suit upon some collateral interlocutory matter, as to summon Juries, witnesses, and the like; distinguished from original Process, which is founded on the writ. *Finch*, *L.* 346. *Mesne Process* is also sometimes put in contradistinction to *final Process*, or Process of *Execution*; and then it signifies all such Process as intervenes between the beginning and end of a suit. 3 *Comm.* c. 19. p. 279.

MESNALTY, *medietas.*] The right of the Mesne, as 'the Mesnalty is extinct.' *Old. Nat. Br.* 44.

MESSARIUS, from *messis.*] The chief servant in husbandry, or harvest time, now called a bailiff in some places. *Mon. Angl. tom.* 2. p. 832. This word is also used for a mower or reaper; one that works harvest-work. *Fleta, lib.* 2. c. 75.

MESSENGER, Is a carrier of messages, particularly employed by the Secretaries of State, &c. and to these commitments may be made of State prisoners; for though regularly no one can justify the detaining a person in custody out of the common gaol, unless there be some particular reason for it; as if the party be so dangerously sick, that it would hazard his life to send him thither, &c. yet it is the constant practice to make

commitments

commitments to Messengers; but it is said, it shall be intended only in order to carrying the offenders to gaol. 1 *Salk.* 347: 2 *Hawk. P. C. c.* 16. § 9. An offender may be committed to a Messenger, in order to be examined before he is committed to prison; and though such commitment to a Messenger is irregular, it is not void; and a person charged with treason, escaping from the Messenger, is guilty of treason, &c. *Skin.* 599. See this Dictionary, titles *Commitment*; *Arrest*; *Treason*.

MESSENGERS OF THE EXCHEQUER, Officers attending that Court; they are four in number, and in nature of *pursuivants* to the Lord Treasurer.

MESSE THANE, Signifies a priest. The *Saxons* called every man Thane who was above the common rank; so *Messe Thane* was he who said mass; and *Werules Thane* was a secular man of quality. *Cowell.*

MESSINA, Reaping time, harvest. *Cowell.*

MESSUAGE, *Messuagium.*] Properly a dwelling-house, with some adjacent land assigned to the use thereof. *West. Symb.* title *Fines*, § 26: *Bract. lib.* 5. *c.* 28. See *Plowd.* 169, 170: where it is said, that by the name of a Messuage may pass also a curtilage, a garden and orchard, a dove-house, a shop, a mill, a cottage, a toft, a chamber, a cellar, &c. yet they may be demanded by their single names. *Messuagium* in *Scotland*, signifies the principal place or dwelling-house within a barony, which we call a *manor-house*. *Skene de verborum signif. verb. Messuagium.* In some places it is called the *site of a manor*. A *præcipe* lies not *de domo*, but *de messuagio*. *Co. Litt. c.* 8.

MESTILO, *Mestine*, or rather *miscellane*, that is, wheat and rye mingled together. *Pat.* 1 *Ed.* 3. *p.* 1. *m.*6.

METAL. The exportation of iron, brass, copper, lattin, bell and other Metal, was restrained by the ancient *stats.* 28 *Ed.* 3. *c.* 5: 33 *Hen.* 8. *c.* 7: 2 & 3 *Ed* 6. *c.* 37. but permitted by *stat.* 5 *W.* & *M. c.* 17. See this Dictionary, title *Navigation Acts.*

METECORN, A measure or portion of corn, given out by the lord to customary tenants, as a reward and encouragement for their duties of labour. *Stipendia et metecorn ac cetera debita servitia in monasterio prædicto solvantur. Ryley's Plac. Parl.* 391.

METEGAVEL, Sax. *etbs gablum*; *seu vectigal.*] A tribute or rent paid in victuals; which was a thing usual in this kingdom, as well with the King's tenants as others, till the reign of King *Hen.* I.

METER of coals in *London*, &c. from *metior*, to mete or measure a thing. See *Measurer.*

METHEGLIN, Brit. *Meddyglin*] An old *British* drink made of honey, &c. which still continues in repute in *England*; it is mentioned in the statute 15 *Car.* 2. *c.* 9 See title *Mead.*

METTESHEP, METTENSCHEP, Was an acknowledgment paid in a certain measure of corn; or a fine or penalty imposed on tenants, for their defaults in not doing their customary services, of cutting the Lord's corn. *Paroch. Antiq.* 495.

MEYA, A mey or mow of corn, as anciently used; and in some parts of *England* they still say *mey* the corn, *i. e.* put it on an heap in the barn. *Blount. Ten.* 130.

MICEL-GEMOTES, MICEL-SYNODS, The great councils in the *Saxon* times of King and noblemen, were called *Wittena-gemotes*, and afterwards *Micel-synods*, or *Michel-synoth*, and *Micel-gemotes*, i. e. great and general assemblies. *Cowell.* See 1 *Comm.* 147; and this Dictionary, title *Parliament.*

MIDDLESEX. The Sessions of the peace how often to be held, *stat.* 14 *H.* 6. *c.* 4. In actions triable by *Middlesex* Jurors, they shall be called the fourth day, &c. *Stat.* 8 *Ed.* 4. *c.* 3. Inhabitants of *Westminster* exempt from serving on Juries at the Sessions for the peace, 7 & 8 *W.* 3. *c.* 32. § 9. No Juror to be returned at the *Nisi prius* in *Middlesex*, who hath been returned in two preceding terms or vacations. Leaseholders qualified to serve as Jurors in *Middlesex*, 4 *Geo.* 2. *c.* 7. § 2, 3. See title *Jury* II. But one county rate to be made for *Middlesex*, *stat* 12 *Geo.* 2. *c.* 29. § 15. A registry of deeds and wills in that county established. *Stat.* 7 *Ann. c.* 20. See titles *Register*; *Enrollments*; *Deeds.*

MILDERNIX, A kind of canvas, of which sail-cloths of ships are made. See *stat.* 1 *Jac. c.* 14.

MILE, *Milliare.*] In the measure of this country, is the distance or length of a thousand paces; otherwise described to contain eight furlongs, every furlong being forty poles, and every pole sixteen foot and a half. See *stat.* 35 *Eliz. c.* 6.—It is 1760 yards, or 5280 feet.

Miles, mentioned in the statutes relative to the refining of salt, are to be computed, according to the common estimation of the county, or place where the pit is; and not according to the statute measure. *St.* 8 *Geo.* 2. *c.* 12.

MILES, A knight. *Mat. West p.* 118.

MILITARE, To be knighted, viz *Rex per Angliam fecit proclamari, &c. ut qui haberent unde militarent adessent apud Westmonasterium*, &c. *Mat. West. p.* 118.

MILITARY CAUSES, Are by *stat.* 13 *R.* 2. *c.* 2, declared to be such as relate to contracts touching deeds of arms and of war, as well out of the realm, as within it, which cannot be determined or discussed by the Common Law; together with other usages and customs to the same appertaining.

The only Military Court known to, and established by, the permanent laws of the land, is the Court of Chivalry, formerly held before the Lord High Constable, and Earl Marshal of *England* jointly; but since the attainder of *Stafford*, Duke of *Buckingham*, under *Hen.* VIII. and the consequent extinguishment of the office of Lord High Constable, it hath usually, with respect to civil matters, been holden before the Earl Marshal only. See title *Court of Chivalry.*

MILITARY FEUDS; See title *Tenures* I.

MILITARY OFFENCES. By the annual acts for punishing mutiny and desertion, if any officer or soldier shall excite or join any mutiny, or, knowing of it, shall not give notice to the commanding officer; or shall desert or list in any other regiment, or sleep upon his post, or leave it before he be relieved, or hold correspondence with a rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands; such offender shall suffer such punishment as a court martial (established by the act) shall inflict, though it extend to death itself.

Exclusive of the before-mentioned statutes, desertion from the King's armies in time of war, whether by land or sea, in *England*, or in parts beyond the seas, is, by the standing laws of the land, and particularly by *stats.* 18 *H.* 6. *c.* 19: 5 *Eliz. c.* 5, made felony, but not without benefit of clergy. But by the *stat.* 2 & 3 *Ed.* 6.

c. 2, clergy is taken away from such deserters, soldiers, and the offence is made triable by the Justices of every shire. The same statutes punish other inferior military offences with fines, imprisonment, and other penalties. See further, title *Courts Martial*.

MILITARY POWER OF THE CROWN; See title *King* V. 3.

MILITARY STATE, Includes the whole of the Soldiery; or, such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm. See title *Soldiers*.

MILITARY TENURES; See title *Tenures* I.

MILITARY TESTAMENT, As a part of the compensation for soldiers being, by the annual act for punishing mutiny and desertion, put in a worse condition than any other subjects, by *stats.* 29 *Car.* 2. *c.* 3: 5 *W.* 3. *c.* 21. § 6, soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expences, which the law requires in other cases. See title *Wills*.

MILITIA,

The NATIONAL SOLDIERY; the standing force of the nation.

It seems universally agreed by all historians, that King *Alfred* first settled a national Militia in this kingdom, and by his prudent discipline made all the Subjects of his dominions, soldiers; but we are unfortunately left in the dark as to the particulars of this celebrated regulation.

The feodal military tenures were established for the purpose of protection, and sometimes of attack against foreign enemies: (see this Dictionary, title *Tenures*:) For the further defence in cases of domestic insurrections or foreign invasions, various other plans have been adopted, all of them tending to unite the character of a citizen and soldier in one. First, The *Assise of Arms*, enacted 27 *H.* 2, and afterwards the *stat. of Winchester*, 13 *E.* 1. *c.* 6, obliged every man, according to his state and degree, to provide a certain quantity of such arms as were then in use; and it was part of the duty of *Constables* under the latter statute to see such arms provided. These weapons were changed by *stat.* 4 & 5 *P.* & *M.* *c.* 2, into more modern ones; but both these provisions were repealed by *stats.* 1 *Jac.* 1. *c.* 25: 21 *Jac.* 1. *c.* 28. While these continued in force, it was usual, from time to time, for our Princes to issue commissions of array; and send into every county officers in whom they could confide, to muster and array (or set in military order) the inhabitants of every district; and the form of the commission of array [illegible] in Parliament, [illegible] so as to [illegible] new penal clauses. [illegible] 275. &c. But it was [illegible] 1 *E.* 3. *st.* 2. *cc.* 5, 7: 25 *E.* 3. *st.* 5. [illegible] be compelled to go out of the kingdom [illegible] out of his shire, but in cases of urgent necessity; nor should provide soldiers unless by consent of Parliament. About the reign of King *Henry* VIII. or his children, *Lieutenancy* began to be introduced, as standing representatives of the Crown to keep the counties in military order; for we find them mentioned as known officers in the *stat.* 4 & 5 *P.* & *M.* [illegible] though they had then not been long in use, for [illegible] of them in the time of Queen *Elizabeth*, as extraordinary magistrates constituted only in times of difficulty and danger. But the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

In this state things continued till the repeal of the statutes of armour in the reign of King *James* I; after which, when King *Charles* I. had, during his northern expeditions, issued commissions of lieutenancy, and exerted some military powers, which having been long exercised, were thought to belong to the Crown, it became a question in the Long Parliament, how far the power of the Militia did inherently reside in the King; being now unsupported by any statute, and founded only upon immemorial usage. This question, long agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the King and his Parliament: the two Houses not only denying this prerogative of the Crown, the legality of which might, perhaps, be somewhat doubtful; but also seising into their own hands the entire power of the Militia; the illegality of which step could never be any doubt at all.

Soon after the Restoration of King *Charles* II, when the military tenures were abolished, it was thought proper to ascertain the power of the Militia, to recognise the sole right of the Crown to govern and command them, and to put the whole into a more regular method of military subordination. And the order in which the Militia now stands by law is principally built upon the *stats.* 13 *C.* 2. *c.* 6: 14 *C.* 2. *c.* 3: 15 *C.* 2. *c.* 4, which were then enacted. It is true, the two last of them are apparently repealed, but many of their provisions are re enacted with the addition of some new regulations by the present Militia laws: the general scheme of which is to discipline a certain number of the inhabitants of every county chosen by lot formerly for *three*, but now (by *stat.* 26 *Geo.* 3. *c.* 107) for *five* years, and officered by the Lord Lieutenant, the Deputy Lieutenants, and other principal landholders, under a Commission from the Crown. They are not compellable to march out of their counties unless in case of invasion or actual rebellion within the realm, (or any of his Majesty's dominions or territories, *stat.* 16 *Geo.* 3. *c.* 3,) nor in any case compellable to march out of the kingdom. They are to be exercised at stated times; and their discipline in general is liberal and easy; but when drawn out into actual service, they are subject to the rigours of martial law, as necessary to keep them in order. This is the constitutional security which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence. See *stats.* 2 *Geo.* 3. *c.* 20: 9 *Geo.* 3. *c.* 42: 16 *Geo.* 3. *c.* 3: 18 *Geo.* 3. *cc.* 14, 59: 19 *Geo.* 3. *c.* 72: 26 *Geo.* 3. *c.* 107: and 1 *Comm.* 410, &c.

The last act passed reducing into one all the laws relating to the Militia is *stat.* 26 *Geo.* 3. *c.* 107. This mentions the particular quota of each county and district in *England* and *Wales*, the whole number amounting to 30,740. And it is by this act provided, that in cases of actual invasion or imminent danger thereof, and in cases of rebellion and insurrection, his Majesty may embody the Militia: and if Parliament is not then sitting, they are to meet by proclamation in 14 days: a measure which was adopted in *December* 1792, from the

the dangerous aspect of affairs, owing to the proceedings of the *French*, aimed at that time not only against their own government, but against every Monarchy in Europe.

The pay and clothing of the Militia is provided for by a bill which passes annually.

By *stats.* 33 *Geo.* 3. *c.* 8: 34 *Geo.* 3. *c.* 47, a weekly allowance is ordered to be made by the parish overseers to the families of Militia-men, (and substitutes in certain cases,) during the time of their actual service; and the bounties to Militia-men mentioned in § 102 of the said *stat.* 26 *Geo.* 3. *c.* 107, are repealed, and others given in their stead by the said *stat.* 33 *Geo.* 3. *c.* 8, and by *stat.* 34 *Geo.* 3. *c.* 16; which latter act was passed for a temporary augmentation of the Militia, in such proportions and for such time as the Lord Lieutenants of the county, by his Majesty's direction, shall appoint. See also *stat.* 34 *Geo.* 3. *c.* 47, allowing volunteers for such augmentation to be beat up for in any place.

The rank of officers of the corps of *Fencibles* in *Scotland*, and of those in the *English* Militia, where serving together, is settled by *stat.* 33 *Geo.* 3. *c.* 36. § 2.

The Militia of the city of *London* is regulated by *stats.* 34 *Geo.* 3. *c.* 81: 35 *Geo.* 3. *c.* 27. See also this Dictionary, title *Trophy-money.*

MILL, *Molendinum.*] A house or engine to grind corn, and is either a water-mill, wind-mill, horse-mill, hand-mill, &c. And besides corn and grist-mills, there are paper-mills, fulling or tucking mills, iron-mills, oil-mills, &c. 2 *Inst.* 621. The toll shall be taken according to the strength of the water, *Ordin. pro pistor. incerti temp.* Prohibition shall not go in suit for tithe of a new Mill. *Art. cler'.* 9 *Ed.* 2. *st.* 1. *c.* 5.

Magistrates may search Mills for adulterated meal, &c. *Stat.* 31 *Geo.* 2. *c.* 29. § 29.—A miller, baker, &c. may not act as magistrate under this act. § 32.

By *stat.* 9 *Geo.* 3. *c.* 29, maliciously to burn or destroy any Mill, or riotously and tumultuously to demolish, or begin to demolish, any Mill, or the works thereto belonging, is felony without clergy.

MILLEATE or MILL-LEAT, (mentioned in *stat.* 7 *Jac.* 1. *c.* 19,) A trench to convey water to or from a mill; the word is most peculiar to *Devonshire. Cowell.*

MILLED-BOARDS; See *Paste-boards.*

MILLET, *Milium.*] A small grain; so termed from its multitude, *Lit. Dict.*

MINA, A corn measure of different quantity, according to the things measured by it: and minage was a toll or duty paid for selling corn by this measure. *Cowell.* According to *Littleton*, it is a measure of ground, containing one hundred and twenty feet in length, and as many in breadth. Also it is taken both for a coin and a weight. *Lit. Dict.*

MINARE, To mine or dig mines. *Minator*, a miner. *Record.* 16 *Ed.* 1.

MINATOR CARUCÆ, A ploughman. *Cowell.*

MINERAL, Any thing that grows in mines, and contains metals. *Shep. Epit.*

MINERAL COURTS, *Curiæ minerales.*] Are peculiar Courts for regulating the concerns of lead mines; as Stannary Courts are for tin. See *Berghmote.*

MINE-ADVENTURERS, A company established by *stat.* 9 *Ann.* *c.* 24.

MINES, *Mineræ.*] Quarries or places whereout any thing is dug; this term is likewise applied to hidden treasure dug out of the earth. The King by his prerogative hath all Mines of gold and silver to make money; and where in Mines the gold and silver is of the greater value, they are called Royal Mines. *Plowd.* 336. But by *stat.* 1 *W.* & *M.* *c.* 30, no Mine of copper or tin shall be adjudged a Royal Mine, though silver be extracted. And by *stat.* 5 *W.* & *M.* *c.* 6, persons having Mines of copper, tin, lead, &c. shall enjoy the same, although claimed to be Royal Mines; but the King may have the ore, (except in *Devon* and *Cornwall,*) paying to the owners of the Mines, within thirty days after it shall be raised, and before removed, 16*l.* *per* ton for copper ore washed and made merchantable; for lead ore, 9*l.* *per* ton; tin or iron, 40*s.* &c. See 1 *Comm.* 295.

If a man hath lands where there are some Mines open and others not, and he lets the land, with the Mines therein, for life or years, the lessee may dig in the open Mines only, which is sufficient to satisfy the words in the lease; and hath no power to dig the Mines unopened; but if there be no open Mine, and the lease is made of the lands, together with all Mines therein, there the lessee may dig for Mines, and enjoy the benefit thereof; otherwise those words would be void. 1 *Inst.* 54: 5 *Rep.* 12: 2 *Lev.* 184. To dig Mines is waste, where lessees are not authorised by their leases; though a Mine is not properly so called, till it is opened; being but a vein of iron or coals, &c. before. See title *Waste.*

If a man demises lands for life or years, in which there is a coal Mine open, the lessee may dig in it; for the Mine being open, it shall be intended, by his demising all the land, that his intent is as general as his demise; but if the Mine was not opened at the time of the demise, the lessee by lease of the land is not impowered to make new Mines: but in such case if he leases his land and all Mines therein, the lessee may dig for Mines there; resolved, 5 *Rep.* 12.

A question was, if copyholder of inheritance may dig Mines in his land? The Court seemed to think he might; for that otherwise, Mines there would never be opened; as in the case of a glebe of a parson. *Sid.* 152.

As to tenant in tail working Mines, See 2 *P. Wms.* 388.

If a person breaks up, or even attempts or threatens to break up, Mines which he ought not to do, that is a reason for coming into Chancery to have an injunction; *per* Lord Chancellor. *Barn. Chan. Rep.* 497.

If any person maliciously set on fire any Mine or Pit of coal, he shall suffer death as a felon, by *stat.* 10 *Geo.* 2. *c.* 32. And damaging such Mines, or any coal-works, by conveying water therein, or obstructing sewers from draining them, &c. shall forfeit treble damages. *St.* 13 *Geo.* 2. *c.* 21. Entering Mines of black lead with intent to steal, is made felony by *stat.* 25 *Geo.* 2. *c.* 10.

By *stat.* 9 *Geo.* 3. *c.* 29, Wilfully and maliciously to burn and destroy any engine or other machines, therein specified, belonging to any Mine, is made single felony, and punishable with transportation for seven years, in the offender, his advisers, and procurers. 4 *Comm.* *c.* 17. *p.* 247. See titles *Felony*; *Coals.*

A man opens a Mine in his land, and digs till he digs under the soil of another; he may follow his Mine there; but if the owner digs there also he may stop his

farther

farther progress; and said to be the use in *Cornwall.* 2 *Vent.* 342. *per Wilde* J. on a case referred to him by Lord *Bridgman.* 22 *Car.* 2.

It was said by the Solicitor General, that there was a great difference between pits and Mines; for if a Mine be opened, he that may work the Mine is not obliged to pursue the vein of ore under ground; but he may sink pits in pursuit of it which are necessary to come at the ore, and as many as he thinks proper; and Lord Chancellor said, it had been so resolved before *Powell* J. on great consideration, and consulting and examining the most able Miners. *Cases in Equity* in Lord *King*'s time, 79.

Allum Mines belong of course to the persons in whose grounds they are; and therefore no privilege concerning them can be granted but in the King's own ground. 3 *Inst.* 185: See *stat* 21 *Jac.* 1. *c.* 3. § 11, 12.

MINES, In another signification, are caves or trenches dug under ground, whereby to undermine the walls of a city or fortification.

MINIMENTS; See *Muniments.*

MINISTERS. If a Minister is disturbed in the execution of his office in the church, the punishment upon conviction is a fine of 10*l.* and, upon non-payment, three months' imprisonment, &c. *Stat.* 2 & 3 *Ed.* 6. *c.* 1. And disturbing any licensed dissenting minister incurs a forfeiture of 20*l.* by *stat.* 1 *W.* & *M. stat.* 1. *c.* 18. See titles *Dissenters; Parson.*

MINISTRI REGIS, Extend to Judges of the realm; as well as to those who have ministerial offices in the government. 2 *Inst.* 208.

MINOR, One under age; more properly an heir male or female, before they come to the age of twenty-one years; during which minority they are generally incapable to act for themselves. See title *Infant.*

MINORES, *Friars Minorites,* of the order of St. *Francis,* that had no prior; they washed each other's feet, and increased very much in the year 1207. *Mat. West.*

MINSTREL; *Minstrellus et menest, allis,* from the Fr. *menestrier.*] A musician, fidler, or piper; mentioned in the ancient *stat.* 4 *H.* 4. *c.* 27. *Quod marifcalli et* Ministrelli *praedicti per se forent et esse deberent unum corpus et una communitas perpetua,* &c. Upon a *Quo-warranto,* 14 *H.* 7, *Laurentius Dominus de Dutton clamavit, quod omnes* Minstrelli *infra civitatem Cestriae et infra Cestriam commorantes, vel officia eadem exercentes, debent convenire coram ipso vel Senescallo suo apud Cestriam, ad festum Nativitatis St. Johannis Baptistae annuatim, et dabunt sibi ad dictum festum quatuor lagenas vini et unam lanceam; et insuper quilibet eorum dabit ei quatuor denarios et unum obolum ad dictum festum, et habere de qualibet* meretrice *infra comitatum Cestriae, et infra Cestriam manente, et officium suum exercente, quatuor denarios per annum ad festum praedictum,* &c. *Pat.* [illegible] *E.* 4. And where, by the statute of 39 *Eliz. c.* 4. Fidlers were declared to be rogues, yet there a proviso was continued therein, exempting those in *Cheshire* licensed by *Dutton* of *Dutton.* See *Claus.* 9 *Ed.* 2. *m.* 26 *Dorso.* an ordinance [illegible] *Scutiferorum et* Menestrallorum. It was usual for these Minstrels, not only to divert princes, and the nobility, with sports, but also with musical instruments, and with flattering [illegible], in praise of them and their ancestors. The office and power of the King of the Minstrels is mentioned in [illegible] *Monastic.* 1 *tom.* 355. *Cowell.* See title *Vagrants.*

MINT; *Officina monetaria; Monetarium.*] The place where the King's money is coined; which is at present and long hath been in the Tower of *London,* though it appears by divers statutes, that in ancient times the Mint has also been at *Calais,* and other places. *Stats.* 2 *R.* 2. *c.* 16: 9 *H.* 5. *c.* 5 The Mint-master is to keep his allay, and receive silver at the true value, &c. *stat.* 2 *H.* 6. *c.* 12. Gold and silver delivered into the Mint is to be assayed, coined, and given out, according to the order and time of bringing in; and persons shall receive the same weight of coin, or so much as shall be finer or coarser than the standard, &c. *Stat.* 18 *Car.* 2. *c.* 5.—All silver and gold extracted by melting and refining of metals, shall be employed for the increase of monies, and be sent to the Mint, where the value is to be paid. *Stat.* 1 *W.* & *M. c* 30. See title *Mines.*—By *stat.* 18 *Car.* 2. 3000*l.* a year was granted out of certain duties on wine, beer, &c. imported, to defray the expence of the Mint; which sum was increased by *stat.* 4 & 5 *Ann. c.* 22; and is now settled by subsequent statutes, at a sum not exceeding 15,000*l.* *per ann.* for *England* and *Scotland,* &c. See this Dictionary, title *Coin; ad finem.*

The officers belonging to the Mint have not always been alike; they are now the following, *viz.* the Warden, who is the chief of the rest, and is by his office to receive the silver and bullion of the goldsmiths to be coined, and take care thereof, and he hath the overseeing of all the other officers. The Master-Worker receives the silver from the warden, and causes it to be melted, when he delivers it to the moniers, and taketh it from them again after made into money. The Comptroller, who is to see that the money be made to the just assise, and controul the officers if the money be not made as it ought. The Master of the Assay, who weigheth the silver, and examineth whether it be according to the standard. The Auditor takes account of the silver, &c. The Surveyor of the Melting, who is to see the silver cast out, and that it be not altered after the assay master hath made trial of it, and it is delivered to the melters. The Clerk of the Irons, who seeth that the irons be clean and fit for working. The Graver, whose office is to engrave the stamps for the money. The Melters, who melt the bullion, &c. The Blanchers to anneal and cleanse the money. The Moniers, who are some to shear the money, others to forge and beat it broad, some to round, and some to stamp or coin it. The Provost, to provide for all the moniers, and oversee them, &c. See title *Money.*

MINT, A pretended place of privilege in *Southwark,* near the *King's Bench,* put down by statute. If any persons within the limits of the Mint shall obstruct any officer in the serving of any writ or process, &c or assault any person therein, so as he receives any bodily hurt, the offenders shall be guilty of felony, and transported to the plantations, &c. *Stat.* 9 *Geo.* 1. *c.* 28. See titles *Prisons; Privileged Places.*

MINUERE, To let blood; *minutio,* blood-letting. This was a common old practice among the regulars, and the secular priests or canons, who were the most confined and sedentary men. In the Register of statutes and customs belonging to the cathedral church of St. *Paul's* in *London,* collected by *Ralph Baldock,* dean, about the year 1300, there is one express chapter *De minutione. Cowell.*

MINUTE

MINUTE TITHES, *minutæ sive minores decimæ.*] Small tithes, such as usually belong to the Vicar, as of wool, lambs, pigs, butter, cheese, herbs, seeds, eggs, honey, wax, &c. See title *Tithes.*

MIRACULA, A superstitious sport or play, practised by the popish clergy for gain and deceit; prohibited by Bishop *Grosthead* in the diocese of *Lincoln. Cowell.*

MIS: This syllable added to another word signifies some fault or defect; as, *misprision*; *misdicere*, i. e. to scandalize any one; *misdocere*, i. e. to teach amiss. *Cowell.*

MISA, A compact or agreement, a form of peace, or compromise. *Cowell.*

MISADVENTURE, Fr. *mesaventure*, Lat. *infortunium.*] The killing a man, partly by negligence and partly by chance. *S. P. C. lib.* 1. *c.* 8. *Britton* distinguishes between Adventure and Misadventure; the first he makes to be mere chance; as if a man being upon or near the water, be taken with some sudden sickness, and so fall in and is drowned; or into the fire, and is burnt; Misadventure he says is, where a person comes to his death by some outward violence, as the fall of a tree, the running of a cart-wheel, stroke of a horse, or such like. *Brit. c.* 7. *Staundford* construes Misadventure more largely than *Britton* understands it; and says, it is where one, thinking no harm, carelesly throws a stone, wherewith he kills another, &c. *West* defines Misadventure to be, when a man is slain by mere fortune, against the mind of the killer; and he calls it *homicide by chance mixed*, when the killer's ignorance or negligence is joined with the chance. *West. Symb.* § 48, 49. See title *Homicide* II. 1.

MISCASTING or MISCOMPUTING. *Assumpsit* to pay 12*l.* Jury found a promise to pay 7*l.* the judgment was reversed; because *it is not the same assumpsit. Dyer*, 219. *b. Marg. pl.* 11.

Debt; and declared, that the defendant had bargained with him to give him for the pasturing of every horse by the night 2*d.* and for every ox 1*d.* halfpenny, and sheweth, that he had pastured 70 horses and 300 oxen, *Et ideo actio accrevit* to demand, &c. and he demanded more than upon his own shewing it appeared he should have; for the number of the horses and oxen did not amount to the sum he had counted; and this was alleged in arrest of judgment, after verdict found for the plaintiff; but judgment was given for the plaintiff notwithstanding. *Cro. Eliz.* 22. In covenant for payment of rent, the miscasting of the sum due doth not make it ill; and if more be laid, it shall be abated as surplus; but it is otherwise in debt for rent. *Dyer* 55. See 15 *Vin. Abr.* 402, 403: and this Dictionary, titles *Assumpsit*; *Amendment*; *Error.*

MISCHIEF, Malicious. Malicious Mischief or damage, is a species of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss, but either out of a spirit of wanton cruelty, or wicked revenge. In this latter light it bears a near relation to the crime of *Arson*, for as that affects the habitation, so does this the property, of individuals; and therefore any damage arising from this mischievous disposition, though only a trespass at the Common Law, is now, by several statutes, made severely penal. The general effect of these is shortly recapitulated by *Blackstone*, in order of time. See 4 *Comm. c.* 17.

By *stat.* 22 *H.* 7. *c.* 11, perversely and maliciously to cut down or destroy the *powdike* in the fens of *Norfolk* and *Ely*, is felony; and in like manner it is by many special statutes, enacted upon the several occasions, made felony to destroy the several *Sea-banks*, *River-banks*, *public Navigations*, and *Bridges*, erected by virtue of those Acts of Parliament.

By *stat.* 43 *Eliz. c.* 13, for preventing rapine on the northern borders, to *burn* any barn, or stack of *corn*, or grain; or to *imprison* or carry away any Subject, in order to ransom him, or make prey or spoil of his person or goods, upon any deadly feud, or otherwise, in the four northern counties of *Northumberland*, *Westmorland*, *Cumberland*, and *Durham*, or being accessory before the fact, to such carrying away or imprisonment; or to give or take any money or contribution, there called *blackmail*, to secure such goods from rapine, is felony without benefit of clergy. See titles *Arson*; *False Imprisonment*; *Black-mail.*

By *stat.* 22 & 23 *Car.* 2. *c.* 7, Maliciously, unlawfully, and willingly, in the night time, to *burn*, or cause to be burnt or destroyed any ricks or stacks of *corn*, hay, or grain, barns, houses, buildings, or kilns; or to *kill* any horses, or other *cattle*, is felony; but the offender may make his election to be transported for seven years: and to *maim* or hurt such horses, sheep, or cattle, is a trespass for which treble damages shall be recovered. See titles *Arson*; *Cattle*; *Burning.*

By *stat.* 4 & 5 *W.* & *M. c.* 23, to *burn* on any *waste* between *Candlemas* and *Midsummer*, any grig, ling, heath, furze, goss, or fern, is punishable with whipping and confinement in the house of correction.

By *stat.* 1 *Ann. st.* 2. *c.* 9, *Captains* and mariners belonging to *ships*, and destroying the same, to the prejudice of the owners, (and by *stat.* 4 *Geo.* 1. *c.* 12, of the insurers,) are guilty of felony without benefit of clergy. See also *stat.* 11 *Geo.* 1. *c.* 29; and this Dictionary, title *Insurance* II. 4. And by *stat.* 12 *Ann. st.* 2. *c.* 18, making any hole in a ship in distress, or stealing her pumps, or aiding or abetting such offence, or wilfully doing any thing tending to the immediate loss of such ship, is felony without benefit of clergy.

By *stat.* 1 *Geo.* 1. *c.* 48, maliciously to *set on fire* any *underwood*, wood, or coppice, is made single felony.

By *stat.* 6 *Geo.* 1. *c.* 23, the wilful and malicious tearing, cutting, spoiling, or *defacing* of the garments or *cloaths* of any person passing in the streets or highways, and the assaulting with intent so to do, is felony. This was occasioned by the insolence of certain weavers and others, who, upon the introduction of some *Indian* fashions, prejudicial to their own manufactures, made it their practice to deface them, either by open outrage, or by privily cutting, or casting *aqua-fortis* in the streets upon such as wore them.

By *stat.* 9 *Geo.* 1. *c.* 22, commonly called the *Waltham Black Act*, it was among other things enacted, that to *set fire* to any *house*, barn, or out-house, (extended by *stat.* 9 *Geo.* 3. *c.* 29, to *Mills*; see that title:) or to any hovel, cock, mow, or stack of *corn*, (a *parcel* of corn is not a sufficient distinction under this Act,) straw, hay, or wood; or unlawfully and maliciously to break down the head of any *fish-pond*, whereby the fish shall be lost or destroyed; or in like manner to kill, maim, or wound

any cattle, (from malice or revenge to the owner;) or cut down or *destroy* any *trees* planted in an avenue or growing in a garden, *for* ornament, shelter, or profit: all these malicious acts, or the procuring, by gift or promise of reward, any person to join therein, are felonies without benefit of clergy; and the hundred shall be charged with the damages, unless the offender be convicted. See this Dictionary, titles *Black Act*; *Burning*.

By *stats.* 6 *Geo.* 2. *c.* 37: 10 *Geo.* 2. *c.* 32, it is also made felony without benefit of clergy, maliciously to cut down any river or *sea-bank*, whereby lands may be overflowed or damaged; or to cut any *hop-binds*, growing in a plantation of hops; or wilfully and maliciously to *set on fire* any *mine*, pit, or delph of *coal*. See titles *Mines*; *Coals*, &c.

By *stat.* 11 *Geo.* 2. *c.* 22, to use any violence in order to deter any persons from buying corn or grain; to seize any carriage or horse carrying grain or meal to or from any market or sea-port; or to use any outrage with such intent, is punishable for the first offence with imprisonment and public whipping; and the second offence, or destroying any granary, where corn is kept for exportation; or taking away or spoiling any grain or meal in such granary, or in any ship or vessel, intended for exportation, is felony, subject to transportation for seven years. See titles *Corn*; *Riots*.

By *stat.* 28 *Geo.* 2. *c.* 19, to *set fire* to any goss, *furze*, or fern, growing in any forest or chase, is subject to a fine of 5*l.*

By *stats.* 6 *Geo.* 3. *cc.* 36, 48: 13 *Geo.* 3. *c.* 33, wilfully to spoil or destroy any timber or other *trees*, *roots*, *shrubs*, or *plants*, is for the two first offences liable to pecuniary penalties; and for the third, if in the day-time, and even for the first if at night, the offender shall be guilty of felony, and liable to transportation for seven years.

By *stat.* 9 *Geo.* 3. *c.* 29, wilfully and maliciously to *burn* or destroy any engine or other machines belonging to *Mines*; or any fences for *Inclosures*, pursuant to any Act of Parliament, is made single felony, and punishable with seven years' transportation. See titles *Mines*; *Common*.

By *stat.* 13 *Geo.* 3. *c.* 38, the punishment of seven years' transportation was inflicted on such as should break into any house, &c. belonging to the *Plate Glass Company*, with intent to steal, cut, or destroy any of their stock or utensils; or should wilfully and maliciously cut or destroy the same.

By *stat.* 22 *Geo.* 3. *c.* 40, if any person shall break into any house or shop, with intent to cut or destroy any *serge*, *woollen*, *velvet*, *silk*, *linen*, or *cotton goods*, in the loom, or any stock of utensils used in the manufacturing such goods, the offender shall be guilty of felony without benefit of clergy.

These form the principal instances of *Malicious Mischief* punishable by statute; and which are here enumerated in one view, though noticed, for the most part, under various titles in this Dictionary.

MISCOGNISANT, Ignorant or not knowing. In the *stat.* 32 *H.* 8. *c.* 9, against *Champerty* and Maintenance, it is ordained that proclamation shall be made twice in the year of that act, to the intent no person should be ignorant or *miscognisant* of the penalties therein mentioned, &c.

MISCOMPUTING; See *Misnosing*.

MISCONTINUANCE, Signifies the same with *discontinuance*. *Kitch.* 231. Though it is generally said to be, where a continuance is made by undue process. *Jenk. Cent.* 57.

MISDEMESNOR, or MISDEMEANOUR, A *crime* less than felony. The term Misdemeanour is generally used in contradistinction to felony, and comprehends *all indictable offences* which do not amount to felony; as *Perjury*, *Libels*, *Conspiracies*, *Assaults*, &c. See 4 *Comm.* *c.* 1. *p.* 5. *in n.*

A Crime or Misdemeanour, says *Blackstone*, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both Crimes and Misdemeanours; which, properly speaking, are mere synonymous terms; though in common usage, the word *Crimes* is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of *Misdemeanours* only.

In making the distinction between public wrongs and private, between Crimes and Misdemeanours, and civil injuries, the same Author observes, that public wrongs, or Crimes and Misdemeanours, are a breach and violation of the public rights and duties, due to the whole community, considered as a community in its social aggregate capacity. 4 *Comm.* 5.

This term may be considered as, and in fact is, a *genus*, which contains under it a great number of *species*, almost as various in their nature as human actions. See *Hale's* & *Hawkins's Pleas of the Crown*; and this Dictionary, title *Misprision*.

MISE, Fr. Lat. *missum*, *misa*.] Is a law term signifying expences, and it is so commonly used in the entries of judgments, in personal actions; as when the plaintiff recovers, the judgment is *quòd recuperet damna sua* to such a value, and *pro misis et custagiis*, for costs and charges, so much, &c. This word hath also another signification in law; which is where it is taken for a word of art, appropriated to a writ of right, so called because both parties have put themselves upon the mere right, to be tried upon the grand assize, so that what in all other actions is called an issue, in a writ of right is termed a Mise; but if in the writ of right a collateral point be tried, there it is called an issue. To join the Mise upon the mere right, is as much as to say, to join the Mise upon the clear right, *i. e.* to join upon this point, which hath the more right, the tenant or demandant. 1 *Inst.* 294: *stat.* 37 *Ed.* 3. *c.* 16. See 3 *Comm. App.* § 6.

MISES, Taxes or tallages, &c. An honorary gift or customary present, from the people of *Wales* to every new King and Prince of *Wales*, anciently given in cattle, wine, and corn, but now in money, being 5000*l.* or more, is denominated a Mise; so was the usual tribute or fine of 3000 marks, paid by the inhabitants of the county palatine of *Chester*, at the change of every owner of the said earldoms, for enjoying their liberties. And at *Chester* they have a Mise-book, wherein every town and village in the county is rated what to pay towards the Mise. The *stat.* 27 *Hen.* 8. *c.* 26, ordains, that "Lands shall have all such Mises and profits of their lands as they had in times past, &c."

MESE is sometimes corruptly used for mese, in Law French *mese*, a messuage; thus a Mise-place in some manors is such a messuage or tenement as answers the lord a heriot at the death of the owner. 2 *Inst.* 528.

MISELLI, Leprous persons. *Cowell.*

MISE-MONEY, Money given by way of contract or composition to purchase any liberty, *&c. Blount. Ten.* 162.

MISERERE, The name and first word of one of the penitential Psalms, and is most commonly that which the Ordinary gave to such guilty malefactors as were admitted to the benefit of clergy; being therefore called the *Psalm of Mercy*. See title *Clergy, benefit of.*

MISERICORDIA, An arbitrary or discretionary amerciament. See title *Amerciament.*

Sometimes *Misericordia* is to be quit and discharged of all manner of amerciaments that a man may fall into in the forest. See *Cromp. Jur.* 196. See title *Moderata Misericordia*; & *stat. Westm.* 1. *cap.* 15.

MISERICORDIA *in cibis & potu*, Exceedings, or over-commons, or any gratuitous portion of meat and drink given to the religious above their ordinary allowance. *Mat. Par. Vit. Abb. S. Albani, p.* 71. In some convents they had a stated allowance of these over-commons upon extraordinary days, which were called *Misericordiæ regulares. Monast. Angl.* i. 149. *b.*

MISERICORDIA COMMUNIS, Is when a fine is set on the whole county or hundred. *Mon. Angl.* i. *pag.* 976.

MISEVENIRE, To succeed ill; as, where a man is accused of a crime, and fails in his defence or purgation. *Lex Canut.* 78. *apud Brompton.*

MISFEASANCE, A misdeed or trespass. Jury to inquire of all *purprestures* and Misfeasance. *Cro Car.* 498.

MISFEASOR, A trespasser. 2 *Inst.* 200.

MISKENNING, *miskenninga*; from *mis*, and Sax. *ecunan*, i. e. *citare. Leg. H.* 1. *c.* 12.] *Iniqua vel injusta in jus vocatio; inconstanter loqui in curia, vel invariare.* It is mentioned among the privileges granted and confirmed to the monastery of *Ramsey* by S. *Edward* the Confessor. *Mon. Angl.* i. 237. *Et in civitate London in nullo placito* miskennagium. *Chart. H.* 2.

MISKERING; Vide *Abishering.*

MISNOMER, of the Fr. *mes*, amiss; and *nomer, nominare.*] The using one name for another; a misnaming. A name, *Nomen, est quasi rei notamen*, and was invented to make a distinction between person and person; and where a person is described, so that he may be certainly distinguished and known from other persons, the omission, or in some cases, the mistake of the name shall not avoid the grant. 11 *Rep.* 20, 21. A grant to a man by a wrong name may be good, *si constat de persona*, but the *demonstratio personæ* must appear upon the face of the grant. *Ld. Raym.* 304. Yet a grant to a knight, by the name of esquire, is void. *Ib.* 305. And if the name of a party is mistaken, the Judges ought to mould a small mistake therein, to make good a contract, *&c.* and so as to support the act of the party by the law. *Hob.* 125. But the Christian name ought always to be perfect; and the law is not so precise as to surnames, as it is of Christian names. *Popb.* 57: 2 *Ld. Abr.* 199. Misprisions of clerks in names, are amendable: *Piers* and *Pierre* have been adjudged one and the same name. *Saunder* and *Alexander*, and *Garret* and *Gerald* are but one name; but *Randolph* and *Randulphus*, *Jeffrey* and *Godfrey*, *&c.* are several names, and must be named rightly. 2 *Rol. Abr.* 135: 1 *And.* 211.

Where a Christian name is quite mistaken, as *John* for *Thomas, &c.* it may be pleaded that there was no such man *in rerum natura. Dyer* 349. Or, he may plead his having been christened by the name of *Thomas*, and always called and known by that name; and traverse his being called or known by the name of *John*. If a person pleads that he never was called by such a name, it is ill; for this may be true, and yet he might be of that name of baptism. 1 *Salk.* 6. One whose name is *Edmund* is bound in a bond by the name of *Edward*; though he subscribes his true name, that is no part of the bond. 2 *Cro.* 640; *Dyer* 279. If a person be bound by the name of *W. R.* he may be sued by the name of *W. R. alias dictus W. B.* his true name; not *W. B. alias dictus W. R.* 3 *Salk.* 258. If a person be indicted by two Christian and surnames, it will be quashed; for he cannot have two such names. 1 *Ld. Raym.* 562. A lady, wife to a private person, ought to be named according to the name of her husband, or the writ shall abate; so if the son of an Earl, *&c.* be sued as a Lord, and not as a private person by the name of his family. *Dyer* 761: 2 *Salk.* 451.

Misnomer of corporations may be pleaded in abatement. 1 *Leon.* 159: 5 *Mod.* 327: 2 *Salk.* 451. And if there be any mistake in the name of a corporation, that is material in their leases and grants; they will be void. 2 *Bendl.* 1: *Amherst.* 196. Judgment against a corporation by a wrong name is void. *Ld. Raym* 119. A defendant may avoid an outlawry by pleading a Misnomer of name of baptism or surname; or Misnomer as to additions of estate, of the town, *&c.* See title *Outlawry.*

Though Misnomer of a surname may not be pleaded on an indictment, in an appeal it may; but any other Misnomers, and defective additions, are as fatal in an indictment as an appeal. 2 *Hawk. P. C. c.* 25. § 68, 9. A Misnomer must be pleaded by the party himself who is misnamed. 1 *Lutw.* 35. Plea of Misnomer by attorney may be refused; but it is no cause of demurrer. *Ld. Raym.* 509. If defendant omits to plead a Misnomer, he may be taken in execution by the wrong Christian name. 2 *Strange* 1218. What words in a plea of Misnomer shall be considered as a special imparlance, see 1 *Wils.* 261.

If issue is joined on a plea in abatement for a Misnomer, in an action upon the case on promises, and found against the defendant, the judgment shall be peremptory, therefore the Jury ought to assess the damages. 2 *Wils.* 367.

What foundation will support a name by reputation, see *Ld. Raym.* 301, 304.—*Note*, names of persons not christened are surnames only. *Ib.* 305.

For the addition or omission of a letter or two, not making any material alteration in the sound, it is not proper to plead a Misnomer. The Courts of Law discourage (and that justly,) dilatory pleas, as much as they can, as tending to the delay of justice. See further *Com. Dig.* title *Abatement*, E. 18—22; F. 17—20; and this Dictionary, titles *Abatement* I. 3. *b*, and *Amendment*.

MISPLEADING. If, in pleading, any thing be [illegible], that is essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is wholly defective in itself,

itself, or if to an action of debt, (*i. e.* on bond, contract, *&c.*) the defendant pleads *Not guilty* instead of *nil debet*, these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second. *Salk.* 365: *Cro. Eliz.* 778.

When an issue is joined on an immaterial point, or such a point, as, after trial, the Court cannot give judgment, the Court regularly awards a repleader. See titles *Pleading*; *Repleader.*

MISPRISION,

Misprisio, from the Fr. *mespris*, contemptus.] A neglect, oversight, or contempt: as for example, Misprision of treason is a negligence in not revealing treason to the King, his Council, or a Magistrate, where a person knows it to be committed: so of felony. *Staundf. P. C. lib.* 1. *c.* 19. If a man knoweth of any treason or felony, and conceals the same, it is Misprision. In a larger sense, Misprision is taken for many great offences, which are neither treason nor felony, or capital, but very near them; and every great misdemeanour, which hath no certain name appointed by the law, is sometimes called Misprision. 3 *Inst.* 36: *H. P. C.* 127: *Wood*, 406, 408.

Misprisions are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon; and it is said that a Misprision is contained in every treason and felony whatsoever; and that if the King so please, the offender may be proceeded against for the Misprision only. *Yearb.* 2 *R.* 3, 10: *Staundf. P. C.* 32, 37: *Kel.* 71. 1 *Hal. P. C.* 374: 1 *Hawk. P. C. c.* 20. § 1.

Misprisions are generally divided into two sorts; 1. *Negative*, which consists in the concealment of something which ought to be revealed; and 2. *Positive*, which consists in the commission of something which ought not to be done. 4 *Comm. c.* 9.

Of the first or negative kind, is what is called *Misprision of Treason*; consisting in the bare knowledge and concealment of treason, without any degree of assent thereto; for any assent makes the party a principal traitor: as indeed the concealment, which was construed aiding and abetting, did at the Common Law. Thus it is laid down, that when one knows another hath committed treason, and doth not reveal it to the King or his Privy Council, or some Magistrate, that the offender may be secured and brought to justice, it is high treason by the ancient Common Law; for delay in discovering treason was deemed an assent or [illegible] high treason. *Bract.* 118: *S. P. C.* [illegible]. But it is now enacted, by *stat.* 1 [illegible] *c.* 10, that a bare concealment of treason shall be only held a Misprision. The concealment becomes criminal if the party apprised of the treason does not, as soon as conveniently [illegible], reveal it to some Judge of Assise, or Justice of the Peace. 1 *Hal. P. C.* [illegible]. But if there be any [illegible] as if a man goes to a [illegible] that a conspiracy is intended [illegible] such [illegible] by [illegible] and [illegible] it [illegible] the [illegible] 1 *Hawk. P. C.* [illegible]

A person having notice of a meeting of conspirators against the government, goes into their company and hears their treasonable consultation and conceals it, this is treason; so where one has been accidentally in such company, and heard such discourse, if he meets such a company a second time; for in these cases, the concealment is attended with circumstances which shew an approbation thereof. *H. P. C.* 127: *Kel.* 17, 21.

A man who hath knowledge of a treason cannot secure himself by discovering generally that there will be a rising, without disclosing the persons intending to rise; nor can he do it by discovering these to a private person, who is no magistrate. *S. P. C*: *H. P. C.* 127. But where one is told in general, that there will be a rising or rebellion, and doth not know the persons concerned in it, or the place where, *&c* this uncertain knowledge may be concealed, and it shall not be Treason or Misprision. *Kel.* 22: 1 *H. P. C.* 36 If high treason is discovered to a clergyman in confession, he ought to reveal it; but not in case of felony. 2 *Inst.* 629. This was law, when the *Roman Catholic* religion was professed here as the religion of the land; the same may be still law. *Dict*

If a person is indicted of Misprision, as for treason; though he be found guilty, the Judges shall not give judgment thereon, he not being indicted of the Misprision. *Jenk. Cent.* 217 Information will not lie for Misprision of treason, *&c.* but indictment, as for capital crimes. There must be two witnesses upon indictments as well as trials of Misprision of treason, by *stat.* 7 *W.* 3. *c.* 3. See title *Treason.*

There is a negative Misprision of treason, created by Act of Parliament. By *stat.* 13 *Eliz. c.* 2, concealers of bulls of absolution from *Rome* are declared guilty of Misprision of treason A positive Misprision of treason is also created by *stat.* 14 *Eliz. c.* 3. which enacts that those who forge foreign coin, not current in this kingdom, their aiders, abettors, and procurers, shall all be guilty of Misprision of treason; for though the law would not put foreign coin upon quite the same footing as our own, yet if the circumstances of trade concur, the falsifying it may be attended with consequences almost equally pernicious to the public; and therefore the law has made it an offence just below capital, and that is all For the *Punishment of Misprision of Treason*, is loss of the profits of land during life, forfeiture of goods, and imprisonment during life. 1 *Hal. P. C.* 374: 3 *Inst.* 36, 218; which total forfeiture of the goods was inflicted while the offence amounted to principal treason, and of course included in it a felony by the Common Law; and therefore is no exception to the general rule, that whenever an offence is punished by such total forfeiture, it is felony at the Common Law. 4 *Comm. c.* 9. *p.* 120, 1.

Misprision of Felony, is the concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either principal or accessory; and the punishment of this, in a public officer, by *stat. Westm.* 1. [illegible] is imprisonment for a year and a day; in a common person, for a less discretionary time; and in both, fine and ransom at the King's pleasure, as declared by the Judges in a Court of Justice. 1 *Hal. P. C.* [illegible]

Under the title of Misprision, that of *Theftbote* may be reduced, which is, where one knowing of a felony, takes his goods again, or amends for the same. 3 *Inst.*

3 *Inst.* 134, 139: *H. P. C.* 130. Though the bare taking goods again which have been stolen is no offence, unless some favour be shewn the thief. 1 *Hawk. P. C.* c. 59. § 7. To take any reward to help any person to stolen goods, is made felony by *stat.* 4 *Geo.* 1. c. 11. And to advertise a reward for the return of things stolen incurs a forfeiture of 50*l.* by *stat.* 25 *Geo.* 2. c. 36. The *stats. Westm.* 1. 3 *E.* 1. c. 9: 3 *H.* 7. c. 1, provide against concealments of felonies by sheriffs, coroners, and bailiffs, &c.

There is also another species of negative Misprision, namely, the *concealing of Treasure-trove*, which belongs to the King or his grantees by prerogative-royal; this concealment was formerly punishable by death, but now only by fine and imprisonment. *Glanv. lib.* 1. c. 2: 3 *Inst.* 133.

2. Misprisions which are *merely positive*, are generally denominated *Contempts* or *High Misdemeanours*; of which the first and principal is the *Mal-administration* of such high *Officers* as are in public trust and employment. This is usually punished by the method of parliamentary impeachment, wherein such penalties, short of death, are inflicted, as to the wisdom of the House of Peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. Hitherto also may be referred the offence of *Embezzling the Public Money*, which is not a capital crime, but subjects the offender to a discretionary fine and imprisonment. 4 *Comm.* 122.

Other Misprisions are in general such contempts of the executive Magistrate, as demonstrate themselves by some arrogant and undutiful behaviour towards the *King* and *Government*; these are either against the King's *Prerogative*; the King's *Person* and *Government*; the King's *Title*; his *Palaces*, or *Courts of Justice*. With respect to the two first of these, see this Dictionary, titles *Contempt*; *Government*.

Contempts against the King's *Title*, not amounting to *Treason* or *Præmunire*, are, the denial of his right to the Crown, in common and unadvised discourse; for if it be by advisedly speaking, it amounts to a *Præmunire*; see that title. This heedless species of contempt is punished with fine and imprisonment. Likewise if any person shall in anywise hold, affirm, or maintain, that the Common Laws of this realm, not altered by Parliament, ought not to direct the right of the Crown of *England*; this is a misdemeanour by *stat.* 13 *Eliz.* c. 1; and punishable with forfeiture of goods and chattels. A contempt may also arise from refusing or neglecting to take the oaths appointed by statute for the better securing the Government, and yet acting in a public office, place of trust, or other capacity for which the said oaths are required to be taken, *viz.* those of allegiance, supremacy, and abjuration; which must be taken within six calendar months after admission. The penalties for this contempt, inflicted by *stat.* 1 *Geo.* 1. *st.* 2. c. 13, are very little, if any thing, short of those of a *Præmunire*; being an incapacity to hold the said offices, or any other; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; or to vote at any election for Members of Parliament: and after conviction the offender shall also forfeit 500*l.* to any that will sue for the same. See this Dictionary, titles *Dissenters*; *Non-conformists*; *Oaths*. Members on the foundation of any colleges in the two Universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the College Register, within one month after; otherwise, if the electors do not remove him, and elect another within twelve months, or after, the King may nominate a person to succeed him, by his great seal or sign manual. Besides thus taking the oaths for offices, any two Justices of the Peace may by the same statute summon, and tender the oaths to any person whom they shall suspect to be disaffected; and every person refusing the same, who is properly called a *Non-juror*, shall be adjudged a popish recusant convict, and subject to the same penalties as are inflicted on them; which in the end may amount to the alternative of abjuring the realm, or suffering death as a felon. 4 *Comm.* 124: See this Dictionary, titles *Papist*; *Oaths*; *Præmunire*.

Contempts against the *King's Palaces* or *Courts of Justice* have been always looked upon as high Misprisions; and by the ancient law, before the Conquest, fighting in the King's Palace, or before the King's Judges, was punished with death. 3 *Inst.* 140: *Ll. Alured, cc.* 7, 34. And at present, by *stat.* 33 *H.* 8. c. 12, *malicious striking in the King's Palace*, wherein his royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment, and fine at the King's pleasure; and also with loss of the offender's right hand: the solemn execution of which sentence is prescribed in the statute at length. See *Sir Edm. Knevett's Ca.* in *Stowe*; & 11 *St. Tr.* 16; & the *Earl of Devonshire's*; 11 *St. Tr.* 133.

But *striking* in the King's superior *Courts of Justice* in *Westminster Hall*, or at the assizes, is made still more penal than even in the King's Palace; the reason seems to be, that those Courts being anciently held in the King's Palace, and before the King himself, striking there included the former contempt against the King's Palace, and something more, *viz.* the disturbance of public justice. For this reason, by the ancient Common Law before the Conquest, striking in the King's Courts of Justice, or drawing a sword therein, was a capital felony. *Ll. Inæ.* c. 6: *Ll. Canut.* c. 56: *Ll. Alured.* c. 7: and our modern law retains so much of the ancient severity, as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or blow in such a Court of Justice, whether blood be drawn or not, or even assaulting a Judge sitting in the Court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of the offender's lands during life. *Staundf. P. C.* 38: 3 *Inst.* 140, 1. A *Rescue* also of a prisoner from any of the said Courts, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and the profits of lands during life; 2 *Hawk. P. C.* c. 21. § 5; being looked upon as an offence of the same nature with the last; but only as no blow is actually given, the amputation of the hand is excused. For the like reason, an affray or riot near the said Courts, but out of their actual view, is punished only with fine and imprisonment. *Cro Car.* 373.

Not only such as are guilty of any actual violence, but of threatening, or reproachful words to any Judge sitting in the Courts, are guilty of a high Misprision, and have been punished with large fines, imprisonment, and corporal punishment. *Cro. Car.* 503. And even in the

the inferior Courts of the King, an affray or contemptuous behaviour is punishable with a fine by the Judges there sitting; as by the Steward in a Court-leet, or the like. 1 *Hawk. P. C. c.* 21. §§ 10, 11.

Likewise all such as are guilty of any injurious treatment to those who are immediately under the protection of a Court of Justice, are punishable by fine and imprisonment: as if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer, for keeping him in custody, and properly executing his duty. 3 *Inst.* 141, 2.

Lastly, to endeavour to dissuade a witness from giving evidence; to disclose an examination before the Privy Council; or to advise a prisoner to stand mute; (all of which are impediments of justice;) are high Misprisions, and contempts of the King's Courts, and punishable by fine and imprisonment. And anciently it was held, that if one of the Grand Jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony; and in treason, a principal. And at this day it is agreed that he is guilty of a high Misprision, and liable to be fined and imprisoned. 1 *Hawk. P. C. c.* 21. § 15.

MISPRISIONS *of Clerks, &c.* Relate to their neglects in writing or keeping records; and here Misprision signifies a mistaking. See *stat.* 14 *Ed.* 3. *c.* 6: and this Dictionary, title *Amendment*.

MISRECITAL of deeds or conveyances, will sometimes hurt a deed, and sometimes not. *Hob.* 18, 19, 129.

If a thing is referred to time, place, and number, and that is mistaken, all is void. *Arg. Pl. C.* 392. *b. Trin.* 13 *Eliz.* in the case of the *Earl of Leicester* v. *Heydon*.

Misrecital in an immaterial point, and where it is only an additional flourish in things circumstantial, shall not avoid a grant; as where the husband has a term in right of his wife, and this term is recited as made to the husband. A Misrecital in the beginning of a deed, which goes not to the end of a deed, shall not hurt; but if it goes to the end of a sentence, so that the deed is limited by it, it is vitious. *Carth.* 149. See titles *Amendment*; *Deed*; *Lease*.

MISSA, The Mass, at first used for the dismission or sending away of the people: and hence it came to signify the whole church service or Common Prayer; but more particularly the Communion-service, and the office of the Sacrament, after those who did not receive it were dismissed. *Litt. Dict.*

MISSAL, *missale*, The Mass-book, containing all things to be daily said in the Mass. *Lindw. Provincial. l.* 3. *c.* 2.

MISSATICUS, A messenger. *Cowel. Domesd in Chesth.*

MISSÆ PRESBYTER, A priest in orders. *Blount.*

MISSURA, Singing the *Nunc Dimittis*, and performing other ceremonies to recommend and dismiss a dying person. And in the statutes of the church of St. *Paul* in *London*, (collected by *Ralph Baldock*, dean about the year 1295, in the chapter *de Fraternia*, of the fraternity or brotherhood, who were obliged to a mutual communication of all religious offices,) it is ordained—*Ut fiat commendatio & Missura & sepultura omnibus sociis condecentibus & astantibus. Liber Stat. Eccles. Paulina*, *M. S. fol.* 25.

MISSURIUM, A dish for serving up meat to a table. *Thorn's Chron. p.* 1762.

MISTAKE, A negligent error in any deed, record, process, *&c.* As to which see this Dictionary, title *Amendment*; *Deed*; *&c.* Ignorance or Mistake is classed by *Blackstone* among defects of the will: as when a man intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. Thus, if a man intending to kill a thief or house-breaker in his own house, by Mistake kills one of his own family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is wilful murder; for a Mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is, in criminal cases, no sort of defence. 4 *Comm. c.* 2. *p.* 27.

MISTERIUM, for MINISTERIUM. *Mon. Angl.* 3 *tom. p.* 102.

MIS-TRIAL, A false or erroneous trial; where it is in a wrong county, *&c.* 3 *Cro.* 284. Consent of parties cannot help such a trial, when past. *Hob.* 5. See tit. *Trial.*

MISUSER, Is an abuse of any liberty or benefit; as, 'he shall make a fine for his Misuser.' *Old Nat. Br.* 149. By Misuser, a charter of a corporation may be forfeited; so also an office, *&c.* See titles *Office*; *Condition*, I. 1.

MITRED ABBOTS, Were those governors of religious Houses, who obtained from the Pope the privilege of wearing the mitre, ring, gloves, and crosier of a Bishop. The mitred Abbots, says *Cowell*, were not the same with the conventual prelates, who were summoned to Parliament as spiritual Lords, though it hath been commonly so held; for their summons to Parliament did not any way depend on their mitres, but on their receiving their temporals from the hands of the King. See title *Abbot*.

MITTA, from the Sax. *mitten*, *mensura*.] An ancient *Saxon* measure; its quantity doth not certainly appear, but it is said to be a measure of ten bushels. *Domesday*, *Tit. Wirecscire. Mon. Angl. tom.* 2. *p.* 262. And Mitta, or Mitcha, besides being a sort of measure for salt and corn, is used for the place where the cauldrons were put to boil salt. *Gale's Hist. Brit.* 767.

MITTENDO MANUSCRIPTUM PEDIS FINIS, Was a judicial writ directed to the Treasurer and Chamberlains of the Exchequer, to search for, and transmit, the foot of a fine, acknowledged before Justices in Eyre, into the Common Pleas, *&c. Reg. Orig.* 14.

MITTIMUS, A writ for removing and transferring of records from one Court to another, as out of the King's Bench into the Exchequer, and sometimes by *Certiorari* into the Chancery, and from thence into another Court: but the Lord Chancellor may deliver such record with his own hand. *Stats.* 5 *R.* 2. *st.* 1. *c.* 15: 28 & 29 *H.* 8: *Dyer* 29, 32. Mittimus is also a precept in writing, under the hand and seal of a Justice of Peace, directed to the gaoler, for the receiving and safe keeping of an offender until he is delivered by law. 2 *Inst.* 590. See title *Commitment*.

MITTERE A LARGE, Is generally to set or put at liberty. *Law Fr. Dict.* And there is a *Mittre le estate* and *de droit* mentioned by *Littleton*, in case of releases of

lands

lands by jointenants, &c. which may sometimes pass a fee, without words of inheritance. 1 *Inst.* 273, 274. See title *Release*.

MIXED ACTIONS, Suits partaking of the nature of real and personal, wherein some real property is demanded, and also personal damages for a wrong sustained. See title *Action*.

MIXED LARCENY, or *Compound Larceny*, Is such as hath all the properties of simple Larceny, but is accompanied with one or both the aggravations of a taking from one's house or person. See title *Larceny*.

MIXED TITHES, Are those of cheese, milk, and young beasts, &c. 2 *Inst.* 649. See title *Tithes*.

MIXTILIO; See *Mestilo*.

MIXTUM. This word is often mentioned by our monkish historians; it sometimes signifies a breakfast, but always a certain quantity of bread and wine. *Cowel*.

MOCKADOES, Stuffs made in *England* and other countries; mentioned in *stat.* 23 *Eliz.* c. 9.

MODERATA MISERICORDIA, A writ founded on *Magna Charta*, which lies for him who is amerced in a Court, not of record, for any transgression, beyond the quality or quantity of the offence: it is directed to the Lord of the Court, or his bailiff, commanding him to take a moderate amerciament of the parties. If a man be amerced in a Court-baron, on presentment by the Jury, where he did not any trespass, he shall not have this writ, unless the amerciament be excessive and outrageous; and if the Steward of the Court, of his own head, will amerce any tenant or other person without cause, the party ought not to sue for his writ of *Moderata Misericordia*, if he be distrained for that amerciament; but he shall have action of trespass. *New Nat. Br.* 167. When the amerciament which is set on a person is affeered by his peers, this writ of *Moderata Misericordia* doth not lie; for then it is according to the statute. See *F. N. B.* 76: *4to edit.* 176.

MODIATIO, Was a certain duty paid for every tierce of wine. *Mon. Angl. tom.* 2. *p.* 994.

MODIUS, A measure, usually a bushel; but various according to the customs of several countries.

MODIUS TERRÆ VEL AGRI, This phrase was much used in the ancient charters of the *British* Kings, and probably signified the same quantity of ground as with the *Romans*, *viz.* One hundred feet long, and as many broad. *Mon Angl.* iii. 200.

MODO ET FORMA, Words of art in law pleadings, &c. and particularly used in the answer of a defendant, whereby he denies to have done the thing laid to his charge, *modo & forma declarata*, *in manner and form* as declared by the plaintiff. *Kitch* 232.

Where *Modo et Forma* are of the substance of the issue, and where but words of form, this diversity is to be observed; where the issue taken goeth to the point of the writ or action, there *Modo et Forma* are but words of form, as in the case of the writ of entry in *casu proviso*. But otherwise it is, when a collateral point in pleading is traversed; as if a feoffment be alledged by two, and this is traversed *Modo et Forma*, and it is found the feoffment of one, there *Modo et Forma* is material. So if a feoffment be pleaded by deed, and it is traversed *absque hoc quod feoffavit Modo et Forma*, upon this collateral issue *Modo et Forma* are so essential as the Jury cannot find a feoffment without deed. *Co. Lit.* 281. *b.* See *Br. Labourers*, *pl.* 46. cites 38 *H.* 6. 22. So in breach of covenant, as for ploughing meadow land, a licence in writing, by several, intitled at the time to the reversion with the appurtenant; (or lands *pro tempore*,) may be traversed *Modo et Forma*, and a licence by parol, or by one or two, &c. and not by all, will not support the issue.

Modo et Forma do not put the day nor place in issue; but only the matter and substance of the plea. *Reg. Plac.* 188. *a.* 5.

Where a traverse is with a *Modo et Forma*, &c. that will put the manner, as well as the matter in issue, where the manner is material, as the time, the fact, and other circumstances, when they are the effect of the issue. *Reg. Plac.* 189. *c.* 5. See title *Pleading*.

MODUS DECIMANDI, Is when lands, tenements, or some certain annual sum, or other profit, hath been given time out of mind to a parson and his successors, in full satisfaction and discharge of all tithes in kind, in such a place. 2 *Rep.* 47: 2 *Inst.* 490; and see title *Tithes*.

A *Modus Decimandi*, commonly called by the simple name of a *Modus* only, is where there is by custom a particular *manner* of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as 2*d.* an acre for the tithe of land; sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him; sometimes in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe-eggs, and the like. Any means, in short, whereby the law of tithing is altered, and a new *method* of taking them is introduced, is called a *Modus Decimandi*, or special *manner* of tithing. 2 *Comm.* c. 3. *p* 29.

MOHAIR YARN; See titles *Manufactures*; *Silk*.

MOIETY, *medietas*, Fr. *moitié*, i. e. *coaequa vel media pars*.] The half of any thing; and to hold by Moieties is mentioned in our books, in case of joint-tenants, &c. *Lit.* 125. See title *Joint-tenants*.

MOLASSES; See *Navigation Act*.

MOLENDINUM, A mill of divers kinds. See *Mill*.

MOLENDUM, Corn sent to a mill, a grist. *Chart. Abbat. de Rading, MS. fol.* 116.

MOLITURA, Was commonly taken for the toll or *multure* paid for grinding corn at a mill; sometimes called *molta*, Fr. *moulta*—*Molitura libera*, free grinding or liberty of a mill, without paying toll; a privilege which the lord generally reserved to his own family. *Paroch. Antiq.* 236.

MOLLITER MANUS IMPOSUIT. Several justifications in trespass, *i. e.* actions of assault, are called by this name, from the words *gently laid his hands upon him* used in the plea; as where the defendant justifies an assault, by shewing that the plaintiff was unlawfully in the house of defendant, making a disturbance, and being requested to cease such disturbance, and depart, he refused, and continued therein, making such disturbance, he, the defendant, *gently laid his hands on the plaintiff*, and removed him out of the house. So in various other instances, as for separating two persons fighting, in order to preserve the peace; so in the legal exercise of an office, &c. See titles *Pleading*; *Assault*.

MOLMAN, A man subject to do service, applied to the servants of a monastery. *Prior. Lewes. p.* 21. *Spelm Gloss.*

MOLMUTIAN, or MOLMUTIN LAWS, The laws of *Dunvallo Molmutius* sixteenth King of the *Britons*, who began his reign above four hundred years before the birth of our Saviour: these were famous in this land till the time of *William* the Conqueror. This King was the first who published laws in *Britain*; and his laws (with those of Queen *Mercia*,) were translated by *Gildas* out of the *British*, into the *Latin* tongue. *Usher's Primord.* 126.

MOLNEDA, MULNEDA, A mill-pool or pond. *Paroch. Antiq.* 135.

MOLTA, The duty or toll paid to the lord by his vassals, to grind corn at his mill. *Monastic.* ii. 97. See *Molitura.*

MONARCHY, That form of government where the sovereign power is entrusted in the hands of a single person. See title *Government.*

MONASTERIES and ABBEYS; See title *Abbot.*

MONETAGIUM, A certain tribute paid by tenants to their lord every third year, that he should not change the money which he had coined, formerly when it was lawful for great men to coin money current in their territories; but not of silver and gold. It was abrogated by the *stat.* 1 *Hen.* 1. *c.* 2. The word *Monetagium* is likewise used for a Mintage, and the right of coining or minting money. *Jus & artificium cudendi monetas.*

MONEY, *moneta.*] That metal, be it gold or silver, which receives authority by the prince's impress to be current; for as wax is not a seal without a print, so metal is not Money without impression. *Co. Litt.* 207. Money is said to be the common measure of all commerce, through the world, and consists principally of three parts; the material whereof it is made, being silver or gold; the denomination or intrinsic value, given by the King, by virtue of his prerogative; and the King's stamp thereon. 1 *Hale's Hist. P. H.* 188.

It belongs to the King only, to put a value, as well as the impression, on Money; which being done, the Money is current for so much as the King hath limited. 2 *Inst.* 575. Any piece of Money coined is of value as it bears a proportion to other current Money, and that without proclamation; and though there is no act of parliament, or order of State for guineas, as they are taken; yet being coined at the Mint, and having the King's insignia on them, they are lawful Money, and current at the value they were coined and uttered at the Mint. 2 *Salk.* 446. It has been insisted that guineas were originally coined for 20*s.* according to the twenty shilling pieces of Money, and that legally, no more ought to be demanded for them: also that in legal proceedings, they should be mentioned as pieces of gold called guineas, of the value, &c. 5 *Mod.* 7. If an action is brought for damages, the value of guineas may be given in evidence to the Jury; but if the action be for so many guineas, the value ought to be set forth in the declaration, to ascertain the debt. *Carthew.* 255.

Gold and silver coin, &c. is not to be exported without licence, on pain of forfeiture. *Stat.* 9 *Ed.* 3. *stat.* 2. *c.* 1. Silver Money melted down, is to be forfeited, and double value. *Stat.* 13 & 14 *Car.* 2. *c.* 31. But by old statutes, foreign Money may be melted down; and no Money shall be current but the King's own, &c. See *stats.* 27 *Ed.* 3. *c.* 14: 17 *R.* 2. *c.* 1; this Dictionary, title *Coin*; and 1 *Comm. c.* 7. *p.* 276, 7. & *n.*

MONEY, LENDING IT ABROAD. By a temporary statute, 5 *Geo.* 2. *c.* 5, the King by proclamation might for one year, prohibit all his subjects from lending or advancing Money to any foreign Prince or State, without licence under the Great or Privy Seal; and if any person knowingly offended in the premises, he should forfeit treble the value of the Money lent, &c. two-thirds to the King, and the other to the informer; but persons might deal in foreign stocks, or be interested in any bank abroad, established before issuing his Majesty's proclamation.

MONEY INTO COURT. In law proceedings, Money demanded is oftentimes brought into Court, either by a rule of Court, or by pleading a *profert in curiam* of the Money on a tender. The practice of bringing Money into Court was first introduced in the time of *Kelyng*, *Ch. J.* to avoid the hazard and difficulty of pleading a *Tender:* and it is allowed in cases where an action is brought upon contract for the recovery of a debt, which is either certain, or capable of being ascertained by mere computation, without leaving any other sort of discretion to be exercised by a Jury. 2 *Burr.* 1120. In these cases, when the dispute is not whether any thing, but how much, is due to the plaintiff, the defendant may have leave to bring into Court any sum of Money he thinks fit; and the Court will make a rule, that unless the plaintiff accept of it, with costs, in discharge of the action, it shall be struck out of the declaration, and paid out of Court to the plaintiff, or his attorney; and the plaintiff, upon the trial, shall not be permitted to give evidence for the sum brought in: which rule should be accompanied with the general issue or other plea, to the residue of the demand. *Tidd's Practice K. B.* and the authorities there cited.

Thus in *Assumpsit* or *Covenant* for the payment of Money, the defendant may bring Money into Court; and in *Covenant* to find diet and lodging, or pay 10*l.* the Court allowed a defendant to bring in the 10*l.* In debt for rent, the defendant was formerly allowed to bring Money into Court, as is done in the Common Pleas and the Exchequer; but the Court of King's Bench has refused it, and said they never did it in *debt.* But there is a distinction between those actions of debt wherein the plaintiff cannot recover less than the sum demanded, as on a record, specialty, or statute, giving a *sum certain* by way of penalty; and those actions wherein the plaintiff may recover *less*, as in debt for rent, or on a simple contract. In the former the defendant cannot, though he may move to stay the proceedings, on payment of the *whole debt* and costs; as was the practice in cases of debt on bond, conditioned for payment of a lesser sum than the penalty, previous to *stat.* 4 & 5 *Ann. c.* 16, which allows the defendant, pending an action on such bond, to bring the principal, interest, and costs into Court, and declares that such payment shall be a full satisfaction and discharge of the bond. But in the latter, the defendant has been allowed to bring Money into Court, because the plaintiff does not recover according to his demand, but according to the verdict of the Jury. *Tidd.*—By *stat.* 19 *Geo.* 2. *c.* 37, the defendant may bring Money into Court, in debt, covenant, or other

 action,

action, on a policy of assurance. See 3 *Burr.* 1773. In an action by an executor or administrator, the plaintiff not being liable to costs, the defendant was not formerly allowed to bring Money into Court; but now it is otherwise, and the effect of the rule will be, not to make the plaintiff pay, but only to lose his subsequent costs. See 2 *Salk.* 596: 2 *Stra.* 796.

In trover the defendant cannot bring the goods and costs into Court. 1 *Wils.* 23. In an action for the mesne profits after a recovery in ejectment, the defendant shall not have leave to pay Money into Court. 2 *Wils.* 115.

In a plea of tender, with a *profert in curiâ*, the sum tendered must be paid to the signer of the writs, and if not so paid, the plaintiff may consider the plea as a nullity, and sign judgment. 1 *Stra.* 638. And as a tender cannot be pleaded, so the defendant cannot bring Money into Court, in an action for general damages upon a contract, or for a tort or trespass. But in action on *assumpsit* against a carrier, for not delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of 20*l.* unless they were entered and paid for accordingly, the Court of King's Bench allowed him to bring the 20*l.* into Court. And where, in an action for general damages, the bringing of Money into Court is irregular, if the plaintiff takes it out, he thereby waves the irregularity, and cannot afterwards have a verdict, unless he recover more than the sum brought in. *Tidd's Pract. K. B.*

By *stat.* 24 *Geo.* 2. *c.* 44. § 4, (which seems to be the first statute allowing Money to be brought into Court in an action for general damages;) *stats.* 20 *Geo.* 3. *c.* 70. § 33; 24 *Geo.* 3. *st.* 2 *c.* 47. § 35; in actions against Justices of the Peace, or Officers of the Excise or Customs, for any thing done in the execution of their offices, "In case the defendants shall have neglected to tender any, or shall have tendered insufficient, amends, before the action brought, they may, by leave of the Court at any time before issue joined, pay into Court such sum of money as they shall see fit; whereupon such proceedings, orders, and judgments shall be had, made, and given, in and by such Court, as in other actions where the defendant is allowed to pay Money into Court."

Where there are several counts or breaches in the declaration, and as to some of them the defendant may bring Money into Court, but not as to the others; he may obtain a rule for bringing it in specially, upon some of the counts or breaches only. Thus where an action of covenant was brought upon a lease, for non-payment of rent, and repairing, &c. the Court made a rule, that upon payment of what should appear to be due for rent, the proceedings as to that should be stayed; and as to the other breaches, that the plaintiff might proceed as he should think fit. So in covenant upon a charter party, the defendant has been allowed to bring Money into Court upon two of the breaches only, *viz.* for freight and demurrage. If a defendant thus bring Money into Court upon some of the counts, and the plaintiff take it out, the latter is only entitled to the costs of those counts. *Tidd's Pract. K. B.*

The motion for leave to bring Money into Court, is a motion of course, and should regularly be made before plea pleaded; but it is frequently made, and in some cases expressly authorised by statute, after plea, on obtaining a Judge's order for that purpose. And if there has been no delay, the Court will give the defendant leave to withdraw the general issue, in order to bring Money into Court, and plead it in payment of costs. *Tidd's Pract. K. B.*

Bringing Money into Court is an acknowledgment of the right of action to the amount of the sum brought in; which the plaintiff (on producing an office-copy of the rule) is entitled to receive at all events, whether he proceed in the action or not; and even though he be nonsuited, or have a verdict against him, and bring an acknowledgment on record, the party can never recover it back again, though it afterwards appear that he paid it wrongfully. *Tidd's Pract. K. B.* But if the defendant brings Money into Court, upon a tender and *uncore prist*, and the plaintiff takes issue upon the tender, and it is found against him, then the defendant shall have the Money out of Court. 2 *Salk.* 597. And beyond the amount of the sum brought in, bringing Money into Court is no acknowledgment of the right of action, and therefore if the plaintiff proceed further, it is at his peril. If he proceed to trial, otherwise than for the payment of costs, and do not prove more to be due to him than the sum brought in, the plaintiff, on producing the rule, shall be nonsuited, or have a verdict against him, and pay costs to the defendant; but if more appear to be due to him, he shall have a verdict for the overplus and costs. Where the plaintiff proceeds further without going on to trial, he shall have his costs to the time of bringing Money into Court; and if the plaintiff proceed to trial, and a Juror is withdrawn by consent, the plaintiff is not entitled to costs up to the time of bringing the Money into Court. *Tidd's Pract. K. B.* and the authorities there cited. And see also on this subject, *Impey's Pract. K. B.*

MONGER, A little sea vessel which fishermen use. See *Stat.* 13 *Eliz. c.* 11. When a word ends with *monger*, as *ironmonger*, &c. it signifies merchant, from the Sax. *manger*, i. e. *Mercator*.

MONIERS or MONEYERS, *Monetarii*; Are ministers of the Mint, who make and coin the King's money. *Reg. Orig.* 262: 1 *Ed.* 6. 15: See *Mint*. It appears in ancient authors that the Kings of *England* had Mints in several counties, and those who had the conduct of them appear to have been called *Monetarii*, Moniers. In the tract in the Exchequer, written by *Oakham*, it is said, that whereas sheriffs were usually obliged to pay into the King's Exchequer the King's sterling money, for such debts as they were to answer; those of *Cumberland* and *Northumberland* were admitted to pay in any sort of money, so it were silver: and the reason there given, is, because those two shires *Monetarios de antiqua institutione non habent*; *quod abbas & monachi praedicti habeant unum monetarium & unum cuneum apud Rading ad monetam ibidem, tam ad obolos & sterlingos quam ad sterlingos prout moris est fabricand. & faciend. Memorand. Scac de Anno* 20 *Ed.* 3. *inter record de Trin. Rot.* Of later days, the title of Moniers hath been given to bankers, that is, such as make it their trade to deal in monies upon returns. *Cowel.*

MONK, *Monachus*, from the Gr. Μόνος, *solus quia soli*, i. e. *Separati ab aliorum consortio vivant*, because the first Monks lived alone in the wilderness.] They were after divided into three ranks; *Cenobitarium*, i. e. a society living in common in a monastery, &c. under the

the government of a single person; and these were under certain rules, and afterwards called *Regulars*: *Anachoretæ*, or *Eremitæ*, those Monks who lived in the wilderness on bread and water; and *Sarabitæ*, Monks living under no rule, that wandered in the world.

MONKERY, The profession of a Monk, mentioned in *Whitlock's* reading upon *Stat.* 21 *H.* 8. *c.* 13.

MONKS CLOTHES, Made of a certain kind of coarse cloth. *Vide* 20 *H* 6.

MONOPOLY, From Μόνος *solus* & πωλέω *vendo*.] A licence or privilege allowed by the King, by his grant, commission, or otherwise, to any person or persons, for the *sole buying*, *selling*, making, working, or using of any thing; by which other persons are restrained of any freedom or liberty that they had before, or hindered in their lawful trade. 3 *Inst.* 181: 4 *Comm.* 159. It is defined to be where the power of selling any thing is in one man alone; or where one shall ingross and get into his hands such a merchandise, &c. as none may sell or gain by them but himself. 11 *Rep.* 86.

A Monopoly, it is said, hath three incidents mischievous to the public: 1. The raising of the price. 2. The commodity will not be so good. 3. The impoverishing of poor artificers. 11 *Rep.* 86. All Monopolies are against the ancient and fundamental laws of the realm: A by-law, which makes a Monopoly, is void; so is a prescription for a sole trade to any one person or persons, exclusive of all others. *Moor*, 591. Monopolies by the Common Law are void, as being against the freedom of trade, and discouraging labour and industry; and putting it in the power of particular persons to set what prices they please on a commodity. 1 *Hawk. P. C.* Upon this ground it hath been held, that the King's grant to any corporation of the sole importation of any merchandise, is *void*. 2 *Rol. Abr.* 214: 3 *Inst.* 182. The grant of the sole making, importing, and selling of playing-cards, was adjudged void. 11 *Rep.* 84: *Moor*, 671. And the King's grant of the sole making and writing of bills, pleas, and writs in a Court of Law, to any particular person, hath been resolved to be void. 1 *Jones*, 231: 3 *Mod.* 75.

The King may grant to particular persons the sole printing of the holy scriptures, and law books. 1 *Hawk. P. C.* All matters of this nature ought to be tried by the Common Law, and not at the Council-table, or any other Court of that kind; and the making use of or procuring any unlawful Monopoly, is punishable by fine and imprisonment at Common Law. 3 *Inst.* 181, 182.

These Monopolies had been carried to an enormous height during the reign of Queen *Elizabeth*; but were in a great measure remedied by *stat.* 21 *Jac.* 1. *c.* 3, by which all Monopolies, grants, letters patent, and licences, for the sole buying, selling, and making of goods and manufactures, are declared void, except in some particular cases; and persons grieved by putting them in use, shall recover treble damages and double costs, by action on the statute; and delaying such action before judgment, by colour of any order, warrant, &c. or delaying execution after, incurs a *Præmunire*: but this does not extend to any grant or privilege granted by act of Parliament; nor to any grant or charter to corporations or cities, &c. or to grants to companies or societies of merchants, for enlargement of trade; or to inventors of new manufactures, who have patents for the term of fourteen years; grants or privileges for printing; or making gunpowder, casting ordnance, &c.

As to inventors of new manufactures, &c. it has been adjudged on this statute, that a manufacture must be substantially new, and not barely an additional improvement of any old one, to be within the statute; it must be such as none other used at the granting the letters patent; and an old manufacture in use before, cannot be prohibited in any grant of the sole use of any such new invention. 3 *Inst* 184. Yet a grant of Monopoly may be to the first inventor, by the *stat.* 21 *Jac.* 1. *c.* 3; notwithstanding the same thing was practised before beyond sea; because the statute mentions new manufactures within the realm, and intended to encourage new devices useful here; and it is the same thing whether acquired by experience or travel abroad, or by study at home. 2 *Salk.* 447. It is said, a new invention to do as much work in a day by an engine, as formerly used to employ many hands, is contrary to the statute; by reason it is inconvenient, in turning so many men to idleness. 3 *Inst.* 184. But experience seems in favour of such inventions, as they tend to lessen the price of manufactures, and enable us to undersell foreigners, both at home and abroad

Combinations among victuallers or artificers to raise the price of provisions or any commodities, or the rate of labour, are commonly called Monopolies; and are in many cases severely punished by particular statutes; and in general by *stat.* 2 & 3 *E* 6. *c.* 15, with the forfeiture of 10*l.* or twenty days' imprisonment, with an allowance of only bread and water, for the first offence; 20*l.* or the pillory, for the second; and 40*l.* for the third, or else the pillory, loss of one ear, and perpetual infamy. See 4 *Comm.* 159.

MONSTER, One who hath not human shape, and yet is born in lawful wedlock: and such may not purchase or retain lands; but a person may be an heir to his ancestor's lands, though he be deformed in some part of his body. *Co. Lit.* 7. See title *Descent*.

Shewing a Monster for money is a misdemeanour.—It was a child that had four legs and four arms, and two heads, and but one belly, where the two bodies were conjoined; the child died and was embalmed to be kept for shew, but was ordered by the Lord Chancellor to be buried in a week. 2 *Ch. Ca.* 110.

MONSTRANS DE DROIT, A shewing a right.] A writ out of Chancery to be restored to lands and tenements that are a man's, in right, though by some office found to be in the possession of one lately dead; by which office the King would be entitled to the said lands, &c. *Staunf. P. C.* c. 21: 4 *Rep* 54.

The Common-law methods of obtaining possession or restitution from the Crown, of either real or personal property, are, 1. By *Petition de droit*, or petition of right, which is said to owe its original to K. *Edward* I. 2. By *Monstrans de droit*, manifestation or plea of right; both of which may be preferred or prosecuted either in the Chancery or Exchequer. *Skin.* 609.

The former is of use where the King is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself: in which case he must be careful to state truly the whole title of the Crown, otherwise the petition shall abate.

abate. *Finch L.* 256. And then, upon this anſwer being indorſed or underwritten by the King, "*ſoit droit fait al partie*—let right be done to the party;" a commiſſion ſhall iſſue to enquire the truth of this ſuggeſtion: after the return of which the King's Attorney is at liberty to plead in bar, and the merits ſhall be determined upon iſſue or demurrer, as in ſuits between Subject and Subject. *Skin.* 608: *Raſt. Entr.* 461. Thus if a diſſeiſor of lands which are holden of the Crown die ſeiſed without any heir, whereby the King is *prima facie* entitled to the lands, and the poſſeſſion is caſt on him either by inqueſt of office, or by act of law without any office found; now the diſſeiſee ſhall have remedy by petition of right, ſuggeſting the title of the Crown, and his own ſuperior right before the diſſeiſin made. *Bro. Ab. Petition,* 20: 4 *Rep.* 58.

But where the right of the party, as well as the right of the Crown, appears upon record, there the party ſhall have *Monſtrans de droit,* which is putting in a claim of right, grounded on facts already acknowledged and eſtabliſhed; and praying the judgment of the Court, whether upon thoſe facts, the King or the Subject hath the right. As if, in the caſe before ſuppoſed, the whole ſpecial matter is found by an inqueſt of office, (as well the diſſeiſin as the dying without any heir,) the party grieved ſhall have *Monſtrans de droit* at the Common Law. 4 *Rep.* 55. But as this ſeldom happens, and the remedy by *Petition* was extremely tedious and expenſive, that by *Monſtrans* was much enlarged, and rendered almoſt univerſal by ſeveral ſtatutes; particularly *ſtat.* 36 *E.* 3. *c.* 13: 2 & 3 *E* 6. *c* 8; which alſo allow inquiſitions of office to be traverſed or denied, wherever the right of a Subject is concerned, except in a very few caſes. *Skin.* 608. Theſe proceedings are had in the Petty-bag Office, in the Court of Chancery; and if upon either of them the right be determined againſt the Crown, the judgment is *quod manus Domini Regis amoveantur; & poſſeſſio reſtituatur petenti: ſalvo jure Domini Regis:* which laſt clauſe is always added to judgments againſt the King, to whom no laches is ever imputed, and whoſe right, till it was otherwiſe provided by ſtatute, was never defeated by any limitation or length of time. See *ſtats.* 21 *Jac.* 1. *c.* 2: 9 *Geo.* 3. *c.* 16: and this Dictionary, title *King,* V. 2.

By the above judgment the Crown is inſtantly out of poſſeſſion, ſo that there needs not the indecorous interpoſition of his own officers, to transfer the ſeiſin from the King to the party aggrieved. *Finch L.* 459: See 3 *Comm. c.* 17. *p.* 256, 7.

Leſſee of an outlaw cannot maintain treſpaſs, but muſt be relieved by *Monſtrans de droit. Ld. Raym.* 307.

MONSTRANS DE FAITS ou RECORDS. Shewing of deeds or records is thus; upon an action of debt brought upon an obligation, after the plaintiff hath declared, he ought to ſhew his obligation, and ſo it is of Records. And the difference between *Monſtrans de faits* and *oyer de faits,* is this; he that pleads the deed or record, or declares upon it, ought to ſhew the ſame; and the other againſt whom ſuch deed or record is pleaded, may demand *oyer* of the ſame. *Cowel.*

Where a man pleads a deed, which is the ſubſtance of his plea or declaration, if he doth not plead it with a *profert in curiâ,* his plea or declaration is bad upon a ſpecial demurrer, *ſhewing it for cauſe;* and if he doth plead it with a *profert in curiâ,* if the other party demands a ſight of it, he cannot proceed till he hath ſhewn it; and when the defendant hath had a ſight of it, if he demands a copy of the ſame, the plaintiff may not proceed until a copy is delivered unto him. See *Stat.* 4 & 5 *Ann. c.* 16: 2 *Lil. Abr.* 201, 202: and this Dictionary, titles *Pleading; Profert in Curiâ.*

MONSTRAVERUNT, Is a writ which lies for tenants in ancient demeſne, who hold land by free charter, when they are diſtrained to do unto their lords other ſervices and cuſtoms than they or their anceſtors uſed to do. Alſo it lieth where ſuch tenants are diſtrained for the payment of toll, &c. contrary to their liberty, which they do or ſhould enjoy. *F. N. B.* 14: 4 *Inſt.* 269. This writ is directed to the ſheriff, to charge the lord that he do not diſtrain them for ſuch unuſual ſervices, &c. And if the lord nevertheleſs diſtrains his tenants, for other ſervices than of right they ought to do, the ſheriff may command the neighbours, who dwell next the manor, or take the power of the county, to reſiſt the lord, &c. And the tenants in ſuch caſe, may likewiſe ſue an attachment againſt their lord, returnable in *C. B.* or *B. R.* to anſwer the contempt and recover damages. *New Nat. Br.* 32.

But the lord ſhall not be put to anſwer the writ of attachment ſued againſt him upon the *Monſtraverunt,* before the Court is certified by the Treaſurer and Chamberlains of the Exchequer, from the book of *Domeſday,* whether the manor be ancient demeſne; ſo that it is requiſite that the plaintiff in the *Monſtraverunt,* do ſue forth a ſpecial writ for the certifying of the ſame. *Ibid.* 35. The writ of *Monſtraverunt* may be ſued for many of the tenants, without naming any of them by their proper names, but generally *Monſtraverunt nobis homines de,* &c. But in the attachment againſt the lord the tenants ought to be named; though one tenant may ſue it in his own name, and the name of the other tenants by general words, *Et homines,* &c. 2 *H.* 6. 26. See titles *Ne injuſte Vexes; Ancient Demeſne.*

MONSTRUM, Is ſometimes taken for the box in which relics are kept. *Item unum* Monſtrum *cum oſſibus St. Petri,* &c. *Monaſt.* iii. 173. *Monſtrum* is alſo taken for what we call corruptly a *muſter* of ſoldiers. *Cowel.*

MONTH or MONETH, Sax. *Monath, Menſis, à menſione lunæ curſus.*] Signifies the time the ſun goes through one ſign of the zodiac, and the moon through all twelve; properly the time from the new moon to its change, or the courſe or period of the moon, whence it is called *Month* from the moon. *Lit. Dict.* A Month is a ſpace of time containing by the week twenty-eight days; by the Calendar ſometimes thirty, and ſometimes thirty-one days: *Julius Cæſar* divided the year into twelve Months, each Month into four weeks, and each week into ſeven days.

The ſpace of a year is a determinate period, conſiſting commonly of 365 days; for though in Biſſextile or Leap Years, it conſiſts properly of 366; yet by *ſtat.* 21 *H.* 3, *de anno Biſſextili,* the increaſing day in the Leap-year, together with the preceding day, ſhall be accounted for one day only. That of a Month is more ambiguous; there being in common uſe, two ways of calculating Months, either as lunar, conſiſting of twenty-eight days, the ſuppoſed revolution of the moon, thirteen of which make a year; or as calendar months of unequal lengths,

according to the *Julian* division in our common almanacks, commencing at the calends of each month, whereof in a year there are only 12. A Month in law is a lunar month, or 28 days; unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease *for* 12 *Months* is only for 48 weeks: but if it be for *a twelvemonth* in the singular number, it is good for the whole year. 6 *Rep.* 61. For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood, that by the space of time called thus, in the singular number, a *twelvemonth*, is meant a whole year, consisting of one solar revolution. 2 *Comm.* 141.

The Month by the Common Law is but twenty-eight days: and in case of a condition for rent, the Month shall be computed at twenty-eight days; so in the case of inrolment of debts, and generally in all cases where a statute speaks of Months: but where the statute accounteth by the year, half-year, or quarter of a year, then it is to be reckoned according to the Calendar. 1 *Inst.* 135: 6 *Rep.* 62: *Cro. Jac.* 167.

A twelvemonth in the singular number includes the whole year, according to the Calendar: but twelve Months, six Months, *&c.* in the plural number, shall be accounted after twenty-eight days to every Month; except in case of presentations to benefices, to avoid lapse, *&c.* which shall be in six *calendar Months.* 6 *Rep.* 61: *Cro. Jac.* 141. But if an agreement is to pay fifty shillings for the interest of one hundred pounds at the end of six Months; the computation must be by calendar Months; because, if it was by lunar Months, the interest would exceed the rate allowed by the statute. So in bills of exchange and promissory notes, a Month is always a calendar Month; as if a bill or note is dated on the 10th of *January* and made payable one Month after date, it is due (the 3 days of grace being added) on the 13th of *February*.

It is somewhat remarkable that the difference between six calendar Months and half a year, does not seem to have been considered by legal writers. *Coke* says, half a year consists of 182 days. 1 *Inst.* 135. But six calendar Months will be 2 or 3 days less or more than such a half year, accordingly as *February* is reckoned or not one of the six. *Coke* in his Report of *Catesby's* case, clearly considers the *tempus semestre* to be six calendar Months. 6 *Co.* 61: yet *Croke* in his report of that case states it, as confidently, to consist of 182 days; *Cro. Jac.* 141, 166; and in neither report is the difference taken notice of. 2 *Comm.* 141, *in n.*

From the cases in 3 *Wils.* 21: 1 *Term Rep.* 159, it seems as if notice to a tenant from year to year to quit the premises, must be half a year, and not six calendar Months; though the computation by the latter would be more simple and convenient, and was understood to be the proper notice by the Court of C. P. See 2 *Black. Rep.* 1224.

MONUMENT. An heir may bring an action against one that injures the Monument, *&c.* of his ancestor; and the coffin and shroud of a deceased person belong to the executors or administrators; but the dead body belongeth to none. 3 *Inst.* 202, 203. See title *Heir* III. 3.

MOORS, In the *Isle of Man*, who summon the Courts for the several sheadings, are the lords bailiffs, called by that name; and every Moor has the like office with our bailiff of the hundred. *King's Descrip. Isle of Man.*

MOOT, from the Sax. *Motian, placitare*, to treat or handle.] A term in the Inns of Court, signifying the exercise of arguing of cases; which young barristers and students used to perform at certain times, the better to enable them for the practice and defence of clients causes. The place where Moot cases were argued, was anciently called the Moot-hall; and in the Inns of Court there is a bailiff of the Moot yearly chosen by the benchers, to appoint the Mootmen for the Inns of Chancery; and keep accounts of the performances of exercises, both there and in the house. *Orig. Juridicial.* 212.

MOOTA CANUM, A pack of dogs. *Cowel.*

MOOTMEN, Those who argue the reader's cases, called Moot-cases, in the Inns of Chancery, in the term-time, and in vacation. See *Moot.*

MORA, A Moor, or barren and unprofitable ground, derived from the Sax. *mor*, signifying also marshland. *Mon. Angl. tom.* 2. *p.* 50: 1 *Inst.* 5. Also a heath. *Fleta, lib.* 2. *c.* 71.

MORA MUSSA, A watery or boggy moor; a morass; and such in *Lancashire* they call *mosses*; *morosta* is used in the same sense. *Mon. Angl. tom* 2. *p.* 306.

MORATUR IN LEGE, Is the same with *demoratur*, and signifies as much as *he demurs*; because the party goes not forward in pleading, but rests or abides upon the judgment of the Court, in a certain point, as to the sufficiency in law of the declaration or plea of the adverse party; who deliberate and take time to argue and advise thereupon, and then determine it. *Co. Lit.* 71. See title *Demurrer.*

MORETUM, A sort of brown cloth, with which caps were formerly made. *Mat. Paris, anno* 1258.

MORGANGINA or MORGANGIVA, from Sax. *morgen*, the morning, and *gifan*, to give.] The gift on the wedding day. Dower, or rather dowry—*Si sponsa virum suum supervixerit, dotem et maritationem suam, cartarum instrumentis, vel testium exhibitionibus et traditam, perpetualiter babeat et* morganginam *suam. LL. Hen.* 1. *c.* 11, 70. In some books it is writ *morgangiba, morgingab.* &c. In *Leg. Canuti apud Brompton*, it is writ *morgagifa, c.* 99. It signifies literally *donum matutinale*; and it is what we now call *dowry money*, or that gift the husband presents to his wife on the wedding-day. It was usually the fourth part of his personal estate; not here, but amongst the *Lombards. Du Cange in v. Morganegiba. Cowel.*

MORIAM, Fr. *morion*; *cassis*] A head-piece. It seems to be derived from the Italian *morione*; see *stat.* 4 & 5 *P. & M c.* 2.

MORINA, Murrain; an infectious distemper in cattle. It also signifies the wool of sick sheep, and those dead with the murrain. *Fleta, lib* 2. *c.* 79. *par* 6.

MORLING, or MORTLING, That wool which is taken from the skin of dead sheep, whether being killed or dying of the rot. See *stats.* 4 *Ed* 4. *c.* 2 & 3: 27 *H.* 6. *c.* 2: 3 *Jac.* 1. *c* 18: 14 *Car.* 2. *c.* 88. and title *Sherling*

MOROSUS, Marshy; see *Mora.*

MORSELLUM or **MORSELLUS TERRÆ**, A ſmall parcel or bit of land. *Charta* 11 *H.* 3: *Mat. Paris*, 438: *Mon. Angl.* 282.

MORTARIUM, A light or taper ſet in churches to burn over the graves or ſhrines of the dead. *Conſuetud. Dom. Farendon, MS. fol.* 48.

MORT-D'ANCESTOR; See *Aſſiſe of Mort-d'anceſtor.*

MORTGAGE,

Mortgagium, *vel mortuum vadium*; from *mort, mortuus* and *gage, pignus.*] A pawn of land or tenement, or any thing immoveable, laid or bound for money borrowed, to be the creditor's for ever, if the money be not paid at the day agreed upon; and the creditor holding land and tenement upon this bargain, is called Tenant in Mortgage. Of this we read in the *Grand Cuſtumary of Normandy*, *c.* 313, which ſee. *Glanvil* likewiſe, *lib.* 10. *c.* 6, defineth it thus: *Mortuum vadium dicitur illud, cujus fructus vel redditus interim percepti in nullo ſe acquietant.* So that it is called a *dead gage*, becauſe whatſoever profit it yieldeth, yet it redeemeth not itſelf by yielding ſuch profit, except the whole ſum borrowed be paid at the day. See *Skene de verb. ſignif. verbo Mortgage.* He who pledgeth this pawn or gage, is called the *Mortgagor*, and he who taketh it the *Mortgagee*. *Weſt. Symbol. p.* 2. title *Fines*, § 145. This if it contain exceſſive uſury, is forbidden by *ſtat.* 37 *H.* 8. *c.* 9. But it is called Mortgage, becauſe, if the money is not paid at the day, the land *moritur* to the debtor, and is forfeited to the creditor. *Cowell.*

I. *Of the Origin, Nature, and ſeveral Kinds of Mortgages.*
II. *What ſhall be deemed a Mortgage, or an Eſtate redeemable; and of the diſtinct Intereſts of Mortgagor and Mortgagee.*
III. *Of the Equity of Redemption and Foreclosure; and of the Manner of redeeming and foreclosing.*

I. The notion of mortgaging and redemption ſeems to be of Jewiſh extraction, and from them derived to the Greeks and Romans; the plan of the Moſaic law conſtitutes a juſt and equal *Agrarian*, that the lands may continue in the ſame tribes and families, and the people might not be diverted by any exotic arts and inventions from the exerciſe of agriculture, in which innocent employment they were to be continually educated; therefore whoever were compelled by want to ſell, could transfer no eſtate in the lands, farther than to the next general jubilee, which returned once in fifty years; wherefore they computed till the jubilee, that, according to the diſtance from thence, ſuch was the intereſt that could be transferred to the buyer; but the vendor had power at any time to redeem, paying the value of the lands to the jubilee; but though he did not redeem it at the year of jubilee, yet the lands came back again free to the vendor and his heirs. *Cumæus*, 11, 12.

But our notion of mortgaging and redemption ſeems to have come more immediately from the civil law; therefore it will be neceſſary herein to conſider the diſtinctions in that law between pledges and things hypothecated. *Juſtin.* 592.

The *pignus* or pledge was, when any thing was obliged for money lent, and the poſſeſſion paſſed to the creditor.

The *hypotheca* was, when the thing was obliged for money lent, and the poſſeſſion remained with the debtor. Now in caſe of goods pignorated, the creditor was obliged to the ſame diligence in keeping them, as he uſed about his own; ſo that if the goods were loſt by the negligence of the creditor, an action lay as for a depoſite; for the property being transferred to the creditor for a particular purpoſe, he was to keep them as his own. See this Dictionary, title *Bailment.*

If the debtor did not redeem the thing pledged, the creditor was to foreclose the redemption of the debtor; and if the money was not paid, the creditor had his *actio pignoritia*, or *hypothecaria*; which, when he had purſued, and obtained ſentence thereon, he might ſell as his own property; but there was this difference between the *actio pignoritia* and *hypothecaria*; that the *actio pignoritia* was only againſt the perſon of the debtor to foreclose him, becauſe the *pignus* was already in the poſſeſſion of the creditor; but the *actio hypothecaria* was *tam in rem, quam in perſonam*, and was given *ad pignus proſequendum, contra quemcunque poſſeſſorem*; becauſe herein the creditor had not the poſſeſſion of the pledge, but it remained to the debtor; and until ſentence was obtained in theſe actions, the creditor could not obtain the property of the pledge; and if the money was paid before ſentence, the pledge was ſubject to redemption: and where the ſame thing was pledged to ſeveral, thoſe were ſaid to be *potiores in pignore*, to whom the things were firſt hypothecated. *Digeſt. lib.* 20. *tit.* 6: *Corvin.* 269, 270, 271.

If the money was tendered or paid to the creditor, the contract of pignoration was diſſolved, and the debtor might have the pledge back, as a thing lent; which ſeems to have introduced the notion among us of the debtor's right to redemption; and with them the uſucaption, or the right of preſcription, did not extinguiſh the pledge, unleſs a ſtranger had held it for thirty years, or the debtor had held it for forty years. *Digeſt. lib.* 20. *tit.* 6.

In the feudal law the rule was, *Feudalia, invito domino, aut agnatis, non recte ſubjiciuntur hypothecæ, quamvis fructus poſſe eſſe receptum eſt*; and the reaſon of this rule was, becauſe the feud was filled with a tenant from the lord's original bounty, on whom he depended for his perſonal ſervice in war and peace; therefore the feudatary could not obtrude a tenant on him without his leave, who might be leſs capable of thoſe ſervices; for which reaſon, as the tenant could not originally aliene without licence, ſo he could not mortgage. *Corvin.* 268. See *Fonblanque's Treat. Eq. lib.* 3. *c.* 1. § 1.

But when a licence of alienation was given about the time of *Hen.* III, and it became a maxim in law, that the purity of a fee-ſimple imported a power of diſpoſing of it as the owner pleaſed; there were two ways of mortgaging lands introduced, which *Littleton* diſtinguiſhes by the names of *vadium vivum*, living pledge, and *vadium mortuum*, dead pledge. 9 *H.* 3. 32: 18 *Ed* 1.

Blackſtone claſſes theſe eſtates held in pledge among eſtates defeaſible on condition ſubſequent, and divides them as above into *vivum* and *mortuum vadium*. See 2 *Comm. c.* 10; III. *p.* 157.

Vivum vadium, or living pledge, is, when a man borrows a ſum, ſuppoſe 200*l*, of another, and grants him an eſtate, as of 20*l. per ann.* to hold, till the rents and profits ſhall repay the ſum ſo borrowed. This is an eſtate conditioned to be void as ſoon as ſuch ſum is raiſed.

And in this case the land or pledge is said to be *living*; it subsists and survives the debt, and immediately on the discharge of that, results back to the borrower. This seems to be the ancient way of pledging lands; for they held, that lands could not be hypothecated; therefore they used to subject the *usufructus*, which continued originally during the life of the feudatary; but when there was a free liberty given of alienation, then the feudatary could pledge the *usufructus* of the land at pleasure; but because, by this way of pledging, the lender received his money by degrees, and in small parcels, which was very troublesome; and those that lend money to usury, are generally willing to receive the whole in a gross sum; therefore this way of pledging is now out of use. *Co. Litt.* 205: See *Madd. Formal.* 136.

But *mortuum vadium*, a dead pledge, or Mortgage, (which is much more common than the other,) is where a man borrows of another a specific sum, *e. g.* 200*l.* and grants him an estate in fee, on condition, that if he, the mortgagor, should repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall re-convey the estate to the mortgagor. 2 *Comm.* 158.

The *vadium mortuum* is so called by *Littleton*, because it is doubtful, whether the feoffor will pay the money at the day limited or not; and if he do not pay, then the land, which is but in pledge upon condition, for the payment of the money, is, in strictness of law, taken from him for ever, and so *dead* to him; and the mortgagee's estate in the lands is then no longer conditional, but absolute; and if he do pay it, then the pledge is dead to the tenant of the land. *Litt.* § 332: *Co. Litt.* 205.

So long as the estate of the mortgagee continues conditional, that is, between the time of the lending the money and the time allotted for payment, the mortgagee is called Tenant in Mortgage. *Litt.* § 332. But as it was formerly a doubt, whether by taking such estate in fee it did not become liable to the wife's dower, and other incumbrances of the Mortgagee; though that doubt has been long ago over-ruled by our Courts of Equity; (see *post* III;) it therefore became usual to grant only a long term of years by way of Mortgage; with condition to be void on repayment of the Mortgage-money; which course has been since pretty generally continued; principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the Mortgage may happen to be. 2 *Comm.* 158.

Of these Mortgages therefore we see there are two sorts; 1st, Of the freehold and inheritance; and 2dly, Of terms for years. *Maddox*, 318, 319.

1st, Of the freehold and inheritance; and here the ancient way was to make a charter of feoffment, on condition that if the feoffor or his heirs paid the sum to the feoffee or his heirs, he should re-enter and re-possess; and sometimes the condition was contained in the charter of feoffment, and sometimes it was defeasanced by another charter, as may be seen in the old forms. *Maddox*, 318, 319.

For as a man might annex a condition to his feoffment, for *cujus est dare, ejus est disponere*, so he might annex a condition by another deed, bearing date, and executed at the same time; for, being executed at the same time, it is really but one and the same disposition, *quæ incontinenti fiunt inesse videntur*; but a defeasance or condition annexed after the feoffment executed comes too late; because the livery *coram paribus* attesting the infeudation, in which there is no condition, the tenant must hold the land according to the tenure of the investiture: but rents, annuities or warranties that are things executory, may be defeated by defeasances made at the time of their creation, or any time after; because there is not any necessity of the notoriety of livery to make an investiture; therefore being created by deed only, they may be defeated or destroyed by deed alone. *Co. Litt.* 226, 227.

These sorts of conveyances were subject to some inconveniences; as if the money were not paid at the day, so that the estate became absolute, the estate was thenceforth subject to the dower of the feoffee, and all other his real charges and incumbrances; for though if the feoffor performed the condition, then he might re-enter, and re-possess himself in his former estate, and consequently was in above all the charges and incumbrances of the feoffee; yet if he did not literally perform the condition by payment of the money at the day, then the estate was legally subject to the charges and incumbrances of the feoffee, though the money was afterwards paid to, and the estate re-conveyed by the feoffee. *Co. Lit.* 221, 222.

But the Courts of Equity, as they grew in power, have set this matter right; and have maintained the right of redemption, not only against tenant in dower, and the persons who come in under the feoffee, but even against the tenant by the curtesy, and lord by escheat, that are in the *post*; because the payment of the money doth, in the consideration of equity, put the feoffor in *statu quo*; since the lands were originally only a pledge for the money lent. *Hard.* 465. See *post* III.

2d, As to Mortgages by way of creating terms, this was formerly by way of demise and re-demise. As for example; *A.* borrowed money of *B.* thereupon *A.* would demise the lands to *B.* for a term of 500, *&c.* years absolutely, with common convenants against incumbrances, and for farther assurance; and then *B.* would, the day after, re-demise to *A.* for 499 years, with condition to be void on non-payment of the money at the day to come; this manner of mortgaging came in after the 21 *H.* 8. for falsifying recoveries, when there was a fixed interest settled in terms for years; and was esteemed best for the mortgagor, to avoid all manner of pretension from the incumbrances and dower of the feoffee in Mortgage; and was reputed best for the mortgagee, to avoid the wardship and feudal duties of the tenure; and was only inconvenient in this, that if the second deed were lost, there appeared to be an absolute term in the mortgagee. 3 *New Abr.* 633.

And this is now the common method, *viz.* by a demise of the land for a term, under a condition to be void on the payment of the Mortgage money and interest; and a covenant is inserted at the end of such deeds, that, till default shall be made in the payment of the money, that the mortgagor shall receive the rents, issues and profits without account. 3 *New Abr.* 633.

This has been ruled to create a tenancy at will to the mortgagor; but if the mortgagor dies, the tenancy at will is determined till there is a receipt of interest from the

the heir, which seems to make him also tenant at will to the mortgagee. *Raym.* 147. In a late case however it was held, that the mortgagor has no interest in the premises but by the mere indulgence of the mortgagee: he has not even the estate of a tenant at will, for he may be prevented from carrying away the emblements or the crops which he himself hath sown. *Moss* v. *Gallimore, Dougl.* 266, (279): *Keech* v. *Hall, Id.* 21. See *post* II.

3d, But now the last and best improvement of Mortgages seems to be, that in the Mortgage deed of a term for years, or in the assignment thereof, the mortgagor should covenant for himself and his heirs, that if default be made in the payment of the money at the day, that then he and his heirs will, at the costs of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to such person or persons (to prevent merger of the term) as he or they shall direct and appoint; for the reversion, after a term of years, being of little worth, and yet the mortgagee for want thereof continuing but a termor, and subject to forfeiture, &c. and not capable of the privileges of a freeholder, therefore where the mortgagor cannot redeem the land, it is but reasonable the mortgagee should have the whole interest and inheritance of it, to dispose of as absolute owner. 3 *New Abr.* 633.

II. Whatever clauses or covenants there are in a conveyance, though they seem to import an absolute disposition or conditional purchase, yet if, upon the whole, it appears to have been the intention of the parties, that such conveyance should only be a Mortgage, or pass an estate redeemable, a Court of Equity will always construe it so. 1 *Vern.* 183, 268, 394. And the mortgagor shall be allowed to redeem, notwithstanding any condition that it should, in any future event, operate as a purchase. 2 *Vern.* 84: 1 *Vern.* 488. 476: 1 *Ch. Ca.* 1: *Finch. Rep.* 376. But see 1 *P. Wms.* 268: 2 *Atk.* 494: *Tasburgh* v. *Ecclin, Bro. P. C.*: and *Powell on Mortgages*, 31. A Mortgage will not however be easily presumed, against an absolute conveyance, especially if the possession has gone along with the conveyance. *Forrest.* 61. But parol evidence is admissible to show or explain the real intention and purpose of the parties, though the conveyance be absolute. See *Pre. Ch.* 526: 2 *Atk.* 98: 3 *Atk.* 388.

Where the condition of a Mortgage is, that the mortgagor should redeem during his life, or that the mortgager, and the heirs of his body, should redeem, yet equity will admit the general heir of such mortgagor to a redemption; because this can be no purchase, since there is a clause of redemption; and when the land was originally only a pledge for money, if the principal and interest be offered, the land is free; and it would be very hard, that it should be in the power of the scrivener, or griping usurer, by such impertinent restrictions, to elude the justice of the Court. 1 *Vern.* 33, 190: 2 *Chan. Ca.* 147.

But if a man borrows money of his brother, and agrees to make him a Mortgage, and that, if he has no issue male, his brother should have the land; such an agreement, made out by proof, will be decreed in equity. 1 *Vern.* 193.

A. in consideration of 1000*l.* made an absolute conveyance to *B.* of the reversion of certain lands after two lives, which, at that time, were worth little more; and by another deed, of the same date, the lands were made redeemable any time during the life of the grantor only, on payment of 1000*l.* and interest; *A.* died, not having paid the money; and it was held by Lord K. *Nottingham*, that his heir might redeem, notwithstanding this restrictive clause, and that it was a rule, Once a Mortgage, and always a Mortgage; and that *B.* might have compelled *A.* to redeem in his life-time, or have foreclosed him; but, on a re-hearing, Lord *North* reversed the decree on the circumstances of this case; for it appeared by proof, that *A.* had a kindness for *B.* and that he married his kinswoman, which made it in the nature of a marriage-settlement: he likewise held, that *B.* could not have compelled *A.* to redeem during his life, which made it more strong. 1 *Vern.* 7, 192, 214, 232: 2 *Vent.* 364. *S.C.* where it is said, that Lord *North*'s decree was affirmed in the House of Lords. See also *Hard.* 511.

If *A.* mortgage lands to *B.* worth 15*l. per ann.* for securing 200*l.* and at the same time *B.* enters into a bond, conditioned, that if the 200*l.* and interest is not paid within a year, then he to pay *A.* his executors or administrators, the further sum of 78*l.* in full for the purchase of the premises, &c. and *A.* dies within the year, and the money is paid the next day after, the Mortgage is forfeited to his administrator; yet *A.*'s heir may redeem paying the 200*l.* and likewise the 78*l.* that was paid to the administrator. 1 *Vern.* 488.

So where *A.* for 550*l.* made an absolute assignment of a church lease for three lives to *B*, and *B.* by writing under his hand agreed, that if *A.* paid 600*l.* at the end of the year, *B.* would convey; *B.* died, leaving *C.* his son and heir; two of the lives died, and the lease was twice renewed by *C.* and his father; and though it was near twenty years since the conveyance was made, yet the Master of the Rolls decreed a redemption on payment of 550*l.* and the two fines. 2 *Vern.* 84.

A. lends money to *B.* to carry on certain buildings, and takes a Mortgage from him to secure 1600*l.* with interest; and by another deed, executed at the same time, takes a covenant from *B.* that he should convey to him, if he thought fit, ground-rents to the value of 1600*l.* at the rate of 20 years' purchase; and, on a bill brought to redeem, the Master of the Rolls decreed a redemption on payment of principal, interest, and costs, without regard to that agreement, but set aside the same as unconscionable; for a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement. 2 *Vern.* 520.

But though these and such like restrictions are relieved against, to make them answer the primary intention of the parties; yet if *A.* on a Mortgage lends money at 5*l. per cent.* but agrees in the deed, that if the money were paid within three months after it became due, that he would accept of 4*l. per cent.* and the mortgagor neglects to pay the interest within the time, equity will not relieve him, but he must pay 5*l. per cent.* for though the Court relieves against unreasonable penalties, yet this is not so, for the mortgagee might have refused to lend his money under 5*l. per cent.* *Preced. Chanc.* 160: 1 *P. Wms.* 653. See *post* III. *ad finem.*

So if the mortgagee devises that the mortgagor should be remited part of his Mortgage money, provided he

pays the principal and interest within three days after his decease; if the condition be not performed, the remittance is lost; because, being a voluntary bounty, and not *ex debito justitiæ*, the party must take it as it is limited, for *cujus est dare, ejus est disponere*; and the Court cannot relieve in this case, after the day. 1 *Chan. Ca.* 52.

But where in a Mortgage there was a proviso, that if the interest was behind six months, that then the interest should be accounted principal, and carry interest; this by Lord *Cowper* was decreed to be a vain clause, and of no use; and he said, that no precedent had ever carried the advance of interest so far, and that an agreement made at the time of the Mortgage, will not be sufficient to make future interest principal; but, to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal. 2 *Salk.* 499.

The mortgagor, before forfeiture, and whilst it remains uncertain, whether he will perform the condition at the time limited or not, hath the legal estate in him; also after forfeiture he hath an equity of redemption; so that he is still considered as owner and proprietor of the estate, until the equity of redemption be foreclosed; therefore may make leases or any settlement thereof, which will bind his equity of redemption. (But they will not bind the mortgagee, unless he is a party to the lease, &c.) See *ante* I.

It is said, that a tenant in tail of an equity of redemption may devise it for payment of debts. 1 *Vern.* 41. *Turner* v. *Gwim.*

If a man mortgages his land, and (as is usual) still continues in possession, and levies a fine, and five years pass, yet the mortgagee is not barred; for though the mortgagee be in reality out of possession, yet when that is done by consent of both parties, and the nature of the contract requires it should be so; while the interest is paid, it is against the original design of the contract, that any act of the mortgagor (except the payment of the money) should deprive the mortgagee of his security; and is no less than fraud, which the law will not countenance. 1 *Sid.* 460: 1 *Vent.* 82: *Carth.* 101, 414: 2 *Keb.* 522.

As the mortgagor, being considered only as tenant at will (or rather *like* a tenant at will) to the mortgagee, cannot, by his act, defeat the interest of the mortgagee, otherwise than by payment of the Mortgage-money; so neither can the mortgagee defeat the mortgagor of his equity of redemption; therefore if a mortgagee in fee suffers a recovery, this, even at law, shall not bind the mortgagor's right of entry, upon performance of the condition; but if the mortgagor had been a party to the recovery, then his right had been bound, not only on account of the recompence in value, but because he is estopped by the recovery to claim the land against the recoveree or his heirs, when he was called in, before the judgment given, to defeat his title, and could not do it. *Palm.* 135: *Cro. Jac.* 593.

So if a mortgagee be disseised, and the disseisor levies a fine, and five years pass after the proclamations, though the mortgagee is hereby barred, yet if the mortgagor pays or tenders his money, he has five years to prosecute his right, by the second saving in the statute 4 *Hen.* 7. *c.* 24, because his title did not accrue till payment of the money. *Plow.* 373. *a.* See title *Fines.*

As to the nature of the estates of the mortgagor and mortgagee; it seems to be at length settled, that as the mortgagee is considered as holding the estate, merely in the nature of a pledge or security for payment of his money, a Mortgage, though in fee, (the legal estate in which descends to the heir at law,) is considered, in equity, only as personal estate. *Fonbl. Treat. Eq. lib.* 3. *c.* 1. § 3 & 13, *in n.*

Hence as the mortgagor, till the equity of redemption be foreclosed, is considered as owner of the land, it was ruled, where a bill for redemption was brought against a mortgagee in possession, and a decree accordingly, that the mortgagee, before the account taken, having presented to a church that became void, should revoke his presentation, and present such a person as the mortgagor or his vendee (he having contracted to sell) should appoint. *Preced Chanc.* 71: 2 *Vern.* 401. So even though nothing but the advowson is mortgaged, and the deed contain a covenant that on any avoidance the mortgagee should present. 3 *Atk.* 559. For, in such case, though the presentation is not deemed the subject of value, and therefore cannot be brought into the account, it might be a benefit beyond the securing of the principal debt and lawful interest thereon; which decision over-rules that in 2 *P. Wms.* 403. The mortgagee may however grant leases of the premises, and avoid such leases as have, since his Mortgage, been granted without his consent by the mortgagor. *Treat Eq. lib.* 3. *c.* 1 § 3.

As to the estate of the mortgagor, though formerly doubted whether he had more than a right of redemption, it is now established that he hath an actual estate in equity, which may be devised, granted, and entailed, and of which there is a *possessio fratris*, and a tenancy by the curtesy. 1 *Atk.* 603.

By *stat.* 7 *W.* 3. *c.* 25, it is enacted, " That no person or persons shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust-estate or *Mortgage*, unless such trustee or mortgagee be in actual possession, or receipt of the rents and profits of the same; but that the mortgagor, or *cestui que trust* in possession, shall and may vote for the same, notwithstanding such Mortgage or trust.

And by *stat.* 9 *Ann. c.* 5, which requires, that knights of the shire should have 600*l.* *per ann.* and every other member 300*l.* *per ann.* it is enacted, " That no person shall be qualified to sit in the House of Commons, within the meaning of the act, by virtue of any Mortgage, whereof the equity of redemption is in any other person; unless the mortgagee shall have been in possession of the mortgaged premises for seven years before the time of election."

III. As soon as the estate is created the mortgagee may immediately enter on the lands: but is liable to be dispossessed, upon performance of the condition by payment of the Mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure whereby the estate becomes absolute, the mortgagee may enter upon it, and take possession without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here the Courts of Equity interpose, and though a Mortgage be thus forfeited, and the

the estate absolutely vested in the mortgagee, at the Common Law, yet they will consider the real value of the tenements, compared with the sum borrowed; and if the estate be of greater value than the sum lent thereon, they will allow the mortgagor, at any reasonable time to recall or redeem his estate, paying to the mortgagee his principal, interest, and expences. And by *stat.* 7 *Geo.* 2. *c.* 20, after payment or tender by the mortgagor of principal, interests, and costs, the mortgagee can maintain no ejectment, but may be compelled to re-assign his securities. See the statute at length, *post*, at the end of this division.

This reasonable advantage, allowed to mortgagors, is called *The Equity of Redemption*; and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back, and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But on the other hand, the mortgagee may either compel the sale of the estate in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or in default thereof to be for ever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. It is not, however, usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious or small, or where the mortgagor neglects even the payment of interest; when the mortgagee was frequently obliged to bring an ejectment and take the lands into his own hands, in the nature of a pledge, or the *pignus* of the *Roman* law already alluded to; *ante* I. But it has now been determined that the mortgagee is not obliged to bring an ejectment to recover the rents and profits of the estate; for where there is a tenant in possession by a lease prior to the Mortgage, the mortgagee may at any time give him notice to pay the rent to him, and he may distrain for all the rent which is due at the time of the notice, and also for all that accrues afterwards. *Moss* v. *Gallimore*, *Doug.* 266, (279). See *Treat. Eq. lib.* 3. *c.* 1. § 8, *in n.*

In general, if the mortgagee has been 20 years in possession, the Court of Chancery, in conformity to the time of bringing an ejectment, will not permit a mortgagor to redeem; unless during part of the time such mortgagor has been an infant or a married woman; or unless the mortgagee admits he holds the estate as a Mortgage, or there is some other special circumstance which forms an exception to the general rule. 1 *Eq. Abr.* 313, B: 2 *Bro. C. R.* 399. See *Treat. Eq. lib.* 3. *c.* 1. § 7.

Where two different estates are mortgaged by the owner to the same person, one cannot be redeemed without the other. *Ambl.* 733. So of other securities given by the mortgagor to the mortgagee. See *Treat. Eq. lib.* 3. *c.* 1. § 9.

Although, after breach of the condition, an absolute fee-simple is vested at Common Law in the mortgagee; yet a right of redemption being still inherent in the land, till the equity of redemption be foreclosed, the same right shall descend to and is vested in such persons as have a right to the land, in case there had been no Mortgage or incumbrance whatsoever; and as an equitable performance as effectually defeats the interest of the mortgagee, as the legal performance doth at Common Law, the condition still hanging over the estate, till the equity is totally foreclosed; on this foundation it hath been held, that a person who comes in under a voluntary conveyance, may redeem a Mortgage: and though such right of redemption be inherent in the land, yet the party claiming the benefit of it, must not only set forth such right, but also shew that he is the person entitled to it. *Hard.* 465: 1 *Vern.* 182, 193.

The right of redemption is not confined to the mortgagor, his heirs, executors, assignees, or subsequent incumbrancers; but extends to all persons claiming any interest whatever in the premises as against the mortgagor: therefore a person claiming under a deed void (as being voluntary) against a subsequent mortgagee, may redeem; for the deed, though void as to the mortgagee, is binding on the mortgagor. 1 *Ch. Ca.* 59: 1 *Vern.* 193. *A fortiori* may any person who has acquired for valuable consideration an interest in the land; as a tenant under the mortgagor; or a judgment-creditor having previously sued out a writ of execution; or a tenant by *elegit*, statute merchant, or staple, or tenant by the curtesy or in dower; or a jointress; the Crown may also redeem estates mortgaged, and afterwards forfeited by the treason, &c. of the mortgagor. *Treat. Eq. lib.* 3. *c.* 1. § 8, *in n.* and the authorities there cited.

As the heir at law is regularly entitled to the benefit of redemption, he is also entitled to the assistance of the personal estate of the mortgagor for that purpose; according to the doctrine established in the Courts of Equity, that the personal estate, in the hands of the executor, shall be employed in ease of the heir, by whatever means the heir becomes indebted as heir; for the personal estate having received the benefit by contracting the debt, the real is considered only as a pledge for it; according to the common rule, *Qui sentit commodum sentiri debet & onus*. *Prec. Chanc.* 477. See *Treat. Eq. lib.* 3. *c.* 2. § 1; and this Dictionary, title *Executor* V. 6.

And on this foundation it hath been frequently held, that if a man mortgage lands, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied in exoneration of the Mortgage. 2 *Salk.* 449.

Also it is held by some opinions, that this benefit shall not only extend to the heir at law, or *hæres natus*, but also to an *hæres factus*; from a presumption, that it is the intention of the testator, that he should have all the privileges of the *hæres natus*: and it has been even held, that an ordinary devisee shall have this benefit; 1 *Vern.* 37; but as to this last point it hath been held otherwise; and that if a man mortgages his land, and devises it to *J. S.* or *A.* for life, the remainder in fee, to *B.* that there the charge doth pass with the estate, there appearing no intention of the testator, that he should have it discharged. 2 *Chan. Ca.* 84: 1 *Chan. Ca.* 271. This distinction however, between an *hæres factus* and a particular devisee, has been long since over-ruled, and the opinion in 1 *Vern.* 37, is now established law. 2 *Atk.* 436. And the devisee of a particular estate shall not only have his devised estate exonerated out of the personal estate, but if there be another estate expresly devised for payment of debts, and the personal estate be excepted or exhausted, he may also resort to such devised estate; and that although the particular estate devised

vised to him be devised subject to the incumbrances thereon. 2 *P. Wms.* 385. So if the personal estate be exempt or exhausted, and there be no real estate expresly devised for payment of debts, but there be a descended estate, the devisee of a particular estate shall have it exonerated out of the descended estate. 2 *Atk.* 430. See title *Executor* V. 6.

So if the mortgagor conveys away the equity of redemption, the purchaser shall not have the benefit of the personal estate, but must take it *cum onere.* 2 *Salk.* 450: 1 *Vern.* 37.

It has likewise been held, that the heir of the mortgagor shall have the benefit of the personal estate to pay off the Mortgage, though there be no covenant in the Mortgage-deed for the payment thereof; because the Mortgage-money is a debt, whether there be any express covenant for the payment of it or not. 2 *Salk.* 449: 1 *Vern.* 436: *Preced. Chanc.* 61: Because the personal estate received the benefit.

But where a Mortgage in fee was made redeemable at *Mich.* 1702, or any other *Mich.* day following on six months' notice; and there was no covenant for payment of the Mortgage-money; it was held by Lord Chancellor *Cowper*, that the mortgagor having devised his personal estate to his wife and daughter, and having during his life paid the interest of the Mortgage, the personal estate should not be applied in ease and exoneration of the real estate for the benefit of the heir at law; for, being no covenant for paying of the money, there was no contract at all between them, neither express nor implied; nor would any action lie against the mortgagor to subject his person, to compel him to pay this money; but this was in nature of a conditional purchase, subject to be defeated on payment by the mortgagor, or his heirs, of the sum stipulated between them, at any *Mich.* day, at the election of the mortgagor, or his heirs: for here was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could not be forfeited at law like other Mortgages; therefore there could be no equity of redemption, or any occasion for the assistance of this Court; but the plaintiffs might, even at law, defeat the conveyance, by performing the terms and conditions of it; which were not limitted to any particular time, but might be performed on any *Michaelmas* day, to the end of the world; and since there was no covenant or contract, either express or implied, to charge the personal estate of the mortgagor, he thought there was no reason to lay the load of this debt upon that which was given to other persons. *Preced. Chanc.* 423: 2 *Vern.* 701.

There is one case in which the Legislature has thought proper to take from the mortgagor the equity of redemption, and to give the mortgagee an absolute estate in the land; that is, where the former is guilty of a fraud upon the latter by concealing prior incumbrances. For by *stat.* 4 & 5 *W.* & *M. c.* 16, it is enacted, that if any person shall borrow any money, and for payment thereof, or for any other valuable consideration, shall voluntarily give a judgment, statute, or recognizance, and shall afterwards borrow any other sum of another, or for other valuable consideration become indebted to such other, and for securing the repayment and discharge thereof shall mortgage lands, or any part thereof, to the second lender, &c. or to any other in trust for or to the use of such second lender, &c. and shall not give notice to the said mortgagee, of such previous judgment, &c. in writing under his hand, before the execution of the said Mortgage or Mortgages; unless such mortgagor or his heirs, upon notice given by the mortgagee, his heirs, &c. in writing, &c. attested by two witnesses, of any such former judgment, &c. shall within six months pay off the said judgment, &c. and all interest and charges, and procure the same to be vacated, &c. then the mortgagor or his heirs, &c. shall have no benefit or remedy against the said mortgagee or his heirs, &c. in equity or elsewhere, for redemption; but the mortgagee shall hold the lands, &c. for such estate and term as was granted to the mortgagee, against the mortgagor, and all persons claiming under him, freed from equity of redemption, &c.

And if any person who shall once mortgage lands for valuable consideration, shall again mortgage the same lands or any part thereof, to any other person for valuable consideration, (the former Mortgage being in force,) and shall not discover to the second mortgagee, the former Mortgage, in writing under his hand, such mortgagor, his heirs, &c. shall have no relief or equity of redemption against the second or after mortgagee, &c. And such second or third mortgagees may redeem any former Mortgage, upon payment of the principal debt, interest, and costs of suit, to the proper mortgagee, &c.

But the statute does not bar any widow of any mortgagor from her dower, who did not legally join with her husband in such Mortgage, or otherwise lawfully exclude herself.

It hath been held, that this statute extends to assignees of a mortgagee; and that if a man mortgages certain lands to one man, and mortgages those lands *with some others* to another, though this seems to be a case omitted out of the above statute against clandestine Mortgages; yet if it appears to be a contrivance to evade it, as if an acre or two of land were only added, this will not exempt it; also a person, who will take advantage of the statute, must be an honest mortgagee; therefore, if a man has used any fraud or practice in obtaining a second Mortgage, he shall not have the benefit of the statute. 2 *Vern.* 589, 590.

It has been said to be an established rule of equity, that a second mortgagee *who has the title-deeds* without notice of any prior incumbrance, shall in all cases be preferred; because if a mortgagee lend money upon real property without taking the title-deeds, he enables the mortgagor to commit a fraud. 1 *Term Rep.* 762 But Lord *Thurlow C.* afterwards observed upon this, that he did not conceive that the not taking the deeds was alone sufficient to postpone the first mortgagee; if it were so, there could be no such thing as a Mortgage of the reversion; and he held, that a second mortgagee in possession of the title deeds was preferred only in cases where the first had been guilty of fraud or gross negligence. 2 *Bro. C. R.* 652. It seems however, that fraud or gross negligence would be presumed, unless the mortgagee could show that it was impossible for him to obtain possession of the title-deeds, or that he had used the due and necessary diligence for that purpose. 2 *Comm.* 160, *in n.* See *Treat. Eq. lib.* 1. *c.* 3. § 4; where the rule of equity is thus stated on the ground of a solemn judgment

ment in the Court of Exchequer; that nothing but a voluntary, diſtinct, and unjuſtifiable concurrence on the part of the firſt mortgagee, to the mortgagor's retaining the title-deeds, ſhall be a reaſon for poſtponing his priority.

Whatever may be the value of the eſtate, it is of great importance to thoſe who lend money upon real ſecurity, to be certain that there is no prior Mortgage upon the eſtate; for it has been long ſettled, that if a third mortgagee, who at the time of his Mortgage *had no notice* of the ſecond, purchaſes the firſt Mortgage, even pending a bill filed by the ſecond to redeem the firſt, both the firſt and third Mortgages ſhall be paid out of the eſtate before any ſhare of it can be appropriated to the ſecond; the reaſon aſſigned is, that the third, by thus obtaining the legal eſtate, has both law and equity on his ſide, which ſuperſede the mere equity of the ſecond. And even Lord *Hale* held it right, that the third, ſhould thus ſeize what he called *tabula in naufragio*, a plank in the ſhipwreck, and ſo leave the ſecond to periſh. See 2 *Ventr.* 337: 1 *C. C.* 162, 36, 149. But among mortgagees, where none has the legal eſtate, the rule in equity is *qui prior eſt tempore potior eſt jure*. 2 *P. Wms.* 491: 1 *Bro. C. R.* 63. See alſo 2 *Vern.* 81, 29, 525: 2 *Atk.* 52, 347. If however the ſecond or meſne incumbrancer has obtained a decree for an account, a ſubſequent incumbrancer cannot, by buying in the firſt incumbrance, defeat the effect of ſuch decree. 3 *Atk.* 809. See *Fonblanque's Treatiſe of Equity*, *lib.* 1. *c.* 4. § 25. Some reflections have been made by Mr. *Chriſtian* on the above doctrine, 2 *Comm.* 160, *in n*; but it ſeems perfectly conſiſtent with the maxim of law, *vigilitantibus non dormientibus ſervit lex*. See *Treat. Eq. lib.* 3. *c.* 3. § 1.

It is well obſerved by *Blackſtone*, that in *Glanvil's* time, when the univerſal method of conveyance was by livery of ſeiſin, or corporal tradition of the lands, no gage or pledge of lands was good, unleſs poſſeſſion was alſo delivered to the creditor, for which the reaſon given is, to prevent ſubſequent and fraudulent pledges of the ſame land. *Glanv. lib.* 10. *c.* 8. And the frauds which have ariſen, ſince the exchange of thoſe public and notorious conveyances for more private and ſecret bargains, has well evinced the wiſdom of our ancient law. 2 *Comm. c.* 10. *p.* 160.

The *ſtat.* 7 *Geo.* 2. *c.* 20, before alluded to, enacts, That where any action ſhall be brought on any bond for the payment of the money ſecured by Mortgage, or performance of the covenants therein contained; or where any action of ejectment ſhall be brought by any mortgagee, &c. for the recovery of the poſſeſſion, and no ſuit ſhall be then depending in equity, for foreclosing or redeeming ſuch mortgaged lands; if the perſon having right to redeem ſhall appear and become defendant in ſuch action, and ſhall, at any time pending ſuch action, pay unto ſuch mortgagee, or in caſe of his, her, or their refuſal, ſhall bring into court where ſuch action ſhall be depending, all the principal money and intereſt due on ſuch Mortgage, and alſo all ſuch coſts as have been expended in any ſuit at law or in equity upon ſuch Mortgage, (ſuch money for principal, intereſt, and coſts, to be aſcertained and computed by the Court where ſuch action is or ſhall be depending,) the monies ſo paid, &c. ſhall be deemed and taken to be in full ſatisfaction and diſcharge of ſuch Mortgage; and the Court ſhall diſcharge every ſuch mortgagor or defendant of and from the ſame accordingly; and ſhall, by rule of the ſame Court, compel ſuch mortgagee, at the coſts of ſuch mortgagor, to aſſign, ſurrender, or re-convey ſuch mortgaged lands, and deliver up all deeds, &c. relating to the title.

And that where any bill or ſuits ſhall be filed, or brought in equity by any perſon having or claiming any eſtate, right or intereſt in any lands, &c. by virtue of any Mortgage to compel the defendant to pay the plaintiff the principal money and intereſt, together with any ſum due on any incumbrance or ſpecialty, charged or chargeable on the equity of redemption; and in default of payment to foreclose ſuch defendant's right of equity of redeeming ſuch mortgaged lands, &c. upon his admitting the right and title of the plaintiff, ſuch court of equity ſhall, at any time before ſuch ſuit ſhall be brought to hearing, make ſuch order or decree therein, as it might or could have made therein, in caſe the ſame had been regularly brought to hearing; and all parties to ſuch ſuit ſhall be bound by ſuch order or decree, to all intents and purpoſes, as if the ſame had been made at or ſubſequent to the hearing of the cauſe.

This act not to extend to any caſe, where the perſon againſt whom the redemption ſhall be prayed, ſhall (by writing under his hand, or the hand of his attorney, &c. to be delivered, before the money ſhall be brought into Court at law, to the attorney or ſolicitor for the other ſide) inſiſt either that the party praying a redemption has not a right to redeem, or that the premiſes are chargeable with other or different principal ſums than what appear on the face of the Mortgage, or ſhall be admitted on the other ſide; nor to any cauſe where the right of redemption to the mortgaged lands ſhall be controverted or queſtioned, by or between different defendants in the ſame cauſe; nor ſhall be any prejudice to any ſubſequent mortgagee, or ſubſequent incumbrancer.

It was heretofore held, that if a contract were made in *England* for a Mortgage of a plantation in the *Weſt Indies*, no more than legal intereſt might be paid; and that a covenant in ſuch Mortgage for payment of 8 *per cent.* intereſt would be within the ſtatute of uſury, notwithſtanding this were the rate of intereſt where the lands lay. But now this point is ſettled by *ſtat.* 14 *Geo.* 3. *c.* 79. § 2; which enacts, "that none of his Majeſty's Subjects in *Great Britain*, ſhall be ſubject or liable to any of the penalties or forfeitures inflicted by *ſtat.* 12 *Ann. ſt.* 2. *c.* 16, againſt uſury, by receiving or taking intereſt for any ſum or ſums of money really and *bona fide* lent on any Mortgage, &c. of lands in *Ireland*, or in the colonies or plantations in the *Weſt Indies*, the ſecurities for which are made and executed in *Great Britain*; ſo as the intereſt ſo to be received or taken do not exceed the rate of *ſix per cent.* See *Powell on Mortgages*, *v.* 2. *c.* 5.

A diſtinction is made in Chancery between an agreement, that the intereſt ſhall be raiſed, if not punctually paid, and for abatement thereof upon punctual payment. For in the former caſe it is conſidered as a *penalty* which the Courts of Equity will relieve againſt: but in the latter as a *condition*, which muſt be ſtrictly adhered to; in which caſe the debtor cannot have relief in equity after the day of payment elapſed; becauſe the abatement is to be upon a condition which is not performed. 3 *Burr.* 1374-5.

If

If the mortgagee assign the Mortgage, with the concurrence of the mortgagor, *all money* really and *bona fide* paid by the assignee, that was due to the mortgagee, shall be considered as principal, and the assignee shall have interest upon the interest then due, and paid by him, as well as upon the principal originally lent. 2 *Ch. Ca.* 67, 68, 258: 1 *Vern.* 169: 2 *Vern.* 135. As to the other cases in which interest shall become principal, see *Powell on Mortgages*, ii. *c.* 5.

A remainder-man can force the tenant for life to keep the interest down if the land be charged; but cannot directly compel him to redeem, though indirectly he may, by purchasing in the Mortgage; when the tenant for life must pay one third, or part with the possession. *Rep. Eq.* 69.

For further matter relative to Mortgages, see *Powell on Mortgages*: *Bac. Abr*: *Vin. Abr*: *Treat. Eq*: and *Com. Dig.*

MORTGAGOR, Is he who mortgages or pawns the lands; as he to whom the mortgage is made is called the Mortgagee.

MORTH, Murder; Sax. *morth*, death. *Morthlaga*, a murderer or manslayer. *Morth-lage*, homicide or murder, &c.

MORTITIVUS, Dead of the rot, applied to sheep and lambs. *Mon. Angl.* ii. 114.

MORTMAIN, *manus mortua*, from the Fr. *mort*, *mors* and *maine*, *manus*—*Cowell, Skene, Hottoman.*] An alienation of lands and tenements to any guild, corporation or fraternity, and their successors, as bishops, parsons, vicars, &c; which could never be done without the King's licence, and that of the lord of the manor, or of the King alone, if it be immediately holden of him. The reason of the name may be deduced from hence; because the services, and other profits due, for such lands, as escheats, &c. should not without such licence come into a dead hand, or into such a hand as it were dead, and so dedicated unto God, or pious uses, as to be abstractedly different from other lands, tenements, or hereditaments, and never to revert to the donor, or any temporal or common use. *Magna Charta, c.* 36.

Polydore Virgil, in the seventeenth book of his *Chronicles*, mentions this law, and gives this reason of the name; *Et legem hanc manum mortuam vocarunt, quod res semel datæ collegiis sacerdotum, non utique rursus venderentur velut mortuæ, hoc est, usui aliorum mortalium in perpetuum adeptæ essent. Lex diligentur servatur, sic, ut nihil possessionum ordini sacerdotali à quoquam detur, nisi regis permissu*; but the statutes of Mortmain are in some manner abridged by *stat.* 39 *Eliz. c.* 5, by which the gift of lands, &c. to hospitals is permitted, without obtaining licences in Mortmain. But see *post*.

Hottoman, in his Commentaries, *De verbis Feudalibus*, verbo *Manus mortua*, hath these words; *Manus mortua locatio est, quæ usurpatur de iis, quorum possessio (ut ita dicam) immortalis est, quia nunquam hæredem habere desinunt: Qua de causa res nunquam ad priorem dominum revertitur, nam manus pro possessione dicitur mortua per antiphrasin pro immortali*, &c. *Petrus Belluga in speculo Principum, fol.* 76.—*Jus amortizationis est licentia capiendi ad manum mortuam*: to the same effect read *Cassan. de Consuet. Burgund. p.* 348, 387, 1183, 1185, 1201, &c. *Skene de verb. signif.* saith, *Dimittere terras ad manum mortuam est idem atque dimittere ad multitudinem sive universitatem, quæ nunquam moritur, idque per antiphrasin, seu à contrario sensu*, because commonalties never die. *Cowell.*

William the Conqueror demanding the cause why he conquered the realm by one battle, which the *Danes* could not do by many; *Frederick*, abbot of St. *Alban's*, answered, that the reason was, because the land, which was the maintenance of martial men, was given and converted to pious employments, and for the maintenance of holy votaries: to which the Conqueror said, that if the clergy were so strong, that the realm were enfeebled of men for war, and subject by it to foreign invasion, he would aid it. Therefore he took away many of the revenues of the abbot, and of others also. *Speed.* 418, *b.* See 1 *Inst.* 2: 2 *Inst.* 75.

The foundation of all the statutes of Mortmain was *Magna Charta*. By *c.* 36, it is declared, "That it shall not be lawful for any to give his lands to any religious house, and to take the same land again to hold of the same house, &c. upon pain that the gift shall be void, and the land shall accrue to the lord of the fee." This statute is interpreted to extend to lands which a religious house kept in their own hands, though they gave them not back again to hold of the same house. 2 *Inst.* 75.

But ecclesiastical persons found means to creep out of the statute, by purchasing lands holden of themselves, or by making leases for a long term of years, &c. wherefore by *stat.* 7 *Ed.* 1, commonly called the *Statute of Mortmain*, or *de religiosis*, no persons religious or others whatsoever, shall buy or sell any lands or tenements, or under the colour of any gift or lease, or by reason of any other title, receive the same, or by any other craft shall appropriate lands in anywise to come into Mortmain, on pain of forfeiture; and within a year after the alienation, the lord of the fee may enter; and if he do not, then the next immediate lord, from time to time, may enter in half a year; and for default of all the lords entering, the King shall have the lands so alienated for ever, and may enfeoff others by certain services, &c.

As this statute extended only to gifts, alienations, &c. made between ecclesiastics and others, they found out an evasion also of this statute; for pretending a title to the land which they meant to gain, they brought a feigned action against the tenant of the land, and he, by consent and collusion was to make default, and thereupon they recovered the land, and entered by judgment of law: so that the statute *West.* 2. 13 *Ed.* 1 *c.* 32, was thought necessary; by which it is to be inquired by the country whether the demandant had a just title to the land, and if so, then he shall recover seisin; but if otherwise, the lord of the fee shall enter, &c.

And by *stat* 34 *Ed.* 1. *st.* 3, lands shall not be aliened in Mortmain, where there are mean lords, without their consent declared under hand and seal; nor shall any thing pass where the donor reserves nothing to himself.

Notwithstanding all these statutes, ecclesiastical persons (not being able to get lands, by purchase, gift, lease, or recovery) procured lands to be conveyed by feoffment, or in other manners, to divers persons and their heirs, to the use of them and their successors, whereby they took the profits. 2 *Inst.* 75. To bar this, the *stat.* 15 *R.* 2. *c.* 5, was made, which statute enacts, "that

no feoffment, *&c.* of any lands and tenements, advowsons or other possessions, to the use of any spiritual persons, or whereof they shall take the profits, shall be made without licence of the King, and of the Lords, *&c.* upon pain of forfeiture." And by *stat.* 23 *H.* 8. *c.* 10, against superstitious uses, forfeitures, fines, recoveries, grants, devises, *&c.* of lands, in trust to the use of any parish church, or to have perpetual obits, or a continual service of a priest for ever, or for sixty years, *&c.* to the prejudice of the King and other lords, as in case of lands alienated in Mortmain, shall be void: though this last act extends not to corporations, where there is a custom to devise lands in Mortmain; as in *London*, a freeman that pays scot and lot, may devise all his lands, in the city, in Mortmain, without licence. 1 *Rol. Abr.* 556.

And notwithstanding this, previous to *stat.* 9 *Geo.* 2. *c.* 36, any man might give lands, tenements, *&c.* to any persons and their heirs, for finding a preacher, maintenance of a school, reparation of churches, relief of the poor, *&c.* or for any like charitable uses; though it was said to be good policy on every such estate to reserve a small rent to the feoffor and his heirs, when the feoffees should be seised to their own use, and not to the use of the feoffor; or if a consideration of a small sum be expressed, the 23 *H.* 8. cannot by any pretence make void the use. 1 *Rep.* 24: 11 *Rep.* 70: *Wood's Inst.* 303: but see *post*.

A more clear and concise account of the rise, progress, and effect of these statutes will be found to be contained in the following extract from the *Commentaries*; *vol.* 4. *c.* 18.

Alienation in Mortmain, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one *dead hand*, this hath occasioned the general appellation of Mortmain to such alienations, and the religious houses themselves to be principally considered in forming the statutes of Mortmain.

By the Common Law any man might dispose of his lands to any other private man at his own discretion, especially when the feodal restraints on alienation were worn away; yet in consequence of these, it was always and still is necessary for corporations to have a license in Mortmain from the Crown to enable them to purchase lands; for as the King is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants who can never be attainted or die. See *F. N. B.* 121. And such licenses of Mortmain seem to have been necessary among the *Saxons*, above sixty years before the *Norman* conquest. *Seld. Jan. Angl. l.* 2. § 45. But besides this general license from the King, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the King and the alienor, to obtain his license also, (upon the same feodal principles) for the alienation of the specific land. And if no such license was obtained, the King or other lord might respectively enter on the lands so aliened in Mortmain, as a forfeiture. The necessity of this license from the Crown was acknowledged by the *Constitutions of Clarendon*, *c.* 2. (*A. D.* 1164) in respect of advowsons, which the monks always greatly coveted, as being the ground-work of subsequent appropriations. Yet such were the influence and ingenuity of the clergy, that notwithstanding this fundamental principle, the largest and most considerable dotations of religious houses happened within less than two centuries after the Conquest. And when a license could not be obtained, the contrivance seems to have been this: that as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate, first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands, in right of such their newly acquired seigniory, as immediate lords of the fee. But when these dotations began to grow numerous, it was observed that the feodal services ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs, and the like; and therefore, to prevent this, it was ordered by the second of King *Henry* III.'s Great Charters, and afterwards by that printed in our common Statute-book, that all such attempts should be void, and the land forfeited to the lord of the fee. See *stat.* 9 *H.* 3. *c.* 36.

But as this prohibition extended only to religious *Houses*, Bishops and other Sole Corporations were not included therein; and the aggregate ecclesiastical bodies found many means to creep out of this statute, by buying in lands that were *boná fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for 1000 or more years, which are now so frequent in conveyances. This produced the statute *de Religiosis*, *stat.* 7 *Ed.* 1, which provided that no person, religious or other, whatsoever, should buy or sell, or receive, under pretence of a gift, or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself any lands or tenements in Mortmain; upon pain that the immediate lord of the fee, or on his default for one year, the lords paramount, and in default of all of them, the King, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in Mortmain; but as these statutes extended only to gifts and conveyances between the parties, the religious Houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant, who by fraud and collusion made no defence; and thereby judgment was given for the religious House, which then *recovered* the land by sentence of law, upon a supposed prior title: and thus they had the honour of inventing those fictitious adjudications of right which are since become the great assurance of the kingdom, under the title of *Common Recoveries*. See this Dictionary, titles *Fines* and *Recoveries*. But upon this the *stat. Westm.* 2. 13 *E.* 1. *c.* 32, enacted that in such cases a Jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin, otherwise it shall be forfeited to the immediate lord of the fee, or else

else to the next lord, and finally to the King, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter, 33 of the same statute, in case the tenants set up crosses on their lands, (the badges of Knights Templars and Hospitallers,) in order to protect them from the feodal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this Prince to prevent any future evasions, that when the statute of *Quia Emptores*, 18 *Ed.* 1, abolished all sub-infeudations, and gave liberty for all men to alienate their lands, to be holden of their next immediate lord, a proviso was inserted, that this should not extend to authorise any kind of alienation in Mortmain. See *stat.* 18 *E.* 1. *st.* 1. *c.* 3: 2 *Inst.* 501. And when afterwards the method of obtaining the King's license by writ of *ad quod damnum*, was marked out by *stat.* 27 *Ed.* 1. *st.* 2, it was further provided by *stat.* 34 *Ed.* 1. *st.* 3, that no such license should be effectual without the consent of the mesne or intermediate lords.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted not to themselves directly, but to nominal feoffees *to the use* of the religious houses; thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of the lands remained in the nominal feoffee; who was held by the Courts of Equity (then under the direction of the clergy) to be bound in conscience to account to his *cestuy que use* for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But they did not long enjoy the advantage of their new device, for the *stat.* 15 *R.* 2. *c.* 5, enacts that the lands which had been so purchased to uses, should be amortised by license from the Crown, or else be sold to private persons; and that for the future, uses shall be subject to the statute of Mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land adjoining to churches, and consecrating them by the name of church-yards, such subtile imagination is also declared to be within the compass of the statutes of Mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And lastly, as during the times of Popery, lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees, to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed State, as actual alienations in Mortmain; therefore at the dawn of the Reformation the *stat.* 23 *H.* 8 *c.* 10, declares, that all future grants of lands for any of the purposes aforesaid, for a longer term than 20 years, shall be void.

During all this time, however, it was in the power of the Crown, by granting a license of Mortmain, to remit the forfeiture, so far as related to its own rights, and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the *stat.* 18 *Ed.* 3. *st.* 3. *c.* 3. But as doubts were conceived at the time of the Revolution, how far such license was valid, since under the Bill of Rights, the King had no power to dispense with the statutes of Mortmain by a clause of *non obstante*, which was the usual course, though it seems to have been unnecessary: (See *Co. Lit.* 99.) and as by the gradual declension of mesne seigniories, through the long operation of the statute of *Quia Emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by *stat.* 7 & 8 *W.* 3. *c.* 37, that the Crown for the future, at its own discretion, may grant licenses to aliene or take in Mortmain, of whomsoever the tenements may be holden.

After the dissolution of monasteries under *Hen.* VIII. though the policy of the next Popish successor affected to grant a security to the possessors of abbey-lands, yet in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of Mortmain were suspended for 20 years by *stat.* 1 & 2 *P.* & *M.* *c.* 8; and during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any license whatsoever.

By the *stat.* 39 *Eliz.* *cap.* 5, The gift of lands, &c. to Hospitals is permitted without obtaining licenses of Mortmain. See title *Hospitals*.

Long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the *Stat.* 17 *Car.* 2. *c.* 3, that appropriators may annex the great tithes to the vicarages; and that all benefices under 100*l.* *per ann* may be augmented by the purchase of lands, without license of Mortmain in either case; and the like provision hath been since made in favour of the Governors of Queen *Anne*'s Bounty. *Stat.* 2 & 3 *Ann.* *c.* 11. § 4. See also *Stat.* 15 *Car* 2. *c.* 17, as to the incorporation of Commissioners for *Bedford* Level; and *Stat.* 22 *C.* 2. *c.* 6: and other statutes for the sale of the fee-farm rents of the Crown. It hath also been held, that the *Stat.* 32 *H.* 8. *c.* 10, before-mentioned, did not extend to any thing but *superstitious* uses, and that therefore a man may give lands for the maintenance of a school, an hospital, or any other *charitable* use. 1 *Rep.* 24. But as it was apprehended from recent experience, that persons on their death-beds might make large and improvident dispositions even, for these good purposes, and defeat the political end of the statutes of Mortmain; it is therefore enacted by *stat.* 9 *Geo.* 2. *c* 36, that no lands or tenements, or money to be laid out thereon, shall be given for, or charged with, any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery, within six months after its execution; (except stocks in the public funds, which may be transferred within six months previous to the donor's death;) and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts shall be void. The two Universities, their Colleges, and the Scholars upon the foundation of the Colleges of *Eton*, *Winchester*, and *Westminster*, are excepted out of this act; but such exemption was granted with this proviso, that no College shall be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows; or, where there are no fellows, one moiety of the students upon the respective foundations; and, under § 5, the advowsons annexed to headships are not to be computed. See 2 *Comm.* *c.* 18.

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It has been declared since this last Mortmain act, that there is no restriction whatsoever upon any one, from leaving a sum of money by will, or any other personal estate, to charitable uses; provided it be to be continued as a personalty, and the executors or trustees are not obliged, or under a necessity of laying it out in land, by virtue of any direction of the testator for that purpose. 2 *Burn. Ecc.* 509, title *Mortmain*.

Money left to repair parsonage-houses, or to build upon land already in Mortmain, is held not to be within the statute. 1 *Bro. C. R.* 444: *Ambl.* 373, 651. But a legacy to the Corporation of Queen *Anne*'s Bounty, is void, as by the rules of the Corporation it must be laid out in land. 1 *Bro. C. R.* 13, *in n.*

The words of the above *stat.* 9 *Geo.* 2. *c.* 36, are, "That no manors, *lands*, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other *personal estate* whatsoever, *to be laid out* or disposed of *in the purchase of any lands*, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever; *unless* such gift, appointment, conveyance, or settlement, of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate, (other than stocks in the public funds,) be and are made by deed indented, sealed and delivered in the presence of two or more credible witnesses, 12 calendar months at least before the death of such donor or grantor, (including the days of the execution and death,) and be inrolled in his Majesty's High Court of Chancery, within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor, (including the days of the transfer and death): and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof; and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or any person or persons claiming under him." § 1 And the fourth section of the said act declares all gifts and dispositions, settlements, incumbrances, &c. otherwise made, to be void to all intents and purposes.

It is incident to every corporation to have a capacity to purchase lands for themselves and successors; and this is regularly true at the Common Law. 10 *Rep.* 30. But they are excepted out of the statute of Wills, *stat.* 34 *H.* 8. *c.* 5; so that no devise of lands to a corporation was then good, except for charitable uses, by *stat* 43 *Eliz. c.* 4, which exception is again greatly narrowed by the above *stat* 9 *Geo* 2. *c.* 36. So that now a corporation, whether ecclesiastical or lay, cannot purchase, without license from the Crown, though that capacity seems to be vested in them by the Common Law. And such charities which have not this license, which is now granted by act of parliament; charter of incorporation, or letters patent, are reduced to the necessity of choosing from among themselves certain persons to be trustees, and to purchase in their names, and to take the lands in trust for the charity; for if they were bought in the name of the institution, not being incorporated, they would instantly vest in the Crown, as a forfeiture in Mortmain. *Highmore on Charitable Uses*.

It frequently happens that a Donor or Testator is not readily furnished with the correct title of the hospital or institution to whose charitable designs he wishes to contribute; to obviate this difficulty, it appears that a statute was passed, *stat.* 14 *Eliz. c.* 14, evidently made for the benefit of *Christ*'s Hospital, St. *Thomas*'s, and St. *Bartholomew*'s; but including also all other hospitals, declaring "that all gifts and legacies, by will, feoffment, or otherwise, for relief of the poor in any hospital, then remaining and being *in esse*, shall be as valid, according to the true meaning of the Donor, as if the said corporation had been rightly named." The same act then recites one preceding, and explains "that the words *Master* or *Guardian* of any hospital mentioned therein, were intended and meant of all hospitals, *Maison-dieus*, bead-houses, and other houses ordained for the sustentation or relief of the poor; and shall be so expounded and taken for ever." It has been decided that the *stat.* 13 *Eliz. c.* 10, to which this refers, extends to all manner of hospitals, whether incorporated by name of Master or Warden, or any other name; or whether a sole corporation, or aggregate of many. 5 *Co.* 14, *b.*: 11 *Co.* 76, *a.*: *Palmer* 216. See *Highmore on Charitable Uses*.

The said *stat.* 9 *Geo.* 2. *c.* 36, has been uniformly construed by our Courts of Law and Equity, so as to give it its full force and effect; and by no means to give way to those subtleties which by degrees overturned the former Mortmain acts: at the same time that all proper encouragement has been given to such gifts and bequests to charities, as did not manifestly appear to be against the policy of this statute.

The statute was not meant solely to restrain devises of lands, or money to be laid out in lands, to charities; but has also been construed to the prohibition of any devise of lands to trustees, to sell them and convert the produce of the sale to such purposes; for this mode, though it does not seem so directly within the mischief intended to be provided against by the act, might open a door to much fraud and evasion. See 1 *Vez.* 108: 2 *Vez.* 52: and *Attorney Gen.* v. *Tindal*, A. D. 1764, cited in *Highmore*'s *Charitable Uses*.

Although, however, the statute prohibits the gift of money or personal estate, *to be laid out in lands* for charitable uses, yet, as has been already hinted, money, &c. *given generally*, is not forbidden: so also the residue of a personal estate hath been decreed not to be within the act; and if money be given to be laid out "in lands or otherwise" to a charitable use, such devise is good; by reason of the option thereby given to lay it out in personal securities, which are not restrained by the statute, unless they are converted into land. See *Soresby* v. *Hollins*, A. D. 1740: *Grimmett* v. *Grimmett*, A. D. 1754, cited in *Highmore*'s *Charitable Uses*.

A devise of a mortgage, or of a term of years, or of a rent-charge on lands, to a charity, is not good. It has been urged that the words of the statute, "that the lands shall not be conveyed or settled for any estate or interest

interest whatsoever, or any ways *charged or incumbered,*" relate merely to the case of a person charging his own lands for the benefit of a charity, and not to prevent the bequeathing a mortgage made to secure a personal debt: but it has been always held that the devise of a mortgage passeth the lands so mortgaged, for the equity of redemption may ultimately vest in the mortgagee; but a charity is precluded from a right of foreclosure; and therefore the bequest of a real security to a charity is in its nature void. See *Cro. Car.* 37: *Atk.* 605: 2 *Vez.* 547, 44: 1 *Bro. C. R.* 271: and *Highmore Cha. Uses*: as to the indirect way in which this may be in some manner affected, by marshalling the assets, so as to pay the debts out of the mortgage, and leave the personal estate free to answer the legacy to the charity; a matter in which the Courts of Equity are very nice and careful.

Courts of Equity have by several decisions favoured devises if made for intended charities, though they were not *in esse* at the time of the making the will. See *Highm. Char. Uses.*

By the exemption in the 4th section of the statute, in favour of the Universities, any land, or personal estate to be laid out in land, may still be disposed of in trust for their benefit, or for any colleges therein, as it might have been before the making of the act. But the extension to the colleges of *Eton*, *Winchester*, and *Westminster*, seems confined to any disposition "for the better support and maintenance of the scholars only upon those foundations," so that a devise to those colleges for any other purpose would apparently be declared void. *Highm. Char. Uses.*

Section 5 of the statute was made to prevent successions in colleges from happening so rapidly, as that fit members might not be left either to govern the college or to succeed to the vacant benefices. The extent and effect of this clause, as well as of the whole statute, underwent a very full discussion before Lord Keeper *Henley*, in the case of Mr. *Tancred*'s will. See 1 *Black. Rep.* 90.

The concluding section of the statute exempts all estate real or personal in *Scotland* from the restraints imposed on those in *England*. A case has occurred where an estate in *Ireland* was devised to charitable uses in *Ireland*. 1 *Bro. C. R.* 27. There does not appear any case where estates either in *Scotland* or *Ireland* were devised to charities in *England*; though it may be concluded if the charities were incorporated, and so became capable of taking, such a devise would not be void. Upon the same principles a devise of lands, or of a rent-charge on lands, in the *West Indies*, to a charity in *England* is good. Instances of the latter have actually occurred, and the executors or heirs at law never thought of contesting the devise against the charity. *Highm. Char. Uses.*

In the case of a legacy in *South-Sea* annuities bequeathed for the maintenance of poor labourers in *Edinburgh* and towns adjacent, the Court of Chancery was of opinion, that no directions could be given there as to the distribution of the money; that belonging to another jurisdiction; *viz.* to some of the Courts in *Scotland*; and therefore directed that the annuities should be transferred to such persons as the plaintiffs should appoint, to be applied to the uses of the will. See *Ambl.* 236.

For further learning on this subject, see *Vin. Abr.* title *Mortmain.*

MORTUARY, *Mortuarium, mortarium.*] A gift left by a man, at his death, to his parish church, for the recompence of his personal tithes and offerings not duly paid in his life-time. A Mortuary is not properly and originally due to ecclesiastical incumbents from any, but those only of his own parish, to whom he ministers spiritual instruction, and hath right to their tithes. But by custom in some places of this kingdom, they are paid to the parsons of other parishes, as the corpse passes through them.

Mortuarium (says *Lindewode*) *sic dictum est quia relinquitur ecclesiæ pro anima defuncti.* Custom did so prevail, that Mortuaries being held as due debts, the payment of them was enjoined as well by the statute *De circumspecte agatis*, 13 *Ed.* 1. *st.* 4, as by several constitutions, *&c.*

The *stat.* 13 *Ed.* 1. *c.* 4, enacts, That a prohibition shall not lie for Mortuaries, in places where Mortuaries used to be paid.

A Mortuary was anciently called *Saule-sceat*, which signifies *pecunia sepulchralis*, or *symbolum animæ*. After the Conquest it was called a *cors-present*, because the beast was presented with the body at the funeral; and sometimes a *principal*; of which see a learned discourse in the *Antiquities of Warwickshire, fol.* 679; and *Selden's Hist. of Tithes, p.* 287: *Ll. Canuti, c.* 13.

There is no Mortuary due by law, but by custom. 2 *Inst.* 491: see *Spelm. de Concil. tom.* 2. 390: *Fleta, lib.* 2. *c.* 600. *par.* 30. See *Nonagium*, *Principal*, and *Pretium sepulchri*. In the *Irish* canons it is called *Pretium sepulchri*, and *Sedatium*, viz. *Omne corpus sepultum habet in jure suo vaccam & equum & vestimentum & ornamenta lecti sui, &c. Canon. Hibern. lib.* 19. *c* 6. And in another place, *Rogat principem loci*, (*i. e.* the bishop,) *ut basilicum ejus foderit, &c. & reddat amicus pretium ejus & sedatium commune.*

The word *Mortuarium* was sometimes used in a civil as well as an ecclesiastical sense, and was payable to the lord of the fee, as well as to the priest of the parish. *Debentur domino* (i. e. *mannerii de* Wrechwyke) *nominibus heriotti &* mortuarii *duæ vaccæ pret.* xii *sol.*—*Paroch. Antiq.* 470: *Cowell.*

Selden says, that the usage anciently was, bringing the Mortuary along with the corpse when it came to be buried, and to offer it to the church as a satisfaction for the supposed negligence and omission, the defunct had been guilty of, in not paying his personal tithes, and from thence it was called a *corse present*; a term which bespeaks it to have been once a voluntary donation. *Selden's History of Tithes*, 287. *c.* 10.

Mortuaries are, in fact, a sort of *Ecclesiastical Heriots*; being a customary gift claimed by, and due to, the minister in very many parishes on the death of his parishioners. 2 *Comm. c.* 28. *p.* 425.—They seem originally to have been like lay-heriots, only a voluntary bequest to the church; being intended, as above-mentioned, and as *Lindewode* states, from a constitution of Archbishop *Langham*, as a kind of expiation and amends to the clergy, for the personal tithes and other ecclesiastical duties, which the laity in their life-time might have neglected or forgotten to pay. For this purpose, *after* the Lord's heriot or best good was taken out, the second best chattel was reserved to the Church as a Mortuary. *Co. Lit.* 185: *Lindew. Provinc. l.* 1. *tit.* 3.

In

In *Bracton*'s time, so early as *Henry* III. this was rivetted into an established custom; insomuch that the bequests of heriots and Mortuaries, were held to be necessary ingredients in every testament of chattels, and that the Lord should have the best good left him as an heriot, and the Church the second best as a Mortuary. See *Bracton, l.* 2. *c.* 26: *Fleta, l.* 2. *c.* 57. See this Dictionary, title *Heriot*.

This custom still varies in different places, not only as to the Mortuary to be paid, but the person to whom it is payable. In *Wales*, a Mortuary or Corse present, was due upon the death of every clergyman, to the Bishop of the diocese; till abolished upon a recompence given to the Bishop, by *stat.* 12 *Ann. st.* 2. *c.* 6. And in the archdeaconry of *Chester*, a custom also prevailed, that the Bishop, who is also Archdeacon, should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet; and also his best signet or ring. *Cro. Car.* 237. But by *stat.* 28 *Geo* 2. *c.* 6, this Mortuary is directed to cease, and an equivalent is settled upon the Bishop in its room.

The King's claim to many goods on the death of all prelates in *England*, seems to be of the same nature; though *Coke* apprehends that this is a duty due upon death, and not a Mortuary; a distinction seemingly without a difference. For not only the King's ecclesiastical character, as supreme Ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of *Chester*, which was an acknowledged Mortuary, puts the matter out of dispute. The King, according to the record vouched by Sir *Edward Coke*, is entitled to six things, the Bishop's best horse or palfrey, with his furniture; his cloak or gown and tippet; his cup and cover; his bason and ewer; his gold ring; and lastly, his *muta canum*, his mew or kennel of hounds. See 2 *Inst.* 491: 2 *Comm.* 426, 7.

This variety of customs, with regard to Mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other, it was thought proper, by *stat.* 21 *Hen.* 8. *c.* 6, to reduce them to some kind of certainty. For this purpose, it is enacted, "That all Mortuaries, or Corse-presents, to parsons of any parish, shall be taken in the following manner; *viz.* for every person who does not leave goods to the value of 10 marks (6*l.* 13*s* 4*d.*) nothing; for every person who leaves goods to the value of 10 marks, and under 30*l.*, 3*s.* 4*d.*; if above 30*l.* and under 40*l.*, 6*s.* 8*d.*; if above 40*l.* of what value soever they may be, 10*s.* and no more. And no Mortuary shall throughout the kingdom be paid for the death of any feme covert; nor for any child; nor for any one of full age that is not a housekeeper; nor for any wayfaring man, but such wayfaring man's Mortuary shall be paid in the parish to which he belongs.

"No person shall pay Mortuaries in more places than one, or more than one Mortuary; and no Mortuary shall be demanded of any but in such places where Mortuaries are due by custom, and have used to have been paid: also in places where Mortuaries have been of less value than as aforesaid, no person shall pay any more than has been accustomed.

"If a parson, vicar, &c. take or demand more than is allowed by the statute for a Mortuary, he shall forfeit all he takes beyond it, and 40*s.* more, to the party grieved, to be recovered by action of debt, &c."

Since this statute, whereby Mortuaries are reduced to a certainty, and on which stands the law of Mortuaries to this day, an action of debt will lie upon the said statute in the Courts of Common Law, for recovery of the sum due for a Mortuary, being by custom as aforesaid, although before that statute they were recoverable only in the Spiritual Court: but as such actions have never been brought, it is said, they are still recoverable in that Court only. *Wats. Clergym. Law*, 475.

Where by custom a Mortuary hath not been usually paid, if a person be libelled in the Spiritual Court, he shall have a prohibition by virtue of the statute 21 *H.* 8. *c* 6. And upon a prohibition the custom may be tried, &c. 2 *Lutw.* 1066: 3 *Mod.* 268.—No suit in equity lies for a Mortuary. 2 *Strange* 715.

MORTUARIUM, A Mortuary, Hath been sometimes used in a civil as well as ecclesiastical sense, being payable to the lord of the fee. *Paroch. Antiq.* 470.

MOSS-TROOPERS, A rebellious sort of people in the North of *England*, that lived by robbery and rapine, not unlike the *Tories* in *Ireland*, the *Buccaneers* in *Jamaica*, or *Banditti* of *Italy*: the counties of *Northumberland* and *Cumberland* were charged with an yearly sum, and a command of men to be appointed by Justices of the peace, to apprehend and suppress them. See *stats.* 4 *Jac.* 1. *c.* 1: 13 & 14 *Car.* 2. *c.* 22: 30 *Car.* 2. *c.* 2: 6 *Geo.* 2. *c.* 37, and this Dictionary, titles *Mischief, Malicious*; *Northern-borders*.

MOTE, *Mota*, Sax. *gemote.*] *Curia, placitum, conventus*: as *Mota de Hereford*, i. e. *Curia vel placita comitatûs de Hereford*. In the charter of *Maud* the Empress, daughter of King *Henry* the First, we read thus; *Sciatis me fecisse Milonem de* Gloucest. *Comitem de* Hereford, & *dedisse ei* motam Herefordiæ *cum toto castello*, &c. Hence Burgmote, *curia vel conventus burgi*; Swainmote, *curia vel conventus ministrorum, scil forestæ*, &c. From this also we draw our word *mote* and *moot*, to plead. The *Scots* say, to *mute*, as the *Mute hill* at *Scone*, i. e. *Mons placiti de Scona*. See *Folc-mote*.

The word *moot* was usually applied to that arguing of cases used by young students in the Inns of Court and Chancery. In the charter of peace between King *Stephen* and Duke *Henry*, afterwards King, it is taken to signify a fortress, as *Turris de* London, & *mota de* Windsor, the tower of *London*, and fortress of *Windsor*. *Mote* also signifies a standing pool of water to keep fish in.

It likewise signifies a great ditch encompassing a castle or dwelling-house. *Chart. Antiq*

MOTE-BELL, or *Mot-bell*, the bell so called, which was used by the *English Saxons* to call people together to the Court. *Leg. Ed. Confess. c.* 35.

MOTEER, A customary service or payment at the *mote* or court of the lord: from which some persons were exempted by charter of privilege. *Rot. Chart.* 5 *Joh. m.* 9.

MOTHERING, A custom of visiting parents on *Midlent Sunday*. See *Lætare Jerusalem*.

MOTIBILIS, One that may be removed or displaced, or rather a vagrant. *Fleta, l.* 6. *c.* 6.

MOTION IN COURT, An occasional application to the Court, by the parties or their counsel, in order to obtain some *Rule* or *Order* of Court, which becomes necessary in the progress of a cause. 3 *Comm.* 304.

A Motion is either for a *Rule absolute* in the first instance, which is sometimes moved for in open Court; and sometimes merely drawn up on a Motion-paper signed by Counsel, and delivered to the Clerk of the Rules; or it is only for a *Rule to show cause*, or, as it is commonly called, *A Rule nisi, i. e. unless* cause be shown to the contrary; which is afterwards moved to be made absolute. *Tidd's Pract. K. B.*

In stating the different Motions, in the following extract from *Tidd's Practice*, the letter A, is used to denote that the rule is *absolute*, in the first instance—A. S. that it is drawn up *absolute* on the mere *signature* of counsel; (these are called *Motions of Course*)—A. C. that it cannot be had without *consent*—N. that in the first instance it is only a rule *Nisi*.

Motions are of a *civil* or *criminal* nature. Of the latter kind is the Motion for an *attachment*, which may be moved for on account of contemptuous words, spoken of the Court, A; or its process, N; for a rescue, N; or disobedience to a subpœna, or other process, N; against a Sheriff, for not returning the writ, or bringing in the body, A; against an attorney, for not performing his undertaking, or otherwise misbehaving himself, N.; against other persons, for non-payment of costs, on the Master's Allocatur, A; for the non-payment of money generally, N; or not performing an award, &c. N.

An attachment for misbehaviour is commonly preceded by a Motion for a Rule to answer the matters of the Affidavit; and the party being taken on the attachment, either remains in custody or puts in bail before a Judge, (for he is not bailable before the Sheriff,) to answer interrogatories to be exhibited against him; which interrogatories must be signed by counsel; and if judgment be not given the same term, the name of the cause should be inserted in the list of Motions appointed to come on peremptorily in the ensuing term. *R. M.* 34 *Geo.* 3; 5 *T. Rep.* 474; *Tidd's Pract. K. B.*

Motions of a *civil* nature are made on behalf of the plaintiff or of the defendant. On behalf of the *Plaintiff*, they are either, 1 for something to be done in the common and ordinary course of the suit, as to increase issues, A; for a *concilium*, A. S; or judgment on demurrer, special verdict, or writ of error, A; for leave to enter up judgment on an old warrant of attorney, A; or *nunc pro tunc*, N; to enter up judgment and take out execution after an award, where a verdict has been taken for the plaintiff's security, N; or after a verdict for the plaintiff against one of several underwriters, where the rest have agreed to be bound by it, N; or to take out execution pending a writ of Error, N; to amend the pleadings or other proceedings in the course of a suit, N; or to set aside a judgment of *Non pros, or of Non-suit*; N; or a verdict, or inquisition, N: Or, 2. they are for something to be done out of the common and ordinary course of the suit; as for the defendant to abide by his plea, A. S; to refer it to the Master to assess the damages, without a writ of inquiry, N; for the execution of a writ of inquiry before a Judge, N; or to have a good Jury upon the execution of such writ, A; for a trial at bar, or in an adjoining county, N; for a view in trespass, A. S; in other cases, N; or special jury, A S; to have witnesses examined on interrogatories, A. C; or for leave to inspect and take copies of books, court-rolls, &c. or to have them produced at the trial, N.

On behalf of the *Defendant* motions may be considered as they arise and succeed one another in the course of the suit. Before declaration: they are, to quash the writ, N; justify bail, A; reverse an outlawry, N; or, after several rules for time to declare, that the plaintiff declare peremptorily, A.—After declaration: they are, to set aside an interlocutory judgment for irregularity; as being signed contrary to good faith, or upon an affidavit of merits, N; to set aside or stay proceedings in actions upon bail-bonds or in other actions if irregular or unfounded, N; and if the defendant is a prisoner to discharge him out of custody upon common bail, N; or if the proceedings are regular, to stay them upon terms, N; to compound penal actions, A. C; change the venue, A; consolidate actions, N; or strike out superfluous counts, N; for time to plead or reply, &c. under special circumstances, N; to plead several matters, or pay money into Court, A. S; to withdraw the general issue and plead it *de novo*, with a notice of set-off; or upon paying money into Court, to add or withdraw special pleas, all these are generally, A; but sometimes, N; to pay the issue money into Court in a *qui tam* action, N; (see *Penal Action*;) to put off a trial if the defendant is not ready, N; or if the plaintiff will not proceed to trial, A; or inquiry, A; or for judgment as in case of a nonsuit, N; in arrest of judgment, N; or for a suggestion after verdict to entitle the defendant to costs, N; to set aside an execution and discharge the defendant, or restore to him the money levied, or to retain it in the Sheriff's hands, N.

The defendant also as well as the plaintiff may move for a *concilium*, A. S, or judgment, A, on a demurrer, special verdict, or writ of error: to amend, N; for a trial at bar, or in an adjoining county, N; for a view or special jury, A. S; to have witnesses examined on interrogatories, A. C; or for leave to inspect and take copies of books, court-rolls, &c. or have them produced at the trial, N; to set aside a verdict or inquisition, N: either party may likewise move to make a Judge's order, submission to arbitration, or order of *Nisi prius*, a Rule of Court, A; to enlarge the time for making an award, A. C; to set aside an award or Judge's order, N; for the Master to make his report, A; or review his taxation, N.

There are some Motions peculiar to the action of *Ejectment*, such as for judgment against the casual ejector; generally A. S; but where there is any thing peculiar in the service of the declaration, it should be mentioned to the Court; and where the affidavit of service is defective, they will give leave to file a supplemental one;—that service on the tenant's son, daughter, &c. may be deemed good service, N; for the landlord to be admitted defendant instead of the tenant, A. S; or for leave to take out execution in such case against the casual ejector after the landlord has failed in his defence, N. See this Dictionary, title *Ejectment*.

There are also other motions not necessarily connected with any action; as to set aside an annuity, and deliver up the securities to be cancelled, &c. N. See *Tidd's Pract. K. B.*

An attachment for non-payment of costs, and against the Sheriff for not returning the writ, may be moved for the last day of term. 1 *Burr.* 651 : 5 *Burr.* 2686. But a Motion to answer the matters of an affidavit cannot be made on that day. 4 *Burr.* 2502; or any Motion which would operate as a stay of proceedings, unless it appear to the Court that, under the circumstances, it could not have been made earlier.

A Motion is in general accompanied with an affidavit, and sometimes preceded by a notice. The affidavit should be properly intitled, and contain a full statement of all the circumstances necessary to support the application; and the rather as it is a rule not to receive any supplementary affidavit on shewing cause. 2 *Term Rep.* 644. Motions and affidavits for attachments in civil suits, are proceedings on the civil side of the Court, until the attachments issue, and are to be intitled with the names of the parties. 3 *Term Rep.* 253. But as soon as the attachments issue, the proceedings are on the Crown side; and from that time the King is to be named as the prosecutor. 3 *Term Rep.* 133, 253. And where a submission to an award is made a Rule of Court, under the statute, there being no action, the affidavits on which to apply for an attachment for disobeying the award, need not be intitled in any cause, but the affidavit in answer must. 3 *Term Rep.* 601. An affidavit sworn before the attorney in the cause cannot be read, except for the purpose of holding the defendant to special bail. *Tidd.* And where an affidavit is made before a commissioner by a person who from his signature appears to be illiterate, the commissioner taking the affidavit shall certify, or state in the *jurat*, that it was read in his presence, to the party making the same, who seemed perfectly to understand it, and wrote his signature in the presence of the commissioner. *R. E* 31 *G* 3. 4 *Term Rep.* 284. The notice of Motion though seldom necessary, is frequently given, in order to save time and expence; by affording the adverse party an opportunity of shewing cause in the first instance, or by inducing the Court to disallow the costs of proceedings taken after the notice, and before the Motion. The *stat.* 14 *Geo* 2. *c.* 17, requires notice of Motion, for judgment as in case of a nonsuit; but in the Court of K. B. the Rule to shew cause is deemed a sufficient notice. *Lofft.* 65. But it is otherwise in C. B. See 1 *H. Black.* 527.

The Rule to shew cause is drawn up for a particular day in term, previous to which it should be duly served. To bring a party into contempt, a copy of the Rule must be *personally* served, and the original at the same time shewed to him; in other cases the same degree of strictness is not required in the service of the Rule, but it is sufficient, without shewing the original, to leave a copy of it with any person representing the party, at his dwelling house or place of abode. 3 *Term Rep.* 351. And when a Rule is obtained to set aside proceedings for irregularity, and to stay proceedings in the mean time, the proceedings are suspended for all purposes till the Rule is discharged. 4 *Term Rep.* 176.

On the day appointed for that purpose, the Counsel for the party, called upon by the Rule, may shew cause against it, either upon or without an affidavit as circumstances require. But an office-copy must be first taken of the Rule, and of the affidavit upon which it was granted; or otherwise Counsel cannot be heard. Previous to shewing cause, it is usual to deliver over the affidavit against the Rule to the Counsel for the Rule, who has a right to make any objection appearing on the face of it; and if a doubt arises, upon the statement of the facts contained in the affidavit, it is inspected by the Judges, or read by the officer of the Court: when an affidavit has been made use of, but not before, it may be filed, in order that, if it be not true, the party may be indicted for perjury. *Tidd's Pract. K. B.*

If cause be not shewn on the day appointed, the Counsel for the party obtaining the Rule may move, the next day, to make it absolute; which is done as a matter of course, if no cause be shewn, on an affidavit of service. But it frequently stands over by consent of the parties, or for the accommodation of Counsel, till a subsequent day, when the Counsel on either side may bring it on, by moving to make the Rule absolute, or to discharge it; though if not brought on, or enlarged during the same term, it falls to the ground. When the Counsel for the party obtaining the Rule is not ready to support it, he may move to enlarge the Rule till a future day in the same or next term, which is pretty much of course, when it is in his own delay; but otherwise the Court will not enlarge the Rule without consent, or some evident necessity; and they will never enlarge the plaintiff's Rule, when it would have the effect of continuing the defendant in custody. In like manner, when the Counsel for the party called upon by the Rule is not prepared to shew cause against it, he may apply to enlarge the Rule till a future day, which is a matter of right if the Rule was not served in time, so as to give the party an opportunity of answering it; but otherwise the Court may impose upon him what terms they think proper, and they commonly require him to file his affidavits, so as to give the adverse party an opportunity of inspecting them, previous to the day appointed for shewing cause. In cases of urgency, the Court, towards the end of the term, will sometimes enlarge the Rule till a day in the vacation, when it is to be brought on before a Judge at Chambers. *Tidd's Pract. K. B.*

On shewing cause against the Rule, the Court either make it absolute, or discharge it, and that either with or without the costs of the application; or such costs are directed to abide the event of the suit; according to the discretion of the Court under all the circumstances of the case.

In hearing Motions, the course formerly was, to begin every day with the *senior* Counsel within the bar, and then to call to the next *senior*, in order, and so on, as long as it was convenient to the Court to sit, and to proceed again in the same manner, upon the next and every subsequent day, although the bar had not been half, or perhaps a quarter gone through, upon any one of the former days: so that the *juniors* were very often obliged to attend in vain, without being able to bring on their Motions for many successive days. 1 *Burr.* 57. This practice bearing hard upon *junior* Counsel, Lord *Mansfield* introduced a different Rule, which has ever since been adhered to; of going quite through the bar, even to the youngest Counsel, before he would begin again with the *seniors*; even though it should happen to take up two or more days, before all the Motions, which were ready at the bar upon the first day, could be heard. 1 *Burr.* 57.

Particular

Particular days are appointed for certain business, as *Tuesday* and *Friday*, which are called paper days, for going through the paper of causes, wherein *conciliums* have been moved for, on the civil-side; and *Wednesday* and *Saturday* for transacting business on the Crown-side. All Motions or Rules, in matters of length or consequence, are appointed for particular days, and called on first. Special causes are to be argued in the same order they are entered in the paper, and not to be entered anew or put off, without a special application to the Court; and all enlarged rules must come on, *peremptorily* during the first week of the term. If a Rule be made absolute, or discharged, by surprise, the Court will open it; and if by mistake it be drawn up wrong, they will order it to be set right. See *Tidd's Pract. K. B.* and the various authorities there cited.

Monday is a special day for Motions in *B. R.* by the ancient course; but they are made upon any day, as the business of the Court will permit. 2 *Lil.* 208, 210.

In the Chancery, during term, every *Thursday* is a day for sealing, and Motions; and *Tuesdays* and *Saturdays* are days for Motions, as are the first and last days of the term: in vacation, only seal days appointed by the Lord Chancellor, are days of Motion.

After Motion in arrest of judgment, no Motion shall be for a new trial; but after Motion for a new trial, one may move in arrest of judgment. 2 *Salk.* 647. See titles *Trial*; *Arrest of Judgment*.

In *B. R.* one ought not to move the Court for a Rule for a thing to be done, which by the common Rules of practice may be done without moving the Court: nor shall the Court be moved for doing what is against the practice of the Court: one ought not to move for several things in one Motion; and where a Motion hath been denied, the same matter may not be moved again by another Counsel, without acquainting the Court thereof, and having their leave for the same. Every person who makes a solemn argument at the bar is allowed by the Court a Motion for his argument. 2 *Lil. Abr.* 209, 210. But Counsel cannot move for his argument in a matter of course in the paper, in *B. R.* 1 *Wils.* 76.

If there be divers Rules of Court made in a cause, and the party intends to move thereon, he must produce the Rule last made in the cause, and move upon that: but it is necessary to have all the Rules and copies of the affidavits, to satisfy the Court how the cause hath been proceeded in, and how it stands in Court; though the last Rule is the most material: and where a Motion is made to set aside a Rule grounded on an affidavit, a copy of the affidavit must be produced, that the Court may be informed upon what grounds the Rule was made, and judge whether there be cause shewn upon the Motion sufficient to set aside the Rule. *Pasch.* 13 *Car. B. R. Hil.* 1649.

If any thing be moved to the Court upon a record, the record is to be in Court, or the Court will make no Rule upon such Motion. *Hil.* 22 *Car. B. R.*

For the reasons of the several Motions as arising from the progress of a cause through the Courts from the commencement of the action to execution; which Motions form the greatest part of the *visible practice* of Courts of Law; See *Eunomus. Dial.* 2. § 26—40: and this Dictionary, title *Practice*. See also *Vin. Abr.* title *Motion*.

MOVEABLES. All sorts of things moveable are included under the name of things personal, or are personal estate, *i. e.* all those things which may attend a man's person wherever he goes. See 2 *Comm. c.* 24.

MOULT, An old *English* word for a mow of corn, or hay; *mullo fœni*, &c. *Paroch. Antiq.* 401.

MOUNTEBANKS. See *Nusance*.

MOWNTEE, An alarm or outcry, to mount and make some speedy expedition; mentioned in the statutes *Hen.* 5.

MUFFULÆ, Winter-gloves made of ram-skins. *In Leg. Hen.* 1. *c.* 70, they are called *Musfluæ*, and sometimes *Mussa*.

MULCT, *Mulcta.*] A fine of money set upon one, for some fault or misdemeanor; fines laid on ships or goods by a company of trade, to raise money for the maintenance of consuls, &c. are called *Mulcts*. *Merch. Dict.*

MULIER, As used in our law, seems to be a word corrupted from *melior*, or the Fr. *meilleur*; and signifies the lawful issue, born in wedlock, though begotten before, preferred before an elder brother born out of matrimony. See *stat.* 9 *Hen.* 6. *c.* 11: *Smith's Repub. Angl. lib.* 3. *c.* 6. But by *Glanvil*, lawful issue are said to be *Mulier*, not from *melior*, but because begotten *è muliere*, and not *ex concubinâ*; for he calls such issue *filios mulieratos*, opposing them to bastards. *Glanv. lib.* 7. *c.* 1. It appears to be thus used in *Scotland* also; *Skene* saying, *mulieratus filius* is a lawful son, begotten of a lawful wife.

If a man hath a son by a woman before marriage, which is a bastard and unlawful, and after he marries the mother of the bastard, and they have another son, this second son is *Mulier* and lawful, and shall be heir to his father, but the other cannot be heir to any man; and they are distinguished in our old books with this addition, *Bastard eigné*, and *Mulier puisné*. *Co. Lit.* 170, 243.

Where a man has issue by a woman, if he afterwards marries her, the issue is *Mulier* by the civil law; though not by the laws of *England*, 2 *Inst.* 99: 5 *Rep.* 416. Of ancient time, *Mulier* was taken for a wife, as it is commonly used for a woman, particularly one not a maid; and sometimes for a widow; but it has been held, that a virgin is included under the name *Mulier*. See *Co. Lit.* 170, 243: 2 *Inst.* 434: this Dictionary, title *Bastard*: and 2 *Comm.* 248.

MULIERTY, The being or condition of a *mulier*, or lawful issue. *Co. Lit.* 352, *b.*

MULLONES FŒNI, Cocks or ricks of hay. *Paroch. Antiq. p.* 401. Hence in old *English* a *moult*, now a mow of hay or corn. *Cowell.* See *Moult*.

MULMUTIN LAWS See *Molmutian Laws*.

MULNEDA, A place to build a water-mill. *Mon.* ii. *p.* 284.

MULTÆ, or MULTURA EPISCOPI, Is derived from the *Latin* word *mulcta*, for that it was a fine given to the King, that the Bishop might have power to —ake his last will and testament, and to have the pro- te of other men's, and the granting administrations. *Inst.* 491.

MULTIPLICATION OF GOLD AND SILVER, Was prohibited and declared to be felony by *stat.* 5 *Hen.* 4. *c.* 4. Which statute was made on a presumption that persons skilful in chemistry, could multiply or augment

augment these metals, by changing other metals into gold or silver; and the endeavours of some persons in making use of extraordinary methods for the producing of gold and silver, and finding out the philosopher's stone, were found to be so prejudicial to the public, from the lavish waste of many valuable materials, and the ruin of many families by such useless expences, that they occasioned the above statute. But the restraint thereby having no other effect, from the unaccountable vanity of those who fancied those attempts practicable, than to send them beyond sea to try their experiments with impunity in other countries, the *stat.* 5 *Hen.* 4. *c.* 4. was at last repealed by *stat.* 1 *W.* & *M.* *c.* 30. See *Dyer* 88: 1 *Hawk. P. C. c.* 18. § 12.

This repeal, it is said, was obtained by the learned and celebrated *Robert Boyle*; who was himself an excellent chemist, and in some measure a favourer of what is called *Alchymy*, or the art of obtaining the *Philosopher's Stone*, for the transmutation of metals.

MULTITUDE, *multitudo.*] According to some authors must be ten persons or more: but Sir *Edw. Coke* says, he could never find it restrained by the Common law to any certain number. *Co. Lit.* 257. See title *Riot*.

MULTO FORTIORI, or A MINORI AD MAJUS, Is an argument often used by *Littleton*, and is framed thus: "If it be so in a feoffment passing a new right, much more it is for the restitution of an ancient right, &c." See *Co. Lit.* 253. *See* 260, *a*.

MULTO, MUTILO, MOLTO, MUTO, MUTTO, A mutton or sheep, or rather a wether, *quia testiculis mutilati. Cowel.*

MULTONES AURI, Pieces of gold money imprest with an *Agnus Dei*, a sheep or lamb on the one side, and from that figure called *Multones*. This coin was more common in *France*, and sometimes current in *England*, as appears by a patent, 33 *Ed.* 1. cited by *Spelman*; though he had not then considered the meaning of it. *Cowel.*

MULTURE, *molitura* vel *multura.*] The toll that the miller takes for grinding corn. *Cowel.*

MUM, A strong liquor brewed from wheat, oats, and ground beans.—It is one of the articles subject to the regulation of the Excise-laws. See that title; and *stat.* 27 *Geo.* 3. *c.* 13. imposing the duty on *Mum* made or imported. *Brunswick* is the most celebrated place for brewing this liquor.

MUMMING, from *Teuton. Mummen*, to mimick.] Antic diversions in the *Christmas* holidays, to get money and good cheer. Mummers to be imprisoned, *stat.* 3 *Hen.* 8. *c.* 9.

MUNDBRECH, from Sax. *mund*, munitio, defensio, & *brice*, fractio.] This is mentioned among divers crimes, as *pacis fractio*, *læsio majestatis*, &c. *Spelm Gloss.* Some would have Mundbrech to signify an infringement of privilege; though of later times it is expounded *clausarum fractionem*, a breach of mounds, by which name ditches and fences are called in many parts of *England*; and we say, when lands are fenced in and hedged, that they are mounded. See the next article.

MUNDE, Peace; hence *Mundebrece* a breach of it. *Leg. H.* 1. *c.* 37.

MUNDEBURDE, *Mundeburdum*, from Sax. *mund*, i. e. *tutela*, and *bord* or *borh*, i e. *fidejussor*. A receiving into favour and protection. *Cowel.*

MUNDICK; See *Metal*.

MUNICIPAL LAW, Is defined by *Blackstone*, (1 *Comm. Introd.*) "*A rule of civil conduct prescribed by the Supreme Power in a State*;" and for this definition he gives his reasons at large, to which we refer the reader. See also this Dictionary, title *Law*.

MUNIMENT-HOUSE, *Munimen.*] In cathedral and collegiate churches, castles, colleges, or public buildings, is a house or little room of strength; purposely made for keeping the seal, evidences, deeds, charters, writings, &c. of such church, college, &c. Such evidences of title to estates, whether of public bodies or private persons, being called *Muniments*, (corruptly *miniments*,) from *munio*, to defend; because inheritances and possessions are defended by them. 3 *Inst.* 170: *Law Terms*: *Stats.* 5 *R.* 2. *c.* 8: 15 *H.* 6. *c.* 37.

MUNIMENTS, *Munimina.*] See the preceding article.

MUNUS ECCLESIASTICUM, The consecrated bread, out of which a little piece is taken for a communicant. *Mon. Angl.* ii. 838.

MURAGE, *Muragium.*] A reasonable toll, to be taken of every cart and horse coming laden through a city or town, for the building or repairing the public walls thereof, due either by grant or prescription; it seems to be a liberty granted to a town by the King for the collecting of money towards walling the same. See *stat.* 3 *Ed.* 1. *c.* 30: 2 *Inst.* 222. The service of work and labour done by inhabitants and adjoining tenants in building or repairing the walls of a city or castle, was called *murorum operatio*; and when this personal duty was commuted into money, the tax so gathered was called *Murage*. *Paroch. Antiq.* 114. In the city of *Chester*, there are two ancient officers called *Murengers*; being two of the principal aldermen, yearly chosen to see the walls kept in good repair; for the maintenance of which they receive certain tolls and customs.

MURALE, The city wall. *Huntingd. lib.* 8. *p.* 392.

MURATIO, A town or borough, surrounded with walls. *Brompt. Vit. K. Steph.*

MURDER; See *Homicide* III. 3.

MURORUM OPERATIO, The service of work and labour done by inhabitants and adjoining tenants in building or repairing the walls of a city or castle. From which duty some were exempted by special privilege. So King *Henry* II. granted to the tenants within the honour of *Wallingford*, *Ut quieti sint de operationibus castellorum & murorum*. *Paroch. Antiq.* 114. When this personal duty was commuted into money, the tax so gathered was called *Murage*. *Cowel.* See *Murage*.

MUSCOVY COMPANY; See *Russia Company*.

MUSICIANS. The Musicians of *England* were incorporated by King *Charles* II. *anno* 1670. See *Minstrels*.

MUSLINS; See titles *Linen*; *Navigation Acts*.

MUSSA, *Lat.*] A moss or marsh ground; also a place where sedge grows; a place over-run with moss. *Cowel*: *Mon.* i. 426.

To MUSTER, from Fr. *Monstre.*] To shew men, and their arms, that are soldiers, and inrol them in a book. *Terms de Ley.* See titles *Soldiers*; *Courts Martial*.

MUSTER-MASTER GENERAL, Mentioned in *stat.* 35 *Eliz. c.* 4. See *Master of the King's Musters*.

MUTA CANUM, Fr. *Meute de Chiens.*] A kennel of hounds, one of the mortuaries to which the King was entitled at a bishop's and abbot's decease. See title *Mortuary*.

MUTARE, To mew up hawks, in the time of their molting or casting their plumes. In the reign of King *Ed.* II. the manor of *Broughton in Com. Oxon.* was held —*Per serjeantiam mutandi unum aspericum domini regis, &c. Paroch. Antiq* 560. The Mews (*Muta Regia*) near *Charing Cross, London*, now the King's stables, was formerly the falconry or place for the King's hawks.

MUTATORIUS, Change of apparel. *Mat. Par. Ann.* 1107.

MUTATUS ACCIPITER, A mewed hawk. *Cowel.*

MUTE, [*Mutus.*] One dumb, who cannot or refuses to speak. And by our law a prisoner may stand Mute two ways;

1. When he speaks not at all; in which it shall be inquired whether he stand Mute out of malice, or by the act of God; and if by the latter, then the Judge ought to inquire whether he be the same person, and of all pleas which he might have pleaded in his defence, if he had not been Mute. 2. When the prisoner does not plead directly, or will not put himself upon the inquest, to be tried; and a person feigning himself mad, and refusing to answer, shall be taken as one who stands Mute. 2 *Inst. H. P C.* 226.

If a prisoner on his trial peremptorily challenge above the number of jurors allowed by law, this being an implied refusal of a legal trial, he shall be dealt with as one who stands Mute, and according to some opinions be hanged. *H. P. C.* 259: *Kel.* 36: 2 *Hawk. P. C. c.* 30.

It seems now clearly settled, that a prisoner thus perversely and obstinately offending, is, in high treason, *ipso facto*, attainted. 2 *Hale* 268: 4 *Comm. c.* 25. *p.* 325: *c.* 27. *p.* 354. And in felony the challenge shall be overruled. 2 *Hale* 376.

Regularly a prisoner is said to stand Mute, when being arraigned for treason, or felony, he either, 1. Makes no answer at all; or, 2. Answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise: or, 3. Upon having pleaded not guilty, refuses to put himself upon the country. 2 *Hal. P. C.* 316. If he says nothing, the Court ought *ex officio* to impanel a Jury to inquire whether he stands obstinately Mute, or whether he be dumb *ex visitatione Dei*. If the latter appears to be the case, the Judges of the Court (who are to be of Counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he pleaded not guilty. But whether judgment of death can be given against such a prisoner, who hath never pleaded, and can say nothing in arrest of judgment, is a point (says *Blackstone*) yet undetermined. See 2 *Hal. P. C.* 317: 2 *Hawk. P. C. c.* 30. § 7.

If he be found to be obstinately Mute, (which a prisoner hath been held to be, that hath cut out his own tongue, *ibid.*) then if it be on an indictment of high treason, it hath long been clearly settled, that standing Mute is equivalent to a conviction, and he shall receive the same judgment and execution. 2 *Hawk. P. C. c.* 30. § 9: 2 *Hal. P. C.* [illegible]. And as in this the highest crime, so in the lowest species of felony, *viz.* in petit larceny, and in all misdemesnors, standing Mute hath always been equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, the prisoner was not by the antient law looked upon as convicted, so as to receive judgment for the felony, but should for his obstinacy have received the terrible sentence of *penance*, or *peine* (probably a corrupted abbreviation of *prisone*) *forte et dure*.

Before this was pronounced the prisoner had not only *trina admonitio*, but also a respite of a few hours, and the sentence was distinctly read to him, that he might know his danger; and after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed; even though he was too stubborn to pray it. 2 *Hal. P. C.* 320, 321: 2 *Hawk. P. C. c.* 30. § 24. Thus tender was the law of inflicting this dreadful punishment; but if no other means could prevail, and the prisoner (when charged with a capital felony) continued stubbornly Mute, the judgment was then given against him without any distinction of sex or degree. A judgment which was purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution.

The rack or question, to extort a confession from criminals, is a practice of a different nature: *this* having been only used to compel a man to put himself upon his trial, *that* being a species of trial in itself. See title *Torture*.

The judgment of penance for standing Mute was as follows: that the prisoner be remanded to the prison from whence he came; and put into a low, dark chamber, and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more; that he have no sustenance, save only on the first day three morsels of the worst bread; and on the second day three draughts of standing water, that should be nearest to the prison door; and in this situation this should be alternately his daily diet, *till he died*, or (as anciently the judgment ran) *till he answered*. *Britt. cc.* 4, 22: *Flet. lib.* 1. *c* 34. § 33.

It hath been doubted whether this punishment subsisted at the Common Law, or was introduced in consequence of *stat. West.* 1. 3 *E.* 1. *c.* 12; which latter seems to be the better opinion. 2 *Inst.* 179: 2 *Hal. P. C.* 322: 2 *Hawk. P. C. c.* 30. § 13. *Staundf. P C.* 149: *Barr.* 82. For not a word of it is mentioned in *Glanvil* or *Bracton*, or in any antient author, case, or record (that hath yet been produced) previous to the reign of *Edward* I; but there are instances on record in the reign of *Henry* III. where persons accused of felony, and standing Mute, were tried in a particular manner, by two successive juries, and convicted; and it is asserted by the Judges in 8 *Hen.* 4, that by the Common Law, before the statute, standing Mute on an appeal, amounted to a conviction of the felony. This statute of *Edward* I. directs such persons "as will not put themselves upon inquests of felonies, before the Judges at the suit of the King, to be put into hard and strong prison (*soient mys en la prisone forte et dure*) as those which refuse to be at the Common Law of the land." And immediately after this statute, the form of the judgment appears in *Fleta* and *Britton* to have been only a very strait confinement in prison, with hardly any degree of sustenance; but no weight is directed to be laid upon the body, so as to hasten the death of the sufferer: and indeed any surcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by *Horne* in the Mirror as a species of criminal homicide. *Mirr. c.* 1. § 9. It also clearly appears, by a record of

31 *E.*

31 *E.* 3, that the prisoner might then possibly subsist for forty days under this lingering punishment. It seems, therefore, that the practice of loading him with weights, or as it was usually called, *pressing him to death*, was gradually introduced between 31 *E.* 3, and 8 *Hen.* 4, at which last period it first appears upon our books; being intended as a species of mercy to the delinquent, by delivering him the sooner from his torment; and hence it seems also that the duration of the penance was then first altered; and instead of continuing *till he answered*, it was directed to continue *till he died*, which must very soon happen under an enormous pressure. *Yearb.* 8 *Hen.* 4. 1, 2.

The uncertainty of its original, the doubts that were conceived of its legality, and the repugnance of its theory (for it rarely was carried into practice) to the humanity of the laws of *England*, all concurred to require a legislative abolition of this process, and a restitution of the ancient Common Law, whereby the standing Mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. Or, if the corruption of the blood, and the consequent escheat in felony had been removed, the judgment of *peine forte et dure* might perhaps have still innocently remained, as a monument of the rapacity with which the tyrants of feodal antiquity hunted after escheats and forfeitures; since no one would ever have been tempted to undergo such a horrid alternative. For the law was, that by standing Mute, and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the *lands* were saved in felony, and petit treason, though not the forfeiture of the *goods*; and therefore this lingering punishment was probably introduced, in order to extort a plea, without which it was held that no judgment of death could be given, and so the lord lost his escheat. But in high treason, as standing Mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures always attended it as in other cases of conviction. 2 *Hawk. P. C. c.* 30. § 9. And now, to the honour of our laws, it is enacted by *stat.* 12 *Geo.* 3. *c.* 20, that every person who, being arraigned for felony or piracy, shall stand Mute or not answer directly to the offence, shall be convicted of the same; and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded, as if the person had been convicted by verdict or confession of the crime. Standing Mute, therefore, at present, in all cases, amounts to a constructive confession. Two instances have occurred, since the passing this statute, of persons who refused to plead, and who were in consequence condemned and executed; one at the Old Bailey for murder in 1778, the other for burglary at the summer assizes at *Wells* in 1792. See 4 *Comm c.* 25. *p.* 324—329. & *n.*

Although this subject is now become matter of curiosity rather than instruction, the following further particulars as to this terrible punishment, are preserved for the satisfaction of the inquiring student.

It is said by Sir *Matth. Hale*, that an appellee of felony standing Mute shall be executed, and not have judgment of penance; but the contrary hath been held by others. *H. P. C.* 226: *S. P. C.* 150: 2 *Inst.* 178: *Kel.* 37. One who stands Mute shall have the benefit of clergy, unless it be otherwise specially provided by some statute. And although it be enacted by *stat.* 3 & 4 *W.* & *M. c.* 9, that if any person shall be indicted of any offence, for which, by virtue of any former statute, he is excluded from the benefit of his clergy, if he had been thereof convicted by verdict or confession, if he stand Mute he shall not be admitted to the same; yet appeals, and offences excluded from the benefit of clergy, by subsequent statutes, seem not within that act and a statute taking away the benefit of clergy generally from those who are convicted of a crime, doth not take it away from those who stand Mute on an indictment or appeal. 2 *Hawk. c.* 30. But see the statutes 25 *H.* 8, *c.* 3, and 5 & 6 *Ed.* 3. *c.* 10; whereby it is enacted, that those who are indicted of offences for which the benefit of clergy is not to be allowed, shall not have their clergy if they stand Mute, &c. and this Dictionary, title *Clergy, Benefit of.*

Hawkins, in his description of the *peine forte et dure*, says; that the manner of inflicting this punishment may be best found from the books of entries and other law books; all of which generally agree, that the prisoner shall be remanded to the place from whence he came, and put into some low dark room, and there laid on his back without any manner of covering, except for the privy parts; and that as many weights be laid upon him as he can bear, and more, and that he shall have no manner of sustenance but the worst bread and water, and that he shall not eat the same day in which he drinks, nor drink the same day on which he eats, and that he shall so continue till he die. But that it is said that anciently the judgment was not, that he should continue until he should die, but until he should answer; and that he might save himself from the penance by putting himself upon his trial, which he cannot do at this day after judgment of penance once given. 2 *Hawk. P. C. cap.* 30. *s.* 16.

And there in the margin, the Serjeant, as to the remanding him to the place whence he came, cites *H. P. C.* 227: *S. P. C.* 150. (E): *Keilw.* 70. *a*: 4 *Ed.* 4. 11. *pl.* 18: 14 *Ed.* 4. 8. *pl.* 17: *Abr. Br. Corone* 160: 2 *Inst.* 178: *Ra. Ent.* 385. *pl.* 17: 8 *Ed.* 4. 1. *pl.* 2.

And as to the words in *some low dark room*, he says, that this clause is omitted in *Keilw.* 70, *a*: 4 *Ed.* 4. 11. *pl.* 18. but is mentioned in all the other books above cited, but with this difference, that 14 *Ed.* 4. 11. *pl.* 17, says only he shall be put in a chamber, without adding that it shall be low or dark.

And as to the words *there laid on his back*, &c. he says, that in this all the books above cited seem to agree. And 14 *Ed.* 4. 8. *pl.* 17, and *S. P. C.* 150. (E), and 2 *Inst.* 178, add, that he shall lie without any litter or other thing under him, and that one arm shall be drawn to one quarter of the room with a cord, and the other to another, and that his feet shall be used in the same manner. But that these clauses are wholly omitted in all the other books above cited, except *H. P. C.* which takes notice of the latter of them only. And *Ra. Ent.* 385. *pl.* 2. adds, that an hole shall be made for the head. And *Keilw.* 70, *a.* says, that the head shall not touch the earth: but none of the other mention either of these clauses.

And as to the words, *that as many weights shall be laid upon him as he can bear, and more*, &c. he says, that in this all the books above cited agree.

And

And as to the word *bread*, he says that 14 *Ed.* 4. 8. *pl.* 17: *S. P. C.* 150. (E), and 2 *Inst.* 178, are, that he shall have *three morsels* of barley bread a day. *Keilw.* 70. *a.* that he shall have only rye bread, and *Ra. Ent.* 385. *pl.* 2. and 2 *Hen.* 4. 1. *pl.* 2, generally, that he shall have the *worst bread*.

And as to the word *water*, he says, that in 14 *Ed.* 4. 8. *pl.* 17: *S. P. C.* 150. (E): 2 *Inst.* 178, and 8 *Hen.* 4. 1. *pl.* 2, and *Keilw.* 70, *a.* are, that he shall have *the water next the prison*, so that it be *not current*; but *Ra. Ent.* 385. *pl.* 5, is general, that he shall have the *worst water*.

And as to the words, *not eat the same day on which he drinks, nor drink the same day on which he eats*, &c. he says, this is omitted in *Keilw.* 70, *a.* and in 8 *Hen* 4. 1, *pl.* 2.

And as to the words *till he die*, he says, this is omitted in none of the books above cited, except 14 *Ed.* 5. [4.] 11. and *H. P. C* 227. But that neither of these books give the whole judgment at large. 2 *Hawk. Pl. C.* c. 30.

To advise a prisoner to stand mute, is a high misprision, a contempt of the King's Court, and punishable by fine and imprisonment. See title *Misprision*.

For more learning on this, now fortunately obsolete, subject, see 15 *Vin. Abr.* title *Mute*; and *Barrington's Observations on ancient Statutes*, p. 51—54.

MUTILATION, The depriving a man of any member, &c. See title *Mayhem*.

For some offences the law punishes with Mutilation, or dismembering, by cutting off the hand, or ears, &c. See titles *Judgment, criminal*; *Misprision*; *Libel*, &c.

MUTINY; See titles *Soldiers*; *Militia*; *Courts-Martial*.

MUTUAL DEBTS; See title *Set-off*, and *stats.* 2 *Geo.* 2. *c.* 22: 8 *Geo.* 2. *c.* 24.

MUTUAL PROMISE, Is where one man promises to pay money to another, and he in consideration thereof promises to do a certain act, &c. See title *Assumpsit*.

MUTUATUS. If a man oweth another 10*l.* and hath a note for the same, without seal, action of debt lies upon a *Mutuatus*; but in this there may be wager of law, which there may not be in action upon the case, on an implied promise of payment, &c. See title *Debt*.

MUTUO, To borrow or to lend. 2 *Saund.* 291.

MUTUS ET SURDUS, A person dumb and deaf, and being tenant of a manor, the lord shall have the wardship and custody of him. 2 *Cro.* 105. If a man be dumb and deaf, and have understanding, he may be grantor or grantee of lands, &c. 1 *Inst.* See *Deaf*.

MYSTERY, *Misterium*, from the Fr. *meistier*, *mistier*, *ars, artificium*.] An art, trade, or occupation.

N.

NACELLA, A skiff or boat. *Mat. Paris.*

NACKA, NACTA, A small ship, yacht, or transport vessel. *Chartular. Abbat. Rading. MS. fol.* 51.

NAM, or NAAM, *namium*; from the Sax. *naman, capere.*] The taking or distraining another man's moveable goods. Lawful Naam, which is a reasonable distress, proportionable to the value of the thing distrained for, was anciently called either *vif* or *mort*, quick or dead, as it consisted of dead or quick chattels; and it is when one takes another man's beasts damage-feasant, in his ground; or by reason of some contract made, as for default of payment of an annuity, it shall be lawful to distrain in such or such lands, &c. There is also a Naam unlawful mentioned in our books. *Horn's Mirror, lib.* 2. See *Leg. Canut. c.* 18: *Spelm. Gloss.* and this Dictionary, title *Replevin*: and *post, Namium.*

NAMATION, *namatio*.] A taking or distraining; and in *Scotland* it is used for impounding: *Namatus*, distrained. *Charta, Hen.* 2. See *Vetitum Namium*, and *Witthernam.*

NAME, *nomen*, Fr. *nosme* or *nom.*] By which any person is known or called. There is a name of persons, bodies politic, and places; and of baptism and surname; also names of dignity, &c. In some cases a name by reputation is sufficient; but it is not so of a thing, if the matter and substance be not right. 11 *Rep.* 21: 6 *Rep.* 65: 4 *Rep.* 170. What foundation will support a name by reputation, See *Ld Raym.* 301, 304: and this Dictionary, title *Misnomer.*

NAMIUM VETITUM, An unjust taking the cattle of another, and driving them to an unlawful place, pretending damage done by them. In which case the owner of the cattle may demand satisfaction for the injury, which is called *placitum de namio vetito.* 2 *Inst.* 140: 3 *Comm* 149. See titles *Replevin*; *Withernam.*

NAPPERA, From *Ital. naperia, linteamina domestica.*] Linen cloth, or household linen. See *stat.* 2 *R.* 2. *c* 1.

NARR, An abbreviation of *narratio*; a declaration in a cause.

NARRATOR, *Lat.*] A pleader or reporter. *Serviens narrator*, a serjeant at law; a serjeant-counter. *Fleta, lib.* 2. *cap.* 37.

NASSE or NESSE, From Sax. *Nase, Promontorium.*] The name of the port or haven of *Orford*, in *Suffolk*, mentioned in *stat.* 4 *Hen.* 7. *c.* 21. Hence also *Sheerness.*

NATALE, The state and condition of a man.

NATHWYTE, Seems to be derived from the Sax. *nath*, i. e. lewdness; and so to signify the same with *Lairwyte.* See that title.

NATIONAL DEBT, The money owing by Government, for which it pays interest, part to our own people, part to foreigners, and which forms our National Funds. After the Revolution, when our new connections with *Europe* introduced a new system of foreign politics, the expences of the nation, not only in settling the new establishment, but in maintaining long wars, as principals, on the continent, for the security of the *Dutch* barrier, reducing the *French* monarchy, settling the *Spanish* succession, supporting the house of *Austria*, maintaining the liberties of the *Germanic* body, and other purposes, increased to an unusual degree; insomuch that it was not thought adviseable to raise all the expences of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the State, and to lay no more taxes upon the Subject than would suffice to pay the annual interest of the sums so borrowed; by this means converting the principal debt into a new species of property, transferable from one man to another, at any time and in any quantity. A system which seems to have had its original in the State of *Florence*, A. D. 1344, which Government then owed about 60,000*l.* sterling; and being unable to pay it, formed the principal into an aggregate sum, called metaphorically a *Mount* or *Bank*, the shares whereof were transferable like our stocks, with interest at 5*l. per cent.* the prices varying according to the exigencies of the State. This laid the foundation of what is called the National Debt: for a few long annuities created in the reign of *Charles* II. will hardly deserve that name. And the example then set has been so closely followed during the long wars in the reign of Queen *Anne*, and since, that the capital of the National Debt has by degrees increased to the wonderful sum of between 250 and 300 millions sterling, to pay the interest of which, and the charges for management, the extraordinary revenues of the kingdom (excepting only the land-tax and annual malt tax) are in the first place mortgaged, and made perpetual by parliament; redeemable, however, by the same authority that imposed them: which, if at any time it can pay off the capital, will abolish those taxes which are raised to discharge the interest. See 1 *Comm. c.* 8, and Mr. *Christian*'s notes there; as to the policy and effect of this National Debt; a subject adapted more to the discussion of the Politician than the Law Student.

By *stat.* 26 *Geo.* 3. *c.* 31, the annual sum of *one million* was vested inalienably in Commissioners for the reduction of the National Debt; in which act every possible precaution was taken, that could be devised, for preventing this fund from being diverted at any future time; and for carrying to the account of the Commissioners, for the purpose of the act, the interest of such stock as should be purchased, and such temporary annuities as should fall in.

Under the provisions of this statute, about ten millions of the capital of the National Debt had been purchased; and the annual sum applicable to the reduction of it was near one million and a half; previous to the war which commenced in 1793.

See the *ſtat.* 32 *Geo.* 3. *c.* 55, for rendering the said *ſtat.* 26 *Geo.* 3. *c.* 31, more effectual; and for providing for the diſcharging of any increaſe of the National Debt through new loans; and *Stats* 33 *Geo.* 3. *c.* 22: 34 *Geo.* 3. *c.* 48, for furthering the ſame purpoſes.

NATIVI DE STIPITE. In the ſurvey of the Dutchy of *Cornwall*, there is mention of *nativi de ſtipite*, and *nativi conventi*...*marii*; the firſt were villeins or bondmen, by birth or ſtock; the other by contract or agreement. *LL. Hen.* 1. *cap.* 76. And in *Cornwall* it was a cuſtom, that a freeman marrying *nativam*, if he had two daughters, one of them was free, and the other villein. *Bract. lib.* 4. *c.* 21, 22.

NATIVITY, *nativitas.*] Birth, or the being born in a place. The caſting the Nativity, or by calculation ſeeking to know how long the Queen ſhould live, &c. was made felony, by *ſtat.* 23 *Eliz. c.* 2. *Nativitas* (*Neifty*) was anciently taken for the ſervitude, bondage, or villeinage, of women. *Leg. Wil.* 1.

NAVIVO HABENDO, A writ that lay to the ſheriff for a lord who claimed inheritance in any villein, when his veillin was run away, for the apprehending and reſtoring him to the lord: and the ſheriff might ſeize the villein, and deliver him unto his lord, if he confeſſed his villeinage; but if he alledged that he was a freeman, then the ſheriff ought not to ſeize him, but the lord was to ſue forth a *pone* to remove the plea before the juſtices of *C. B.* &c. And if the villein purchaſed a writ *de libertate probanda* before the lord had taken out the *pone*, it was a *ſuperſedeas* to the lord, that he proceeded not on the writ of *nativo habendo*. *Reg. Orig.* 7, 8: *F. N. B.* 77: *New Nat. Brev.* 171, 172.

This writ *nativo habendo* was in nature of a writ of right, to recover the inheritance in the villein; upon which the lord was to purſue his plaint, and declare thereupon, and the villein to make his defence ſo as the freedom was to be tried. *New Nat. Br.* 171, 173. See title *Villain.*

NATIVUS, He who was born a ſervant, and ſo differed from him who ſuffered himſelf to be ſold, of which ſervants there were three ſorts, bondmen, natives, and villains; bondmen were thoſe who bound themſelves by covenants to ſerve, and took their name from the word *bond*; natives we ſpoke of juſt before; and villains were ſuch who belonging to the land, tilled the lord's demeſnes, nor might depart thence without the lord's licence. *Spelman's Gloſſ.* See *Chart. R.* 2; *Quà omnes manumittit a bondagio in com.* Hertf. *Walſingham, p.* 254. *Cowell.* See title *Villain.*

NATURAL AFFECTION, *naturalis affectio.*] Is a good conſideration in a deed; and if one, without expreſſing any conſideration, covenant to ſtand ſeiſed to the uſe of his wife, child, or brother, &c. here the naming them to be of kin, implies the conſideration of Natural affection, whereupon ſuch uſe will ariſe. *Cart.* 138. See title *Conſideration.*

NATURALIZATION; See title *Alien.*

NATURÆ *Pudenda*, Privities. *Leg. Hen.* 1. *c.* 83.

NAVAGIUM, A duty incumbent on tenants, to carry their lord's goods in a ſhip. *Mon. Angl.* i. 922.

NAVAL STORES. Perſons ſtealing or imbezzilling any of the King's Naval Stores, to the value of twenty ſhillings, are guilty of felony without benefit of clergy. *Stat.* 22 *Car.* 2. *cap.* 5. And by *ſtat.* 1 *Geo.* 1. *ſt.* 2. *c.* 25, the treaſurer and commiſſioners of the navy are impowered to inquire of Naval Stores imbezilled, and appoint perſons to ſearch for them, &c. who may go on board ſhips, and ſeize ſuch Stores; and the commiſſioners, &c. may impriſon the offenders, and fine them double value, the Stores being under the value of twenty ſhillings.

None but the contractors with the commiſſioners of the navy, ſhall make any Stores of war, Naval Stores, with the marks commonly uſed to his Majeſty's Stores, upon pain of forfeiting two hundred pounds. And perſons in whoſe cuſtody ſuch Stores ſhall be found concealed, are liable to the ſame penalty. *Stat.* 9 & 10 *W.* 3. *c.* 41.

The *ſtat.* 3 *Ann. c.* 10, was made for the encouragement of the importation of Naval Stores from the plantations in *America*, and for preſervation thereof in thoſe countries; inflicting penalties for cutting down pine, or pitch trees, under ſuch and ſuch ſizes, &c. To the like purpoſe, and for the making the ſame more effectual, is the *ſtat.* 8 *Geo.* 1. *cap.* 12.

Alſo Naval Stores are imported here from *Scotland*, under an encouragement by ſtatute; and a *premium* is given for the importing of Naval Stores from *America* and *North Britain*, of one pound *per* ton, for maſts and pitch, &c. by *ſtat:* 2 *Geo* 2. *cap.* 35.

Juſtices may mitigate the penalty of concealing Stores; *ſtat.* 9 *Geo.* 1. *c.* 8. Juſtices of aſſize and quarter ſeſſions may hear and determine offences relating to Stores; *ſtat.* 17 *Geo.* 2. *c.* 40. Pre-emption of Stores imported in neutral ſhips given to the commiſſioners of the navy during the war; *ſtat.* 19 *Geo.* 2. *c.* 36. The exportation of Naval Stores prohibited; *ſtat.* 33 *Geo.* 2. § 1.

NAUFRAGE, A ſea term for ſhipwreck. *Merch. Dict.*

NAVIGABLE RIVERS; See *Rivers.*

NAVIGATION, Is the art of ſailing at ſea, alſo the manner of trading: and a navigator is one who underſtands *Navigation*, or imports goods in foreign bottoms. See title *Longitude.*

NAVIGATION-ACTS.

THOSE Statutes which have from time to time been made for the encouraging and increaſing of SHIPPING and NAVIGATION.

The following is a general view of the preſent ſtate and effect of the laws which the Legiſlature has ſeen fit to provide for this purpoſe; and is extracted and abridged from *Reeves*'s Hiſtory of that branch of the law.

This ſyſtem is a ſeries of reſtrictions and prohibitions, and it tends to the eſtabliſhing of monopoly; but it is a plan of regulation which our anceſtors, who were more verſed in the practical philoſophy of life than the ſpeculative one of the cloſet, thought neceſſary for the welfare and ſafety of the kingdom. Reaſoning from the ſelf-preſervation of an individual to the ſelf-preſervation of a people, they conſidered the defence of this iſland from foreign invaſion, as the firſt law in national policy; and judging that the dominion of the land could not be preſerved without poſſeſſing that of the ſea, they made every effort to procure to the nation a maritime power of its own. They wiſhed that the merchants ſhould own as many ſhips, and employ as many *native* mariners as poſſible. To induce, and ſometimes to force them to this application of their capital, reſtrictions and prohibitions were deviſed. Theſe affected not only foreigners but

but natives. The interests of commerce were often sacrificed to this object. Trade was considered principally as the means of promoting the employment of ships, and was encouraged chiefly as it conduced to the one great national object, *the Naval strength of the Country.*

This policy was pursued by those who came after them in directing the public councils; and in the last century, when many institutions of our ancestors fell a sacrifice to the rage of reformation, the wisdom of the *Navigation System* was respected; measures were even taken for rendering it more narrow and restrictive.

If the wisdom of any scheme of policy is to be measured by its effects and consequences, our Navigation System is entitled to the praise of having attained the end for which it was designed. Whether we regard the primary or inferior objects in this system, whether it is the increase of shipping, the extension of our foreign trade, or the strength of our navy, they have all advanced to a degree of consideration unexampled, and they owe that advancement to this system.

The increase of our trade and Naval strength has kept pace with that of our shipping and Navigation. We can reflect with pride, that our foreign trade, combined with our manufactures and domestic industry, enables us to raise annually *sixteen millions* of money with more ease, than four millions were raised during the reign of King *William*; and this upon a people, who, in their different ranks, enjoy more riches, more competency, and more comfort, than any people in *Europe*; and who are more industrious, because they are better protected by a Constitution, which has been progressively improving, both in the theory and practice of it, to the present time.

The first grand scheme for establishing *English* Shipping and Navigation on a footing of distinction, that had never been before attempted, was brought forward by the famous *Act of Navigation*, passed by the Usurpation-Parliament, 9th of *October* 1651. In this act we may see principles, which had been gradually developing in former laws, (and which had been enforced, repealed, or qualified, according as different opinions prevailed, and circumstances allowed,) now adopted and expanded to their full extent, in one system of regulation, that has subsisted, without any material change in its substance, to the present day.

One principal object of jealousy at the time of passing this act, was the immense *carrying trade* possessed by the *Dutch*; and the title of the act is suited to this leading idea, "*Goods from foreign parts, by whom to be imported.*" *Vide Scob. Acts, ann.* 1651. *c.* 22. *p.* 132. The portion of the carrying trade with our colonies, which the *Dutch* had obtained, was the most serious grievance, and that which the nation bore with least patience.

The next main object was, *the Fisheries*, in which the rivalship and success of the *Dutch* had been long regarded as a national loss and disgrace.

From these two motives arose the scheme of Navigation, which the bold reformers of that day designed, for increasing the naval strength and consideration of this country. It may be said to have originated in jealousy, and to have caused the decline and diminution of a neighbouring nation; but it was founded in a policy, which the necessities and the advantages of an insular situation suggested; and the nation having, from supineness, or ignorance, permitted an active neighbour so long to take a share in the fisheries and foreign trade which belonged to us, thought itself justified in asserting, at length, its rights, and carrying them into full effect by this legislative act. And although this measure brought upon the country an obstinate and bloody war, and though the authority on which it was founded was unconstitutional and usurped, yet a plan so wise and solid was strenuously maintained by those who formed it; and it was not suffered to pass away with the transient government from which it derived its origin; the leading features of it were adopted by the lawful government, at the restoration of *Ch.* II. when a new act of Navigation was passed.

The present condition of our Marine (says *Blackstone*) is in a great measure owing to the salutary provisions of the statutes called the *Navigation Acts*; whereby the constant increase of *English* shipping and seamen was not only encouraged, but rendered unavoidably necessary. By *stat.* 5 *R.* 2. *c.* 3, in order to augment the navy of *England*, then greatly diminished, it was ordained, that none of the King's liege people should ship any merchandize out of or into the realm, but only in ships of the King's ligeance, on pain of forfeiture In the next year, by *stat.* 6 *R.* 2. *c.* 8, this wise provision was enervated, by only obliging the merchants to give *English* ships (if able and sufficient) the preference. But the most beneficial statute for the trade and commerce of these kingdoms is that *Navigation Act*, the rudiments of which were first framed in 1650, with a narrow partial view; being intended to mortify our own sugar islands, which were disaffected to the Parliament, and still held out for *Charles* II.; by stopping the gainful trade which they carried on with the *Dutch*; and at the same time to clip the wings of those our opulent and aspiring neighbours. This prohibited all ships of foreign nations from trading with any *English* plantations, without licence from the Council of State. In 1651, the prohibition was extended also to the mother country; and no goods were suffered to be imported into *England*, or any of its dependencies, in any other than *English* bottoms; or in the ships of that European nation, of which the merchandize imported was the genuine growth or manufacture. At the Restoration, the former provisions were continued by *stat.* 12 *Charles* II, *c.* 18, with this very material improvement, that the master and three-fourths of the mariners shall also be *English* subjects; under forfeiture of the ship, and all goods imported or exported. 1 *Comm. c.* 13. *p.* 417.

This STAT. 12 CAR. II. c. 18, is intitled "AN ACT FOR THE ENCOURAGING AND INCREASING OF SHIPPING AND NAVIGATION;" which pursues the policy and detail of the one made in 1651, using sometimes its very words. It has made however some alterations, and has, as already remarked, added considerably to the scope of the former act.

Having thus slightly traced the history of these celebrated laws, we shall proceed by endeavouring to separate such matter as is repealed or become obsolete; and to extract so much as constitutes the law of the present day; not indeed the whole particulars of it, but such an outline as may easily be filled up by a reference to the statutes, and Mr. *Reeves*'s excellent digest of them on this subject. To assist the reader's mind, these principles are condensed into certain RULES and the EXCEPTIONS to them; and to each rule and exception are subjoined

joined the grounds and reasons on which they are respectively founded.

The *Act of Navigation*, as the *stat.* of 12 *Car.* 2 *c.* 18, is usually stiled, is looked on as the origin and great charter of our Navigation system, upon which all subsequent laws may be considered as comments. It seems most natural therefore to class our proposed rules according to the course directed by that act, and under the heads into which that is divided. These are,

I. *The Plantation Trade.* And herein,

(A) *Of the* general trade *with the* [illegible] *dominions*; and

(B) *Of the trade with the* United States of America, *and the* Colonies [illegible]

II. *The Trade* [illegible]

III. *The European Trade.*

IV. *The Coasting Trade.*

V. *The Fisheries*; and lastly,

VI. *British Ships and their registry.*

I. (A) RULE 1. No goods or commodities, may be imported into, or exported out of, any *colony or plantation* to his Majesty in *Asia, Africa, or America*, belonging, or in his possession, but in British built ships owned by *British* subjects, and navigated by a master and three-fourths at least of the mariners, *British* subjects; or in prize ships, legally condemned and navigated in like manner. [illegible] Rule 21.) *Stat.* 7 & 8 *W.* 3. *c.* 22. [illegible]

[Except [illegible] such goods and commodities as may be imported into, and exported from, the free ports in the islands of *Jamaica*, *Granada*, *Dominica*, and *New Providence*, by foreign ships owned and navigated by the subjects of some foreign European Sovereign, or State, or by persons inhabiting any country under the dominion of some foreign European Sovereign or State, on the continent of *America*; and except salt, which may be [illegible] in ships belonging to [illegible]

These exceptions [illegible] 27 *Geo.* 3. *c.* 27, for establishing free ports, [illegible] by *stat.* 30 *Geo.* 3. *c.* 29 [illegible] *stat.* 28 *Geo.* 3. *c.* 6. § 9, respecting [illegible] 355, 373.

The [illegible] *c.* 27, is made perpetual by [illegible] and amended by *stat.* [illegible]

[illegible] sugar, tobacco, cotton, wool, indigo, ginger, [illegible] other dying woods, (*stat.* 12 *Car.* 2. *c.* 18. [illegible] § 18.) rice, molasses (*stat.* 3 & 4 *Ann.* [illegible]) copper ore, (*stat.* 8 *Geo.* 1. *c.* 18. § 22,) coffee, pimento, cocoa nuts, whale fins, raw silk, hides, or skins, pot or pearl ashes, iron or lumber, of the growth, production, or manufacture, of any *British plantation in Asia, Africa*, or *America*, (*stat.* 4 *Geo.* 3. *c.* 15. § 27, 28.) *may be transported* [illegible] *place whatsoever*, other than to some *British plantation*, or to *Great Britain*; or (by *stat.* 20 *Geo.* 3. *c.* 10; and *stat.* 23 *Geo.* 3. *c.* 63,) to *Ireland*.

[Except sugar, which may be carried from the sugar colonies to any port in *Europe*, in a ship clearing out from *Great Britain*, and having a licence from the commissioners of the customs for that purpose; and lumber, which may be carried from any *British* colony or plantation to the *Madeiras*, or the Western Islands called *Azores*, or to any part of Europe to the southward of *Cape Finisterre*.]

This depends on *stat.* 12 *Geo.* 2. *c.* 30; [illegible] by *stat.* 15 *Geo.* 2. *c.* [illegible]) and [illegible]. See [illegible] 103.—By *stat.* 12 *Geo.* 3. *c.* [illegible] [illegible] certain price, in [illegible] *stat.* 15 *Geo.* 3. *c.* [illegible] 10, 11. [illegible] the importation of foreign sugar and coffee into certain of the *West India* islands; and the re-exportation of them from thence without payment of duty.

RULE 3. All other goods and commodities, not so enumerated, being the growth, production, or manufacture of any *British* colony or plantation in *Asia, Africa*, or *America*, may be transported to any place whatsoever.

Because what is not prohibited or restricted by any statute, is open and free: And by *stat.* 30 *Geo.* 3. *c.* 29. § 2, goods the growth of the countries bordering on *Quebec*, and imported into that province, may be imported into *Great Britain* from thence.

[Except hops to *Ireland*, *stat.* 5 *Geo.* 2. *c.* 9; rum and other spirits, to the *Isle of Man*, *stat.* 5 *Geo.* 3. *c.* 39; rum to *Guernsey* and *Jersey*, *stat.* 9 *Geo.* 3. *c.* 28. § 1, 2, 3; and *East-India* goods, which must be brought to the port of *London*; *stat.* 7 *Geo.* 1. *c.* 21. § 9.]

RULE 4. No goods or commodities of the growth, production, or manufacture of *Europe*, may be *imported* into any land, island, plantation, *colony*, territory, or place to his Majesty belonging, or in his possession, in *Asia, Africa*, or *America*, but such as shall be shipped in *Great Britain*. *stat.* 15 *Car.* 2. *c.* 7. § 6; or *Ireland*: *stat.* 20 *Geo.* 3. *cc.* 6, 7, 10; and *stat.* 23 *Geo.* 3. *c.* 63.

[Except salt for the fisheries of *Newfoundland*, and wines from the *Madeiras*, and from the Western Islands or *Azores*; (*stat.* 15 *Car.* 2. *c.* 7. § 7;) craft, clothing, or other goods, the growth, production, or manufacture of *Great Britain*, *Guernsey*, or *Jersey*; or food or victuals, the growth, production, or manufacture of *Great Britain*, *Ireland*, *Guernsey*, or *Jersey*, from *Guernsey* or *Jersey* to *Newfoundland*, or any other *British* colony where the fishery is carried on, for the use of the fishery. *Stat.* 9 *Geo.* 3. *c.* 28.]

RULE 5. Lands, islands, territories, or places to his Majesty belonging, in *Asia, Africa*, or *America*, *not being Colonies*, or plantations, are not included in any of the foregoing prohibitions or restrictions, other than the prohibition contained in the fourth *rule*, and the restriction that all goods and commodities must be imported into, and exported out of, them in *British*-built ships, or in *British* ships owned by his Majesty's subjects, and navigated by a master and three-fourths at least of the mariners *British* subjects.

If the before-mentioned prohibitions and restrictions are confined by the statutes enacting them, to *Colonies* and *Plantations*, then all islands, lands, territories, or places, that are judged not to be colonies or plantations, (if there are any such) are not within the meaning of them; and such lands, islands, territories, and places, are only included in the first section of the Act of Navigation, and the fixth section of *stat.* 15 *Car.* 2. *c.* 7, where they are so named; and not in the second section of

of the act of Navigation concerning the enumerated goods, where colonies and plantations are named; nor in *stat.* 7 & 8 *Will.* 3. c. 22. which confines the import and export of the colonies and plantations to *British*-built ships. See *Reeves* 134—7.

(B) Rule 6. Sugar, molasses, cocoa-nuts, ginger, and pimento, and all goods and commodities which were not prohibited in the year 1787 to be exported to any foreign country in Europe, may be *exported from the* West India Islands *to the* United States. *Stat.* 28 *Geo.* 3. c. 6. § 3.

Rule 7. No goods or commodities may be *imported from* the United States *into the* West-India Islands, except tobacco, pitch, tar, turpentine, hemp, flax, masts, yards, bowsprits, staves, heading-boards, timber, shingles, and lumber of any sort; horses, neat-cattle, sheep, hogs, poultry, and live stock of any sort; bread, biscuit, flour, peas, beans, potatoes, wheat, rice, oats, barley, and grain of any sort, being the growth or production of any of the territories of the United States. *Stat.* 28 *Geo.* 3. c. 6. § 1.

Rule 8. No goods or commodities may be *imported from the United States* by sea or coastwise *into* the province of *Quebec*, or the countries or islands within that government, or up the river *St. Lawrence*, (*stat.* 28 *Geo.* 3. c. 6. § 14.) nor at all into the province of *Nova Scotia* or *New Brunswick*, the islands of *Cape Breton*, *St John's*, or *Newfoundland*, or any country or island within their respective governments. *Stat.* 28 *Geo.* 3. c 6 § 12.

[Except that the Governors of *Nova Scotia*, *New Brunswick*, the islands of *Cape Breton*, and *St. John's*, may, in cases of public emergency and distress, authorize the importation of scantling, planks, staves, heading-boards, shingles, hoops, or squared timber of any sort, horses, neat-cattle, sheep, hogs, poultry, or live stock of any sort, bread, biscuit, flour, peas, beans, potatoes, wheat, rice, oats, barley, or grain of any sort, for a limited time; and the Governor of *Newfoundland*, being impowered by order of his Majesty in Council, may authorize, in case of necessity, the importation of bread, flour, *Indian*-corn, and live stock, for the then ensuing season only. *Stat.* 28 *Geo.* 3. c. 6. § 13.]

And by *stat.* 30 *Geo.* 3. c. 8. § 1, the Governor of *Quebec* may authorize the importation of cattle, grain, or flour, by sea or coastwise, from the *United States*, by *British* Subjects in *British* vessels. By *stat.* 33 *Geo.* 3. c. 50. § 14, *Pitch*, *tar*, and *turpentine* the produce of the *United States* may now be imported into *Nova Scotia* and *New Brunswick*, by *British* Subjects in *British* ships.

By § 10, of the above *stat.* 28 *Geo.* 3. c. 6, no tobacco, pitch, tar, turpentine, hemp, flax, masts, yards, bowsprits, staves, heading-boards, timber, shingles, or lumber of any sort; bread, biscuit, flour, peas, beans, potatoes, wheat, rice, oats, barley, or grain, shall be imported into the *West India* islands, including the *Bahama* and *Bermudas* islands, from any of the foreign European *West-India* islands; or (by *stat.* 31 *Geo.* 3. c. 38. § 11) from any foreign colony or plantation whatsoever, belonging to any foreign European State; on penalty of forfeiture, except by authority of the respective Governors in cases of public emergency, and except timber of certain species under *stat.* 33 *Geo.* 3 c. 50. § 14.

Rule 9. Goods and merchandize being the growth or production of any of the territories of the *United States of America*, may be imported directly from thence in *British-built ships*, *owned by British Subjects*, and navigated according to law, or in ships built in the countries belonging to the *United States*, owned by such Subjects, and navigated by a master and three-fourths of the mariners of those countries, under the following duties; namely, unmanufactured goods and merchandize, (except fish, oil, blubber, whale-fins, and spermaceti,) and also tobacco, pig-iron, bar-iron, pitch, tar, turpentine, rosin, pot-ash, pearl ash, indigo, masts, yards, and bowsprits, upon the same duties as if they came from any *British* island or plantation in *America*: secondly, fish, oil, blubber, whale-fins, spermaceti, and all other goods, and merchandize, (except snuff,) upon the lowest of the duties imposed by law upon those articles, if they came from countries not under the *British* dominion: thirdly, snuff upon the same duties as if it was the product and manufacture of *Europe*.

This stands upon an annual order of council, made by virtue of *stat.* 23 *Geo.* 3. c. 39, continued and enforced from time to time by statutes passed every year for that purpose.

The duties to be taken on the second class of goods and merchandize are those contained in the tables and schedules A, D, & F, of the Consolidation-Act, *stat.* 27 *Geo.* 3. c. 13, and those enacted by any law passed subsequent touching the duties in those schedules. Snuff is further to be subject to the regulations of *stat.* 29 *Geo* 3. c. 68.

The following regulations as to the Plantation-trade ought also to be noticed.

By *stat.* 30 *Geo.* 3 c. 26. § 2, exporters of goods to *Yucatan* are allowed the same drawbacks as to *America*. By *stat.* 30 *Geo.* 3. c. 27, Subjects of the *United States* settling in the *British* territories in *North America*, may import negroes, &c. duty-free. By *stat.* 34 *Geo.* 3. c. 35, Governors in the *West India* islands are indemnified for having permitted importation and exportation in foreign bottoms, under certain circumstances.

II. Rule 10. No goods or commodities of the growth, production, or manufacture of *Asia*, *Africa*, or *America*, may be imported into *Great Britain*, in any other than in *British-built ships*, or in *British ships* owned by his Majesty's Subjects, and navigated by a master and three-fourths at least of the mariners *British* Subjects. *Stat.* 12 *Car.* 2. c. 18. (*Navigation Act*) § 3.

[Except such goods and commodities of the growth or production of *the United States*, as are permitted by the before-mentioned order in council to be imported in ships belonging to the *United States*, as stated in the ninth rule.]

This is the only *direct* exception; but some of the instances which are given as exceptions to the subsequent rule are exceptions also to this, as far as they relate to ships.

Rule 11. No goods or commodities of the growth, production, or manufacture of *Asia*, *Africa*, or *America*, may be shipped or brought from any other place or country

country, *but only from those of their growth*, production, or manufacture, or from those ports where only they can can be, or are, or usually have been, first shipped for transportation.

This restriction applies as well to the trade with the plantations as the general trade with *Asia*, *Africa*, or *America*; and is founded on the construction of *stat.* 12 *Car.* 2. *c.* 18, (*Navigation Act*,) § 4.—See *Reeves* 140—143.

[Except the commodities of the *Streights* or *Levant Seas*, from the usual ports for lading them within the *Streights* or *Levant Seas* *Stat.* 12 *Car.* 2. *c.* 18. § 12. *East-India* commodities, from the usual ports for lading them to the southward and eastward of the *Cape of Good Hope*. *Id.* § 13. The goods of the *Spanish* or *Portuguese* plantations or dominions, from the ports of *Spain* or *Portugal*, or the Western Isles, commonly called *Azores*, or the *Madeira* or *Canary* Islands. *Id.* § 14. Bullion and prize goods, from any port in any sort of ships. *Id.* § 15. Jesuits-bark, sarsaparilla, balsam of *Peru* and *Tolu*, and all drugs the produce of *America*, from the *British* plantations. *Stat.* 7 *Ann.* *c.* 8. Raw-silks, or other goods of *Persia*, from any place belonging to the Emperor of *Russia*, in *British-built ships*. *Stat.* 14 *Geo.* 2. *c.* 36. Cochineal, by *stat.* 13 *Geo.* 1. *c.* 15, and indigo, by *stat.* 7 *Geo.* 2. *c.* 18, from any port in *British* ships, or ships of a State in amity. Gum-senega, by *stat.* 25 *Geo.* 2. *c.* 32; coarse printed calicoes, cowries, drangoes, and other *East India* goods, prohibited to be worn here, from any port in *Europe*, in *British* ships. *Stat.* 5 *Geo.* 3. *c.* 30. § 1. Cotton-wool, *stat.* 5 *Geo.* 3. *c.* 52. § 20; and goat-skins, raw, or undressed, 15 *Geo.* 3. *c.* 35. § 1, 2. (made perpetual by *stat.* 31 *Geo* 3. *c.* 43.) from any place, in *British-built ships*; and goods, the merchandize of the dominions of the Emperor of *Morocco*, from *Gibraltar*, in *British* ships, by *stat.* 27 *Geo.* 3. *c.* 19. § 11, See *Reeves* 142, 149, 37, 8.]

III. Rule 12. No goods or commodities of the growth, production, or manufacture of *Europe*, hereinafter enumerated and described, namely, no goods or commodities the growth, production, or manufacture of *Muscovy*, or of any territories belonging to the Emperor of *Russia*; nor any sort of masts, timber, or boards; no foreign salt, pitch, tar, rosin, hemp, or flax, raisins, figs, pruens, olive oils; no sort of corn, grain, sugar, pot-ashes, wines, vinegar, or spirits called aqua-vitæ, or brandy-wine, may be imported, but in *British built ships, or in ships owned by his Majesty's Subjects*, and navigated by a master and three-fourths at least of the mariners *British* Subjects; nor any currants or commodities of the growth, production, or manufacture of any country belonging to the *Turkish empire*, may be imported, but in *British-built ships owned by British Subjects*, and navigated by a master and three-fourths at least of the mariners *British* Subjects; or, in ships of the built of any country or place in *Europe* under the dominion of the Sovereign or State in *Europe* of which such goods are the growth, production, or manufacture; or of the built of such port where only the said goods can be, or most usually are, first shipped for transportation; and navigated by a master and three-fourths at least of the mariners of that country, place, or port.

This rule is founded on *stat.* 12 *Car.* 2. *c.* 18, (*Nav. Act*,) § 8, amended by *stat.* 27 *Geo.* 3. *c.* 19. § 10. See *Reeves* 197, 382, 383.

Rule 13. No sort of wines, (other than *Rhenish*,) no sort of spicery, grocery, tobacco, pot-ashes, pitch, tar, salt, rosin, deal-boards, fir, timber, or olive oil, may be imported from the *Netherlands*, or *Germany*, upon any pretence, in any sort of ships or vessels whatsoever. *Stat.* 13 & 14 *Car.* 2. *c.* 11. § 23. See *Reeves* 202, 205.

[Except timber, fir, planks, masts, and deal-boards, *the production of Germany*, from any port or place in *Germany*, by *British Subjects in British-built ships*; *stat.* 6 *Geo.* 1. *c.* 16. § 2; and wines, the growth or production of *Hungary*, the *Austrian* dominions, or any part of *Germany*, from the *Austrian* Netherlands, or any port or place belonging to the Emperor of *Germany*, or the House of *Austria*, in any such ships as are described in the twelfth rule. *Stat.* 22 *Geo.* 2. *c.* 78. § 2; amended by *stat.* 27 *Geo.* 3. *c.* 19. § 10.]

Rule 14. Bullion and prize goods, and all other goods and commodities of the growth, production, or manufacture of *Europe*, (not prohibited absolutely to be imported,) may be imported from any country, place, or port, *in any sort of ships*, owned and navigated in any sort of manner.

Because bullion and prize goods are excepted by § 15, out of all the provisions of the Act of Navigation; and because what is not prohibited or restricted by any statutes, is open and free.

IV. Rule 15. No person may lade or carry on board any ship or vessel, other than a *British-built ship*, or a *British ship owned by British Subjects* and navigated by a master and three-fourths at least of the mariners *British* Subjects, (by *stat.* 34 *Geo.* 3. *c.* 68, after the then existing war navigated *wholly* by *British* Subjects,) any commodities or things of what kind soever from any port or creek of *Great Britain* or *Ireland*, or of the islands of *Guernsey* or *Jersey*, to another port or creek of the same, or any of them. *Stat.* 12 *Car.* 2. *c.* 18, (*Nav. Act*,) § 6.

Rule 16. Every foreign-built ship or vessel, bought and brought into *Great Britain* to be employed in carrying goods and merchandize from any port to port, is to pay at the port of delivery for every voyage five shillings *per* ton, over and above all other duties. *Stat.* 1 *Jac.* 2. *c.* 18.

V. Rule 17. (See this Dictionary, title *Fish*.) *Fresh fish* of every kind caught by the crew of any *British-built ship*, or vessel *owned by British Subjects* usually residing in *Great Britain*, *Ireland*, *Guernsey*, *Jersey*, or *Man*, and navigated by a master and three-fourths at least of the mariners *British* Subjects, may be imported in such ships free of duty. *Stat.* 27 *Geo.* 3. *c.* 13. § 32.

Rule 18. No sort of fish whatever of *foreign fishing*, (except eels, stock-fish, anchovies, sturgeon, botargo, or caveare, turbots, lobsters, and oysters,) may be imported into *Great Britain*.

This depends on *stat.* 10 & 11 *Will.* 3. *c.* 24. § 13, 14: *stat.* 1 *Geo.* 1. *st.* 2. *c.* 18. § 1, 2, 3, enforced by *stat.*

ftat. 9 *Geo.* 2. *c.* 33 : and *ftat.* 26 *Geo.* 3. *c.* 81. § 43, 44. *Oyfters* are not fpecially excepted in any flatute, but there is a duty on them in the Confolidation-Act (*ftat.* 27 *Geo.* 3. *c.* 13,) which not being leviable on *Britifh*-caught fifh, muft be conftrued as a permiffion to import foreign-caught oyfters.

RULE 19. *Perpetual bounties* are payable on the export of pilchards, or fhads, cod-fifh, ling, or hake, whether wet or dried, falmon, white-herrings, red-herrings, and dried red-fprats, being of *Britifh* fifhing and curing. *Stats.* 5 *Geo.* 1. *c.* 18. § 6: 26 *Geo.* 3. *c.* 81. § 16.

RULE 20. *Temporary bounties* are payable on the tonnage of fhips carrying on the *Britifh* and *Greenland* Fifheries; on the quantity of fifh taken in the *Britifh and Newfoundland Fifheries*; on the quantity of oil, head-matter, blubber, and whale-fins, taken in the *Southern whale-fifhery*, and on the export of pilchards.—Seal-fkins, head-matter, blubber, and whale-fins, taken in the *Newfoundland*, *Greenland*, and Southern whale-fifheries, may be imported free of duty, provided *Britifh-built fhips* are employed, *owned by Britifh Subjects*, ufually refiding in the King's European dominions, and navigated by a mafter and three-fourths at leaft of the mariners ufually refiding in the King's European dominions. Thefe temporary bounties all depend on the ftatutes 26 *Geo.* 3. *c.* 81. (explained by *ftat.* 27 *Geo.* 3. *c.* 10:) 26 *Geo.* 3. *cc.* 26, 41, 50, explained by *ftats.* 28 *Geo.* 3. *c.* 20: 29 *Geo.* 3. *c.* 53: and fuch ftatutes as are from time to time made for amending or continuing them. See *ftats.* 31 *Geo.* 3. *c.* 45: 32 *Geo.* 3. *c.* 22: 33 *Geo.* 3. *cc.* 42, 58. And fee *ftat.* 34 *Geo.* 3. *c.* 68. § 4, under which, after the then exifting war, no veffels are to fifh on the coafts, unlefs *wholly* manned with *Britifh* Subjects; but foreign mariners are allowed, under certain regulations, to be on board fuch fhips, to inftruct *Britifh* mariners in fifhing, &c.

VI. RULE 21. *A Britifh-built fhip* is fuch as has been built in *Great Britain*, or *Ireland*, *Guernfey*, or *Jerfey*, or the *Ifle of Man*, or in fome of the colonies, plantations, iflands, or territories, in *Afia*, *Africa*, or *America*, which at the time of building the fhip belonged to, or were in the poffeffion of, his Majefty; or any fhip whatfoever which has been taken and condemned as lawful prize.

[Except fuch *Britifh*-built fhips as fhall be rebuilt or repaired in any foreign port or place to an amount exceeding fifteen fhillings *per* ton, unlefs fuch repairs fhall have been proved to be neceffary to enable the fhip to perform her voyage.]

This rule and exception are contained in the firft and fecond fections of *ftat.* 26 *Geo.* 3. *c.* 60. See *Reeves* 453, 454.

RULE 22. *A Britifh fhip* is, firft, fuch as is foreign *built*, but which before *May* 1, 1786, belonged wholly to any of the people of *Great Britain*, or *Ireland*, *Guernfey*, or *Jerfey*, or the *Ifle of Man*, or of any colony, or plantation, ifland, or territory in *Afia*, *Africa*, or *America*, in poffeffion of his Majefty; fecondly, fuch as has been built or rebuilt on a foreign-made keel or bottom, and regiftered before *May* 1, 1786, as a *Britifh* fhip; thirdly, fuch as had begun to be repaired or rebuilt on a foreign-made keel or bottom before *May* 1, 1786, and has been fince regiftered by order of the commiffioners of the cuftoms of *England* or in *Scotland*. See *Reeves* 452, 538.

RULE 23. Every fhip, or veffel, having a deck or being of the burthen of fifteen tons, and belonging to a fubject in *Great Britain* or *Ireland*, *Guernfey*, *Jerfey*, or the *Ifle of Man*, or any colony, plantation, ifland, or territory to his Majefty belonging, muft be *regiftered* by the perfon claiming property therein; who is to obtain a certificate of fuch regiftry in the port to which the fhip or veffel properly belongs, and the certificate is to diftinguifh the fhip or veffel under one of thefe two claffes; certificates of *Britifh plantation* regiftry, or, certificates of *foreign fhips regiftry for the European trade, Britifh property*. *Stat.* 26 *Geo.* 3. *c.* 60. § 3, 28.

RULE 24. No fhip is to be permitted to clear out as a *Britifh*-built fhip, or a *Britifh* fhip, nor to be entitled to the privileges of a *Britifh*-built fhip, or a *Britifh* fhip, unlefs the owner has obtained a certificate of regiftry; and any fhip parting from port without being fo regiftered, and obtaining fuch a certificate, fhall be forfeited. *Stat.* 26 *Geo.* 3. *c.* 60. § 32.

RULE 25. *All fhips, not entitled to the privileges* of a *Britifh*-built fhip, or a *Britifh* fhip, and all fhips *not regiftered* as aforefaid, are deemed, although they may belong to *Britifh* Subjects, to all intents and purpofes *alien or foreign fhips*. *Stat.* 27 *Geo.* 3. *c.* 29. § 13. See *Reeves* 509—512.

RULE 26. As often as the mafter of a fhip is *changed* a memorandum thereof is to be indorfed on the certificate by the proper officer of the cuftoms. *Stat.* 26 *Geo.* 3. *c.* 60.

RULE 27. The owner is to caufe the name by which a fhip is regiftered to be painted in a confpicuous part of the ftern, and fuch name is not to be changed. *Stat.* 26 *Geo.* 3. *c.* 60. § 19.

RULE 28. If a certificate of regiftry is loft or miflaid, or if a fhip fhall be altered in form or burthen, or from any denomination of veffel to another, by rigging or fitting, fhe muft be *regiftered de novo*, and a new certificate granted. *Stat.* 26 *Geo.* 3. *c.* 60. § 22, 23, explaining 15 *Geo.* 2. *c.* 31.

RULE 29. Mafters of fhips are, on demand, to produce their certificates to the principal officer in any port within the King's dominions, or to the *Britifh* conful or chief officer in any foreign port, on penalty of 100*l.* *Stat.* 26 *Geo.* 3. *c.* 60. § 34: and fee *ftat.* 33 *Geo.* 3. *c.* 68. § 18, &c. Some doubt having arifen whether fhips belonging to the *Eaft-India* Company could ftrictly be confidered as *Britifh* fhips, confidering how many foreigners were proprietors of the Company's ftock, this was removed by *ftat.* 21 *Geo.* 3. *c.* 65. § 33.

SINCE the above recapitulation a material ftatute has been paffed, *viz.* *ftat.* 33 *Geo.* 3. *c.* 68; by which it is enacted, that after fix months from the conclufion of the then exifting war, no goods, &c. fhall be imported into *Great Britain*, nor any goods exported from thence, in *Britifh* veffels, unlefs the mafter and three-fourths of the crew are *Britifh* Subjects. This act contains feveral regulations to enforce thefe provifions; it defines *Britifh Seamen*; who, it declares, muft be natural-born Subjects, or perfons naturalized by act of parliament, or made de-

nizens by letters of denization, or persons having become Subjects by conquest, or cession of some newly-acquired country, having taken the oath of allegiance, or other oath required on such conquest or cession. Foreign seamen, however, serving three years in the navy in time of war may be employed as *British* seamen, not having taken the oath of allegiance to a foreign State. Regulations are also contained for the employment of negroes in *America*, and the *East* and *West Indies*: and provisions made for the employment of foreign seamen in case of necessity. This statute also contains further regulations as to the registry of *British* ships, by enacting that no transfer of property in any vessel shall be valid, unless made according to *stat* 26 *Geo*. 3. *c*. 60. The form of indorsement on change of property is prescribed; and other instructions given as to the transfer of property where the vessels or their owners are not in the country. The mode of registering *de novo* in case of transfer of property, is further settled; and directions given in case of transfer of the property, in such registered ship, to foreigners.

The above short view of an interesting and important subject, contains much useful information, not merely confined to this head of law, but connected with the general policy of the *English* Government. The particulars of the laws here detailed, are sometimes fluctuating, and above all, much affected by the circumstances of peace and war. An intimate research into the regulations contained in the statutes above referred to, and others, can only be conducted with safety by a reference to the statutes themselves; and particular caution is necessary to render the Student aware of the number of laws continually claiming the attention, and receiving the sanction, of Parliament on this national subject.

See particularly as to the importation and exportation of Bark, *stat*. 32 *Geo*. 3. *c*. 50;—Books, 34 *Geo*. 3. *c*. 20;—Cambricks from the *Austrian* Netherlands, *stat*. 34 *Geo*. 3. *c*. 50;—Coasting trade, *stat*. 32 *Geo*. 3. *c*. 50;—Corn, this Dictionary, title *Corn*, and *stats*. 30 *Geo*. 3. *c*. 1, 42: 31 *Geo*. 3. *c*. 4: 31 *Geo*. 3. *c*. 30: repealing all acts and all provisions in every other act regulating the importation of wheat, &c.; 33 *Geo*. 3. *c*. 3: 34 *Geo*. 3. *c*. 71, the latter regulating the exportation to the *West Indies*;—Drugs, *stat*. 30 *Geo*. 3. *c*. 28.—As to *Ireland*, see *stat*. 33 *Geo*. 3. *c*. 63; by which, goods legally imported into *Ireland* from *America*, &c. may be imported from thence into *Great Britain* in *British* or *Irish*-built ships, owned and navigated according to law; except goods produced or manufactured within the limits of the *East-India* Company's trade.—*Man*, *Isle of*;—*Stat*. 32 *Geo*. 3. *c*. 50, § 12, repeals so much of *stat*. 5 *Geo*. 3. *c*. 39, as relates to the *Isle of Man* bond;—Paper, exportation of and drawback on, *stat*. 32 *Geo*. 3. *c*. 54. § 28;—Pot-ashes, exportation of, 34 *Geo*. 3. *c*. 34;—Rape-seed, importation of, *stat*. 30 *Geo*. 3. *c*. 41;—Salt-petre, *stat*. 31 *Geo*. 3. *c*. 42;—Skins, seal-skins, 31 *Geo*. 3. *c*. 26; 32 *Geo*. 3. *c*. 36, § 6;—raw hides and skins from *Ireland* and *America*, *stat*. 32 *Geo*. 3. *c*. 36. § 2;—Silks, crapes, and tiffanies, the manufacture of *Italy*, to be imported directly from thence, *stat*. 31 *Geo*. 3. *c*. 37;—Slate, *stat*. 34 *Geo*. 3. *c*. 51;—Stores, naval, exportation of, *stat*. 33 *Geo*. 3. *c*. 2;—Tea, *stat*. 32 *Geo*. 3. *c*. 9, by which the certificates required by *stat*. 21 *Geo*. 2. *c*. 14, for due exportation of that article, are no longer required;—Tin unwrought allowed to be exported, duty free, to any place beyond the *Cape of Good Hope*; *stat*. 30 *Geo*. 3. *c*. 4;—Tobacco and snuff, *stats*. 30 *Geo*. 3. *c*. 40: 31 *Geo*. 3. *c*. 47. See also this Dictionary, under many of the above titles for such regulations, affecting them, as do not relate to the immediate provisions of the Navigation Acts.

It has been thought expedient in this place to insert articles III, XI, XII, XIII, XIV, and XV, of the TREATY of *Amity*, *Commerce*, and *Navigation*, made between GREAT BRITAIN, and AMERICA in the year 1795. Article III is a permanent article: the duration of Article XII is therein particularly specified. The restraint of the burthen of *American* ships to 70 tons, was also a subsequent matter of negotiation, not settled at the time of writing this, (*August* 1795.) The other articles, it was agreed, should remain in force for *twelve years* from the time of exchanging the ratification. In the preamble of the Treaty it was recited to be for the purpose (among other things) of regulating "the *Commerce* and *Navigation* between the respective countries, territories, and people, in such a manner as to render the same *reciprocal*, *beneficial*, and *satisfactory*."

"Art. III. It is agreed, that it shall at all times be free to his Majesty's Subjects, and to the Citizens of the United States, and also to the *Indians* dwelling on either side of the boundary line, (specified in the treaty,) freely to pass and repass, by land or inland navigation, into the respective territories and countries of the two parties on the Continent of *America*, (the country within the limits of the *Hudson's Bay* Company only excepted,) and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade or commerce with each other. But it is understood that this article does not extend to the admission of vessels of the United States into the sea-ports, harbours, bays, or creeks, of his Majesty's said territories; nor into such parts of the rivers in his Majesty's said territories as are between the mouth thereof and the highest port of entry from the sea, except in small vessels trading *bonâ fide* between *Montreal* and *Quebec*, under such regulations as shall be established to prevent the possibility of any frauds in this respect; nor to the admission of *British* vessels from the sea into the rivers of the United States, beyond the highest ports of entry for foreign vessels from the sea. The river *Mississippi* shall, however, according to the treaty of peace, be entirely open to both parties; and it is further agreed, that all the ports and places on its eastern side, to which soever of the parties belonging, may freely be resorted to, and used by both parties, in as ample a manner as any of the Atlantic ports or places of the United States, or any of the ports or places of his Majesty in *Great Britain*.

"All goods and merchandize whose importation into his Majesty's said territories in *America*, shall not be entirely prohibited, may freely, for the purposes of commerce, be carried into the same in the manner aforesaid, by the Citizens of the United States, and such goods and merchandise shall be subject to no higher or other duties than would be payable by his Majesty's Subjects on the importation of the same from *Europe* into the said territories. And in like manner all goods and merchandize whose importation into the United States shall not be wholly prohibited, may freely, for the purpose of commerce, be carried into the same, in the manner aforesaid, by his Majesty's Subjects; and such goods or mer-

chandize shall be subject to no higher or other duties than would be payable by the Citizens of the United States on the importation of the same, in *American* vessels, into the Atlantic ports of the said States. And all goods not prohibited to be exported into the said territories respectively, may, in like manner, be carried out of the same by the two parties respectively, paying duty as aforesaid.

" No duty of entry shall ever be levied by either party, on peltries brought by land or inland navigation into the said territories respectively; nor shall the *Indians* passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages unusual among *Indians*, shall not be considered as goods belonging *bona fide* to *Indians*.

" No higher or other tolls or rates of ferriage than what are or shall be payable by natives, shall be demanded on either side; and no duties shall be payable on any goods which shall merely be carried over any of the portages or carrying places on either side, for the purpose of being immediately re-embarked and carried to some other place or places. But as by this stipulation it is only meant to secure to each party a free passage across the portages on both sides, it is agreed, that this exemption from duty shall extend only to such goods as are carried in the usual and direct road across the portage, and are not attempted to be in any manner sold or exchanged during their passage across the same; and proper regulations may be established to prevent the possibility of any frauds in this respect.

" Art. XI. It is agreed between his Majesty and the United States of *America*, that there shall be a reciprocal and entirely perfect liberty of navigation and commerce between their respective people, in the manner, under the limitations, and on the conditions specified in the following articles.

" Art. XII. His Majesty consents, that it shall and may be lawful, during the time hereinafter limited, for the Citizens of the United States to carry to any of his Majesty's islands and ports in the *West Indies* from the United States, in their own vessels, *not being above the burthen of* 70 *tons*, any goods or merchandizes, being of the growth, manufacture, or produce of the said States, which it is or may be lawful to carry to the said islands or ports from the said States in *British* vessels; and that the said *American* vessels shall be subject there to no other or higher tonnage duties or charges than shall be payable by *British* vessels in the ports of the United States; and that the cargoes of the said *American* vessels shall be subject there to no other or higher duties or charges than shall be payable on the like articles, if imported there from the said States in *British* vessels.

" And his Majesty also consents that it shall be lawful for the said *American* Citizens to purchase, lade, and carry away in their said vessels to the United States, from the said islands and ports, all such articles, being of the growth, manufacture, or produce of the said islands, as may now by law be carried from thence to the said States in *British* vessels, and subject only to the same duties and charges on exportation, to which *British* vessels and their cargoes are or shall be subject in similar circumstances.

" Provided always, that the said *American* vessels do carry and land their cargoes in the United States only; it being expresly agreed and declared, that during the continuance of this article, the United States will prohibit and restrain the carrying any *molasses*, *sugar*, *coffee*, *cocoa*, or *cotton*, in *American* vessels, either from his Majesty's islands or from the United States, to any part of the world, except the United States, *reasonable sea-stores excepted*.

" Provided also, that it shall and may be lawful, during the same period, for *British* vessels to import from the said islands, into the United States, and to export from the United States to the said islands, all articles whatever, being of the growth, produce or manufacture of the said islands, or of the United States respectively, which now may, by the laws of the said States, be so imported and exported. And that the cargoes of the said *British* vessels shall be subject to no other or higher duties or charges, than shall be payable on the same articles, if so imported or exported in *American* vessels.

" It is agreed, that this article, and every matter and thing therein contained, shall continue to be in force *during the continuance of the war* in which his Majesty is now engaged; and also for *two years* from and after the day of the signature of the preliminary or other articles of peace by which the same may be terminated.

" And it is further agreed, that at the expiration of the said term, the two contracting parties will endeavour further to regulate their commerce in this respect, according to the situation in which his Majesty may then find himself with respect to the *West Indies*, and with a view to such arrangement as may best conduce to the mutual advantage and extension of commerce.

" And the said parties will then also renew their discussions, and endeavour to agree, whether in any or what cases neutral vessels shall protect enemy's property; and in what cases, provisions, and other articles, not generally contraband, may become such. But in the meantime, their conduct towards each other in these respects, shall be regulated by the articles hereinafter inserted on those subjects.

" Art. XIII. His Majesty consents that the vessels belonging to the Citizens of the United States of *America* shall be admitted and hospitably received in all the seaports and harbours of the *British* territories in the *East Indies*. And that the Citizens of the said United States may freely carry on a trade between the said territories and the said United States in all articles of which the importation or exportation respectively to or from the said territories shall not be entirely prohibited. Provided only, that it shall not be lawful for them in time of war between the *British* Government and any other Power or State whatever, to export from the said territories, without the special permission of the *British* Government there, any military stores or naval stores or rice. The Citizens of the United States shall pay for their vessels, when admitted into the said ports, no other or higher tonnage duty than shall be payable on *British* vessels when admitted into the ports of the United States. And they shall pay no other or higher duties or charges on the importation or exportation of the cargoes of the said vessels, than shall be payable on the same articles when imported or exported in *British* vessels. But it is ex-

presly agreed, that the vessels of the United States shall not carry any of the articles exported by them from the said *British* territories to any port or place except to some port or place in *America*, where the same shall be unladen; and such regulations shall be adopted by both parties, as shall from time to time be found necessary to enforce the due and faithful observance of this stipulation.

"It is also understood, that the permission granted by this article, is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the said *British* territories; but vessels going with their original cargoes, or part thereof, from one port of discharge to another, are not to be considered as carrying on the coasting trade. Neither is this article to be construed to allow the Citizens of the said States to settle or reside within the said territories, or to go into the interior parts thereof, without the permission of the *British* Government established there; and if any transgression should be attempted against the regulations of the *British* Government in this respect, the observance of the same shall and may be enforced against the Citizens of *America*, in the same manner as against *British* Subjects, or others transgressing the same rule. And the Citizens of the United States, whenever they arrive in any port or harbour in the said territories, or if they should be permitted in manner aforesaid to go to any other place therein, shall always be subject to the laws, government, and jurisdiction of what nature established in such harbour, port or place, according as the same may be: the Citizens of the United States may also touch for refreshment at the Island of *St. Helena*, but subject in all respects to such regulations as the *British* Government may from time to time establish there.

"Art. XIV. There shall be between all the dominions of his Majesty in *Europe* and the territories of the United States a reciprocal and perfect liberty of commerce and navigation. The people and inhabitants of the two countries respectively shall have liberty freely and securely, and without hindrance and molestation, to come with their ships and cargoes to the lands, countries, cities, ports, places, and rivers, within the dominions and territories aforesaid, to enter into the same, to resort there, and to remain and reside there, without any limitation of time: and also to hire and possess houses and warehouses for the purposes of their commerce; and generally the merchants and traders on each side shall enjoy the most complete protection and security for their commerce; but subject always, as to what respects this article, to the laws and statutes of the two countries respectively.

"Art. XV. It is agreed, that no other or higher duties shall be paid by the ships, or merchandize of the one party in the ports of the other, than such as are paid by the like vessels or merchandize of all other nations. Nor shall any other or higher duty be imposed in one country on the importation of any articles the growth, produce, or manufacture of the other, than are or shall be payable on the importation of the like articles being of the growth, produce, or manufacture of any other foreign country. Nor shall any prohibition be imposed on the exportation or importation of any articles to or from the territories of the two parties respectively, which shall not equally extend to all other nations.

"But the *British* Government reserves to itself the right of imposing on *American* vessels entering into the *British* ports in *Europe*, a tonnage-duty equal to that which shall be payable by *British* vessels in the ports of *America*; and also such duty as may be adequate to countervail the difference of duty now payable on the importation of *European* and *Asiatic* goods when imported into the United States in *British* or in *American* vessels.

"The two parties agree to treat for the more exact equalization of the duties on the respective navigation of their subjects and people in such manner as may be most beneficial to the two countries. The arrangements for this purpose shall be made at the same time with those mentioned at the conclusion of the 12th article of this treaty, and are to be considered as a part thereof. In the interval it is agreed, that the United States will not impose any new or additional tonnage-duties on *British* vessels, nor increase the now subsisting difference between the duties payable on the importation of any articles in *British* or in *American* vessels."

NAVIS ECCLESIÆ, The nave or body of the church, as distinguished from the choir, and wings, or isle: it is that part of the church where the common people sit. *Du Cange.*

NAVIS, NAVICULA, A small dish to hold frankincense before put into the *thuribulum*, censor or smoking pot; and seems to have its name from the shape, resembling a boat or little ship; we have several of these boat-cups in silver, &c. for various uses. *Paroch. Antiq.* 598.

NAVITHALAMUS, A ship or barge that noblemen use for pleasure, with fine chambers and other stately ornaments. *Law. Lat. Dict.*

NAVY.

THE Fleet or Shipping of a Prince or State; or an Armament at sea.

I. *Of the Navy of* England, *and its Jurisdiction in the* British *Seas.*

II. *Of raising and paying the Mariners.*

III. *Of their Discipline, under the Articles of War and Naval Courts Martial.*

I. THE NAVY OF ENGLAND, it has been observed, excels all others for three things, *viz.* beauty, strength, and safety; for beauty our ships of war are so many floating palaces; for their strength so many moving castles; and for safety, they are the most defensive walls of the land; and as our naval power gains us authority in the most distant climates, so the superiority of our fleet above other nations, renders the *British* Monarch the arbiter of *Europe*.

The Kings of *England* in ancient times commanded their fleets in person; and King *Arthur* vindicated the dominion of the seas, making ships of all nations salute our ships of war by lowering the topsail, and striking the flag, as in like manner they shall do to the forts upon land; by which submission they are put in mind that they are come into a territory, wherein they are to own a sovereign power and jurisdiction, and receive protection from it: and this duty of the flag, which hath been constantly paid to our ancestors, serves to imprint reverence in foreigners, and adds new courage

rage to our seamen; and reputation abroad, is the principal support of any government at home.

King *Edgar*, successor to *Arthur*, stiled himself *Sovereign of the narrow seas*; and having fitted out a fleet of four hundred sail of ships, in the year 937, sailing about *Britain* with his mighty Navy, and arriving at *Chester*, was there met by eight Kings and Princes of foreign nations, come to do him homage; who, as an acknowledgment of his sovereignty, rowed this monarch in a boat down the river *Dee*, himself steering the boat; a marine triumph which is not to be paralleled in the histories of *Europe*.

Canutus (*Edgar*'s successor) laid the ancient tribute called *Danegeld*, for guarding the seas, and sovereignty of them; with the following emblem expressed, *viz.* Himself sitting on the shore in his royal chair, while the sea was flowing, speaking, *Tu meæ ditionis es, & terra in qua sedeo est, &c.*

Egbert, *Althred*, and *Eltbred* kept up the dominion and sovereignty of their predecessors; nor did the succeeding princes, of the *Norman* race, waive this great advantage, but maintained the right to the four adjacent seas surrounding the *British* shore: the honour of the flag King *John* challenged, not barely as a civility, but a right to be paid *cum debitâ reverentiâ*, and the persons refusing he commanded to be taken as enemies: and the same was ordained not only to be paid to whole fleets, bearing the royal standard, but to those ships of privilege that wear the Prince's ensigns or colours of service: this decree was confirmed and bravely asserted by a fleet of five hundred sail, in a royal voyage to *Ireland*, wherein he made all the vessels which he met with in his way, in the eight circumfluent seas, to pay that duty and acknowledgment, which has been maintained by our Kings to this day, and was never contested by any nation, unless by those who attempted the conquest of the intire empire.

Trade gave occasion to the bringing mighty fleets to sea; and on the increase of trade, ships of war were necessary in all countries for the preservation of it in the hands of the just proprietors.

In ancient times the several counties of *England* were liable to a particular taxation for building ships of war, and fitting out fleets, every one in proportion to their extent and riches; so that the largest counties were each of them to furnish a first-rate man of war, and the others every one to build one in proportion; but this method has been long disused, and the fitting out our navy for many ages has been always thrown into the public charge.

King *Edward* III. in his wars with *France*, had a Fleet of ships before *Calais*, so numerous, that they amounted to seven hundred sail; but these were only very small vessels.

Notwithstanding that the Fleets of *Great Britain* have been remarkable for several ages past, for the great and signal victories obtained from time to time over their enemies, and that in the reigns of some of our ancient Kings, there have been greater numbers of ships fitted out at different times, upon certain expeditions, than have been of late years, yet that of a Royal Navy was never properly established, until by *Hen.* VIII. in the fourth year of his reign, *anno* 1512; at which time, that King taking umbrage at the mighty naval preparations of *France*, made an augmentation of twenty-five large ships of war to those already in being; he likewise erected an office for the Navy, and established a certain number of Commissioners, to whom the charge of the Navy was committed, and whose duty it was to inspect into the state and condition of the King's ships, and to make a report thereof to the Lord High Admiral, in order to their being repaired or rebuilt, and supplied with every thing necessary for the public service, according as the case required it; for till that time, the establishment of the naval forces of this kingdom seems to have been upon an auxiliary dependency of the sea-ports and maritime towns, who were under certain conditions of furnishing their respective quotas of ships, for the King's use, upon previous notice given to them in that behalf; after which, they all came to the appointed rendezvous, and were then disposed of by the King's order upon the services intended. Upon this augmentation, the King's fleet at that time consisted of no more than forty five ships, with which that of the *French* was soon overcome. Of those towns which furnished ships for the public service, the Cinque-Ports were the most noted, and whose privileges still subsist, on account of the services which they obliged themselves in particular to perform to the Crown. See title *Cinque-ports*.

There are lists of the fleet of Queen *Elizabeth*, which make it appear there was but one private gentleman a captain, all the rest being Lords and Knights: so high was the esteem for service at sea in those days, when our Princes ruled with the most consummate glory: but the opinion of serving at sea in late times having been very much lessened, it has since been declined by the nobility and gentry.

The Navy of *England* is at present divided into three squadrons, distinguished by the different colours of the several flags, *viz.* red, white, and blue; the principal commander whereof bears the title of Admiral, and each has under him a Vice-Admiral, and a Rear-Admiral, who are likewise flag-officers. There are belonging to his Majesty's Navy, six great yards, *Chatham*, *Deptford*, *Woolwich*, *Portsmouth*, *Sheerness*, and *Plymouth*; fitted with several docks, and furnished with store of timber, masts, anchors, cables, &c. And for the management of the Royal Navy, there are several officers of trust and authority, besides the Commissioners of the Admiralty; as the Treasurer, Controller, Surveyor, Commissioners of the Navy, Commissioners of the Victualling office, &c. the principal whereof hold their offices by patent under the Great Seal.

The *Maritime State*, says *Blackstone*, though nearly related to the military, is much more agreeable to the principles of our free Constitution. The Royal Navy of *England* hath ever been its greatest defence and ornament; it is its ancient and natural strength, the floating bulwark of the island: an army from which, however strong and powerful, no danger can ever be apprehended to liberty: and accordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection was our Naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of *Oleron*, and are received by all nations in *Europe* as the ground of all their marine constitutions, was confessedly compiled by our King *Richard* I. at the isle of *Oleron*, on the coast of *France*, then

then part of the possessions of the Crown of *England*. 4 *Inst.* 144. And yet so vastly inferior were our ancestors in this point, to the present age, that even in the maritime reign of Queen *Elizabeth*, Sir *Edward Coke* thinks it matter of boast, that the Royal Navy of *England* then consisted of *thirty-three* ships. The present condition of our marine is in a great measure owing to the salutary provisions of the statutes, called the *Navigation Acts*; whereby the constant increase of *English* shipping and seamen was not only encouraged, but rendered unavoidably necessary. See this Dictionary, title *Navigation Acts*.

At the same time that the good œconomy of the Royal Navy is displayed, it seems necessary to take some notice of that, which affords it an opportunity of appearing in more magnificent grandeur than can be represented by the ablest writer in the world; namely, the ocean on which it is borne; especially as there is a peculiar sovereignty and property inherent therein, to the Monarchs of *Great Britain*; the preservation of which, for several ages past, has not a little conduced to increase the glory of the nation, and to gain it such a reputation abroad, as must justly make our fleets seem as formidable to strangers, as they are to us, who know their real strength. This right is so ancient and undeniable, that even the most haughty of our neighbours dare not pretend to controul it by any public act, however they may presume to contradict it by bare words; neither was any thing ever written against it until it was undertaken by *Hugo Grotius*, in his book called *Mare liberum*.

The boundaries properly said to encompass what are called the *British* Seas, are thus accounted, under the distinction of the four cardinal points of the compass; taking it for granted in general, that all the seas which surround *Great Britain*, *Ireland*, and the other islands appertaining to the Crown, are called the *British* Seas: but as to particulars they stand thus: On the South is the *British* Channel which separates *England* from *France*, the boundaries of which extend to the opposite shores of *France*, and to those of *Spain*, as far as *Cape Finisterre*. From that Cape it extends to the west in an imaginary line running in twenty-three degrees of West longitude from *London*, to the latitude of sixty-three degrees North, which last is called the Western Ocean of *Britain*. From the aforesaid latitude of sixty-three degrees it extends in another line (supposed to be drawn) in that parallel of latitude, to the middle point of the land, *Van Staten*, on the coast of *Norway*, which is the northern boundary, and from that point it extends along the shores of *Norway*, *Denmark*, *Germany*, and the *Netherlands*, to the channel first mentioned; which last boundary comprehends what is called the Eastern Ocean of *Britain*.

There being no lands lying on the West and North sides of the *British* dominions, nearer than the continent of *America*, the island of *Newfoundland*, and *Greenland*, and the King of *Great Britain* having possessions in the two first places; the boundaries of his maritime empire cannot be said to be strictly limited on that side. Moreover, as to *Greenland*, it was at first discovered in the reign of *Edward* the Sixth, by Sir *Hugh Willoughby*, for the use of the Crown of *England*; and still again to the Northward there is some foundation for extending this sovereignty a great deal farther, on account of the acquisitions of King *Arthur*, a record of which is to be found in *Hackluyt*, *p.* 245, translated from the *Latin* original there quoted from *Geoffrey* of *Monmouth's Hist.*

According to this ancient right the *British* dominion on the North Sea is very extensive; and so far from being questioned, or the trade of the *British* Subjects in those parts obstructed, that on the contrary, (without regard to the above relation concerning King *Arthur*,) *Britain* has a prior right even to *Denmark* and *Norway* in the *Greenland* fishery, and *Davis's Streights*; these places being unknown to them, and the rest of *Europe*, till *John Davis*'s voyage for discovery of the North-west passage in the year 1585, though it seems that the *Danes* afterwards demanded toll for our fishing at *Greenland*, but it was refused to them.

See an incomplete note on this subject, 1 *Inst.* 107. *a.* *n.* 6.

II. Many laws have been made for the supply of the Royal Navy with seamen; for their regulation when on board; and to confer privileges and rewards on them during and after their service.

As to their supply, the power of *impressing seamen*, though one of the most invidious, has ever been found one of the most certain means. It has been a matter of some dispute, and submitted to not without a national reluctance: it is now however established by the law of the land beyond question, and from the spirit of the Constitution, the exercise of it resides in the Crown. See this Dictionary, title *Impressing Seamen*.

But besides this method of impressing, (which, after all, is only defensible from absolute public necessity, to which all private considerations must give way,) other ways have from time to time been adopted, and many of them still continue to be, that tend to the increase of seamen and manning the Royal Navy. Among these deserves to be noticed the provision that every foreign seaman, who during a war shall serve two years in any man-of-war, merchant-man, or privateer, is naturalized, *ipso facto*; *stat.* 13 *Geo.* 2. *c.* 3; and serving three years may be employed as a *British* mariner, *stat.* 34 *Geo.* 3. *c.* 68; and by various statutes, sailors having served the King for a limited time, are free to use any trade or profession in any town in the kingdom without exception.

For the furnishing of mariners for the fleet, an act of parliament, *stat.* 7 & 8 *W.* 3. *c.* 21, was passed; by which it was enacted, That all seamen, watermen, &c. above the age of eighteen years, and under fifty, capable of sea-service, who should register themselves voluntarily for the King's service in the Royal Navy, to the number of thirty thousand, should have paid to them the yearly sum or bounty of forty shillings, besides their pay for actual service, and that whether they were in service or not; and none but such mariners, &c. as were registered, should be capable of preferment to any commission, or be warrant officers in the navy; and such registered persons were exempted from serving on Juries, parish offices, &c. also from service abroad after the age of fifty-five years, unless they went voluntarily; and when by age, wounds, or other accidents, they were disabled for future service at sea, they were to be admitted into *Greenwich Hospital*, and there be provided for, during life: and the widows of such seamen as should

should be slain or drowned, not of ability to provide for themselves, should be likewise admitted into the hospitals; and their children educated, &c. But if any registered seaman should withdraw himself from the King's service, in his ships or navy; or if any such mariner relinquished the service, without consent of the Commissioners of the Admiralty, he was for ever to lose the benefit of the act, and be compelled to serve in his Majesty's fleet six months without pay. This registry however, being by experience proved to be ineffectual as well as oppressive, was abolished; and the above statute repealed, by *stat.* 9 *Ann.* c. 21. § 64.

By *stat.* 4 *Ann.* c. 19. § 18, Watermen plying on the *Thames* between *Gravesend* and *Windsor*, on notice given by the Commissioners of the Admiralty to the company of watermen, are to appear before the said company, to be sent to his Majesty's fleet, or, on refusal, they shall suffer one month's imprisonment, and be disabled working on the *Thames* for two years.

The *stat.* 2 *Ann.* c. 6, provides, That poor boys, whose parents are chargeable to the parish, may by churchwardens and overseers of the poor, with consent of two Justices of Peace, be placed out apprentices to the sea service, until the age of twenty-one years, they being thirteen years old at the time of their placing forth: these apprentices shall be protected from being impressed for the first three years; and if they are impressed afterwards, the master shall be allowed their wages. And all masters and owners of ships, from thirty to fifty tons burthen, are required to take one such apprentice, one more for the next fifty ton, and one more for every hundred ton above the first hundred, under the penalty of ten pounds. Masters of apprentices placed out by the parish may, with the consent of two Justices, turn over such apprentices to masters of ships.

Of more modern statutes, the following deserve particular notice:

By *stat.* 35 *Geo.* 3. cc 5, 9, the number of 9769 men was raised for the Navy according to a certain proportion imposed on every *County* in *England*. The execution of this act was intrusted to the Justices of Peace and Magistrates of Corporations, and the expence defrayed by rates made upon every parish out of which bounties were paid to volunteers entering;—a mode which met with the greatest success; and by which the men were raised in a space of time inconceivably short. One provision in this act was, that no person enlisting under it should be liable to be taken out of his Majesty's service but by some criminal process, or for some criminal matter.

A similar statute, 35 *Geo.* 3. c. 9, was also passed for the purpose of raising 18,874 men from the several *Ports* of the Kingdom; to effectuate which an embargo was imposed on all *British* vessels: these also were so speedily raised, that the effect of the embargo was scarcely perceived. Every able-bodied *seaman* raised under this act was estimated as *two* able-bodied men; a protection was by this act also allowed against all arrests, except for criminal matters.

By c. 29, of the same session, 35 *Geo.* 3, the number of 1814 men was raised in the counties, stewarties, &c. of *Scotland*. By this act a penalty of 25*l.* for each man not produced was imposed on the chief resident magistrate of each burgh or town.

To further the urgent demand for sailors, the *stat.* 35 *Geo.* 3. c. 34, was passed to enable Magistrates to levy for his Majesty's Navy in their several jurisdictions, "all able-bodied, idle, and disorderly persons who could not on examination prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their maintenance." The execution of this act was, by a clause therein, allowed to be suspended and revived according to necessity, by his Majesty's proclamation or notice from the Admiralty. It is to be feared, however, that it was never enforced to the extent it ought to have been.

By *stat.* 35 *Geo.* 3. c. 83, private *Militia-men* who had served in the Navy were allowed to be discharged from the militia in order to re-enter into the Navy, to a certain extent.

To encourage these men in the exercise of their duty, to ensure them their wages, to protect their persons, to provide for their families, and to secure them from impositions, in relation to their prize-money and other advantages; several acts of parliament have from time to time been past. By the first of these now in force, *stat.* 31 *Geo.* 2. c. 10, encouragement is given to seamen to enter into his Majesty's service voluntarily: volunteers entering their names with any commission officer of the fleet, and forthwith proceeding towards their ships, on certificate thereof shall be entitled to wages from the date of the certificate, and be allowed the usual conduct-money, and also be paid an advance of two months' wages, &c. And if any volunteer is turned over to another ship, he shall receive, over and above his wages due, the like advance of two months' pay, and not serve in a lower degree than he did before. Persons entered on board ships of war, are not to be taken thereout by any process at law, unless it be for a criminal matter; or where the debt amounts to 20*l.* When seamen die on board, the commander of the ship shall, as soon as may be, make out tickets for their pay, which shall be paid to their executors, &c. without tarrying for the ship's return: and seamen's pay shall not be bargained and sold; but tickets may. Governors and consuls in foreign parts are to provide for shipwrecked mariners at 6*d.* (increased by *stat.* 33 *Geo.* 3. c. 33. to 9*d.*) *per diem* each, and put them on board the first ships of war, &c. and on sending bills of disbursements with vouchers to the Commissioners of the Navy, they shall be paid.

This statute is enforced and explained by several others, particularly *stats.* 3 *Geo.* 3. c. 16: 26 *Geo.* 3. c. 63: 32 *Geo.* 3. cc. 33, 34, 67; in the latter of which acts is contained an *abstract* of all the preceding acts; which abstract is ordered to be hung up in some conspicuous part of every ship; together with the articles of war after mentioned. The *stat.* 32 *Geo.* 3. c. 67, extends the benefit of that and all other acts to *Ireland*.

Stat. 35 *Geo.* 3. c. 121, explains and amends *stats.* 19 *Geo.* 3. c. 67: 20 *Geo.* 3. c. 23: 21 *Geo.* 3. c. 15, as to the distribution of prize-money.

To obviate the natural improvidence of these brave but thoughtless men, *stat.* 35 *Geo.* 3. c. 28, was passed, to enable petty officers in the Navy, and seamen, non-commissioned officers of marines, and mariners serving in the Navy, to allot part of their pay for the maintenance of their wives and families; and a number of

minute regulations are thereby made for this very humane purpose: and by chapter 95 of the same session, that excellent provision was extended to boatswains, gunners, and carpenters in the Navy.

In pursuance of the same plan, for the comfort and relief of the defenders of their country, it is provided by *stat.* 35 *Geo.* 3. *c.* 53. §§ 7, 8, that letters to and from non-commissioned officers, seamen, and privates, in any departments of the army, Navy, or militia, be subject only to *one penny* postage.

By *stat.* 35 *Geo.* 3. *c.* 94, a more easy and expeditious method was established for the punctual and frequent wages and pay of *officers* in the Navy, as also of masters and surgeons in the same service; to whom the benefit of former regulations had not previously extended, or for whom they were not sufficiently adequate.

The pay and wages of one man in a hundred, of every ship of war, and value of his victuals, shall be applied for relieving poor widows of officers of the Navy, *stat.* 6 *Geo.* 2. *c.* 25. Able seamen who voluntarily enter on board ships of war, shall receive 5*l.* besides their wages, and ordinary seamen 3*l.* And if any seaman, under a commission or warrant officer, who enters into the service, be killed or drowned, his widow, on certificate to the Commissioners of the Navy that she is such, is to have, by way of bounty, one year's wages, according to the pay for which he served. *Stat.* 14 *Geo.* 2. *c.* 38.

III. The Commissioners of the Navy, &c. have power to examine and punish all persons who make any disturbance, fighting or quarrelling in the yards, and offices, &c. of the Navy.

The method of ordering seamen in the Royal fleet, and keeping up discipline there, is directed by certain express rules, articles, and orders, first enacted by the authority of Parliament soon after the Restoration, but since new modelled and altered. In the 13th year of King *Charles* II. an act passed for the regulating the government of the fleet, *stat.* 13 *Car.* 2. *st.* 1. *c.* 9. which was repealed by *stat.* 22 *Geo.* 2. *c.* 33 explained and amended by *stat.* 19 *Geo.* 3. *c.* 17. These two latter statutes contain not only the 36 articles of war, in which almost every possible offence is explicitly set down, and the punishment thereof annexed or left to the discretion of a Court Martial; but also sundry clauses of express rules and orders for assembling and holding Courts for the trial of any of the offences specified therein.

The following are the Articles of War above alluded to:

1. Officers are to cause public worship, according to the liturgy of the church of *England*, to be solemnly performed in their ships, and take care that prayers and preaching by the chaplains be performed diligently, and that the Lord's Day be observed.

2. Persons guilty of profane oaths, cursing, drunkenness, uncleanness, &c. to be punished as a Court Martial shall think fit.

3. If any person shall give or hold intelligence to or with an enemy without leave, he shall suffer death.

4. If any letter or message from an enemy be conveyed to any in the fleet, and he shall not in twelve hours acquaint his superior officer with it, or if the superior officer, being acquainted therewith, shall not reveal it to the commander in chief, the offender shall suffer death; or such punishment as a Court Martial shall impose.

5. Spies and persons endeavouring to corrupt any one in the fleet, shall suffer death, or such punishment as a Court Martial shall impose.

6. No person shall relieve an enemy with money, victuals, or ammunition, on like penalty.

7. All papers taken on board a prize shall be sent to the Court of Admiralty, &c. on penalty of forfeiting the share of the prize, and such punishment as a Court Martial shall impose.

8. No person shall take out of any prize any money or goods, unless for better securing the same, or for the necessary use of any of his Majesty's ships, before the prize shall be condemned; upon penalty of forfeiting his share, and such punishment as shall be imposed by a Court Martial.

9. No person on board a prize shall be stripped of his cloaths, pillaged, beaten, or ill-treated, upon pain of such punishment as a Court Martial shall impose.

10. Every commander who, upon signal or order of fight, or sight of any ship which it may be his duty to engage, or who, upon likelihood of engagement, shall not make necessary preparations for fight, and encourage the inferior officers and men to fight, shall suffer death; or such punishment as a Court Martial shall deem him to deserve. And if any person shall treacherously or cowardly yield or cry for quarter, he shall suffer death.

11. Every person who shall not obey the orders of his superior officer, in time of action, to the best of his power, shall suffer death; or such punishment as a Court Martial shall deem him to deserve.

12. Every person, who, in time of action, shall withdraw or keep back, or not come into the fight, or do his utmost to take or destroy any ship which it shall be his duty to engage, and to assist every ship of his Majesty or his allies, which it shall be his duty to assist, shall suffer death, or other punishment. See *post*, and *stat.* 19 *Geo.* 3. *c.* 17. § 3.

13. Every person, who through cowardice, &c. shall forbear to pursue the chase of any enemy, &c. or shall not assist or relieve a known friend in view, to the utmost of his power, shall suffer death, or other punishment. See *post*.

14. If any person shall delay or discourage any action or service commanded, upon pretence of arrears of wages, or otherwise, he shall suffer death; or such punishment as a Court Martial shall deem him to deserve.

15. Every person who shall desert to the enemy, or run away with any ship, ordnance, &c. to the weakening of the service, or yield up the same cowardly or treacherously to the enemy, shall suffer death.

16. Every person who shall desert, or entice others so to do, shall suffer death; or such punishment as a Court Martial shall think fit. If any commanding officer shall receive a deserter, after discovering him to be such, and shall not with speed give notice to the captain of the ship to which he belongs, or if the ship is at a considerable distance, to the Secretary of the Admiralty, or Commander in Chief, he shall be cashiered.

17. Officers and seamen of ships appointed for convoy of merchant ships, or of any other, shall diligently attend upon that charge according to their instructions;

and whosoever shall not faithfully perform their duty, and defend their ships in their convoy, or refuse to fight in their defence, or run away cowardly and submit the ships in their convoy to hazard, or exact any reward for convoying any ship, or misuse the master or mariners, shall make reparation of damages, as the Court of Admiralty shall adjudge; and be punished criminally by death, or other punishment, as shall be adjudged by a Court Martial. See title *Insurance*.

18. If any officer shall receive or permit to be received on board any goods or merchandise, other than for the sole use of the ship, except gold, silver, or jewels, and except goods belonging to any ship which may be shipwrecked, or in danger thereof, in order to the preserving them for the owners, and except goods ordered to be received by the Lord High Admiral, &c. he shall be cashiered, and rendered incapable of further service.

19. Any person making or endeavouring to make any mutinous assembly shall suffer death. Any person uttering words of sedition or mutiny shall suffer death; or such punishment as a Court Martial shall deem him to deserve. If any officer, mariner, or soldier, in or belonging to the fleet, shall behave himself with contempt to his superior officer, being in the execution of his office, he shall be punished according to the nature of his offence, by the judgment of a Court Martial.

20. Any person concealing any traiterous or mutinous practice or design, shall suffer death; or such punishment as a Court Martial shall think fit. Any person concealing any traiterous or mutinous words, or any words practice, or design, tending to the hindrance of the service, and not forthwith revealing the same to the commanding officer; or, being present at any mutiny or sedition, shall not use his utmost endeavours to suppress the same, shall be punished as a Court Martial shall think he deserves.

21. Any person finding cause of complaint of the unwholesomeness of victuals, or upon other just ground, he shall quietly make the same known to his superior, who, as far as he is able, shall cause the same to be presently remedied; and no person upon any such or other pretence shall attempt to stir up any disturbance; upon pain of such punishment as a Court Martial shall think fit to inflict.

22. Any person striking any his superior officer, or drawing or offering to draw or lift up any weapon against him, being in the execution of his office, shall suffer death. And any person presuming to quarrel with any his superior officer, being in the execution of his office, or disobeying any lawful command of any his superior officer, shall suffer death, or such other punishment as shall be inflicted upon him by a Court Martial.

23. Any person quarrelling or fighting with any other person in the fleet, or using reproachful or provoking speeches or gestures, shall suffer punishment as a Court Martial shall impose.

24. There shall be no wasteful expence or embezzlement of any powder, shot, &c. upon penalty of such punishment as by a Court Martial shall be found just.

25. Every person burning or setting fire to any magazine, or store of powder, ship, &c. or furniture thereunto belonging, not then appertaining to an enemy, shall suffer death.

26. Care is to be taken that through wilfulness or negligence no ship be stranded, run upon rocks or sands, or split or hazarded; upon pain of death, or such punishment as a Court Martial shall deem the offence to deserve.

27. No person shall sleep upon his watch, or negligently perform his duty, or forsake his station, upon pain of death, or such punishment as, &c.

28. Murder;—And

29. Buggery or sodomy, shall be punished with death.

30. Robbery shall be punished with death, or otherwise as a Court shall find meet.

31. Every person knowingly making or signing, or commanding, counselling, or procuring the making or signing, any false muster, shall be cashiered and rendered incapable of further employment.

32. Provost Martial refusing to apprehend or receive any criminal, or suffering him to escape, shall suffer such punishment as a Court Martial shall deem him to deserve. And all others shall do their endeavours to detect and apprehend all offenders, upon pain of being punished by a Court Martial.

33. If any flag-officer, captain, commander, or lieutenant, shall behave in a scandalous, infamous, cruel, oppressive, or fraudulent manner, unbecoming his character, he shall be dismissed.

34. Every person in actual service and full pay, guilty of mutiny, desertion, or disobedience, in any part of his Majesty's dominions on shore, when in actual service relative to the fleet, shall be liable to be tried by a Court Martial, and suffer the like punishment as if the offence had been committed at sea.

35. Every person in actual service and full pay, committing upon shore, in any place out of his Majesty's dominions, any crime punishable by these articles, shall be liable to be tried and punished as if the crime had been committed at sea.

36. All other crimes not capital, not mentioned in this act, shall be punished according to the laws and customs used at sea. No person to be imprisoned for longer than two years. Court Martial not to try any offence (except under the 5th, 34th, and 35th Articles) not committed upon the main sea, or in great rivers beneath the bridges, or in any haven, &c. within the jurisdiction of the Admiralty, or by persons in actual service and full pay, except such persons as mentioned in 5th Article; nor to try a land officer or soldier on board a transport-ship. The Lord High Admiral, &c. may grant commissions to any officer commanding in chief any fleet, &c. to call Courts Martial, consisting of commanders and captains. And if the commander in chief shall die or be removed, the officer next in command may call Courts Martial. No commander in chief of a fleet, &c. of more than five ships, shall preside at any Court Martial in foreign parts, but the officer next in command shall preside. If a commander in chief shall detach any part of his fleet, &c. he may empower the chief commander of the detachment to hold Courts Martial during the separate service. If five or more ships shall meet in foreign parts, the senior officer may hold Courts Martial and preside thereat. Where it is improper for the officer next to the commander in chief to hold or preside at a Court Martial, the third officer in command may be empowered to pre-

side at, or hold, the same. No Court Martial shall consist of more than thirteen, nor less than five persons. Where there shall not be less than three, and yet not so many as five of the degree of a post captain or superior rank, the officer who is to preside may call to his assistance as many commanders under the degree of a post captain, as together with the post captains shall make up the number five, to hold the Court Martial.

Proceedings shall not be delayed, if a sufficient number remain to compose the Court, which shall sit from day to day (except *Sunday*) till sentence be given.

The Judge Advocate, and all officers constituting a Court Martial, and all witnesses, shall be upon oath. Persons refusing to give evidence may be imprisoned. Sentence of death within the Narrow Seas (except in case of mutiny) shall not be put in execution till a report be made to the Lord High Admiral, *&c.* Sentence of death beyond the Narrow Seas, shall not be put in execution, but by order of the commander in chief of the fleet, *&c.* Sentence of death in any squadron detached from the fleet, shall not be put in execution (except in case of mutiny) but by order of the commander of the fleet, or Lord High Admiral, *&c.* And sentence of death passed in a Court Martial, held by the senior officer of five or more ships met in foreign parts, (except in case of mutiny,) shall not be put in execution but by order of the Lord High Admiral, *&c.*

The powers given by the said articles shall remain in force with respect to crews of ships wrecked, lost, or destroyed, until they be discharged or removed into another ship, or a Court Martial shall be held to inquire of the causes of the loss of the ship. And if upon inquiry it shall appear, that all or any of the officers and seamen did their utmost to save the ship, and behaved obediently to their superior officers, their pay shall go on: as also shall the pay of officers and seamen taken by the enemy, having done their best to defend the ship, and behaved obediently. If any officer shall receive any goods on board, contrary to the 18th article, he shall further forfeit the value of such goods, or 500*l.* at the election of the informer; half to the informer, and half to *Greenwich* Hospital. See *Seamen*; *Ships*.

By *stat.* 31 *Geo.* 2. *c.* 10. § 33, a competent number of printed copies of the above Articles of War are to be delivered to the captain or commander of every ship or vessel; who is to cause them to be hung up and affixed to the most public places of the ship, and to have them constantly kept up and renewed, so that they may be at all times accessible to the inferior officers and seamen on board: and likewise to observe that such abstract be audibly and distinctly read over, once in every month, in the presence of the officers and seamen, immediately after the Articles of War are read.

The offences comprehended and specified in the above *Articles of War* may be classed under four general heads: 1. Those immediately against God and Religion, contained in the 1st and 2d Articles, *viz.* neglecting public worship, and being guilty of swearing, drunkenness, *&c.* the punishment of which is left to the discretion of the Courts Martial.—2. Such as affect the executive power of the State, or concern the criminal neglect of the established rules of discipline; these offences are specified in Articles 3, 4, 5, 15, 16, 19, 20, 22, 24, 25, 27, and 34, *viz.* holding intelligence with an enemy or rebel; concealing letters or messages from or relieving them; deserting to an enemy; running away with ships, stores, *&c.* or yielding the same to an enemy; desertion from the service, or entertaining deserters; waste or embezzlements of stores; mutinous assemblies; seditious or mutinous words; concealing any traiterous or mutinous designs, *&c.* striking, quarrelling, or disobeying the orders of a superior officer; sleeping upon the watch; neglecting duty, or forsaking a station allotted; and knowingly signing false muster-books.—3. Such as violate or transgress the rights and duties which are owing to individuals or fellow-subjects; under which may be classed murder, robbery, *&c.* See Articles 28, 29, 30.—4. Offences in themselves strictly military, and such as are peculiarly the object of martial law. These are recited in Articles 10, 11, 12, 13, 14, and 17. The 12th and 13th Articles as they formerly stood, by restraining the power of a Court Martial to the positive inflicting the punishment of death in the cases therein mentioned of cowardice, negligence, or disaffection in time of action, *&c.* were deemed too severe, and attended with peculiar inconveniences; one instance of which was the case of the unfortunate Admiral *Byng*. These Articles were therefore explained and amended by § 3 of *stat.* 19 *Geo.* 3. *c.* 17, whereby it is now lawful for a Court Martial to pronounce sentence of death, "*or* to inflict such other punishment as the nature and degree of the offence therein recited shall be found to deserve." See *M'Arthur on Naval Courts Martial.*

It is already mentioned under title *Courts Martial*, that desertion from the King's armies in time of war is made felony by *stat.* 18 *H.* 6. *c.* 19. It may here be added that by *stat.* 5 *Eliz.* c 5. § 27, this penalty is extended to mariners and gunners serving in the Navy.

The ground of the jurisdiction of Naval Courts Martial depends on nearly the same reasoning as relates to those of the army; as to which see this Dictionary, title *Courts Martial*. The theory and general principles of Courts of Enquiry and Courts Martial in both services, also rest upon the same basis. Some observations, however, more peculiarly applicable to the latter, are here introduced; chiefly from *M'Arthur on Naval Courts Martial*; and the authorities referred to by him.

It is to be observed, that though in this as in the ordinary course of the criminal judicature of the kingdom, the King has the prerogative of pardoning or remitting punishment; yet he can no more alter the sentence of a Court Martial, than he can a judgment of any other Court. At the same time it is unquestionable that the Royal prerogative may be exercised on all occasions in dismissing officers from the service; even though acquitted by a Court Martial.

Among many reasons urged against Naval Courts Martial, the most cogent and constitutional, at the first glance, is that of the inferior officers and seamen, not being tried by their peers; for by the statute, no Court Martial shall consist of more than thirteen, or less than five persons; to be composed of such flag-officers, captains, or commanders, then present, as are next in seniority to the officer who presides at the Court Martial. This objection, however, is (we may say completely) obviated by the necessity of subordination, which could not be preserved by admitting those as Jurymen, who certainly would have too great a fellow-feeling in the fate

fate of the culprit: besides that it would open a dangerous door to confederacies that might destroy the whole discipline of the Navy.

To institute one inferior or divisional Court Martial, subject to appeal in the Navy, analogous to the regimental Courts in the army, would not be adequate to remedy some other evils complained of; for according to the ancient practice of the sea, and as established by the 4th Article of the general printed *Instructions*, a captain or commander of any of his Majesty's ships or vessels has the power of inflicting punishment upon a seaman in a summary manner, for any faults or offences committed contrary to the rules of discipline and obedience established in the Navy; such punishment not to exceed twelve lashes for any *one* fault.

All Courts Martial are to be held, and offences tried, in the forenoon, and in the most public part of the ship, where all who will may be present: and the Captains of all his Majesty's ships in company who take post, have a right to assist thereat *Instr. Art.* 4.

Under the *stat.* 22 *Geo.* 2. *c.* 33, No member of any Court Martial, after the trial commenced, could go on shore, or leave the ship in which the Court Martial should first assemble, until sentence was given; but it having been found that this restraint and confinement might, in many cases, be attended with great inconvenience, and even prejudice to the health of the members, this clause was repealed by §§ 1, 2, of *stat.* 19 *Geo.* 3. *c.* 17, under which all the members are now at liberty to retire upon every adjournment.

The jurisdiction of Naval Courts Martial extends to the trial of all offences specified in the Articles of War; which may be committed upon the main sea, or on great rivers, only beneath the bridges of the said rivers nigh to the sea, or in any haven, river, or creek within the jurisdiction of the Admiralty: and which shall be committed by persons then in actual service and full pay in the fleet or ships of war of his Majesty. *Stat.* 22 *Geo.* 2. *c.* 33. § 4.—Likewise to the trial of all spies, and all persons whatsoever who shall come and be found in the nature of spies, as specified in the 5th of the above Articles of War; as well as to the trial of every person who shall be guilty of mutiny, desertion, or disobedience to any lawful command, in any part of his Majesty's dominions on shore, when in actual service, relative to the fleet: and for crimes committed on shore by such persons, in any places out of his Majesty's dominions, as are more fully specified in the 34th and 35th of the said Articles.

Murders are cognizable by Courts Martial, only in cases where the stroke or poison is given on board ship, and the person dies in consequence thereof on board; but in order to prevent any failure of justice, it is enacted by *stat.* 2 *Geo.* 2. *c.* 21, that if any person be stricken or poisoned at sea or abroad, and die in *England*, or being stricken or poisoned in *England*, die at sea or abroad, the murderer and accessaries are to be given up to the civil power, and may be indicted and tried in the county where the stroke, poison, or death happened. See this Dictionary, title *Homicide* III. 3: *Admiral.*

Naval Courts Martial can likewise take cognizance of crimes committed by warrant officers or men belonging to ships *in ordinary*; that is, stationed for particular purposes in the several dock-yards of the kingdom, and not in active public service. But they cannot take cognizance of offences committed by masters, mates, or seamen belonging to Navy transports, as they are persons not subject to naval discipline. They are entitled to be discharged in time of war or peace, on their own application. The Articles of War are never stuck up or read on board these Navy transports; though the officers and men receive their wages quarterly at the dock-yards, in the same manner as the officers and men of his Majesty's ships in ordinary.

By § 23 of the said *stat.* 22 *Geo.* 2. *c.* 33, it is enacted, that no person, not flying from justice, shall be tried or punished by a Court Martial for any offence, unless the complaint of such offence be made in writing, *or* (*and?*) unless a Court Martial to try such offender shall be ordered within three years after the offence shall be committed; or within one year after the return of the ship into any of the ports of *Great Britain* or *Ireland*.

Pardons, when extended to a criminal tried by a Naval Court Martial, are sent to the Lords Commissioners of the Admiralty, who immediately transmit (as secret) their order of reprieve or pardon to the commander in chief or senior officer of the place for the time being, where the execution would take place; signed by the Lords under the Admiralty Seal, signifying his Majesty's royal clemency, and directing the commander in chief to keep the whole of the order *extremely secret*, until the offender is, on the day appointed for execution, brought out upon deck, and every thing prepared for his execution, agreeable to the custom of the Navy; and then only to make known to him his Majesty's pleasure, and to release him from his confinement. *M'Arthur.*

Some doubts having been entertained in the time of *Will.* III. whether the Commissioners of the Admiralty had the same power to issue commissions to a Court Martial to try a prisoner, as the Lord High Admiral was allowed to have; this and all the other powers of a Lord High Admiral were vested in such Commissioners, by *stat.* 2 *W.* & *M. stat.* 2. *c.* 2. See this Dictionary, title *Admiral.*

It is hinted under title *Courts Martial*, in the former volume of this Dictionary, that Members of Courts Martial are liable to answer, in damages to the party injured, for the consequences of any unjust sentence. A remarkable instance of this occurred in the case of Lieutenant *Frye*, of the Marines, who in the year 1743 was sentenced to 15 years imprisonment by a Court Martial. He brought an action against the president Sir *Chaloner Ogle*, and recovered 1000 *l.* damages; and the Judge informing him that he was at liberty to bring his action against any of the members, he proceeded against Rear-Admiral *Mayne* and Captain *Rentone*; who were arrested by a *capias* from the Court of Common Pleas, at the breaking up of the Court Martial on Admiral *Lestock*, where the former presided, and the latter sat as member. This was much resented by that Court Martial, who passed some resolutions on the subject, reflecting in intemperate language on the Chief Justice of the Court, (Sir *John Willes*,) and these were laid by the Lords of the Admiralty before the King: upon this the Chief Justice caused every member of the Court to be taken into custody; and was proceeding in legal measures to assert and maintain the authority of his office, when a stop was put to the process by a public written *submission*, signed by all the members of the Court, transmitted to the

the Lord Chief Justice, received and read in the Court of Common Pleas, registered in the Remembrancer's Office, and inserted in the Gazette of *Nov.* 15th, 1746. "A memorial (as the Chief Justice observed) to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken."

NAVY BILLS: As to counterfeiting or stealing them, &c. See *statt.* 1 *Geo.* 1. *st.* 2. *c.* 25. § 6: 2 *Geo.* 2. *c.* 25. § 3: and this Dictionary, titles *Forgery*; *Larceny.*

NE ADMITTAS, A writ directed to the bishop for the plaintiff or defendant, where a *quare impedit* or assise of *darrein presentment* is depending, when either party fears that the bishop will admit the other's clerk during the suit between them: it ought to be brought within six calendar months after the avoidance, before the bishop may present by lapse; for it is in vain to sue out this writ when the title to present is devolved unto the bishop. *Reg. Orig.* 31: *F. N. B.* 37. Writ of *Ne admittas* doth not lie, if the plea be not depending in the King's Court by *quare impedit*, or *darrein presentment*; therefore there is a writ in the register directed to the Chief Justice of C. B. to certify the King in the Chancery, if there be any plea before him and the other Judges between the parties, &c. So that the writ should not be granted until that be done: but yet it may be had out of the Chancery before the King is certified that such plea of *quare impedit* is depending; and then the party grieved may require the Chief Justice to certify, &c. *New Nat. Br.* 83, 84. The writ runs, *Prohibemus vobis*, Ne admittas, &c.

Immediately on the suing out of a *quare impedit*, if the plaintiff suspects that the bishop will admit the defendant's or any other clerk pending the suit, he [or the defendant *vice versâ*] may have this prohibitory writ of *Ne admittas*, which recites the contention begun in the King's Courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined. And if the bishop doth after the receipt of this writ admit any person, even though the patron's right may have been found in a *jure patronatûs*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by writ of *scire facias.* 2 *Sid.* 94: And he shall have a special action against the bishop, called a *quare incumbravit*, to recover the presentation; and also satisfaction in damages for the injury done him by incumbering the church with a clerk pending the suit, and after the *Ne admittas* received. *F. N. B.* 48. But if the bishop has incumbered the church by instituting the clerk, no *quare incumbravit* lies; for the bishop hath no legal notice till the writ of *Ne admittas* is served upon him. The patron is therefore left to his *quare impedit* merely, which, since the *stat. Westm.* 2, lies as well upon a recent usurpation within six months past, as upon a disturbance without usurpation had. See 3 *Comm. c.* 16, *p.* 248, 9.

NEAT, or NET, Is the weight of a pure commodity alone, without the cask, bag, dross, &c. *Merch. Dict.*

NECESSITY. The Law charges no man with default where the act is compulsory, and not voluntary, and where there is not a consent and election; therefore if there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as, in presumption of law, he cannot overcome, such Necessity carries a privilege in itself. *Bac. Elem.* 25.

Necessity is of three sorts; Necessity of conservation of life, Necessity of obedience, and Necessity of the act of God or of a stranger.

And first of conservation of life. If a man steal viands to satisfy his present hunger, it was anciently held to be no felony nor larceny. *Britton, c.* 10: *Mirr. c.* 4. § 16. But this now seems to be considered as an unwarranted doctrine, borrowed from the notions of some civilians. But if such Necessity be owing to his unthriftiness, surely it is far from being an excuse. 1 *Hawk. P. C. c.* 33. § 20. See title *Hunger.* So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another, to save his life, thrusts him from it, whereby he is drowned, this is neither *se defendendo*, nor by misadventure, but justifiable. 1 *Hawk. Pl. C. c.* 28. § 26.

So if divers felons be in gaol, and the gaol by casualty is set on fire, whereby the prisoners get forth, this is no escape nor breaking of prison. *Bac. Elem.* 25.

So upon the statute, that every merchant setting his merchandise on land without satisfying the customer or agreeing for it, (which agreement is construed to be in certainty,) shall forfeit his merchandise; and it is so that by tempest a great quantity of the merchandise is thrown overboard, whereby the merchant agrees with the customer by estimation, which falls out short of the truth, yet the over quantity is not forfeited; where note, that Necessity dispenses with the direct letter of a statute law. *Bac. Elem.* 25, 6.

So if a man have right to land, and do not make his entry for terror of force, the law allows him a continual claim, which shall be as beneficial unto him as any entry. See title *Claim.*

The second Necessity is of obedience; therefore where baron and feme commit felony, the feme can neither be principal nor accessory; because the law intends her to have no will, in regard of the subjection and obedience she owes to her husband.

So one reason among others, why ambassadors are excused of practices against the State where they reside (except it be in point of conspiracy, which is against the law of nations and society) is, because *non constat* whether they have it *in mandatis*, and then they are excused by Necessity of obedience. *Ibid.*

The third Necessity is of the act of God, [as inevitable accident by the elements is, rather irreverently, styled in law,] or of a stranger; as, if I be tenant for years of a house, and it be overthrown by tempest or by floods, or invasion of enemies, or if I have belonging to it some cottage which has been infected, whereby I can procure none to inhabit them, nor workmen to repair them, and so they fall down; in these cases I am excused in waste; but of this last learning, when and how the act of God and strangers do excuse, there are other particular rules. *Bac. Elem.* 26, 27.

Yet Necessity is a privilege only *quoad jura privata*; for in all cases if the act that should deliver a man out of the Necessity be against the commonwealth, Necessity is no excuse; for *privilegium non valet contra rempublicam*; and another says, *Necessitas publica major est quam privata*;

for

for death is the last point of particular Necessity; and the law imposes upon every subject, that he prefer the urgent service of his prince and country, before the safety of his life; as if in danger of tempest those who are in the ship throw over other men's goods, they are not answerable; but if a man be commanded to bring ordnance or munition to relieve any of the King's towns that are distressed, then he cannot for any danger or tempest justify throwing them overboard; for there it holds which was spoken by the *Roman*, when he alleged the same Necessity of weather to hold him from embarking, *necesse est ut eam, non ut vivam.* So in the case put before, of husband and wife, if they join in committing treason, the Necessity of obedience, it has been said, does not excuse the offence, as it does in felony; because it is against the commonwealth. *Bac. Elem.* 27: see titles *Treason*; *Baron and Feme.*

So if a fire happen in a street, I may justify pulling down the wall or house of another, to prevent the fire from spreading; but if I be assailed in my house in a city or town, and distressed, and to save my life I set fire to my house, which spreads and takes hold of other houses adjoining, this is not justifiable; but I am subject to their action upon the case, because I cannot rescue my life by doing any thing which is against the commonwealth; but if it had been but a private trespass, as the going over another's ground, or breaking his inclosure, when I am pursued, for the safeguard of my life, it is justifiable. *Bac. Elem.* 27, 28.

The common case proves this exception; that is, if a madman commit felony, he shall not lose his life, because his infirmity came by the act of God; but if a drunken man commit felony, he shall not be excused, because his imperfection came by his own default; for the reason that loss or deprivation of will, and election by Necessity and by infirmity, is all one, for the lack of *arbitrium solutum* is the matter; therefore as *infirmitas culpabilis* excuses not, no more does *Necessitas culpabilis. Bac. Elem.* 29.

Compulsion and *inevitable Necessity* are considered, by *Blackstone*, among those causes from whence arises *a defect of will*; and under which, therefore, an action is not to be considered as criminal which would otherwise be so.

These, he states to be a constraint upon the will whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

Of this nature, in the first place, is the obligation of *civil subjection*, whereby the inferior is constrained, by the superior, to act contrary to what his own reason and inclination would suggest; as when a legislature establishes iniquity by a law, and commands the Subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiæ*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, is a question not determinable by municipal law, though among the casuists it will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The Sheriff who burnt *Latimer* and *Ridley*, in the days of Queen *Mary*, was not liable to punishment from *Elizabeth*, for executing so horrid an office: being justified by the commands of the then existing magistracy.

As to persons in private relations; the principal case where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband: for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master; though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment even for capital offences; as to which see this Dictionary, title *Baron and Feme* VII.

Another species of compulsion or Necessity is what our law calls *duress per minas*; as to which see this Dictionary, title *Duress*.

There is a third species of Necessity which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon, and constrain a man's will, and oblige him to an action, which without such obligation would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a Necessity of chusing one, he chuses the least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active: or if active it is rather in rejecting the greater evil than in choosing the less. Of this sort is that Necessity where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority; it is here justifiable, and even necessary, to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue; for the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public; and therefore excuse the felony which the killing would otherwise amount to. 1 *Hal. P.C.* 53: See 4 *Comm.* 27—31.

As to *homicide* justifiable by Necessity, see this Dict. title *Homicide* I.

NEEDLE-WORK, Importing it prohibited, *stat.* 13 & 14 *Car.* 2. *c.* 13. May be exported duty free, *stat.* 11 & 14 *W.* 3. *c.* 3. § 15. See title *Embroidery*.

NE EXEAT REGNO; (or as it is sometimes, ungrammatically as it seems, termed, *Ne exeat Regnum.*) A writ to restrain a person from going out of the kingdom without the King's licence. *F. N. B.* 85. It may be directed to the Sheriff to make the party find surety that he will not depart the realm; and on his refusal, to commit him to prison; or it may be directed to the party himself; and if he then goes, he may be fined. 2 *Inst.* 178.

A *Ne exeat Regnum* has been granted to stay a defendant from going to *Scotland*; for though it is not out of the kingdom, yet it is out of the process of the Court, and within the same mischief. 2 *Salk.* 702; 3 *Mod.* 127, 169; 4 *Mod.* 179. If the writ be sued for the King, the party against whom sued may plead licence by letters patent, &c. which shall discharge him; but where any Subject goes beyond sea with the King's licence, and continues longer than his appointed time, it hath

hath been held, he loses the benefit of a Subject. 4 *Leon.* 29. And if a person beyond sea refuses to return to *England* on the King's letters under his privy seal, commanding him upon his allegiance to return; being certified into the Chancery, a commission may be awarded to seize his lands and goods for the contempt: and so it is if such person's servants hinder a messenger from delivering his message, on affidavit of it, *&c. Jenk. Cent.* 246: 3 *Nelf. Abr.* 211: see title *King* V. 3.

The right which the King has, whenever he sees proper, of confining his Subjects to stay within the realm, (or of recalling them when beyond sea,) is classed by *Blackstone* among his prerogatives as *Generalissimo* of the realm. By the common law every man may go out of the realm for whatever cause he pleaseth, without obtaining the King's leave; provided he is under no injunction of staying at home; (which liberty was expressly declared, in King *John's* Great Charter, though left out in that of *Henry* III.): but, because that every man ought of right to defend the King and his realm, therefore the King at his pleasure may command him by his writ that he go not beyond the seas, or out of the realm without licence, and if he do the contrary, he shall be punished for disobeying the King's command. *F. N. B.* 85. Some persons there anciently were, that, by reason of their stations, were under a perpetual prohibition of going abroad without licence obtained: among which were reckoned all *Peers*, on account of their being counsellors of the Crown; all *Knights*, who were bound to defend the kingdom from invasions; all *Ecclesiastics*, who were expresly confined by the fourth chapter of the constitution of *Clarendon*, on account of their attachment in the times of popery to the see of *Rome*; all *Archers* and other *Artificers*, lest they should instruct foreigners to rival us in their several trades and manufactures. This was law in the times of *Britton*, who wrote in the reign of *Edw.* I. And Sir *E. Coke* gives us many instances to this effect in the time of *Edw.* III. *Britton, c.* 123; 3 *Inst.* 175. In the succeeding reign the affair of travelling wore a very different aspect: an act of parliament being made (5 *Ric.* 2. *c.* 2.), forbidding all persons whatever to go abroad without licence; *except* only the Lords and other great men of the realm; and true and notable merchants; and the King's soldiers. But this act was repealed by *stat.* 4 *Jac.* 1. *c.* 1. And at present every body has, or at least assumes, the liberty of going abroad when he pleases. Yet undoubtedly if the King, by writ of *Ne exeat Regnum* under his great seal or privy seal, thinks proper to prohibit him from so doing, and the Subject disobeys; it is a high contempt of the King's prerogative, for which the offender's lands shall be seised till he return, and then he is liable to fine and imprisonment. 1 *Hawk. P. C.* 22: 1 *Comm. c.* 7.

It is said, in Lord *Bacon's* Ordinances, No. 89, that, "towards the latter end of the reign of King *James* I. this writ was first thought proper to be granted, not only in respect of attempts prejudicial to the King and State; (in which case the Lord Chancellor granted it on application from any of the principal secretaries, without shewing cause, or upon such information as his Lordship should think of weight;) but also in the case of interlopers in trade; great bankrupts in whose estates many Subjects might be interested; in duels and other cases that did concern multitudes of the King's Subjects."

But in the year 1734, Lord Chancellor *Talbot* declared, that in his experience he never knew this writ of *Ne exeat Regnum* granted or taken out without a bill first filed.—It is true, it was originally a state-writ, but for some time, though not very long, it has been made use of in aid of the Subjects for the helping of them to justice; but it ought not to be made use of where the demand is entirely at law, for there the plaintiff has bail, and he ought not to have double bail both in law and equity. 3 *P. Wms.* 312.

The use and object of this writ is, in fact, at present exactly the same as an arrest at law in the commencement of an action, *viz.* to prevent the party from withdrawing his person and property beyond the jurisdiction of the Court, before a judgment could be obtained and carried into execution: so where there is a suit in equity for a demand, for which the defendant cannot be arrested in an action at law, upon an affidavit made that there is reason to apprehend that he will leave the kingdom before the conclusion of the suit, the Chancellor by this writ will stop him, and will commit him to prison, unless he produces sufficient sureties that he will abide the event of the suit. 1 *Comm. c.* 7. *p.* 266. *n.* And see 2 *Com. Dig.*: *F. N. B.* 85, &c.: 2 *C. C.* 245: *La.* 29: 7 *Mod.* 9: *Pre. Ch.* 171: 1 *P. Wms.* 263; and Mr. *Cox's* note there: 15 *Vin.* 537, 9.

NEGATIVE, Is a proposition by which something is denied; also a particle of denial; as, not. An affirmative includes a Negative; for every statute limiting any thing to be done in one form, although it be spoke in the affirmative, includes a Negative; as the statute of *Westm.* . 4, of a *quod ei deforceat* is, that the demandant shall vouch *ac si tenens esset in priori brevi*, includes a Negative, *viz.* and not otherwise. *Plowd* 206. *b.* 207. *a.*

A Negative cannot be proved or testified by witnesses, only an affirmative. 2 *Inst.* 662. Though a Negative is incapable of being proved directly, yet indirectly it is otherwise: for in case one accuses *B.* to have been at *York*, and there to have committed a certain fact, in proof of which he produces several witnesses; here *B.* cannot prove that he was not at *York*, against positive evidence that he was; but shall be allowed to make out the Negative by collateral testimony, that at that very time he was at *Exeter*, &c. in such a house and in such company. *Fortescue* 37.

Negative may be implied by an affirmative, but not necessarily *è contra*. As the saying, that a papist, unless he conforms, shall not take by devise, does not necessarily imply, that if he does conform he shall take by devise, *&c.* 2 *P. Wms.* 9.

Where a ..ult of a term for raising portions for daughters directs a particular method for raising them, it implies a Negative, that they shall not be raised any other way. 2 *P. Wms.* 19.

An affirmative oath is made to ground an attachment upon; if the person against whom the motion is, denies the charge by oath positively and fully, the Negative oath shall be preferred; and this is the only case in which it shall be so. 8 *Mod.* 81.

NEGATIVE PREGNANT, *negativa pregnans*,] Is a Negative, implying also an affirmative; as if a man being impleaded to have done a thing on such a day, or in such a place, denieth that he did it *modo & forma declarata*,

declarata, which implieth, neverthelefs, that in fome fort he did it; or if a man be faid to have alienated land in fee, and he faith he hath not aliened in fee, that is a Negative pregnant; for though he hath not aliened in fee, yet it may be, he hath made an eftate in tail. *Dyer* 17. *num.* 95: *Brook hoc titulo*: *Kitchen* 232: *Terms of the Law.*

A Negative pregnant is a fault in pleading; and there muft be a fpecial demurrer to a Negative pregnant plea, &c. for the Court will intend every pleading to be good, till the contrary doth appear. See 2 *Leon.* 248: *Bro. Iffue join. pl.* 81: *Heath's Max.* 53: 2 *Leo.* 199: *Cro. Jac.* 559, 560: 15 *Vin. Abr.* title *Negative pregnant*: and this Dictionary, title *Pleading.*

NEGGILDARE, Signifies to claim kindred. *Leg. H.* 1. *c.* 70: *LL. Inæ*, §§ 7, 8.

NEGLIGENCE, Is where a perfon neglects or omits to do a thing which he is by law obliged to. And where one has goods of another to keep till fuch a time, and hath a certain recompence or reward for the keeping, he fhall ftand charged for injury by Negligence, &c. But if he hath nothing for keeping them, he is not bound to anfwer. *Doct. & Stud.* 269. See title *Bailment.* A man who finds another's goods, if they are after hurt by wilful Negligence, it is held he is chargeable to the owner; though it is otherwife when they are loft by cafualty, as in cafe they are laid in a houfe that is accidentally burnt, or if he deliver them to another to keep, who runs away with them, &c. *Ibid.* It is held if an accountant be robbed, and it is without his default and Negligence, he fhall not be anfwerable for the money. 1 *Inft.* 89. A right may be loft by Negligence, as where an action is not brought in the time appointed by the ftatutes of limitations, &c. See 2 *P. Wms.* 665: *Tot.* 76: *Chanc. Rep.* 10: *Chanc. Prec.* 583: and the proper titles in this Dictionary.

NEGRO; See title *Slaves* and *Slave-trade.*

NEIF, Fr. *neif*, Lat. *naturalis, nativa.*] A bondwoman, or the villein, born in one's houfe, mentioned in *ftat.* 9 *R.* 2. *c.* 2. If a bondwoman married a free man, fhe was thereby made free; and being once made free, and difcharged of bondage, fhe could not be Neif after, without fome fpecial act done by her, as by divorce, confeffion in Court, &c. And a free woman taking a villein to her hufband, was not thereby bond; but their iffue were villeins as their father was; though this is contrary to the civil law, which fays, *partus fequitur ventrem. Terms de Ley.*

Anciently lords of manors fold, gave, or affigned their bondmen and Neifs, as appears by many ancient deeds. See title *Villein.*

NEIFTY, *Nativitas.*] There was an ancient writ called *Writ of Neifty*, whereby the lord claimed fuch a woman for his Neif; now out of ufe. See title *Villein.*

NEIGHBOUR, *vicinus.*] One who dwells near another. See *Vicinage*: *Jury.*

NE INJUSTE VEXES, A writ founded on Magna Charta, *c.* 10, that lies for a tenant diftrained by his lord, for more fervices than he ought to perform; and is a prohibition to the lord *not unjuftly to* diftrain or *vex* his tenant: in a fpecial ufe, it is where the tenant hath prejudiced himfelf, by doing greater fervices, or paying more rent, without conftraint, than he needed; for in this cafe, by reafon of the lord's feifin, the tenant cannot avoid it by avowry, but is driven to his writ for remedy. *Reg. Orig.* 4: *F. N. B.* 10. And if the lord diftrains to do other fervices, or to pay other rent than due, after the prohibition delivered unto him, then the tenant fhall have an attachment againft the lord, &c. and when the lord cometh thereon, the tenant fhall count againft him, and put himfelf upon the grand affife, &c. whereupon judgment fhall be given. *New Nat. Br.* 22.

This writ is one of the remedies which the ancient law provided to remedy the oppreffion of lords: though it is of the prohibitory kind, yet it is in the nature of a writ of right. *Booth* 126. It lies where *tenant in fee fimple*, and his anceftors, have held of the lord by certain fervices, and the lord hath obtained feifin of more or greater fervice, by the inadvertent payment or performance of them by the tenant himfelf; there the tenant cannot in an avowry avoid the lord's poffeffory right, becaufe of the feifin given by his own hands; but is driven to this writ to diveft the lord's poffeffion, and eftablifh the mere right of property, by afcertaining the fervices and reducing them to their proper ftandard. 3 *Comm. c.* 15. *p.* 234.

This writ is always anceftral, where the tenant and his anceftors have holden of the lord and his anceftors; and the lord hath encroached any rent, &c. A feoffee fhall not avoid feifin of rent had by encroachment of his feoffor, nor have the writ *Ne injufte vexes*; alfo a man fhall not have a writ of *Ne injufte vexes* againft the grantee of the feigniory. *Mich.* 18 *Ed.* 2: 10 *Ed.* 3. Tenant in tail may not have this writ; but fhall plead and fhew the matter, and not be eftopped by the payment of his anceftors, &c. *Trin.* 20 *Ed.* 3.; for he may avoid fuch feifin of the lord obtained from the payment of his anceftors, by plea to an avowry in replevin. *F. N. B.* 11: 2 *Inft.* 21. But it feems that almoft every queftion that can now arife, where this writ was formerly in ufe, may be determined in an action of trefpafs.

FORM of the WRIT of *Ne injufte vexes.*

GEORGE *the Third*, &c. *To* A. B. *greeting*: *We command you, that you do not vex or trouble* C. D. *or fuffer him to be vexed, for his freehold meffuage*, &c. *which he holds of you, in*, &c. *Nor in any manner exact, or permit to be exacted from him fervices which therefore he ought not to do, (or rent which he owes not,) nor has been accuftomed*, &c.

NEMINE CONTRADICENTE, Words ufed to fignify the unanimous confent of the members of the Houfe of Commons in parliament to a vote or refolution. The term *Nemine diffentiente* is, in the fame manner, applied in the Houfe of Peers.

NE RECIPIATUR, Againft the receiving and fetting down a caufe to be tried. That is, where the caufe is not entered in due time. See *Trial.*

NE VICECOMES, *Colore Mandati Regis, quenquam amoveat à poffeffione Ecclefiæ minus jufte. Reg. Orig.* 61.

NEW ASSIGNMENT. In many actions the plaintiff who hath alleged in his declaration a general wrong, may in his replication, after an evafive plea by the defendant, reduce that general wrong to a more particular certainty, by affigning the injury afrefh with all its fpecific circumftances in fuch manner as clearly to afcertain and identify it, confiftently with his general complaint; which is called a New or Novel Affignment. 3 *Comm.* 311. See title *Pleading.*

NEWCASTLE UPON TINE. Keels in the haven to be measured and marked. *Stats.* 9 *H.* 5. *c.* 10: 30 *Car.* 2. *st.* 1. *c.* 8: 6 & 7 *W.* 3. *c.* 10. See title *Coals.* Goldsmiths, silversmiths, and plate-workers incorporated. *Stat.* 1 *Ann. st.* 1. *c.* 9.

No person shall ship, load, or unload any goods to be sold, into or from ships at any place on the river *Tine*, but at the town of *Newcastle*, on pain to forfeit the goods; and none shall raise any wear in the haven there, between certain places on the said river, *&c.* *Stat.* 21 *H.* 8. *c.* 18. At *Newcastle upon Tine*, if a trial be had between two inhabitants of the place, and the damages not exceeding 40*s.* the plaintiff is to have no judgment, but defendant shall have costs; by a private act of parliament. 5 *Mod.* 367.

NEWFOUNDLAND. Persons trading to *Newfoundland*, shall have freedom of fishing, *&c.* And every fishing ship that first enters any harbour or creek in *Newfoundland*, shall be admiral of the said harbour for that season, and determine differences between the masters of fishing vessels, and the inhabitants there, *&c.* *Stat.* 10 & 11 *W.* 3. *c.* 25. See *Navigation Acts*, Div. V: *Fisheries.*

NEWHAVEN; See *Harbours.*

NEWPORT in the *Isle of Wight*, The poll for knights of the shire may be adjourned to it. *Stat.* 7 & 8 *W.* 3. *c.* 25. § 10. See title *Parliament.*

NEW RIVER; See *River.*

NEWS. Spreading false News to make discord between the King and nobility, or concerning any great man of the realm, is punishable at common law with fine and imprisonment; which is confirmed by *stats. Westm.* 1. 3 *E.* 1. *c.* 34: 2 *R.* 2. *st.* 1. *c.* 5: 12 *R.* 2. *c.* 11: 2 *Inst.* 226: 3 *Inst.* 198: 4 *Comm. c.* 11. *p.* 149.

NEWS-PAPERS, Are by various statutes subject to a stamp-duty of 2*d.* if consisting of half a sheet or less; if consisting of one sheet, 2*d.* halfpenny; and for every additional half sheet, one halfpenny more. Persons selling any News-paper, not being stamped or marked as directed, a justice of peace may commit them to the house of correction for three months; and a reward of 20*s.* is to be paid for apprehending any such offender. *Stat.* 16 *Geo.* 1. *c.* 26. § 5. See titles *Advertisements*; *Lottery*; *Sunday*; *Unlawful Assemblies*; *Libel*, &c.

NEW STILE; See *Year.*

NEW TRIAL. Judgments are often suspended by granting New Trials. The causes of suspending the judgment by granting a New Trial, are at present wholly extrinsic, arising from matter foreign to, or *dehors* the record. See this Dictionary, title *Trial.*

NEW-YORK; See title *Navigation Acts.*

NEXT OF KIN; See titles *Descent*; *Executor*, III; and V. 8.

NICOL, Anciently used for *Lincoln.* 30 *Ed.* 1: 7 *E.* 1: *& sæpe alibi. Cowell.*

NIDERLING, NIDERING, or NITHING, A vile, base person, a sluggard. *Will. of Malmsb. p.* 121: *Mat. Par. Ann.* 1088. Chicken-hearted; See *Spelman in voc.*

NIENT COMPRISE, Is an exception taken to a petition, because the thing desired is not contained in that deed or proceeding whereon the petition is founded; for example, one desires of the Court wherein a recovery is had of lands, *&c.* to be put in possession of a house, formerly among the lands adjudged unto him; to which the adverse party pleads, that this is not to be granted by reason this house is *not comprised* amongst the lands and houses for which he had judgment. *New Book Entries.*

NIENT DEDIRE, Signifies to suffer judgment to be had against one, by *not denying* or opposing it, *i. e.* by default. 29 *Car.* 2.

NIGER LIBER. The Black Book or Register in the Exchequer is called by this name.

NIGHT, Is when it is so dark that the countenance of a man cannot be discerned; and by some opinions, burglary in the Night may be committed at any time after sun-set, and before rising. *H. P. C.* 79: 3 *Inst.* 63: 1 *Hawk. P. C.* See *Noctanter*; *Burglary.*

NIGHTWALKERS, Are such persons as sleep by day and walk by night, being oftentimes pilferers, or disturbers of the peace. *Stat.* 5 *Ed.* 3. *c.* 14. Constables are authorized by the common law to arrest Nightwalkers and suspicious persons, *&c.* Watchmen may also arrest Nightwalkers, and hold them until the morning: and it is said, that a private person may arrest any suspicious Nightwalker, and detain him till he give a good account of himself. 2 *Hawk. P. C.* Watchmen, either those appointed by the statute of *Winchester*, 13 *E.* 1. *c.* 4, to keep watch and ward in all towns from sun-setting till sun-rising, or such as are mere assistants to the constable, may *virtute officii* arrest all offenders, and particularly *Night-walkers*, and commit them to custody till morning. 4 *Comm. c.* 21. *p.* 292, cites 2 *Hal. P. C.* 88—96. One may be bound to the good behaviour for being a Nightwalker; and common Nightwalkers and haunters of bawdy-houses are to be indicted before justices of peace, *&c.* 1 *Hawk. P. C.*: 2 *Hawk. P. C.*: *Latch.* 173: *Poph.* 280. But it is held not lawful for a constable, *&c.* to take up any woman, as a Nightwalker, on bare suspicion only, of being of ill fame; unless she be guilty of a breach of the peace, or some unlawful act, and found misdoing. *Holt's MS.* See 2 *Hale's Hist. P. C.* 89; and this Dictionary, titles *Constable*; *Watch.*

NIHIL CAPIAT PER BREVE, or *per Billam.* Is the judgment given against the plaintiff in an action, either in bar of his action, or in abatement of his writ or bill, *&c.* *Co. Litt.* 363.

NIHIL, or NIL DEBET, Is a common plea to an action of debt, when the money is paid; but it is no plea in covenant, on breach assigned for non-payment of rent; *&c.* 3 *Lev.* 170. If an action of debt be brought against a Sheriff or gaoler, for the escape of one in execution, the plaintiff must declare upon the judgment, and yet *Nil debet per patriam* is a good plea. 1 *Saund.* 38; See titles *Issue*; *Pleading.*

NIHIL, or NIL DICIT, Is a failing by the defendant to put in an answer to the plaintiff by the day assigned; which being omitted, judgment is had against him of course, as saying nothing why it should not. See title *Judgment*

NIHIL, or NIL HABUIT IN TENEMENTIS, A plea to be pleaded in an action of debt only, brought by a lessor against lessee for years, or at will, without deed. 2 *Lil. Abr.* 214. In debt for rent upon an indenture

indenture of lease, *Nil habuit in tenementis* may not be pleaded; because it is an estoppel, and a general demurrer will serve. 3 *Lev*. 146. But if debt is brought for rent upon a deed poll, the defendant may plead this plea: and where a defendant pleaded *Nil habuit in tenementis tempore dimissionis*; the plaintiff replied, *Quod habuit in tenementis*, &c. and verdict and judgment was had for the plaintiff; whereupon writ of error being brought, it was assigned for error, that the replication was not good, for he ought to have shewn what estate he then had; and of that opinion was the Court; and it had been bad upon demurrer, but being after a verdict, it is good. *Cro. Jac*. 312. If a less estate is found than the plaintiff pleads in his reply to a *Nil habuit*, &c. so as it be sufficient to entitle the plaintiff to make a lease, it is good enough. 10 *W*. 3. *Nil habuit in tenementis* cannot be given in evidence where the plaintiff hath been in possession. *Ld. Raym*. 746. See title *Pleading*.

NIHILS, or NICHILS, Are issues which the Sheriff that is *apposed* in the Exchequer says, are nothing worth, and illeviable, for the insufficiency of the parties from whom due. Accounts of *Nihil* shall be put out of the Exchequer, *Stat*. 5 *R*. 2. *c*. 13.

NISI PRIUS, The Commission to Justices of assise; so called from a judicial writ of *distringas*, whereby the Sheriff is commanded to distrain the impanelled jury to appear at *Westminster* before the justices at a certain day in the following term, to try some cause; *Nisi prius justic. domini regis ad assisas capiend. venerint, viz. Unless* the justices come *before* that day to such a place, &c. 2 *Inst*. 424: 4 *Inst*. 159.

A writ of *Nisi prius* is where an issue is joined, then there goes a *venire* to summon the jury to appear at a day in court; and upon the return of the *venire*, with the panel of the jurors names, the record of *Nisi prius* is made up and sealed, and there goes forth the writ of *distringas* to have the jurors in Court, *Nisi prius justic. venerint*, &c. such a day in such a county, to try the issue joined between the parties. 2 *Lil*. 215.

A record of *Nisi prius* ought to contain a transcript of the whole issue roll. All civil causes at issue in the Courts at *Westminster*, are brought down in the two issuable vacations before the day of appearance appointed for the jury above, into the county where the action was laid to be tried there; *viz*. at the assises; and then upon the return of the verdict given by the jury to the Court above, the next term, the judges there give judgment for the party for whom the verdict is found; and these trials by *Nisi prius* are for the ease of the county, the parties, jurors, and witnesses, by saving them the charge and trouble of coming to *Westminster*; but in matters of great weight and difficulty, the judges above, upon motion, will retain causes to be tried there; though laid in the country, and then the juries and witnesses in such causes must come up to the courts at *Westminster* for trial at bar: and the King hath his election to try his suits at the bar, or in the county, &c. *Wood's Inst*. 479.

The statute of *Westm*. 2. 13 *Ed*. 1. *st*. 1. *c*. 30, having ordained, "that all pleas in either bench, which require only an easy examination, shall be determined in the country before justices of assise, by virtue of the writ appointed by that statute, commonly called the writ of *Nisi prius*;" it has been held, that an issue joined in the King's Bench upon an indictment or appeal, whether for treason or felony, or a crime of an inferior nature, committed in a different county from that wherein the Court sits, may be tried in the proper county by writ of *Nisi prius*: but as the King is not expresly named in this statute, and it is a general rule, that he shall not be bound except named, it is said, where the King is party, a *Nisi prius* ought not to be granted, without his special warrant, or the assent of his attorney; though the Court may grant it in appeals in the same manner as any other actions. 2 *Inst*. 424: 4 *Inst*. 160: *Dyer* 46: 2 *Hawk. P. C. c*. 42. §§ 2, 3.

Justices of *Nisi prius* have power to record nonsuits and defaults in the country at the days assigned; and are to report them at the bench, &c. And are to hear and determine conspiracy, confederacy, champerty, &c. *Stat*. 4 *Ed*. 3. *c*. 11: *Nisi prius* shall be granted in attaints; but that which cannot be determined before the justices upon the *Nisi prius*, shall be adjourned to the bench where they are justices: and the justices before whom inquisitions, inquests, and juries, shall be taken by the King's writ of *Nisi prius*, are empowered to give judgment in felony and treason, &c. and to award execution by force of their judgment. *Stats*. 5 *Ed*. 3. *c*. 11: 14 *Hen*. 6. *c*. 1.

It was held by *Hale*, that the justices of *Nisi prius* have not any original power of determining felony, without special commission for that purpose; and by virtue of *stats*. 27 *Ed*. 1. *st*. 1. *c*. 3: 14 *H*. 6. *c*. 1, they have authority to determine such felonies only as are sent down to be tried before them; in which case, on removal of the indictments, they may proceed to trial and judgment as if Justices of gaol-delivery. 2 *Hale's Hist. P. C*. 41.

By *stat*. 18 *Eliz. c*. 12, the Chief Justice of the King's Bench, Chief Justice of the Common Pleas, and Chief Baron of the Exchequer, and in their absence two other of the Judges, &c. as Justices of *Nisi prius* for the county of *Middlesex*, shall try causes upon writs of *Nisi prius* on issues joined in B. R. and C. B. and the Exchequer, which were formerly only triable at bar, in the term time or four days after each term. And by *stat*. 12 *Geo*. 1. *c*. 31, the time is enlarged to eight days (and by *stat*. 24 *Geo*. 2. *c*. 18, to fourteen days) after the end of any term; also any one judge or baron may try such issues, in the absence of the chiefs; and all Sheriffs, officers, parties, and witnesses are required to give attendance, &c. The authority of justices of *Nisi prius* in the country, is annexed to the justices of assise; and the Court above will take judicial notice of what is done at *Nisi prius*; being entered on record. See this Dictionary, titles *Assise*; *Justices of Assise*; *Circuits*; *Trial*; *Jury*, &c.

NIVICOLINI BRITONES, *Welshmen*; because in *Caermarthenshire* and other *Northern* counties of *Wales*, they lived near high mountains covered with snow. *Du Cange*: *Cowel*.

NOBILITY, *nobilitas*.] Compriseth all degrees of dignity above a Knight; under which latter term is included a Baronet; so that a baron is the lowest order of nobility: it is derived from the King, and may by him be granted by patent in fee, for life, &c. See title *Peers of the Realm*.

NOBLE, An ancient kind of *English* money in use in *England* in the time of *Edward* III. *Knighton* says, the *Rose Noble*

Noble was a gold coin current in *England* about the year 1344. A Noble is now valued at 6*s.* 8*d.* but we have no peculiar coin of that name. From the treaty of peace between *John*, King of *France*, and *Edward* III. *A. D.* 1360, the Noble was valued as equal to two *French* gold crowns.

NOCTANTER, *By night; In the Night-time.*] The name of a writ issuing out of the Chancery and returnable in the King's Bench, given by *stat. Westm.* 2. 13 *E.* 1. *st.* 1. *c.* 46. By virtue of which statute, in case any one having right to approve waste ground, *&c.* doth raise and levy a ditch or hedge, and it is thrown down in the night time, and it cannot be known by a verdict of the assise or a jury by whom; or if the neighbouring towns will not indict such as are guilty, they shall be distrained to make again the hedge or ditch at their own costs, and to answer damages. 2 *Inst.* 476. And the *Noctanter* writ thereupon is directed to the Sheriff of the county to make inquisition relative thereto. On the return of this writ by the Sheriff, that the same is found by inquisition, and that the jury are ignorant who did it, the return being filed in the Crown-office, there goes out a writ of inquiry of damages, and a *distringas* to the Sheriff to distrain the circumadjacent vills, to repair the hedges and fences so destroyed at their own charge, and also to restore the damages, *&c.*

The circumadjacent vills intended by the statute are the contiguous vills round the place; and if they are not contiguous, they are not guilty, and may plead so; and when other vills near, of as great value, by favour or negligence of the Sheriff, are not summoned, *&c.* they may plead as tenants do, where all are not summoned. As to the pleadings to this writ; where more damages are found than there ought to be, the defendant may by protestation deny the fact, or confess, and aver that the damages were but small; and traverse that the party sustained damages to the sum found, or any other sum beyond what they admit; or may plead *Not guilty*, and give in evidence any matter which will be a bar to the prosecutor, but satisfaction. 2 *Lil. Abr.* 227.

Here if the vills repair, damages ought not to be given to the value of the repairs; and if the vills which are liable thereto have repaired, it ought so far to help them in the trial of the *quantum damnificatus*, that the other damages ought only to be considered. *Ibid.*

The charges for the defence of the several vills must be raised by agreement: and if they cannot agree, each vill is to bear their own charges, as in case of a suit against a hundred, till execution; and then the *stat.* 27 *Eliz.* c. 13, hath provided a remedy.

The writ of *Noctanter*, by the better opinion, lies for the prostration as well of all inclosures as those improved out of Commons; but if it be not in *the night*, this writ will not lie; and there ought to be a convenient time (which the Court is to judge of) before the writ is brought for the country to inquire of, and indict the offenders; which *Coke* says should be a year and a day. 2 *Inst.* 476. See *Cro. Car.* 440: 1 *Keb.* 845. And if any one of the offenders be indicted, the defendants must plead it, *&c.*

The words, *in the night-time*, are so necessary in an indictment of burglary, that it hath been adjudged insufficient without it. *Cro. Eliz.* 483. See title *Burglary*.

NOCTES ET NOCTEM DE FIRMA. In the book of *Domesday* we often meet with *Tot noctes de firma*, or *firma tot noctium*; which is understood of entertainment of meat and drink for so many nights; for in the time of the *English Saxons*, time was computed not by days, but nights; and so it continued till the reign of King *Hen.* I. as appears by his laws, *c.* 66, 76. And hence it is still usual to say a sevennight, i. e. *septem Noctes*, for a week; and a fortnight for two weeks, i. e. *quatuordecim Noctes*.

NODFYRS, or NEDFRI, *Sax.*] *Spelman* says this word is derived from the old Saxon *neod*, *obsequium*, and *fry*, *ignis*, and signified fires made in honour of the heathen deities. But by others it is said to come from the Saxon *neb*, that is *necessary*; and was used for the necessary fire.

NOLLE PROSEQUI, Is used in the law, where a plaintiff in any action will not proceed any further; and may be before or after verdict, though it is usually before; and it is then stronger against the plaintiff than a nonsuit, which is only a default in appearance; but this is a voluntary acknowledgment, that he hath no cause of action. 2 *Lil.* 218.

A *Nolle prosequi* is an acknowledgment or agreement by the plaintiff, that he *will not* further *prosecute* his suit as to the whole or a part of the cause of action; or where there are several defendants against some or one of them; and it is *in nature* of a *retraxit* operating as a release or perpetual bar. *Tidd. Pract. K. B.* cites *Cro. Car.* 239, 243: 2 *Rol. Ab.* 100: *Hard.* 153: 8 *Co.* 58: *Cro. Jac.* 211.

On a plea of coverture, *&c.* if the plaintiff cannot answer it, he may enter a *Nolle prosequi* as to the whole cause of action, but the defendant in such case is entitled to costs, under *stat.* 8 *Eliz. c.* 2. § 2: 3 *T. R.* 511.—So if the defendant demur to one of several counts of a declaration, the plaintiff may enter a *Nolle prosequi* as to that count which is demurred to, and proceed to trial upon the other counts. 2 *Salk.* 456. Or if judgment be given for him on demurrer, he may enter a *Nolle prosequi* as to the issue, and proceed to a writ of inquiry on the demurrer. 1 *Salk.* 219: 2 *Salk.* 456: 1 *Str.* 532, 574. But after a demurrer for *misjoinder*, the plaintiff cannot cure it by entering a *Nolle prosequi*. 1 *H. Bl.* 108. And after demurrer to a declaration, consisting of two counts against two defendants, because one of them was not named in the last count, the plaintiff cannot enter a *Nolle prosequi* on that count, and proceed on the other. 4 *T. R.* 360.

If there be a *demurrer* to part, and an issue upon other part, and the plaintiff prevails upon the demurrer, it was in one case holden, that without a *Nolle prosequi* as to the issue, he cannot have a writ of inquiry on the demurrer; because on the trial of the issue, the same jury will ascertain the damages for that part which is demurred to. 1 *Salk.* 219: 12 *Mod.* 558. But in a subsequent case, where the declaration consisted of four counts, to three of which there was a plea of *non assumpsit*, and a demurrer to the fourth; and after judgment on the demurrer, the plaintiff took out a writ of inquiry and executed it; this was moved to be set aside, there being no *Nolle prosequi* on the roll; and it was insisted, that the plaintiff ought to take out a *venire*, as well to try the issue, as to inquire of the damages

damages upon the demurrer; *sed per Curiam*, that is, indeed, the course where the issues are carried down to trial, before the demurrer is determined, and in that case the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for, upon that count, there is no reason why we should force him to carry down the record to *nisi prius*, and as to the want of a *Nolle prosequi* upon the roll, he may supply that when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment upon the inquiry must stand. 1 *Stra* 532: 8 *Mod*. 108.

In *trespass* or other action for a wrong, against several defendants, the plaintiff may, at any time before final judgment enter a *Nolle prosequi* as to one defendant, and proceed against the others: *Hob*. 70: *Cro. Car*. 239: 243: 2 *Rol. Abr*. 100: 2 *Salk*. 55, 6, 7: 3 *Salk*. 244, 5: 1 *Wils*. 306: so in *assumpsit*, or other action upon *contract*, against several defendants, one of whom pleads bankruptcy, or other matter in his personal discharge, the plaintiff may enter a *Nolle prosequi* as to him, and proceed against the other defendants. 1 *Wils*. 89. But a *Nolle prosequi* cannot be entered as to one defendant, after final judgment against the others. 2 *Salk*. 455. And it seems that in *assumpsit*, or other action upon contract, against several defendants, the plaintiff cannot enter a *Nolle prosequi* as to one, unless it be for some matter operating in his *personal* discharge, without releasing the others. 1 *Wils*. 89. See *Tidd's Pract. K. B.*

A plaintiff comes by his attorney *hic in curiam & fatetur se ulterius Nolle prosequi*; whereupon judgment was given, that the defendant *eat sine die*, and no amercement upon the plaintiff; this was held erroneous; for the plaintiff ought also to be amerced. 8 *Rep*. 58. But later determinations have settled that in entering a *Nolle prosequi* the plaintiff need not be amerced *pro falso clamore*, but it is sufficient that the defendant be put without day. 1 *Stra*. 574.

Where there are two defendants, and one pleads not guilty, and the other another plea; if on demurrer there is judgment for the plaintiff against one on the demurrer, and a *Nolle prosequi* for the other, there it ought to be *eat sine die*, or it is ill, and the entry of *quod eat sine die* is a discharge to the defendant. *Cro. Jac*. 439: *Hob*. 180.

In trespass against two, one pleaded not guilty, the other justified; and both issues being found for the plaintiff, and several damages and joint costs assessed; the plaintiff then entered a *Nolle prosequi* against one, and took judgment against the other for damages found against him, and the costs; upon which it was insisted on for error, that the entry of a *Nolle prosequi* before judgment as to one, is a release to him, and *quasi* a release to both; *per Cur*. it is not an absolute release, but as it were an agreement that the plaintiff will not proceed against the one; and as to him it is a bar, but he may proceed against the other; and where they sever by pleas, there may be proceedings against one, and a *Nolle prosequi* against the other. *Cro. Car*. 239, 243; 2 *Lil*. 220. It has been held, in trespass against three defendants; if a *Nolle prosequi* were entered against two, before judgment against any of them, it had not amounted to a release to them all; only to a waiver of suit: and the three defendants cannot join in a writ of error; for those against whom the *Nolle prosequi* is entered are not damnified. *Jenk. Cent* 309.

A *Nolle prosequi* does not amount to a *retraxit* or release, where there are more defendants. *Ld. Raym*. 599.

The King may, by his attorney general, enter a *Nolle prosequi* on an information; but it shall not stop the proceedings of the informer. 1 *Leon*. 119. But the clerk of the Crown cannot enter a *Nolle prosequi* on an indictment, without leave of the attorney general. *Ld Raym*. 721. And if an informer cause a *Nolle prosequi* to be entered, the defendant shall have costs, *&c.* by *stat*. 4 & 5 *W. & M. c*. 18. See title *Costs*. *Keble* mentions a *Nolle prosequi* on *retraxit* by attorney. 3 *Keb*. 332.

Where in an action against several defendants the jury by mistake have assessed several damages, the plaintiff may cure it by entering a *Nolle prosequi* as to one of the defendants, and taking judgment against the others. 11 *Co*. 5: *Cro. Car*. 239, 243: *Carth*. 19.

Where there are several defendants, and they sever in plea, whereupon issue is joined, the plaintiff may enter a *Nolle prosequi* as to one defendant at any time before the record is sent down to be tried at *nisi prius*. 2 *Rol. Ab*. 100: *Salk*. 457.—See title *Nonsuit*.

NOMENCLATOR, One who opens the etymologies of names, interpreted *Thesaurarius*. *Spelman*: *Cowell*.

NOMINATION, *nominatio*.] Is the power (by virtue of some manor or otherwise) of appointing a clerk to a patron of a benefice, by him to be presented to the Ordinary. The right of Nomination a man may have by deed; and in such case, if the patron refuse to present the nominee, or presents another, he may bring a *quare impedit*; for he who is to present, is only an instrument to him who nominates; and the person who hath the Nomination is in effect the patron of the church. *Plowd*. 529: *Moor* 47. A nominator must appoint his clerk within six months after avoidance; if he doth not, and the patron presents his clerk before the bishop hath taken any benefit of the lapse, he is obliged to admit that clerk. But where one hath the Nomination, and another the presentation, if the right of presentation should afterwards come to the King, it is said he who hath the Nomination will be entitled to the presentation also; because the King who should present cannot be subservient to the nominator, being contrary to his dignity. *Hughes's Pars. Law* 76, 77. Right of Nomination may be forfeited to the Crown as well as presentation; where the nominator corruptly agrees to nominate, within the statute of *Simony*, &c. See title *Advowson*.

NOMINA VILLARUM. *Edw*. II. in the 9th of his reign, sent his letters to every Sheriff in *England*, requiring an exact account and return into the Exchequer of the *names* of all the *villages*, and possessors thereof in every county, which being done accordingly, the returns of the Sheriffs all joined together are called *Nomina villarum*, still remaining in the Exchequer, *Anno* 9 *Ed*. 2.

NOMINE PŒNÆ, A penalty incurred for not paying rent, &c. at the day appointed by the lease or agreement for payment thereof. 2 *Lil*. 221. If rent is reserved, and there is a *Nomine pœnæ* on the non-payment of it, and the rent be behind and unpaid, there must be an actual demand thereof made, before the grantee of the rent can distrain for it; the *Nomine pœnæ* being of

of the same nature as the rent, and issuing out of the land out of which the rent doth issue. *Hob.* 82, 133. And where a rent-charge was granted for years, with a *Nomine pœnæ* and clause of distress, if it was not paid on the day; on the rent's being behind, and the term expired, the Court was moved that the grantee might distrain for the *Nomine pœnæ*; but it was held that he could not, because the *Nomine pœnæ* depended on the rent, and the distress was gone for that, and by consequence for the other. 2 *Nels. Abr.* 1182. See *stat.* 8 *Ann. c.* 14.

When any sum *Nomine pœnæ* is to be forfeited for non-payment of the rent at the time, &c. the demand of the rent ought to be precisely at the day, in respect of the penalty; and debt will not lie on a *Nomine pœnæ*, without a demand. 7 *Rep.* 28: *Cro. Eliz.* 383: *Style* 4. If there is a *Nomine pœnæ* of such a sum for every day after rent becomes due, it has been a question whether there must be a demand for every day's *Nomine pœnæ*, or one demand for many days. And by the better opinion it hath been holden, that for every day there ought to be a demand; and that one will not be sufficient for the whole; but where a *Nomine pœnæ* of forty shillings was limited *quolibet die proximo* the feast-day on which the rent ought to be paid, it was adjudged, that there was but one forty shillings forfeited, because the word *proximo* must relate to the very next day following the rent day; so likewise when the rent became due and unpaid at the next rent day after that, and so on. *Palm.* 207: 2 *Nels.* 1182. An assignee is chargeable with a *Nomine pœnæ* incurred after the assignment, but not before. *Moor* 357: 2 *Lil. Abr.* 221. Though forfeiture is mentioned to be *Nomine pœnæ*, or not paying of a collateral sum, it is no *Nomine pœnæ*, if it be not of a rent. *Lutw.* 1156. See this Dictionary, title *Distress* III.

NON-ABILITY, Is an exception taken against the plaintiff in a cause, upon some just ground, why he cannot commence any suit in law; as *præmunire*, outlawry, excommunication, &c. *F. N. B.* 35, 65. See titles *Disability*; *Abatement*.

NONÆ ET DECIMÆ, Payments made to the church by those who were tenants of church farms; where *Nonæ* was a rent or duty for things belonging to husbandry, and *Decimæ* were claimed in right of the church. Formerly a *ninth* part of moveable goods was paid to the clergy on the death of persons in their parish, which was called *Nonagium*, and claimed on pretence of being distributed to pious uses. *Blount.*

NON-AGE, In general understanding, is all the time of a person's being under the age of 21: and in a special sense, where one is under 14 as to marriage, &c. See titles *Age*; *Infant*.

NON ASSUMPSIT. The general issue in an action of *Assumpsit*, whereby a man denies that he made any promise. See titles *Issue*; *Pleading*.

NON ASSUMPSIT INFRA SEX ANNOS. Where a defendant by virtue of the statute of limitations, *stat.* 21 *Jac.* 1. *c.* 16, pleads *that he did not undertake or promise within* 6 *years* before the commencement of the action; as a plea of *actio non accrevit infra sex annos* is pleaded by virtue of the same statute. This last plea is proper where the *cause of action* does not accrue, at the time of the promise made, as in the case of a note, payable at some time specified, but subsequent to the date. See title *Limitation of Actions*.

NON-CLAIM, Is an omission or neglect of one that claims not within the time limited by law, as within a year and a day where a continual claim ought to be made, or in 5 years after a fine levied, &c. by which a man may be barred of his right of entry. See *stats.* 4 *H.* 7. *c.* 24: 32 *H.* 8. *c.* 33; and this Dictionary, titles *Claim*; *Entry*.

NON COMPOS MENTIS, One not of sound mind, memory, and understanding: See this Dictionary, title *Idiots and Lunaticks*.

NON-CONFORMISTS, Persons *not conforming* to the rites and ceremonies of the Church of *England* as by law established. The *stats.* 1 *Eliz. c.* 2: 13 & 14 *Car.* 2. *c.* 4, were made for the uniformity of Common Prayer and service in the church; but see *stat.* 10 *Ann. c.* 2, under title *Dissenters*. Non-conformists to be punished by imprisonment, and to submit in three months, or to abjure the realm; and keeping a Non-conformist in the house after notice, subjected the offender to the penalty of 10*l.* a month. *Stat.* 35 *Eliz. c.* 1. Penalties on being at conventicles. *Stat.* 22 *Car.* 2. *c.* 1. See further this Dictionary, title *Dissenters*. In addition to what is said there, the following deserves the notice of the Student:

Toleration of the Episcopal communion in *Scotland*, *stat.* 10 *Ann. c.* 7. Episcopal meeting-houses in *Scotland* to be registered; and a penalty imposed on unqualified ministers officiating in *Scotland*. *Stat.* 19 *Geo.* 2. *c.* 38. Episcopal ministers in *Scotland* to be ordained by a bishop of *England* or *Ireland*. *Ib.* & *stat.* 21 *Geo.* 2. *c.* 34. Peers and others present at unlawful meeting-houses in *Scotland* disqualified from voting. *Stat.* 19 *Geo.* 2. *c.* 38. A form of affirmation to be taken instead of an oath by the members of the *Unitas fratrum*; and privileges granted to the members thereof who should settle in *America*. *Stat.* 22 *Geo.* 2. *c.* 30.

This seems the properest place to notice those statutes which are usually known by the name of the *Corporation Act* and *Test Act*; as to the true policy or propriety of which any discussion is not here by any means called for.

By the CORPORATION ACT, *stat.* 13 *Car.* 2. *st.* 2. *c.* 1, No person can be legally elected to any office relating to the government of any city or corporation, unless, within one year before, he has received the sacrament of the Lord's Supper, according to the rites of the church of *England*; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office, or, in default of either of these requisites, such election shall be void. By *stat.* 5 *Geo.* 1. *c.* 6, however, no person shall be removed from a corporate office to which he has been duly elected, or otherwise prosecuted for his omission to take the sacrament, nor incur any incapacity or penalty, unless such person be so removed, or the prosecution commenced within six months after his being elected into the office. See title *Nonjurors*.

By the TEST ACT, *stat.* 25 *Ch.* 2. *c.* 2, all officers civil and military, and persons having places of trust under his Majesty in *England, Wales, Berwick, Jersey*, or *Guernsey*, or in the navy, are directed to take the oath, and make the declaration against transubstantiation in the Court of King's Bench or Chancery, the next term, or at the next quarter sessions; or by substitutes within six months after their admission; and also within the same time

time to receive the sacrament of the Lord's Supper, according to the usage of the Church of *England*, in some public church immediately after divine service and sermon; and to deliver into Court a certificate thereof signed by the minister and churchwarden; and also to prove the same by two credible witnesses; upon forfeiture of 500*l.* and disability to hold the office.

It is to be observed, that the *Toleration Act*, *stat.* 1 *W.* & *M. st.* 1. *c.* 18. (see title *Dissenters*), though it exempts Dissenters and others from certain penalties, does not dispense either with the Test or Corporation Acts as far as they impose the obligation of receiving the sacrament on persons serving in offices or corporations. See further as connected with this subject, title *Papists*.

NON-DAMNIFICATUS, A plea to an action of debt upon bond, with condition to save the plaintiff harmless. 2 *Lil. Abr.* 224. If the condition of a bond be to save harmless only, *Non damnificatus* generally is a good plea; but if it be to discharge the plaintiff, &c. then the manner of the discharge is to be shewn. 1 *Leon.* 72. When one pleads a discharge, and that he saved another harmless, he ought to shew how he did it, that the Court may judge thereof; though a defendant may plead *Non damnificatus*, without shewing it; because he pleads in the negative, and then the other party shall shew damnification. *Cro. Jac.* 363: 2 *Rep.* 3, 4: *March* 121. It has been adjudged, where a condition of a bond is to save harmless from all suits in general, *Non damnificatus* may be pleaded; and if it is in a particular suit or thing, there the defendant must set forth how he hath saved harmless and discharged; but where a suit is upon a counter-bond, the plea of *Non damnificatus* is good. 17 *Mod.* 243. See title *Pleading*.

NON DECIMANDO, A custom or prescription, *De Non Decimando* is to be discharged of all tithes, &c. See *Modus Decimandi*; *Tithes*.

NON DISTRINGENDO, A writ *not to distrain*, used in divers cases. *Table of Reg. of Writs*.

NONES, *nonæ*.] So called from their beginning the *ninth* day before the *Ides*. The seventh day of *March*, *May*, *July*, and *October*; and the fifth day of all the other months. By the *Roman* account the *Nones* in the aforementioned months are the six days next following the first day, or the *calends*; and of others the four days next after the first, according to these verses,

Sex Nonas, Maius, October, Julius, & Mars,
Quatuor at reliqui, &c.

Though the last of these days is properly called *Nones*; for the others are reckoned backwards as distant from them, and accounted the third, fourth, or fifth *Nones*. See *Ides*.

NON CULPABILIS; See *Not guilty*.

NON EST FACTUM, The general issue, in an action on bond or other deed, whereby the defendant denies that to be his deed whereon he is impleaded. *Broke*. In every case where a bond is void, the defendant may plead *Non est factum*. But when a bond is voidable only, he must shew the special matter, and conclude judgment, *Si actio*, &c. 2 *Lil.* 226.

This plea is good in all cases where the bond or specialty was not executed, or varies from the declaration. *Com. Dig.* title *Pleader*: 2 W. 18.

Under this plea the defendant may give in evidence that the deed was void *ab initio*; being obtained by fraud or made by a married woman, lunatick, &c. or that it became void after it was made, and before the commencement of the action, by erasure, alteration, cancelling, &c. or that it was delivered as an escrow to a third person. But he cannot give in evidence that the deed was *voidable* by infancy, duress *per minas*, &c.; or that it was *void* by statute, as by *stat.* 23 *H* 6. *c.* 9, relating to Sheriffs' bonds, or by the statutes against usury, gaming, &c. In these cases, therefore, the defendant must plead specially. So he must plead *payment* at or after the day, *performance* or any other matter in excuse of performance, as *non damnificatus* to a bond of indemnity, no *award* to an arbitration bond; or to a bail-bond no *process* to arrest a defendant, &c. See *Tidd's Pract. K B.* and the authorities there cited.

It ought to conclude to the country; but if the plaintiff pleads over to the special matter, it will be well. 1 *Salk.* 274.

A special *Non est factum* puts the proof upon the defendants, which, upon *Non est factum* generally, will be upon the plaintiff. *Mod. Cas.* 218.

If a deed is rased in a material part, by which it becomes void, the person bound by it may plead *Non est factum*, and give the matter in evidence, because it was not his deed at the time of the plea. 11 *Rep.* 27.

A bond was dated *November* the 10th, and so set forth in the plaintiff's declaration; the defendant pleaded *Non est factum*, and though it was found that it was not delivered till the 18th, the issue being upon a *Non est factum*, it appeared to be his deed: but it is said the defendant might have helped himself by pleading specially. *Cro. Jac.* 126.

The defendant pleads *quod factum prædict.* was made and delivered without a date, and that the plaintiff put a date to it, and so *Non est factum*; this was held naught upon a demurrer, for the defendant confesses the deed by saying *factum prædict.* and afterwards denies it; though he might have said generally, *Non est factum*. *Cro. Eliz.* 800. Where two are jointly bound in a bond, and an action is brought on it against one only, he cannot plead *Non est factum*, or demur in that case; but may have his plea in abatement of the writ. 5 *Rep.* 119. None but the party, his heirs, executors, &c. can plead *Non est factum*. *Lutw.* 662. For a stranger to the deed cannot plead a special *Non est factum*; but must say, nothing passed by the deed. 1 *Rol.* 188. See *Com. Dig.* title *Pleading*; and this Dictionary, titles *Bond*; *Deed*; *Pleading*.

NON EST INVENTUS, The Sheriff's return to a writ, when the defendant is *not to be found* in his bailiwick. And there is a return that the plaintiff *non invenit plegium*, on original writs. *Shep. Epit.* 1129.

NONFEASANCE, An offence of omission of what ought to be done; as in not coming to church, &c. which need not be alleged in any certain place; for generally speaking it is not committed any where. But Nonfeasance will not make a man a trespasser, &c. *Hob.* 251; 8 *Rep.* 146.

NON IMPLACITANDO ALIQUEM DE LIBERO TENEMENTO SINE BREVI, A writ to prohibit bailiffs, &c. from distraining or impleading any man touching his freehold, *without* the King's *writ*. *Reg. Orig.* 171.

NON

NON INTROMITTENDO, QUANDO BREVE PRÆCIPE IN CAPITE SUBDOLE IMPETRATUR: Was a writ directed to the justices of the Bench, or in Eyre, commanding them not to give one, who had under colour of entitling the King to land, &c. as holding of him *in capite*, deceitfully obtained the writ called *Præcipe in capite*, any benefit thereof, but to put him to his writ of right. *Reg. Orig.* 4. This writ having dependence on the court of Wards, since taken away, is now disused.

NONJURORS, Persons who refuse to take the oaths to Government, who are liable to certain penalties; and those who deny that oaths are unlawful are for a third offence to abjure the realm, by *stat.* 13 & 14 *Car.* 2. *c.* 1.—Parsons, vicars, &c. are to take the oaths, and give their assent to the declaration, *stat.* 13 & 14 *Car.* 2. *c.* 4, or they shall not preach, under the penalty of forty pounds, &c. *Stat.* 17 *Car.* 2. *c.* 2.—Ecclesiastical persons not taking the oaths on the Revolution, were rendered incapable to hold their livings: but the King was empowered to grant such of the nonjuring clergy as he thought fit, not above twelve, an allowance out of their ecclesiastical benefices for their subsistence, not exceeding a third part. *Stat.* 1 *W.* & *M. sess* 1. *c.* 8. Persons refusing the oaths, shall incur, forfeit, and suffer the penalties inflicted on Popish recusants, and the Court of Exchequer may issue out process against their lands, &c. *Stat.* 7 & 8 *W.* 3. *c.* 27. See title *Non-conformists*; *Oaths*; *Dissenters*; *Papists*, &c.

Blackstone enumerates among the contempts to the King's title, the refusing or neglecting to take the oaths appointed by the statutes for the better securing the Government, and yet acting in a public office, place of trust, or other capacity for which the said *oaths* are required to be taken, *viz.* those of *allegiance*, *supremacy*, and *abjuration*, which must be taken within six calendar months after admission. The penalties for this contempt, inflicted by *stat.* 1 *Geo.* 1. *st.* 2. *c.* 13, are very little if any thing short of those of a *præmunire*; being an incapacity to hold the said offices, or any other; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament; and after conviction the offender shall also forfeit 500*l.* to him or them that will sue for the same. Members on the foundation in any college of the two Universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college register within one month after: otherwise if the electors do not remove him and elect another within 12 months, or after, the King may nominate a person to succeed him, by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon and tender the oaths to any person whom they shall suspect to be disaffected; and every person refusing the same, who is properly called a *Nonjuror*, shall be adjudged a Popish recusant convict, and subjected to the same penalties as such recusants; which in the end may amount to the alternative of abjuring the realm, or suffering death as a felon. 4 *Comm.* *c.* 9. *p.* 123, 4. But by *stat.* 31 *Geo* 3 *c.* 32. § 18, no person shall be summoned to take the *oath* of *supremacy*, or be prosecuted for not obeying such summons. This act was made expressly for the relief of the Roman Catholics, but does not appear to extend to repeal the provisions of *stat.* 1 *Geo* 1. *c.* 13: as to the oaths of *allegiance* and *abjuration*, as suggested by Mr. *Christian* in his note on 4 *Comm.* *c.* 8. *p.* 116.

NON MERCHANDIZANDO VICTUALIA, An ancient writ to justices of assise, to inquire whether the magistrates of such a town do sell victuals in gross, or by retail, during the time of their being in office, which is contrary to an obsolete statute; and to punish them if they do. *Reg. Orig.* 184.

NON MOLESTANDO, A writ that lies for a person who is *molested* contrary to the King's protection granted him. *Reg. of Writs* 184.

NON OBSTANTE, *Notwithstanding.*] Was a clause heretofore frequent in statutes and letters patent, and was a licence from the King to do a thing which at the common law might be lawfully done; but which being restrained by act of parliament, could not be done without such licence. *Vaugh.* 347: *Plowd.* 501. But this doctrine of *Non obstante's*, which sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the Revolution, and abdicated at *Westminster-Hall* when King *James* abdicated the kingdom. 1 *Comm.* 342. See this Dictionary, titles *King*, V. 3; *Grant of the King*; *Pardon*; *Mortmain*.

The *stat.* 18 *Eliz.* *c.* 2, confirmed all grants of the Queen by letters patent, of any honours, castles, manors, lands, tenements, &c. and that they should stand and be good in law against the Queen, her heirs and successors, *Non obstante* any misnaming, misrecital, want of certainty, finding offices or inquisitions, livery of seisin, &c.

NON OMITTAS, A writ directed to the Sheriff, where the bailiff of a liberty or franchise who hath the return of writs refuses or neglects to serve a process, for the Sheriff to enter into the franchise and execute the King's process himself, or by his officer. Before this writ is granted, the Sheriff ought to return, that he hath sent to the bailiff, and that he hath not served the writ; but for dispatch, the usual practice is to send a *Non omittas* with a *capias* or *latitat*. *F. N. B.* 68, 74: 2 *Inst.* 453. If a Sheriff return that he sent the process to the bailiff of a liberty, who hath given him no answer; a *Non omittas* shall be awarded to the Sheriff. And if he returns that he sent the process to such bailiff, who hath returned a *cepi corpus*, or such like matter; and the bailiff bring not in the body, or money, &c. at the day, the bailiff shall be amerced, and a writ issue to the Sheriff to distrain the bailiff to bring in the body. 2 *Hawk. P. C.*

Writs of *capias utlagatum*, and of *quo minus* out of the Exchequer, and it is said all writs whatsoever at the King's suit, are of the same effect as a *Non omittas*; and the Sheriff may by virtue of them enter into a liberty and execute them. 2 *Lil. Abr.* 229. The *Reg. of Writs* mentions three sorts of this writ, given to prevent liberties being privileged to hinder or delay the general execution of justice; and the clause of the *Non omittas* is, *quod* non omittas, *propter aliquam libertatem* (*viz.* such liberty to which the Sheriff hath made a *mandavi ballivo, qui nullum dedit responsum*) *quin in eam ingrediaris* & *capias* A. B. *&c.*

NON PLEVIN, *non plevina.*] Is defined to be *defalta post defaltam*; and in *Hengham Magna, cap.* 8, it is said, that the defendant is to replevy his lands seised by the King within fifteen days; and if he neglects, then, at the instance of the plaintiff at the next court-day, he shall lose his seisin, *sicut per defaltam post defaltam.* But by statute it was enacted, that none should lose his land, because of *non plevin*, i. e. where the land was not replevied in due time. *Stat.* 9 *Ed.* 3. *c.* 2.

NON PONENDIS IN ASSISIS ET JURATIS. A writ granted for freeing and discharging persons from serving on assises and juries; and when one hath a charter of exemption, he may sue the Sheriff for returning him. This writ is founded on the *stats. West.* 2. 13 *E.* 1. *st.* 1. *c.* 38: and *Articuli super Chartas*, 28 *E.* 1. *st.* 3. *c.* 9. See *F. N B.* 165: 2 *Inst.* 127, 447.

NON PROCEDENDO AD ASSISAM REGE INCONSULTO. A writ to stop the trial of a cause appertaining to one who is in the King's service, &c. until the King's pleasure be farther known. *Reg. Orig.* 220.

NON PROS. or NON PROSEQUITUR; See titles *Nolle Prosequi*; *Nonsuit.*

NON-RESIDENCE, The absence of spiritual persons from their benefices. See *Residence.*

NON RESIDENTIA PRO CLERICIS REGIS, A writ directed to the bishop, charging him not to molest a clerk, employed in the King's service, by reason of his *Non-residence*; in which case he is to be discharged. *Reg. Orig.* 58.

NON SANE MEMORY, *Non sanæ Memoriæ.*] Is used in law for an exception to an act, declared to be done by another, whereon the plaintiff in any action grounds his plaint; and the effect of it is, that the party who did that act was not well in his senses when he did it, or when he made his last will and testament. *New Book of Entries.* And *sane Memory* for the making of a will is not always where the testator can answer Yes or No, or in some things with sense; but he ought to have judgment to discern, and be of perfect Memory, or the will shall be void. *Moor, c.* 1051. See title *Idiots and Lunaticks.*

NONSENSE. Where a matter set forth is grammatically right, but absurd in the sense and unintelligible, some words cannot be rejected to make sense of the rest, but must be taken as they are; for there is nothing so absurd but what by rejecting may be made sense; but where the matter is nonsense by being contradictory and repugnant to somewhat precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected. As in ejectment where the declaration is of a demise the 2d of *January*, and that the defendant *postea*, to wit, on the 1st of *January*, ejected him; here the *scilicet* may be rejected, as being expresly contrary to the *postea* and the precedent matter; *per Holt*, Ch. J. 1 *Salk.* 324. But *per Powel*, J. Words unnecessary might in construction be omitted or rejected, though they are not repugnant or contradictory; but in *cæteris omnibus* agreed with the Ch. J. See titles *Mistake*; *Amendment.*

NON SOLVENDO PECUNIAM, AD QUAM CLERICUS MULCTATUR PRO NON RESIDENTIA. A writ prohibiting an Ordinary to take a pecuniary mulct, imposed on a clerk of the King's for non residence. *Reg. of Writs, fol.* 59.

NONSUIT.

NON EST PROSECUTUS.] A Renunciation of a suit by the plaintiff or demandant, most commonly upon the discovery of some error or defect, when the matter is so far proceeded in that the Jury is ready at the bar to deliver their verdict. The civilians term it *Litis renunciationem. Cowell.*

If the plaintiff in an action neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law, in any subsequent stage of the action, he is adjudged *not to follow* or pursue his remedy as he ought to do; and thereupon a *Nonsuit* or *Non prosequitur* is entered, and he is said to be *non-prossed.* And for thus deserting his complaint, after making a false claim (*pro falso clamore suo*), he shall not only pay costs to the defendant, but is liable to be amerced to the King. A Nonsuit differs from a *Retraxit*, in that the former is negative, and the latter positive. The Nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs: but a *Retraxit* is an open and voluntary renunciation of his suit in Court, and by this he for ever loses his action. 3 *Comm. c.* 20. *p.* 295, 6.

Before the Jury gave their verdict on a trial, it was formerly usual to *call* or demand the plaintiff, in order to answer the amercement, to which by the old law he was liable, in case he failed in his suit. 3 *Comm.* 376. And it is now usual to call him, whenever he is unable to make out his case, either by reason of his not adducing any evidence in support of it, or any evidence arising in the proper county. The cases in which it is necessary that the evidence should arise in a particular county, are either where the action is in itself local, or made so by act of parliament, as in actions upon penal statutes, &c. or where upon a motion to change or retain the venue, the plaintiff undertakes to give material evidence in the county where the action was brought. 2 *Black Rep.* 1039. See titles *Action*; *Venue.* And there is this advantage attending a Nonsuit; that, as is already hinted, the plaintiff, though he pays costs, may afterwards bring another action for the same cause; which he cannot do, after a verdict against him. *Tidd's Pract. K. B.*

Further information on this subject may be thus arranged:

I. *Who may be Nonsuit; in what action, and at what time, there may be a Nonsuit.*

II. *How far the Nonsuit of one shall be the Nonsuit of another; and how far a Nonsuit for part of the thing in demand shall be a Nonsuit for the whole.*

III. *Of the effect of a Nonsuit; and of its being a temporary bar.*

IV. *Of judgments as in case of a Nonsuit.*

I. IT is agreed, that the King, being in supposition of law always present in Court, cannot be Nonsuit in any information or action wherein he is sole plaintiff; but it is held, that any informer *qui tam*, or plaintiff in a popular action, may be Nonsuit, as well in respect of the King as of himself. *Bro. Nonsuit*, 68: *Co. Lit.* 139, *b*: 2 *Roll. Abr.* 131.

If an infant bring an assise by guardian, although the infant disavow the suit in proper person, yet no Nonsuit shall be awarded. 39 *Ass. pl.* 1: 2 *Roll. Abr.* 130.

Where an executor need not name himself executor, he shall pay costs upon a Nonsuit, and the naming himself executor shall not exempt him from it. 6 *Mod.* 181. See title *Executor*. VI. 2.

If an attorney of the Common Pleas sues an action there, he shall not be demanded, because he is supposed always present aiding the Court. 2 *H.* 6. 44. *b*: 1 *Roll. Abr.* 581. *Sed qu.* as to this doctrine? In many cases it is the interest of the plaintiff to be Nonsuit, instead of having a verdict against him, as he may bring a new action, wherein, if properly advised and pursued, he may recover. *J. M.*

A person may be Nonsuit in a writ of error. 2 *Roll. Abr.* 130: 1 *Sid.* 255. So in a writ of false judgment. 20 *H.* 6. 18. *b*: 2 *Roll. Abr.* 130. *S. C.*

One cannot be Nonsuit in an action in which he is not an actor or demandant; and though he afterwards becomes an actor, yet not being originally so, he cannot be Nonsuit; as an avowant: so of garnishees who become actors, but were not so originally. 22 *Ed* 4. 10.

So if a person outlawed hath a charter of pardon, and sues a *scire facias* against the party, though hereby he is an actor, yet he cannot be Nonsuit. 2 *Roll. Abr.* 130.

So if a man traverse an office he cannot be Nonsuit, though he is an actor, for he hath no original pending against the King. 2 *Roll. Abr.* 130: *Dyer* 141. *pl.* 47. where it is made a *quære*.

But in a petition of right against the King, the plaintiff may be Nonsuit. 11 *H.* 4. 52: 2 *Roll. Abr.* 130.

So in an *auditâ querelâ*, to avoid a statute, the plaintiff may be Nonsuit, for he is plaintiff in this action. 47 *Ed.* 3. 5. *b.*

If to two *nihils* returned to a *scire facias* on a charter of pardon, the plaintiff does not appear, he shall be Nonsuit; for the statute ordains, that upon his appearing he ought to count against the defendant. 45 *Ed.* 3. 16.

At the common law, upon every continuance, or day given over before judgment, the plaintiff was demandable, and upon his non-appearance might have been Nonsuit. *Co. Lit.* 139. *b.* That if at common law he did not like the damages given by the jury, he might be Nonsuit, See 5 *Mod.* 208.

By now by *stat.* 2 *Hen.* 4. *cap.* 7, it is enacted in the words following: "Whereas, upon verdict found before any Justice in assise of *novel disseisin*, *mort d'ancestor*, or any other action whatsoever, the parties before this time have been adjourned upon difficulty in law, upon the matter so found; it is ordained and established, that if the verdict pass against the plaintiff, the same plaintiff shall not be nonsuited."

Notwithstanding this statute, it hath been held, that the plaintiff may be nonsuited after a special verdict, or after a demurrer and argument thereon. *Co. Litt.* 139: 2 *Jon.* 1: 2 *Roll. Abr.* 131-2: 3 *Leon.* 28: and see 2 *Hawk. P C. c.* 23. § 95.

If there be a judgment to account, and auditors assigned, and thereupon a *capias ad computandum*, the plaintiff cannot be nonsuited on the original, because the original is determined, by the judgment to account. 2 *Roll. Abr.* 131. See *Co. Lit.* 139. *b.*

A Nonsuit can only be at the instance of the defendant; and therefore where the cause, at *nisi prius* was called on, and jury sworn, but no counsel, attornies, parties, or witnesses appeared on either side, the judge held, that the only way was to discharge the jury; for nobody has a right to demand the plaintiff, but the defendant, and the defendant not demanding him, the Judge could not order him to be called. 1 *Stra.* 267: see also 2 *Stra.* 1117.

The plaintiff in no case is compellable to be nonsuited; and therefore, if he insist upon the matter being left to a jury, they must give in their verdict, which is general or special. If it be for the plaintiff, or for the defendant in *replevin*, the jury should regularly assess the damages; but when the plaintiff is nonsuited on the trial of an issue, he cannot have *contingent* damages assessed for him on a demurrer. 1 *Stra.* 507. Though when the plaintiff in *replevin* is *nonsuited*, the jury may assess damages for the defendant. *Comb.* 11: 5 *Mod.* 76: and see *Tidd's Pract. K. B.*

II. In real or mixt actions, the Nonsuit of one demandant is not the Nonsuit of both; but he who makes default shall be summoned and severed; but regularly, in personal actions, the Nonsuit of one is the Nonsuit of both. *Co. Lit.* 139: 2 *Inst.* 563: and *vide* 2 *Roll. Abr.* 132, several cases to this purpose.

But in personal actions brought by executors, there shall be summons and severance, because the best measure shall be taken for the benefit of the dead; and so it is in action of trespass, as executors for goods taken out of their own possession. Like law in account, as executors by the receipt of their own hands. *Co. Lit.* 139. *a.* See title *Executors*. VI. 2.

In an *auditâ querelâ* concerning the personalty, the Nonsuit of the one is not the Nonsuit of the other; because it goeth by way of discharge, and freeing themselves, therefore the default of the one shall not hurt the other. *Co. Lit.* 139. In an *auditâ querelâ*, *scire facias*, *attaint*, the Nonsuit of one shall not prejudice the other. 6 *Co.* 26.

In a *quid juris clamat*, the Nonsuit of the one is the Nonsuit of both; because the tenant cannot attorn according to the grant. *Co. Lit.* 139. *a.*

An appeal against divers, whether they plead the same or several issues, it hath been adjudged, that a Nonsuit against one, at the trial of any one of the issues, is a Nonsuit as to all, because a Nonsuit operates as a release of the whole. *Cro. Eliz.* 460. *pl.* 6: *Dyer* 120: 2 *Roll. Abr.* 133: 1 *Sid.* 378.

A *latitat* was sued out against four defendants in trespass, the plaintiff was Nonsuit for want of a declaration, and the defendant's attorney entered four Nonsuits against him; and it was held to be irregular, because the trespass is joint; and though the plaintiff may count severally against the defendants, yet it remains joint till severed by the count. 2 *Salk.* 455. There is a Nonsuit before appearance at the return of the writ, or after appearance at some day of continuance. *Co. Lit.* 138. *b.*

In an action against *several* defendants, the plaintiff must be nonsuited as to all, or to none of them: and therefore, if one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be

non-

nonsuited as to him; but such defendant must have a verdict, if the plaintiff fail to make out his case. 3 *Term Rep.* 662.

It is laid down as a general rule, that a Nonsuit for part is a Nonsuit for the whole: but it hath been held, that if a defendant plead to one part, and thereupon issue is joined, and demur to the other, the plaintiff may be Nonsuit as to one part, and proceed for the other. 2 *Leon.* 177: *Hob.* 180.

If in debt the defendant acknowledges the action as to part, and joins issue as to the residue, and the plaintiff hath judgment for that which is confessed; but there is a *cessat executio*, by reason of the damages to be assessed by the jury; if the plaintiff be nonsuited in this issue, this shall be a Nonsuit, for the damages to be given, because that he had judgment. 2 *Roll. Abr.* 134.

If in trover the defendant pleads, that as to some of the goods they were fixed to his freehold, as to others that he had them of the gift of the plaintiff, and as to the rest not guilty: and as to the first, the plaintiff enters *non vult ulterius prosequi*; this amounts only to a *retraxit*, and is no Nonsuit, so as to bar the plaintiff from proceeding on the other parts of the plea, on the rule, that a Nonsuit for part is a Nonsuit for the whole. 2 *Leon.* 177.

III. A Nonsuit, as hath been observed, is regularly no peremptory bar; but the plaintiff may, notwithstanding, commence any new action of the same or like nature: but this general rule hath the following exceptions:

1. It is peremptory in a *quare impedit*; and in that action a discontinuance is also peremptory; and the reason is, for that the defendant had, by judgment of the Court, a writ to the bishop; and the incumbent, that cometh in by that writ, shall never be removed; which is a flat bar to that presentation.

2. Nonsuit in an appeal of murder, rape, robbery, *&c.* after appearance, is peremptory, and this *in favorem vitæ*; but the Nonsuit of the plaintiff in an appeal is not such an acquittal, on which the defendant shall recover damages against the abettors, by *stat. Westm.* 2. 13 *E.* 1. *st.* 1. *c.* 12; unless after the Nonsuit, he were arraigned at the King's suit, and acquitted.

3. So if the plaintiff, in an appeal of maihem, be Nonsuit after appearance, it is peremptory; for the words therein are *felonicè maihemavit.*

4. A Nonsuit after appearance is also peremptory in a writ of *nativo habendo*, and the Nonsuit of one plaintiff in that action nonsuits both, *in favorem libertatis*; for in a *libertate probandâ* such Nonsuit is not peremptory, neither is the Nonsuit of one plaintiff the Nonsuit of both. *Co. Lit.* 139. *a*: *Cro. Eliz.* 881.

5. Such Nonsuit is also peremptory in an attaint, but a discontinuance in an attaint is not; because there is a judgment given upon the Nonsuit, but not upon the discontinuance. *Co. Lit.* 139. *a.*

IV. The delay and expence attending the trial by *proviso*, (see this Dictionary, title *Trial*,) gave rise to the statute, 14 *Geo.* 2. *c.* 17, by which it is enacted, "That where any issue is joined in an action in the Courts of Record at *Westminster*, and the plaintiff hath neglected to bring such issue on to be tried, according to the course and practice of the said Courts, the Judges of the said Courts respectively may, at any time after such neglect, upon motion in open Court (due notice having been given thereof), give the like *judgment* for the defendant *as in cases of Nonsuit*; unless the said Court shall, upon just cause and reasonable terms, allow any further time for the trial of such issue; and if the plaintiff shall neglect to try such issue within the time so allowed, then and in every such case the said Court shall proceed to give such judgment as aforesaid. Provided, that all judgments given by virtue of this act shall be of the like force and effect as judgments upon Nonsuit, and of no other force or effect. Provided also, that the defendants shall, upon such judgment, be awarded their costs, in any action or suit, where they would upon Nonsuit be entitled to the same."

This statute has been held to extend to *qui tam* actions, as well as others. *Barnes* 315. And also to a traverse of the return of a *mandamus*. *Say. Rep.* 110: *Say. Costs* 166: 4 *T. R.* 689. But it does not extend, any more than the trial by *proviso*, to actions of *replevin*, &c. in which the defendant is considered as an actor, and may therefore enter the issue, and carry down the cause to trial himself. 1 *Black. Rep.* 375: *Say. Costs* 168: 3 *T. R.* 661: 5 *T. R.* 400: but see *Barnes* 317. And where there are two defendants, one of whom lets judgment go by default, the other cannot have judgment as in case of a Nonsuit. *Say. Rep.* 22, 103: *Say. Costs* 163, 4, 8: 1 *Wils.* 325: 1 *Burr.* 358. Also where the cause has been once carried down to trial, the defendant cannot have such judgment for not carrying it down again. 1 *T. R.* 492: 3 *T. R.* 1: 1 *H. Black.* 101.

The *course* and *practice* of the Court, referred to by the statute, is that which before regulated the trial by *proviso* (see this Dictionary, title *Trial*); and as the defendant could not have such trial until the plaintiff had been guilty of laches, nor until after the issue was entered on record, so neither till then is he entitled to judgment as in case of a Nonsuit. If the action be laid in *London* or *Middlesex*, the defendant ought not to give a rule for the plaintiff to enter his issue the same term in which it is joined, unless notice of trial hath been given; and accordingly it is held, that in a *town* cause, unless notice of trial has been given, the defendant cannot move for judgment as in case of a Nonsuit, the next term after that in which issue was joined, although it was joined early enough to enable the plaintiff to give notice of trial for the sittings after that term; the plaintiff in such case having the whole of the next term to enter the issue, and no laches can be imputed to him till the term after. 4 *T. R.* 557: 1 *H. Black* 65, *contra*: and see 1 *H. Black.* 123, 282. But if notice of trial has been given, in a *town* cause, for a sitting in term, the plaintiff may move for judgment as in case of a Nonsuit the next term, being the term after that in which the issue ought to be entered. To support a rule for judgment as in case of a Nonsuit in the next term after that in which issue was joined, the affidavit must state that notice of trial was given for a sitting in the preceding term; but, in the third or other subsequent term, a general affidavit, stating the term when the issue was joined, is deemed sufficient. 1 *H. Black.* 282. In a *country* cause, where notice of trial is given for the assises, the defendant may move for judgment as in case of a Nonsuit the next term; but

the plaintiff is not bound to give notice of trial, till the term succeeding that in which issue was joined. And if he do not, the plaintiff cannot move for judgment as in case of a Nonsuit till after the next assises. 2 *Term. Rep.* 734.

The rule for judgment as in case of a Nonsuit is a rule to shew cause, founded on an affidavit of the state of the proceedings, and of the plaintiff's default in not proceeding to trial; which rule has been held sufficient *notice* of motion within the act. *Lofft.* 265: 1 *H. Black.* 517, *contra.* And the roll must be in Court at the time the motion is made. This rule is made absolute of course, on an affidavit of service, unless the plaintiff shew some cause to the contrary; as the absence of a material witness, &c. But a slight cause in general is deemed sufficient, if the plaintiff will undertake *peremptorily* to try at the next sittings or assises. The insolvency of the defendant, after the action brought, is good cause against judgment as in case of a Nonsuit. *Doug.* 671. But unless the plaintiff will consent to stay all further proceedings, and enter a *cesset processus*, the Court will bind him down to a peremptory undertaking. Where the rule to shew cause was discharged, on an affidavit which contained an answer false in itself, the Court would not afterwards open the matter, on an affidavit which disproved the contents of the former one. 3 *T. R.* 405. See *Tidd's Pract. K. B.*

For more learning on this subject, see 15 *Vin. Abr.* title *Nonsuit*; and this Dictionary, titles *Costs*; *Damages*; *Process*; *Trial*, &c.

NON SUM INFORMATUS. A formal answer made of course by an attorney, that he is *not* instructed or *informed* to say any thing material in defence of his client; by which he is deemed to leave it undefended, and so judgment passeth against his client. See title *Judgments acknowledged for Debts.*

NON-TENURE. A plea in bar to a real action, by saying, that he (the defendant) *holdeth not* the land mentioned in the plaintiff's count or declaration, or at least some part thereof. See *stat.* 25 *E.* 3. *c.* 16: 1 *Mod. Rep* 250. And our books mention Non-tenure general and special: general, where one denies ever to have been tenant of the land in question; and special is an exception, alleging that he was not tenant on the day whereon the writ was purchased. *West. Symb. par.* 2. When the tenant or defendant pleads Non-tenure of the whole, he need not say who is tenant; but if he pleads Non-tenure as to part, he must set forth who is the tenant. 1 *Mod.* 181. Non-tenure in part, or in the whole, is not pleadable after imparlance. 3 *Lev.* 55. See title *Pleading*.

NON-TERM, *non terminus.*] The vacation between term and term; formerly called the time or days of the King's peace. *Lamb. Archa.* 126.

NON-USER, Of offices concerning the publick, is cause of forfeiture. 9 *Rep.* 50. And if one have a franchise, and do not use it, he shall forfeit the same; which likewise may be lost by default, as well as *Non-user*. See titles *Office*; *Condition* I. 1.

NOOK OF LAND, *nocata terræ.*] In an old deed of Sir *Walter de Pedwardyn*, twelve acres and a half of land were called a *Nook of Land*; but the quantity is generally uncertain. *Dugd. Warwick. p.* 665.

NORROY *Quasi North Roy*, The Northern King at Arms, mentioned in *stat.* 14 *Car.* 2. *c.* 33. See *Herald*.

NORTHAMPTON. The statute named from this place was made there, *anno.* 2 *Edw.* 3.

NORTHERN BORDERS; See titles *Mischief*, *Malicious*; and post *Northumberland*.

NORTHLEECH SCHOOL, In the county of *Gloucester*, how founded and incorporated. *Stat.* 4 *Jac.* 1. *c.* 7.

NORTHUMBERLAND AND NORTHERN COUNTIES. Provisions for preventing theft and rapine upon the Northern Borders are made by *stats.* 7 *Jac.* 1. *c.* 1: 13 & 14 *Car.* 2. *c.* 22; made perpetual by *stats.* 31 *Geo.* 2. *c.* 42: 29 & 30 *Car.* 2. *c.* 1; revived by *stat.* 6 *Geo.* 2. *c.* 37; made perpetual by *stat.* 31 *Geo.* 2. *c.* 42. Benefit of clergy taken from notorious spoil-takers in *Northumberland*, &c.; or justices of assise, &c. may transport them not to return, *stat.* 18 *Car.* 2. *c* 3; revived by *stat.* 6 *Geo.* 2. *c.* 37, and made perpetual by *stat.* 31 *Geo.* 2. *c.* 42. The acts for preventing theft and rapine on the Northern Borders shall be deemed public acts. 6 *Geo.* 2. *c.* 37. § 10. See also titles *Mischief*, *Malicious*; and *stats.* 2 *H.* 5. *st.* 1. *c.* 5: 9 *H.* 5. *c.* 7: 23 *H.* 6. *c.* 6: 11 *H.* 7. *c.* 9: 2 & 3 *Ed.* 6. *c.* 34: 14 *Eliz. c.* 13.

NORTH WALES; See *Wales*.

NORTH-WEST PASSAGE, From the Atlantic to the Pacific Ocean; for the reward for the discovery of which, see this Dictonary, title *Longitude*.

NORWICH. In the city of *Norwich*, or county of *Norfolk*, no persons shall buy any worsted yarn spun there, but such as work at it in *Norwich*, &c. on pain to forfeit 40*s.* for every pound. *Stat.* 33 *H.* 8. *c.* 16. The making of *Norwich* stuffs is regulated by statute; and penalties and forfeitures for defaults in making them are leviable by justices of peace, &c. They are to be sealed; and persons having them in their possession unsealed, other than the first owner, are liable to certain penalties. All manufacturers of stuffs, not journeymen, &c. may be made freemen of *Norwich*; and persons using trades, not being free, shall forfeit 10*l.* a month. *Stat.* 9 *G.* 1. *c.* 9. See titles *Wool*; *Woollen Manufactures*.

NOTARY, or NOTARY-PUBLIC, *Notarius.*] A person who takes notes, or makes a short draught of contracts, obligations, or other writings and instruments. *Stat.* 27 *Ed.* 3. *st.* 1. *c.* 1. At this time a Notary-public is one who publicly attests deeds or writings, to make them authentic in another country; but principally in business relating to merchants; they make protests of foreign bills of exchange, &c See *Bill of Exchange*.

NOTE OF A FINE, Is a brief of the fine made by the chirographer before it is engrossed. *West. Symb.*

NOTES PROMISSORY; See *Bill of Exchange*.

NOT GUILTY, The general issue or plea of the defendant in any criminal action or prosecution; Not Guilty is a good issue in actions of trespass, and upon the case for deceits or wrongs; but not on a promise, &c. *Palm.* 393. If one hath cause of justification in trespass, and plead Not Guilty, he cannot give the special matter in evidence, but must confess the fact, and plead the special matter, &c. 5 *Rep.* 119. Unless in some cases, provided for by statute; as in the case of justices of the peace, peace officers, churchwardens, and overseers of the poor, &c. See title *Pleading*.

NOTICE,

NOTICE, The making something known, that a man was or might be ignorant of before. And it produces divers effects; for by it the party who gives the same shall have some benefit, which otherwise he should not have had: by this means, the party to whom the Notice is given, is made subject to some action or charge, that otherwise he had not been liable to; and his estate in danger of prejudice. *Co. Litt.* 309.

Notice is required to be given in many cases by law, to justify proceedings where any thing is to be done or demanded, *&c.* But none is bound by law to give Notice to another person of that which such other may otherwise inform himself, except such Notice is directed by act of parliament.

If one be bound by an assumpsit generally to do a thing to another, he to whom the promise is made must give Notice when he will have him do it; but if he promise that another person shall do it, there he to whom the thing is to be done is not obliged to give Notice to that third person when he will have it done, but the party must procure it at his peril; for he may not know that other person, and there is no privity of contract between those two, as there is betwixt the other two. 2 *Lill. Abr.* 239. And in case of a promise, it has been adjudged, that where a penalty is to be recovered, Notice is requisite; but it is not so where damages are to be recovered; in which case the party hath sufficient Notice by the action brought. 1 *Bulst.* 12. If a person promise to pay so much to another at his day of marriage, the party at his peril is to take Notice of the marriage. *Cro. Car.* 34, 35. And it is a necessary intendment, that when after the marriage the plaintiff requested payment of the money, that Notice was given of the marriage. *Cro. Jac.* 228.

It was held, that if a collateral thing is to be done at or after marriage, there Notice is to be given of it; though when money is to be paid, it is a debt due to the party by the marriage, and may be recovered without any Notice given. 2 *Bulst.* 254. Notice must be given to an heir at law of a condition annexed to his estate; or he is not bound to take Notice of the condition. 1 *Lutw.* 809: 4 *Rep.* 82: 3 *Mod.* 28. Yet it is said, that the heir is bound to take Notice of a proviso in a feoffment; and this difference has been taken, that where Notice is required to be given by the original deed or agreement, it is hereditary, and descends to the heir; but if it is collateral to the father, it shall not bind his heir, without express Notice. *Winch.* 108: 2 *Nelf. Abr.* 1186. See title *Condition.*

A man who is a stranger to a deed, that hath an estate by way of remainder, *&c.* shall not forfeit or determine his estate by virtue of any proviso in such deed, unless he hath Notice of it. 8 *Rep.* 92. The feoffee of land, or bargainee of a reversion, shall not take advantage of a condition, for non-payment of rent reserved upon a lease, on demand made by them, without Notice thereof given to the lessee. 9 *Rep.* 31. See title *Condition.* If a manor be conveyed or granted away, by deed of bargain and sale, *&c.* to another, the present lord must give Notice of it to the copyholder; otherwise, if he deny to pay his rent, it will be no forfeiture. 5 *Rep.* 13. And copyholders shall not forfeit their estates for not appearing at the lord's court, if they have no Notice of the Court, *&c.* 1 *Leon.* 104.

In a covenant to make assurance generally, Notice must be given to the party to know what estate he would have made to him. *Style* 61. Where one is bound to another to make such an assurance as *A. B.* shall advise, the obligor is bound to make the assurance, without Notice that *A. B.* had advised it: but if he had been bound to make such assurance as the counsel of the obligee should advise, Notice ought to be given to the obligor, that the counsel of the obligee had advised it. 1 *Leon.* 105.

If I am bound to enfeoff such persons as the obligee should name, he is to give Notice of those which he names, or I am not bound to enfeoff them. 2 *Danv. Abr.* 105. And if the condition of an obligation be to account before such auditors as the obligee shall assign, and the obligee assigns auditors; he is to give Notice thereof to the obligor, or he will not be bound to account. *Ibid.* Notice is not to be given so strictly upon a covenant as upon a bond, which is on the point of forfeiture. *Cro. Jac.* 391. If the agreement be, that a person shall pay so much as *A. B.* hath paid, the defendant is to inquire of him, and the plaintiff is not bound to give Notice: but if the person or thing is altogether uncertain, the plaintiff, to entitle himself to an action, must give Notice. *Cro. Jac.* 432, 433.

If an act is to be done by a stranger, and not by the plaintiff, the cognizance thereof lies as well in the Notice of the defendant as of the plaintiff: therefore the plaintiff need not lay a Notice. *Cro. Jac* 492: *Cro. Car.* 132. If a thing lies in the knowledge of the plaintiff, there ought to be Notice given to the defendant, *March* 156: 4 *Mod.* 230. And when one may take Notice, and not the other; Notice is necessary. *Latch.* 15. It has been holden, that a defendant having undertaken to do a thing, undertakes to do all circumstances incident to the doing it, and that without Notice; but if he had been ignorant of the thing to be done, then Notice must be given. 2 *Bulst.* 143.

If one make a lease for years, with covenant that if the lessee, his executors and assigns, do not repair within six months after Notice given, the lease to be void; and the lessee makes a lease for part of his term to another, and then the house is decayed; in this case the Notice is to be given to the first lessee in person, and not to the under-tenant. 2 *Cro.* 9, 10. But see titles *Covenant*; *Lease.*

A Notice may not be pleaded to be given to executors, without averring the death of the testator. *Hob.* 93. In all writs of inquiry of damages, as well in real as personal actions, Notice must be given to the other party to the suit. *March Rep.* 82.

Notice is to be given of trials and motions; of a robbery committed, to recover against the hundred; of a prior mortgage, on making a second; of an assignment of a lease, to charge the assignee, only on acceptance of rent; in cases of distress for rent, according to the statute; and of avoidances of churches, by resignation, deprivation, *&c.* to the patron that he may present, *&c.* A month's Notice is also, by *stat.* 24 *Geo.* 2. *c.* 44, to be given to a justice of peace, before commencement of an action against him for any thing done in the execution of his office. See this Dictionary, under titles *Action*; *Award*; *Judgment*; *Motion*; *Trial*; and other appropriate titles.

NOVALE, Land newly ploughed or converted into tillage, that had not been tilled within time of memory; and sometimes it is taken for ground which hath been ploughed for two years, and afterwards lies fallow for one year; or that which lies fallow every other year: it is called *Novale*, because the earth *novâ culturâ proscinditur*. *Cartular Abbat. de Furnesse in Com. Lac. in Officio Ducat. Lanc. fol.* 41.

NOVA OBLATA, Mentioned in *clause* 12 *Ed.* 1. *m.* 7. See *Oblata*.

NOVEL ASSIGNMENT, *nova assignatio.*] See titles *New Assignment*; *Trespass*.

NOVEL DISSEISIN, *nova disseisina*] See title *Assise of Novel Disseisin*.

NOVELLÆ. Those constitutions of the civil law, which were made after the publication of the *Theodosian* code, were called *Novellæ* by the Emperors who ordained them; but some writers call the *Julian* edition only by that name. See title *Civil Law*.

NOYLES. By stat. 21 *Jac.* 1. *c.* 18, no persons shall put any flocks, Noyles, thrums, *&c.* or other deceivable thing, into any broad woollen cloth.

NUCES COLLIGERE, To gather hazle-nuts; this was formerly one of the works, or services, imposed by lords upon their inferior tenants. *Paroch. Antiq.* 495.

NUDE CONTRACT, *nudum pactum.*] Is a bare naked contract, without a consideration. If a man bargains or sells goods, *&c.* and there is no recompence made or given for the doing thereof: as if one say to another, I sell you all my lands or goods, but nothing is agreed upon what the other shall give or pay for the same, so that there is not a *quid pro quo* of one thing for another; this is a Nude Contract, and void in law, and for the non-performance thereof, no action will lie; for the maxim of law is *ex* nudo pacto *non oritur actio*. *Terms de Ley*. The law, in fact, supposes error in making these contracts; they being as it were of one side only. See titles *Assumpsit* III.; *Consideration*.

NUDE MATTER, A bare allegation of a thing done, *&c.* See *Matter*.

NUDUM PACTUM; See *Nude Contract*.

NUISANCE; See *Nusance*.

NUL DISSEISIN, Plea of. A plea in real actions, that there was *no disseisin*, and is one species of the general issue. See titles *Issue*; *Pleading*.

NUL TIEL RECORD, The plea of a plaintiff that there is *no such record*, on the defendant's alleging matter of record, in bar of the plaintiff's action. See title *Failure of Record*. It is sometimes the plea of a defendant, as in action on a judgment, *&c.*

NUL TORT, Plea of. A plea in a real action, *i. e.* that *no wrong* was done, and is a species of the general issue. See title *Pleading*.

NULLUM ARBITRIUM, The usual plea of the defendant prosecuted on an arbitration bond, for not abiding by an award; that there was *no award* made. See title *Award*.

NULLITY, Is where a thing is null and void, or of no force. *Litt. Dict.* And there is a Nullity of marriage, where persons marry within the prohibited degrees, *&c.* See title *Marriage*.

NUMERUM, *Civitas Cant Reddit* 24*l. ad Numerum*, *i. e.* by number or tale, as we call it. *Domesday*.

NUMMATA, The price of any thing, generally by money; as *denariata* denoteth the price of a thing by computation of pence, and *librata* by computation of pounds.

NUMMATA TERRÆ, Is the same with *denariatus terræ*, and thought to contain an acre. *Spelman*.

NUMMUS, A piece of money or coin among the *Romans*; and it is a penny according to *Matth. Westm. sub anno* 1095.

NUN, *nunna.*] A consecrated virgin or woman who by vow hath bound herself to a single and chaste life, in some place or company of other women, separated from the world, and devoted to the service of God by prayer, fasting, and such like holy exercises; it is an *Egyptian* word, St. *Jerome* says.

NUNCIUS, A nuncio, or messenger, servant, *&c.* The Pope's nuncio was termed *legatus pontificis*; a *Legate*.

NUNCUPATIVE WILL; See *Will*.

NUPER OBIIT, Is a writ that lies for a sister and coheir, deforced by her coparcener of lands or tenements, whereof their father, brother, or any other common ancestor *died* seised of an estate in fee-simple; for if one sister deforce another of land held in fee-tail, her sister and coheir shall have a formedon against her, *&c.* and not a *Nuper obiit*; and where the ancestor, being once seised, died seised, not of the possession, but the reversion, in such a case a writ of *rationabili parte* lies. *Reg. Orig.* 226: *F. N. B.* 197: *Terms de Ley*: *Finch. L.* See title *Assise of Mort d'Ancestor*.

NURTURE, Guardian for, This is, of course, the father or mother, until the infant attains the age of fourteen years; and in default of father or mother, the Ordinary usually assigns some proper person. *Co. Lit.* 88: *Moor* 738: 3 *Rep.* 38: 2 *Jones* 90: 2 *Lev.* 163. See title *Guardian*.

NUSANCE.

NOCUMENTUM, from the Fr. *nuire*, i. e. *nocere.*] Annoyance; any thing that worketh hurt, inconvenience, or damage.

Nusances are of two kinds; *public* or *common*, which affect the public, and are an annoyance to all the King's Subjects; and *private Nusances*, which may be defined, to be any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another. *Finch. L.* 188.

I. *Common or Public Nusances; what shall be considered as such.*

II. *What are Private Nusances.*

III. *Of the Remedy for both.*

I. COMMON NUSANCES are a species of offences against the public order and œconomical regimen of the State; being either the doing of a thing to the annoyance of all the King's Subjects, or the neglecting to do a thing which the common good requires. 1 *Hawk P. C. c.* 75. § 1.

Of this nature are, 1. Annoyances in *highways*, *bridges*, and the public *rivers*, by rendering the same inconvenient or dangerous to pass, either positively by actual obstructions, or negatively by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them,

or

or (in default of these last) the parish at large may be indicted, distrained to repair and amend them, and in some cases fined. And a presentment thereof by a judge of assise, &c. or a justice of the peace, shall be in all respects equivalent to an indictment. *Stat.* 7 *Geo.* 3. *c.* 42. Where there is an house erected, or an inclosure made on any part of the King's demesnes, or of an highway, or common street, or public river, or such like public things, it is called a *purpresture*, from the French *pourpris*, an inclosure. 1 *Inst.* 277: and see *Highway*.

2. All those kinds of Nusances (such as offensive trades and manufactures) which, when injurious to a private man, are actionable, are, when detrimental to the public, punishable by public prosecution, and subject to fine according to the quantity of the misdemeanor; and particularly the keeping of any hogs in any city or market-town is indictable as a public Nusance. *Salk.* 460.

3. All disorderly *inns* or *ale houses*, *bawdy-houses*, *gaming-houses*, *stage-plays* unlicensed, booths and stages for *rope-dancers*, *mountebanks*, and the like, are public Nusances, and may upon indictment be suppressed and fined. 1 *Hawk. P. C. c.* 75. § 6. Inns in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller, without a very sufficient cause; for thus to frustrate the end of their institution is held to be disorderly behaviour. 1 *Hawk. P. C. c.* 78. § 2.

4. By *stat.* 10 & 11 *W.* 3. *c.* 17, all *Lotteries* are declared to be public Nusances; and all grants, patents, or licences for the same to be contrary to law. But as State Lotteries have for many years past been found a ready mode for raising the Supplies, several acts have from time to time been made to license and regulate the keepers of such lottery-offices. See title *Lottery*. And by *stat.* 6 *Geo.* 1. *c.* 18. § 19, all projects by public subscription, for adventuring in commerce, to the common grievance, or acting as a body corporate without a charter, are considered as common Nusances, and punishable accordingly, and also subject to the pains of *premunire*.

5. The making and selling of *fire works* and *squibs*, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common Nusance, by *stat.* 9 & 10 *W.* 3. *c.* 7, and therefore is punishable by fine. See title *Fire-works*. To this head also may be referred (though not declared a common Nusance) the making, keeping, or carriage of too large a quantity of *gun powder* at one time, or in one place, or vehicle, which is prohibited by *stat.* 12 *Geo* 3. *c.* 61, under heavy penalties and forfeiture. See title *Gunpowder*.

6. *Eaves-droppers*, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common Nusance, and presentable at the Court-leet. *Kitch of Courts* 20. Or are indictable at the sessions, and punishable by fine, and finding sureties for their good behaviour. *Ibid*: 1 *Hawk. P. C. c.* 61. § 4.

Lastly, a *Common Scold*, is a public Nusance to her neighbourhood. For which offence she may be indicted. 6 *Mod.* 213. And, if convicted, shall be sentenced to be placed in a certain engine of correction, called the trebucket, castigatory, or *cucking-stool*. 3 *Inst.* 219. See titles *Castigatory*; *Scold*.

If a ship be sunk in a port or haven, and it is not removed by the owner, he may be indicted for it as a common Nusance, because it is prejudicial to the commonwealth in hindering navigation and trade. 2 *Lil.* 244.

Indictment lies for laying logs, &c. in the stream of a public navigable river; it is a common Nusance to divert part of a public navigable river whereby the current is weakened, and made unable to carry vessels of the same burden it could before; and if a river be stopped to the Nusance of the country, and none appear bound by prescription to cleanse it; those who have the piscary, and the neighbouring towns that have a common passage and easement therein, may be compelled to do the same. 1 *Hawk. P. C. c.* 75. §§ 11, 13.

It is a common Nusance indictable, to divide a house in a town for poor people to inhabit in, by reason whereof it will be more dangerous in the time of sickness and infection of the plague. 2 *Roll. Abr.* 139. A common playhouse, if it draws together such number of coaches and people as incommode and disturb the neighbourhood, may be a Nusance; but these places are not naturally Nusances, but become so by accident. 1 *Roll. Rep.* 109: 1 *Hawk. P. C. c.* 75. § 7.

A prohibitory writ was issued out of *B. R.* against *Betterton* and other actors, for erecting a new playhouse in *Little Lincoln's Inn Fields*, reciting that it was a Nusance to the neighbourhood; and they not obeying the writ, an attachment was granted against them; but it was objected that an attachment could not be issued, and that the most proper method was to proceed by indictment, and then the Jury would consider whether it were a Nusance or not; and this was the better opinion. 5 *Mod.* 142: 2 *Nels. Abr.* 1192.

One *Hall* having begun to build a booth near *Charing-Cross*, for rope-dancing, which drew together many idle people, was ordered by the Lord Chief Justice not to proceed: he proceeded, notwithstanding, affirming, that he had the King's warrant and promise to bear him harmless; but being required to give a recognizance of three hundred pounds that he would not go on with the building, and he refusing, he was committed, and a record was made of this Nusance, as upon the Judge's own view, and a writ issued to the Sheriff of *Middlesex* to prostrate it. 1 *Vent.* 169: 1 *Mod.* 96.

Erecting a dove-cote is not a common Nusance; though action on the case will lie at the suit of the lord of the manor for erecting it without his licence. 1 *Hawk. P. C. c.* 75. § 8. It was anciently held, that if a man erected a dove-cote he was punishable at the Leet; but it has been since adjudged not to be punishable in the Leet as a common Nusance, but that the lord for this particular Nusance should have an action on the case, or an assise of Nusance; as he may for building an house to the Nusance of his mill. 5 *Rep.* 104: 3 *Salk.* 248. Neither the King, nor lord of a manor, may licence any man to make or commit a Nusance. 1 *Roll. Abr.* 138.

A brew-house erected in such an inconvenient place, wherein the business cannot be carried on without incommoding the neighbourhood, may be indicted as a common Nusance; and so in the like case may a glass-house, &c. 1 *Hawk. P. C. c.* 75. § 10. Where there hath been an ancient brew-house time out of mind, although in a most public street of a city, this is not any

Nusance, because it shall be supposed to be erected when there were no buildings near; though if a brewhouse should be now built in any of the high streets of *London*, or trading places, it will be a Nusance, and action on the case lies for whomsoever receives any damage thereby. 2 *Lil. Abr.* 246: *Palm.* 536.

It hath been holden to be a common Nusance to make great noises in the night with a speaking trumpet. *Stra.* 704. Or to permit a house near the highway to continue in a ruinous condition. *Salk.* 357. Or to lay timber in a public river, although the soil on which it is laid belong to the party; provided it obstructs the necessary intercourse. 3 *Bac. Abr.*: *Stra.* 1247. Or to place a floating dock in the river, although beneficial in repairing ships. 2 *Hawk. P. C. c.* 75. § 11, *in n.* Or to travel with a cart on a common pack-way or horse-way, and by thus ploughing it up to render the use of it inconvenient. 6 *Mod.* 145. Or to put a ship of three hundred tons into *Billingsgate* dock; for although it is a common dock, it is only for the reception of small vessels freighted with provisions for the *London* market. 1 *Hawk. P. C. c.* 75. § 11. Or to manufacture acid spirit, of sulphur, vitriol, or *aqua fortis* in the vicinity of dwelling-houses. 1 *Burr.* 333. See also *stats.* 13 *E.* 1. *c.* 24: 12 *R.* 2. *c.* 13: 2 *W.* & *M. st.* 2. *c.* 8: 30 *Geo.* 2. *c.* 22: 31 *Geo.* 2. *c.* 17, respecting Nusances in the cities of *London* and *Westminster*.

But the fears of mankind, however reasonable, will not create a Nusance; therefore it is no Nusance to erect a building for the purposes of inoculation. 3 *Atk.* 21, 726, 750. Nor to lay bricks in the river *Thames* in the party's own fishery. 3 *Burr.* 1770. Nor to violate a public law. *Black. Rep.* 570 [if it provides a specific punishment]. Whether coney burrrows are a Nusance, see 1 *Burr.* 259: 6 *Mod.* 453: 11 *Mod.* 7, 8.

II. Private Nusances are such as affect either the corporeal or incorporeal hereditaments of an individual.

First, As to corporeal hereditaments. If a man builds a house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, this is a Nusance, for which an action will lie. *F. N. B.* 184. Likewise to erect a house or other building so near to mine, that it obstructs my antient lights and windows, is a Nusance of a similar nature. 9 *Rep.* 58. But in this latter case it is necessary that the windows be *antient*; that is, have subsisted a long time without interruption, otherwise there is no injury done. [This time, by modern practice, is now settled at an uninterrupted enjoyment of twenty years.] For he hath as much right to build a new edifice upon his ground as I have upon mine, since every man may erect what he pleases upon the upright or perpendicular of his own soil, so as not to prejudice what has long been enjoyed by another; and it was my folly to build so near another's ground. *Cro. Eliz.* 118: *Salk.* 459. Also if a person keeps his hogs, or other noisome animals, so near the house of another that the stench of them incommodes him, and makes the air unwholesome [or renders the enjoyment of life or property uncomfortable], this is an injurious Nusance, as it tends to deprive him of the use and benefit of his house. 9 *Rep.* 58: 1 *Burr.* 337. A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, *sic utere tuo, ut alienum non lædas*; this therefore is an actionable Nusance. *Cro. Car.* 510. So that the Nusances which affect a man's *dwelling* may be reduced to these three: 1. Overhanging it, which is also a species of trespass, for, *cujus est solum, ejus est usque ad cœlum*. 2. Stopping ancient lights; and, 3. Corrupting the air with noisome smells; for light and air are two indispensable requisites to every dwelling. But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable Nusance. 9 *Rep.* 58: 3 *Salk.* 247, 459: *Cro. Eliz.* 118.

As to Nusance to one's *lands*; if one erects a smelting-house for lead so near the land of another that the vapour and smoke kills his corn and grass, and damages his cattle therein, this is held to be a Nusance. 1 *Roll. Abr.* 89. And by consequence it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a *Nusance*; for it is incumbent on him to find some other place to do that act where it will be less offensive. So also if my neighbour ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable Nusance. *Hale on F. N. B.* 427.

With regard to *other* corporeal hereditaments; it is a Nusance to stop or divert water that uses to run to another's meadow or mill. *F. N. B.* 184. To corrupt or poison a water-course, by erecting a dye-house, or a lime pit, for the use of trade, in the upper part of the stream. 9 *Rep.* 59: 2 *Roll. Abr.* 141. Or, in short, to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbour. 3 *Comm. c.* 13.

Secondly, As to *incorporeal* hereditaments. If I have a way annexed to my estate, across another's lands, and he obstructs me in the use of it either by totally stopping it or putting logs across it, or ploughing over it, is a Nusance; for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought. *F. N. B.* 183: 2 *Roll. Abr.* 140. Also if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a Nusance to the freehold which I have in my market or fair. *F. N. B.* 148: 2 *Roll. Abr.* 140. See this Dictionary, title *Market*.

If a ferry is erected on a river so near another antient ferry as to draw away its custom, it is a Nusance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the King's Subjects; otherwise he may be grievously amerced: it would therefore be extremely hard if a new ferry were suffered to share his profits, which does not also share his burden. 2 *Roll. Abr.* 140. But where the reason ceases, the law also ceases with it; therefore it is no Nusance to erect a mill so near mine as to draw away the custom, unless the miller also intercepts the water. Neither is it a Nusance to set up any trade, or a school, in a neighbourhood or rivalship with another; for by such emulation the public are like to be gainers; and

if

if the new mill or school occasion a damage to the old one, it is *damnum absque injuriâ*. *Hale on F. N. B.* 184.

The stopping up a way leading from houses to lands, suffering the next house to decay to the damage of my house; and setting up or making a house of office, lime-pit, dye-house, tan house, or butcher's shop, &c. and using them so near my house that the smell annoys me, or is infectious; or if they hurt my lands or trees, or the corruption of the water of lime pits spoils my water or destroys fish in a river, &c.: these, and the other evils already enumerated, are in general private Nusances. 3 *Inst.* 231: 5 *Rep.* 101: 9 *Rep.* 54: 1 *Roll. Abr.* 88: 2 *Roll.* 140: 1 *Danv. Abr.* 173.

A plaintiff was possessed of an house wherein he dwelled, and the defendant built a brew-house, &c. in which he burnt coal so near the house, that by the stink and smoke he could not dwell there without danger of his health; and it was adjudged, that the action lay, though a brew-house is necessary, and so is burning coal in it. *Hutton* 135. If a person melt lead so near the close of another that it injures his grass there, whereby cattle are lost; notwithstanding this is a lawful trade, and for the benefit of the nation, action lies against him; for he ought to use his trade in waste places, so as no damage may happen to the proprietors of the land adjoining. 2 *Roll. Abr.* 140.

Building a smith's forge near a man's house, and making a noise with hammers, so that he could not sleep, was held a Nusance, for which action lies; although the smith pleaded that he and his servants worked at seasonable times; that he had been a blacksmith, and used the trade above twenty years in that place, and set up his forge in an old room, &c. For though a smith is a necessary trade, and so is a lime burner, and a hog-merchant; yet these trades must be used, so as not to be injurious to the neighbours. 1 *Lutw.* 69.

But if a schoolmaster keeps a school so near the study of a lawyer by profession, that it is a disturbance to him; this is not a Nusance for which action may be brought. *Wood's Inst.* 538. An inn-keeper brought an action on the case against a person for erecting a tallow furnace, and melting stinking tallow so near his house that it annoyed his guests, and his family became unhealthy; and adjudged that the action lay. *Cro Car.* 367. So where a person kept a hogsty near a man's parlour, whereby he lost the benefit of it. 2 *Roll. Abr.* 140.

Yet it is said to be no Nusance to a neighbourhood for a butcher or chandler to set up their trades in houses amongst them; but it may be by such tradesmen laying stinking heaps at their doors: in other cases the necessity of the thing shall dispense with the noisomeness of it. *Pasch.* 5 *Jac.* 1. *B. R.* If a man have a spout falling down from his house, and another person erect any thing above it, that the water cannot fall as it did, but is forced into the house of the plaintiff, and rots the timber; it is a Nusance actionable. 18 *E.* 3: 2 *Roll Abr.* 140. And in trespass for a Nusance, in causing stinking water in the defendant's yard to run to the walls of the plaintiff's house, and piercing them so that it ran into his cellar, &c. judgment was given for the plaintiff. *Hard.* 60.

III. As common or public Nusances are such inconvenient or troublesome offences which annoy the whole community in general, and not merely some particular person, they are therefore *indictable* only, and not *actionable*; as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow-subjects. 4 *Comm. c.* 13. *p.* 167: 5 *Rep.* 73: 1 *Inst.* 56: 1 *Vent.* 208. And as the law gives no private remedy for any thing but a private wrong, therefore no action lies for a public or common Nusance, but an indictment only; because the damage being common to all the King's Subjects, no one can assign his particular proportion of it. 3 *Comm. c.* 13. *p.* 219. For this reason no person natural or corporate can have an action for a public Nusance, or punish it; but only the King in his public capacity of supreme governor and *pater familias* of the kingdom. *Vaugh.* 341, 2. Yet this rule admits of one exception; where a private person suffers some extraordinary damage beyond the rest of the King's Subjects by a public Nusance, in which case he shall have a private satisfaction by action. As if by means of a ditch dug across a public way, which is a common Nusance, a man or his horse suffer an injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action. 1 *Inst.* 56: 5 *Rep.* 73. So if by reason of a pit dug in a highway, a man for whose life I held lands is drowned; or my servant falling into it receives injury, whereby I lose his service, &c.; for this special damage, which is not common to other persons, action lies. 4 *Rep.* 18: 5 *Rep.* 73: *Cro. Car.* 446: *Vaugh.* 341: 4 *Bulst.* 344. But a modern authority says, the injury must be direct; and not consequential, as by being delayed in a journey of importance. *Bull. N. P. c.* 5. *p.* 26. But see *c.* 7. *p.* 78. And where the inhabitants of a town had by custom a watering place for their cattle, which was stopped by another, it has been held, that any inhabitant might have an action against him, otherwise they would be without remedy; because such a Nusance is not common to all the King's Subjects, and presentable in the leet, or to be redressed by presentment or indictment in the quarter sessions. 5 *Rep.* 73: 9 *Rep.* 103.

Also if a man hath abated or removed a Nusance which offended him; in this case he is entitled to no action, for he had choice of two remedies: either without suit by abating it himself by his own mere act and authority, or by suit in which he may both recover damages, and remove it by the aid of the law; but having made his election of one remedy, he is totally precluded from the other. 3 *Comm. c* 13. *p.* 220, cites 9 *Rep.* 55. See also *F. N. B.* 185: 2 *Roll. Abr.* 7,5. But this apparently admits of some qualification; for the party's right of action might attach before the removal: and in another case it is said, There is a difference between an assise for a Nusance, and an action on the case (see *post.*); for the first is to abate the Nusance, but the last is not to abate it, but to recover damages; therefore, if the Nusance be removed, the plaintiff is entitled to his damages which accrued before; and though it is laid with a *continuando* for a longer time than the plaintiff can prove, he shall have damages for what he can prove, before the Nusance was removed. 2 *Mod.* 253.

This abatement or removal of Nusances is classed by *Blackstone* among the species of remedy, allowed by law, through

through the mere act of the party injured. 3 *Comm.* c. 1. This abatement, removing, or taking away, may be performed by the party aggrieved by the Nusance, so as he commits no riot in the doing it. 5 *Rep.* 101: 9 *Rep.* 55. If a house or wall is erected so near to mine that it stops my ancient lights, which is a *private* Nusance, I may enter my neighbour's lands, and peaceably pull it down. *Salk.* 459. Or if a new gate be erected across the public highway, which is a *common* Nusance, any of the King's Subjects passing that way may cut it down, and destroy it. *Cro. Car.* 184. And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice. 3 *Comm.* 6.

With respect to the redressing of *Private Nusances* by due course of law; the remedies by suit are;

1. By action on the case for damages; in which the party injured shall only recover a satisfaction for the injury sustained, but cannot thereby remove the Nusance. Indeed every continuance of a Nusance is held to be a fresh one, and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it. 2 *Leon. pl.* 129: *Cro. Eliz.* 402. Yet the founders of the law of *England* did not rely upon probabilities merely in order to give relief to the injured; they have therefore provided two other actions, the assise of *Nusance*, and the writ of *quod permittat prosternere*; which not only give the plaintiff satisfaction for his injury past, but also strike at the root, and remove the cause itself, the Nusance that occasioned the injury. These two actions, however, can only be brought by the tenant of the freehold, so that a lessee for years is confined to his action upon the case. *Finch L.* 289.

2. *An assise of Nusance* is a writ wherein it is stated, that the party injured complains of some particular fact done *ad nocumentum liberi tenementi sui*; and therefore commanding the Sheriff to summon an assise, that is a jury, and view the premises, and have them at the next commission of assises, that justice may be done therein. *F. N. B.* 183. And if the assise is found for the plaintiff, he shall have judgment of two things: 1st, To have the Nusance abated; and 2d, To recover damages. 9 *Rep.* 55. Formerly, an assise of Nusance lay against the very wrong-doer himself who levied or did the Nusance, and did not lie against any person to whom he had aliened the tenements whereon the Nusance was situated. This was the immediate reason for making that equitable provision in *stat. West.* 2. 13 *E.* 1. c. 24, for granting a similar writ, *in casu consimili*, where no former precedent was to be found. The statute gives the form of a new writ in this case, which only differs from the old one in stating that the wrong-doer and the alienee both raised the Nusance. For every continuation, as was before said, is a fresh Nusance.

3. Before this statute the party injured, upon any alienation of the land wherein the Nusance was set up, was driven to his *quod permittat prosternere*, which is in the nature of a writ of right, and therefore subject to greater delays. 2 *Inst.* 405. This is a writ commanding the defendant *to permit the plaintiff to abate* the Nusance complained of, and unless he so permits, to summon him to appear in Court, and shew cause why he will not. *F. N. B.* 124. And this writ lies as well for the alienee of the party first injured, as *against* the alienee of the party first injuring, as hath been determined by all the Judges. 5 *Rep.* 100, 1. And the plaintiff shall have judgment therein to abate the Nusance, and to recover damages against the defendant.

Both these actions of *assise of Nusance* and of *quod permittat prosternere* are now out of use, and have given way to the action on the case; in which, as was before observed, no judgment can be had to abate the Nusance, but only to recover damages. Yet as therein it is not necessary that the freehold should be in the plaintiff and defendant respectively, as it must be in these real actions, but it is maintainable, by one who hath possession only against another that hath like possession, the process is therefore easier, and the effect will be much the same, unless a man has a very obstinate as well as an ill-natured neighbour, who had rather continue to pay damages than remove his Nusance; for in such a case, recourse must at last be had to the old and sure remedies, which will effectually conquer the defendant's perverseness, by sending the Sheriff with his *posse comitatûs*, or power of the county, to level it. 3 *Comm.* c. 13. p. 220—222.

It is said both of a common and private Nusance, that they may be abated or removed by those who are prejudiced by them; and they need not stay to prosecute for their removal. 2 *Lil. Abr.* 244: *Wood's Inst.* 443. Also if a house be on the highway, or a house hang over the ground of another, they may be pulled down; but no man can justify the doing more damage than is necessary, or removing the materials farther than requisite. 1 *Hawk. P.C.* c. 75, 76: *Stra.* 680.

Where two houses, one whereof is a Nusance to the other, come both into one and the same hand, the wrong is purged. See *Hob.* 131.

An action lies for hindering the wholesome air, and also for corrupting the air. 9 *Rep.* 58. And by an old *stat.* 12 *R.* 2. c. 13, which if not actually *obsolete*, is now entirely disregarded, none shall cast any garbage, dung, or filth into ditches, waters, or other places within or near any city or town; on pain of punishment by the Lord Chancellor at discretion, as a Nusance.

On the principle that the continuation of a Nusance is, as it were, a new Nusance; where a Nusance is erected in the time of the devisor, and continued afterwards by the devisee, action may be maintained against the latter. 2 *Leon.* 129: *Cro. Car.* 231. But a plaintiff may declare both ways, one for erecting and continuing, the other for continuing only, though the latter method is sufficient in any case. *J. M.*

If one hath freehold land adjoining to the highway, and he encroach part of the way, and lay lands to it, and then dying, it comes to his heir; if he continues it, though he do nothing else, he may be indicted for the continuance of the Nusance. *Roll. Abr.* 137. A man erects a Nusance, and then lets it; the continuance by the lessee has been held a Nusance, and that action lies against him. *Cro. Jac.* 373: *Moor* 353. But it is said in another case of this nature, that admitting the plaintiff might have an assise of Nusance against the builder, the lessor, he cannot have an action against his lessee,

because

because it would be waste in him to pull it down; but the plaintiff may abate the Nusance standing on his own ground; yet where the thing done is a Nusance *per intervalla*, as a pipe or gutter, action lies against the lessee, because every running is a fresh Nusance; and if a man have a way over the ground of another, and such other stops that way, and then demises the ground, an action lies against the lessee for continuing this Nusance. 1 *Mod.* 54: 3 *Salk.* 248.

If a person assigns his lease with a Nusance, action lies against him for continuing it, because the lease was transferred with the original wrong, and his assignment confirms the continuance; besides he hath a rent as consideration for the continuance, therefore he ought to answer the damages occasioned by it. 2 *Salk.* 460: 2 *Cro.* 272, 555.

A Nusance in a church-yard is, properly, of ecclesiastical cognisance. *Carthew* 152. If a man straiten a way only, and do not stop it up, action on the case lieth; not assise of Nusance. 33 *H.* 6. *c.* 26. But for stopping such way, belonging to a freehold tenement, an assise will lie; and where one may have assise of Nusance for an injury to his way, there he shall not have action of trespass. 19 *H.* 6. *c.* 29: 2 *Shep. Abr.* 468. This means trespass *vi et armis*, but an action upon the case will undoubtedly lie. *J. M.*

Writs of Nusance, called *vicontiel*, are to be made at the election of the plaintiff, determinable before the justices of either bench, or the justices of assise of the county, being in nature of assises, *&c.* 6 *R.* 2. *c.* 3.

See further on this subject *Vin. Abr.* title *Nusance*: and this Dictionary, title *Highways*.

NUTMEGS, *Nuces muscatæ.*] A spice well known, mentioned, among spices that are to be garbled, in the statutes imposing a duty on their importation.

NUTRIMENTUM, Nourishment, particularly applied to breed of cattle. *Paroch. Antiq.* 401.

NYAS, *Nidarius accipiter.*] A hawk, or bird of prey. *Litt. Dict.*

O.

O. The ſeven *Antiphones*, or alternate hymn of ſeven verſes, &c. ſung by the choir in the time of *Advent*, was called O, from beginning with ſuch exclamation. In the ſtatutes of St. *Paul's* church in *London*, there is one chapter, *De faciendo* O. *Liber Statut. MS. f.* 86.

OATH, Sax. *Eoth*, Lat. *Juramentum*.] An affirmation or denial of any thing, before one or more perſons who have authority to adminiſter the ſame, for the diſcovery and advancement of truth and right, calling *God* to witneſs that the teſtimony is true: therefore it is termed *Sacramentum*, a holy band or tie: it is called a *corporal Oath*, becauſe the witneſs when he ſwears lays his right hand on the Holy Evangeliſts, or New Teſtament. 3 *Inſt.* 165.

There are ſeveral ſorts of Oaths in our law, *viz. Juramentum promiſſionis*, where Oath is made either to do, or not to do, ſuch a thing: *Juramentum purgationis*, when a perſon is charged with any matter by bill in Chancery, &c. *Juramentum probationis*, where any one is produced as a witneſs, to prove or diſprove a thing: and *Juramentum triationis*, when any perſons are ſworn to try an iſſue, &c. 2 *Nelſ.* 1181.

All Oaths muſt be lawful, allowed by the Common Law, or ſome ſtatute; if they are adminiſtered by perſons in a private capacity, or not duly authorized, they are *coram non judice*, and void; and thoſe adminiſtering them are guilty of a high contempt, for doing it without warrant of law, and puniſhable by fine and impriſonment. 3 *Inſt.* 165: 4 *Inſt.* 278: 2 *Roll. Abr.* 257.

One who was to teſtify on behalf of a felon, or perſon indicted of treaſon, or other capital offence, upon an indictment at the King's ſuit, could not formerly be examined on his Oath for the priſoner againſt the King; though he might be examined without Oath: but by *ſtat.* 1 *Ann. ſt.* 2. *c.* 9, witneſſes on behalf of the priſoner upon indictments are to be ſworn to depoſe the truth, in ſuch manner as witneſſes for the King; and if convicted of wilful perjury, ſhall ſuffer the puniſhment inflicted for ſuch offences. The evidence for the defendant in an appeal, whether capital or not, or on indictment or information for a miſdemeanor, was to be on Oath before this ſtatute. 2 *Hawk. P. C.*

A perſon who is to be a witneſs in a cauſe may have two Oaths given him, one to ſpeak the truth to ſuch things as the Court ſhall aſk him concerning himſelf, or other things which are not evidence in the cauſe; the other to give teſtimony in the cauſe in which he is produced as a witneſs: the former is called the Oath upon a *voyer (vrai) dire*.

If Oath be made againſt Oath in a cauſe, it is a *non liquet* to the Court which Oath is true; and in ſuch caſe the Court will take that Oath to be true, which is to affirm a verdict, judgment, &c. as it tends to the expediting of juſtice. 2 *Lil. Abr.* 247.

A voluntary Oath, by conſent and agreement of the parties, is lawful as well as a compulſory Oath; and in ſuch caſe, if it is to do a ſpiritual thing, and the party fail, he is ſuable in the Eccleſiaſtical Court, *pro læſione fidei*; if to do a temporal thing, and he fail therein, he may be puniſhed in *B. R.* Adjudged on aſſumpſit, where if the defendant would make Oath before ſuch a perſon, the plaintiff promiſed, &c. *Cro. Car.* 486: 3 *Salk.* 248.

By the Common Law, officers of juſtice are bound to take an Oath for the due execution of juſtice. *Trin.* 22 *Car.* 1. *B. R.* Though if promiſſory Oaths of officers are broken, they are not puniſhed as perjuries, like unto the breach of aſſertory Oaths; but their offences ought to be puniſhed with a ſevere fine, &c. *Wood's Inſt.* 412. Anciently, at the end of a legal Oath, was added, *So help me God at his holy dome*, i. e. judgment; and our anceſtors did believe, that a man could not be ſo wicked to call God to witneſs any thing which was not true; but that if any one ſhould be perjured, he muſt continually expect that God would be the revenger: and thence probably *purgations* of criminals, by their own Oaths, and for great offences by the Oaths of others, were allowed. *Malmſb. lib.* 2. *c.* 6: *Leg. Hen.* 1. *c.* 64.

OATHS TO THE GOVERNMENT. By *Magna Charta*, the Oaths of the King, the Biſhops, the King's Counſellors, Sheriffs, Mayors, Bailiffs, &c. were appointed. The Oaths of the Judges of both benches; and of the Clerks in Chancery, and the Curſitors, were ordained by *ſtat.* 18 *Ed.* 3. *ſt.* 4: and ſee *ſtat.* 14 *E.* 3. *ſt.* 1. *c.* 5.

Eccleſiaſtical perſons are required to take the Oaths of Supremacy, &c. And clergymen not taking the Oaths, on their refuſal being certified into *B. R.* &c. do for a ſecond offence, incur the penalties of *præmunire*: See *ſtat.* 1 *Eliz. c.* 1: and this Dictionary, title *Parſon*. Officers and eccleſiaſtical perſons, Members of parliament, lawyers, &c. are to take the Oath of Allegiance, or be liable to penalties and diſabilities. *Stat.* 7 *Jac.* 1. *c.* 6.

By *ſtat.* 1 *W.* & *M. ſt.* 1. *c.* 6, the Coronation Oath was altered and regulated; ſee title *King*: the Oaths of Allegiance and Supremacy were abrogated, and others appointed to be taken and enforced, on pain of diſability, &c. by *ſtats.* 1 *W.* & *M. c.* 8: 7 & 8 *W.* 3. *c.* 27.

By *ſtat.* 13 *W.* 3. *c.* 6, all that bear offices in the government, peers and members of the Houſe of Commons, eccleſiaſtical perſons, members of colleges, ſchoolmaſters, preachers, ſerjeants at law, counſellors, attornies, ſolicitors, advocates, proctors, &c. are enjoined to take the Oaths of Allegiance; and perſons neglecting or refuſing are declared incapable to execute their offices and

and employments, disabled to sue in law or equity, to be guardian, executor, &c. or to receive any legacy or deed of gift, to be in any office, &c. and to forfeit five hundred pounds.

This extends not to constables, and other parish officers, nor to bailiffs of manors, &c.

The *stat.* 1 *Ann. c.* 22, obliges the receiving the abjuration Oath, with alterations.

The *Oath of Allegiance*, as administered for upwards of six hundred years, contained a promise "to be true and faithful to the King and his heirs, and truth and faith to bear of life and limb and terrene honour, and not to know or hear of any ill or damage intended him without defending him therefrom." See *Mirr. c.* 3. § 35: *Fleta* iii. 16: *Britt. c.* 29: 7 *Rep. Calvin's Ca.* 6. Upon which Sir *M. Hale* makes this remark; that it was short and plain, not intangled with long and intricate clauses or declarations, and yet is comprehensive of the whole duty from the Subject to his Sovereign. 1 *Hal. P. C.* 63. But at the Revolution, the terms of this Oath being thought perhaps to favour too much the notion of non-resistance, the present form was introduced by the Convention-Parliament, which is more general and indeterminate than the former; the Subject only promising "that he will be faithful, and bear *true* allegiance to the King," without mentioning "his heirs," or specifying the least wherein that allegiance consists. The *Oath of Supremacy* is principally calculated as a renunciation of the Pope's pretended authority; and the *Oath of Abjuration*, as introduced by *stat.* 13 *Will.* 3. *c.* 6, and regulated by *stat.* 6 *Geo.* 3. *c* 53, very amply supplies the loose and general texture of the Oath of Allegiance; it recognizing the right of his Majesty, derived under the Act of Settlement; engaging to support him to the utmost of the juror's power; promising to disclose all traiterous conspiracies against him, and expresly renouncing any claim of the descendants of the late Pretender, in as clear and explicit terms as the *English* language can furnish. This Oath must be taken by all persons in any office, trust, or employment; and may be tendered by two Justices of the Peace to any person whom they shall suspect of disaffection. *Stats.* 1 *Geo.* 1. *c.* 13: 6 *Geo.* 3. *c.* 53: See this Dictionary, title *Nonjurors*. And the Oath of Allegiance may be tendered to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the Court-leet of the manor, or in the Sheriff's tourn, which is the Court-leet of the county. 2 *Inst.* 121: 1 *Hal. P. C.* 64: and see 1 *Comm.* 367, 8.

By *stat.* 1 *W.* & *M. c.* 8, persons of eighteen years of age refusing to take the new Oaths of Allegiance on tender by the proper magistrate, are subject to the penalties of a *præmunire*. And by *stat.* 7 & 8 *W.* 3. *c.* 24, serjeants, counsellors, proctors, attornies, and all officers of Courts practising without having taken the Oaths of Allegiance, [and Supremacy, and subscribing the Declaration against Popery, repealed by *stat.* 31 *Geo.* 3. *c.* 32. § 18. see title *Nonjurors*,] are guilty of a *præmunire*, whether the Oaths be tendered or not. See 4 *Comm.* 116, 117.

In almost every session of Parliament, acts are made for indemnifying persons who have omitted to qualify themselves for offices and promotions within the time limited by law, and for allowing further time for that purpose.

Oaths must be taken in the very words expressed in the acts, and cannot be qualified; yet the equivocation of using the words *in* conscience, instead of *my* conscience, or *Sea* of *Rome*, instead of *See* of *Rome*, shall not, it has been said, invalidate the Oath. 1 *Bulst.* 197.

See further on the subject of *Oaths*, this Dictionary, titles *Nonconformist*; *Nonjuror*; and, particularly, *Papist*.

OATMEAL. Selling corrupt Oatmeal, is punishable by statute: it shall be forfeited for the second offence, &c. See *stat.* 31 *Ed.* 1: *Pult. Kalend. Stat.* 323.

OBEDIENTIA, In the Canon law, is used for an office, or the administration of it: whereupon the word *obedientiales*, in the provincial constitutions, is taken for officers under their superiors. *Can. Law, c.* 1. And as some of these offices consisted in the collection of rents or pensions, rents were called *Obedientiæ: quia colligebantur ab obedientialibus*. But though *Obedientia* was a rent, as appears by *Hovedcn*, in a general acceptation of this word, it extended to whatever was enjoined the monks by the abbot; and in a more restrained sense, to the cells or farms which belonged to the abbey to which the monks were sent, *vi ejusdem Obedientiæ*, either to look after the farms, or to collect the rents, &c. See *Mat. Paris, Ann.* 1213.

OBIT, *Lat.*] Signifies a funeral solemnity or office for the dead, most commonly performed when the corpse lies in the church uninterred; also the anniversary office. 2 *Cro.* 51: *Dyer* 313. The anniversary of any person's death was called the *Obit*; and to observe such day with prayers and alms, or other commemoration, was the keeping of the *Obit*: in religious houses they had a register, wherein they entered the *Obits* or *Obitual* days of their founders or benefactors, which was thence termed the *Obituary*. The tenure of *Obit*, or *Obituary*, or chantry lands, is taken away and extinct, by *stat.* 1 *Ed* 6. *c.* 14.

OBJURGATRICES, Scolds, or unquiet women, punished with the cucking-stool. *MS LL. Lib. Burg. Villæ de Montgomery temp. Hen.* 2. See *Castigatory*.

OBLATA, Gifts or offerings made to the King by any of his Subjects, which in the reigns of King *John* and King *Hen.* III. were so carefully heeded, that they were entered into the *Fine Rolls* under the title of *Oblata*; and if not paid, esteemed a duty, and put in charge to the Sheriff. *Philips of Purveyance*. In the Exchequer it signifies old debts, brought as it were together from precedent years, and put on the present Sheriff's charge. *Pract. Excheq.* 78.

OBLATIONS, *oblationes*.] Offerings to God and the Church. See *Spelm. de Concil. tom.* 1. *p.* 393. The word is often mentioned in our law books; and formerly there were several sorts of Oblations, viz. *Oblationes altaris*, which the priest had for saying mass; *Oblationes defunctorum*, which were given by the last wills and testaments of persons dying to the church; *Oblationes mortuorum*, or *funerales*, given at burials; *Oblationes pœnitentium*, which were given by persons penitent; and *Oblationes pentecostales*, &c.

The chief or principal feasts for the Oblations of the altar were *All Saints*, *Christmas*, *Candlemas*, and *Easter*, which were called *Oblationes quatuor principales*; and of the customary offerings from the parishioners to the parish

rish priest, solemnly laid on the altar, the mass or sacrament offerings were usually three-pence at *Christmas*, two-pence at *Easter*, and a penny at the two other principal feasts. Under this title of Oblations were comprehended all the accustomed dues for *sacramentalia* or christian offices; and also the little sums paid for saying masses and prayers for the deceased. *Kennet's Gloss.* See *Offerings*.

Oblationes funerales were often the best horse of the defunct, delivered at the church gate or grave to the priest of the parish; to which old custom we owe the origin of mortuaries, &c. And at the burial of the dead, it was usual for the surviving friends to offer liberally at the altar for the pious use of the priest, and the good estate of the soul deceased, being called the *Soul-sceat*. In *North Wales* this usage still prevails, where, at the rails of the communion table in churches, is a tablet conveniently fixed, to receive the money offered at funerals according to the quality of the deceased; which has been observed to be a providential augmentation to some of those poor churches. *Kennet's Gloss.* At first the church had no other revenues beside these Oblations, till in the fourth century it was enriched with lands and other possessions. *Blount.* See title *Mortuary*.

Oblations, &c. are in the nature of tithes, and may be sued for in the Ecclesiastical Courts, and it is said are included in the act 7 & 8 *W.* 3. *c.* 6, for recovery of small tithes under 40*s.* by the determination of Justices of Peace, &c. See title *Tithes*.

OBLIGATION, *obligatio.*] A bond, containing a penalty, with a condition annexed for payment of money, performance of covenants, or the like; it differs from a bill, which is generally without a penalty or condition, though a bill may be obligatory. *Co. Lit.* 172. Obligations may also be by matter of record; as statutes and recognizances, to which there are sometimes added defeasances, like the condition of an Obligation; but when the Obligation is simple, or single, without any defeasance or condition, it is most properly called so. *Shep. Abr.* 475. See title *Bond*.

OBLIGOR, He who enters into an obligation; as Obligee is the person to whom it is entered into.

Before the coming in of the *Normans*, writings obligatory were made firm with golden crosses, or other small signs or marks. But the *Normans* began the making such bills and obligations with a print or seal in wax, impressed with every one's special signet, attested by three or four witnesses. In former time many houses and lands thereto passed by grant and bargain, without script, charter, or deed, only with the landlord's sword or helmet, with his horn or cup; and many tenements were demised with a spur or currycomb, with a bow or with an arrow. *Cowell.* See *Wang*; *Bond*; *Deed*, II. 6.

OBOLATA TERRÆ, According to some accounts, half an acre of land; but others hold it to be only half a perch. *Spelm. Gloss.*

OBVENTIONS, *Obventiones.*] Offerings or tithes; and Oblations, Obventions, and Offerings are generally the same thing, though Obvention has been esteemed the most comprehensive. See *Oblations*; *Tithes*.

OCCASIO, Is taken for a tribute which the lord imposed on his vassals or tenants; *propter* occasiones *bellorum vel aliarum necessitatum. Fleta, lib.* 1. *c.* 24. Rather the cause or pretext of such imposition.

OCCASIONARI, To be charged or loaded with payments, or occasional penalties. *Stat. Ed.* 2. *anno* 21. So in *Fleta, Ita quod ipsi vigilatores non occasionentur. Lib.* 1. *cap.* 24. *par.* 7.

OCCASIONES, Assarts, whereof *Manwood* speaks at large; the word is derived *ab occando*, i. e. harrowing or breaking clods. See *Spelman's Glossary*, v. Essartum. *Lib. Niger Scac. par.* 1. *cap.* 27, and this Dictionary, *Assart*.

OCCUPANT, *occupans.*] He who first gets possession of a thing. An island in the sea, precious stones on the sea-shore, and treasure discovered in a ground that has no particular owner, by the Law of Nations belong to him who finds them and gets the first occupation of them. *Treat. Laws* 342.

THE LAW OF OCCUPANCY is founded upon the law of nature, *viz. Quod terra manens vacua occupanti conceditur.* So as, upon the first coming of the inhabitants to a new country, he who first enters upon such part of it, and manures it, gains the property; (as is now used in *Cornwall*, &c. by the laws of the *Stannaries*, under certain regulations, for which see the Stannary laws;) so that it is the actual possession and manurance of the land which was the first cause of occupancy, and consequently is to be gained by actual entry. *Sid.* 347.

Where a man finds a piece of land which no other possesses or hath title unto, and enters upon the same, this gains a property, and a title by occupancy; but this manner of gaining property of lands has long since been of no use in *England*; for lands now possessed without any title are in the Crown, and not in him who first enters. *Sid.* 218. Though an estate for another's life, by our ancient laws, might be gotten by occupancy: as for example; suppose *A.* had lands granted to him for the life of *B.* and died without making any estate of it; in such case, whoever first entered into the land after the death of *A.* got the property for the remainder of the estate granted to *A.* for the life of *B.* For to the heir of *A.* it could not go, not being an estate of inheritance, but only an estate for another man's life; which was not descendible to the heir, unless he were specially named in the grant: and the executors of *A.* could not have it, as it was not an estate testamentary, that it should go to the executor as goods and chattels; so that in truth no man could entitle himself unto those lands: therefore the law preferred him who first entered, and he was called *Occupans*, and should hold the land during the life of *B.* paying the rent, and performing the covenants, &c. *Bac. Elem.* 1. And not only if tenant *pur terme d'autre vie* died, living *cestui que vie*; but if tenant for his own life granted over his estate to another, and the grantee died before him, there should be an Occupant. *Co. Lit.* 41, 388.

A man could not, however, be an Occupant but of a void possession; and it was not every possession of a person entering that could make an occupancy, for it must be such as would maintain trespass without farther entry. *Vaugh.* 191, 192: *Carter* 65: 2 *Keb.* 250. It was also held, that there could be no occupancy by any person of what another had a present right to possess: occupancy by law must be of things which have natural existence, as of land, &c. and not of rents, advowsons, fairs, markets, tithes, &c. which lie in grant, and are incorporeal rights and estates; and there could not be an Occupant

of a copyhold eſtate. *Vaugh.* 190: *Mod. Ca.* 66: 1 *Inſt.* title by *general* occupancy is now univerſally prevented by *ſtats.* 29 *Car.* 2. *c.* 3. § 12: 14 *Geo.* 2. *c.* 20. § 9. The firſt ſtatute enacts, that eſtates *pur autre vie* ſhall be deviſable; and if not deviſed, chargeable in the hands of the heir as aſſets by deſcent where the eſtate falls on him as ſpecial Occupant; and if he is not entitled as ſuch, ſhall go to the grantee's executors or adminiſtrators, and be aſſets. On this ſtatute a doubt aroſe whether it operated further than by making ſuch eſtates deviſable, and aſſets for debts; and in one caſe it was adjudged, that the adminiſtrator took the ſurplus of ſuch eſtates after payment of debts, if not deviſed, for his own benefit, as in the place of a general Occupant. See 12 *Mod.* 103. This gave occaſion to the ſecond ſtatute, which expreſsly makes the ſurplus, in caſe of inteſtacy, diſtributable as perſonal eſtate. See further as to Occupancy, 2 *Comm.* 258: *Vaugh.* 187: *Vin.* title *Occupancy and Eſtates*, R. 2, 3: *Com. Dig. Eſtates*, F.

By the old law no right of occupancy was allowed where the King had the reverſion of the lands; for the reverſioner hath an equal right with any other man to enter upon the vacant poſſeſſion; and where the King's title and a Subject's concur, the King's ſhall be always preferred: againſt the King, therefore, there could be no prior Occupant, for *nullum tempus occurrit regi.* 1 *Inſt.* 41. And even in the caſe of a Subject, had the eſtate *pur autre vie* been granted to a man and his heirs during the life of *ceſtui qui vie*, there the heir might and ſtill may enter and hold poſſeſſion, and is called in law a *ſpecial Occupant*; as having a ſpecial excluſive right, by the terms of the original grant, to enter upon and occupy this *hæreditas jacens* during the reſidue of the eſtate granted; though ſome have thought him ſo called with no very great propriety, and that ſuch eſtate is rather a deſcendible freehold. *Vaugh.* 201. See 2 *Comm.* *c.* 16. *p* 259.

By the ſtatutes above mentioned, though the title of common or general occupancy is utterly extinct and aboliſhed, yet that of ſpecial occupancy by the heir at law continues to this day; ſuch heir being held to ſucceed to the anceſtor's eſtate, not by deſcent, for then he muſt take an eſtate of inheritance; but as an Occupant ſpecially marked out and appointed by the original grant. And it ſeems (notwithſtanding the opinion of *Blackſtone* to the contrary) that theſe ſtatutes extend to caſes of incorporeal hereditaments; although, as has been already noticed, before the ſtatute, no common occupancy could be had of ſuch incorporeal hereditaments. See 2 *Comm.* *c.* 16. *p.* 260; and *Chriſtian*'s note there; and 3 *P. Wms.* 264—6, with *Cox*'s notes.

The true ground of occupancy is, that anciently all trials of titles were by real actions, therefore he who had the freehold was one to whom the law had a ſpecial regard. The ancient law, for many reaſons, did not allow leaſes for above forty years, till the *ſtat.* 21 *Hen.* 8. *c.* 15. Beſides, there was reaſon too, that not only he who had right paramount, might know how to try his action, but that the lord might know how to avow for his ſervices (which were conſiderable things formerly); he ought to know who was his tenant, therefore the law provided there ſhould be a perſon on whom he ſhould avow. See *Cart.* 57: 1 *Sid.* 346: 1 *Lev.* 202. *Gray* v. *Bearcroſt*.

The ſubject and object of the Occupant are only ſuch things as are capable of occupancy, and not the freehold at all; into which he neither doth, nor can enter; but the law caſts the freehold immediately upon him who hath made himſelf Occupant of the land, or other real thing whereof he is Occupant, that there may be a tenant to the *præcipe*; *per Vaughan* Ch. J. *Hil.* 19 & 20 *Car.* 2. in the caſe of *Holden* v. *Smallbrooke*.

See farther, 27 *Aſſ.* 31: 2 *Roll. Abr.* 151: *Cro. Eliz.* 158: 6 *Mod.* 63, 68. *Smartle* v. *Penhallow*.

In ſome caſes where the laws of other nations give a right by occupancy, as in lands newly created, by the riſing of an iſland in the ſea or in a river, or by the *Alluvion* or *Dereliction* of the waters; in theſe inſtances the law of *England* aſſigns them an immediate owner. For *Bracton* ſays, that if an iſland ariſe in the *middle* of a *river*, it belongs in common to thoſe who have lands on each ſide thereof; but if it be nearer to one bank than another, it belongs only to him who is proprietor of the neareſt ſhore. *Bract. l.* 2. *c.* 2. Yet this ſeems only to be reaſonable, where the ſoil of the river is equally divided between the owners of the oppoſite ſhores; for if the whole ſoil is the freehold of any one man, as it uſually is whenever a ſeveral fiſhery is claimed, there it ſeems juſt (and ſo is the conſtant practice) that the eyotts or little iſlands, ariſing in any part of the river, ſhall be the property of him who owneth the piſcary and ſoil. *Salk.* 637. However, in caſe a new iſland riſe in the *ſea*, though the civil law gave it to the Occupant, yet ours gives it to the King. *Bract. l.* 2. *c.* 2: *Callis of ſewers* 22. And as to lands gained from the ſea, either by *alluvion*, by the waſhing up of ſand and earth, ſo as in time to make *terra firma*; or by *dereliction*, as when the ſea ſhrinks back below the uſual water-mark; in theſe caſes the law is held to be, that if this gain be by little and little, by ſmall and imperceptible degrees, it ſhall go to the owner of the land adjoining, 2 *Roll. Abr.* 170: *Dyer* 326: For *de minimis non curat lex*; and, beſides, theſe owners, being often loſers by the breaking in of the ſea, or at charges to keep it out, this poſſible gain is therefore a reciprocal conſideration for ſuch poſſible charge or loſs. But if the alluvion or dereliction be ſudden and conſiderable, in this caſe it belongs to the King; for as the King is lord of the ſea, and ſo owner of the ſoil while it is covered with water, it is but reaſonable he ſhould have the ſoil when the water has left it dry. *Callis* 24, 28. So that the quantity of ground gained, and the time during which it is being gained, are what make it either the King's or the Subject's property. In the ſame manner if a river running between two lordſhips by degrees gains upon the one, and thereby leaves the other dry, the owner who loſes his ground thus imperceptibly has no remedy; but if the courſe of the river be changed by a ſudden and violent flood, or other haſty means, and thereby a man loſes his ground, it is ſaid that he ſhall have what the river has left in any other place as a recompence for this ſudden loſs. *Callis* 28.

Of *Things Perſonal*, to which a title may be obtained by *Occupancy*.--Among theſe *Blackſtone* enumerates, 1. The goods of alien enemies: reſtrained, however, to captors authorized by public authority, and to goods brought into the country by an alien enemy after a declaration

of

of war, without a safe-conduct. See title *Alien*, and also title *Insurance*, II. 2. The persons of prisoners till their ransom is paid; and perhaps in some cases negro slaves. See this Dictionary, title *Slaves*. 2. Any thing found which does not come under the description of *waifs*, *estrays*, *wreck*, or *treasure-trove*. See those titles. 3. The benefit of the *elements* of light, air, and water, as far as they are previously unoccupied, or as they may be occupied without injury to another. See title *Nusance*. 4. Animals *feræ naturæ*, under the restrictions of the *Game-laws*. See that title. 5. A special personal property in corn growing on the ground, or other *emblements*; though the title to these, as Mr. *Christian* observes, is rather the continuation of an inchoate, than the acquisition of an original, right. See title *Emblements*.—6, 7. Property arising by *accession* and *confusion of goods*; as to the former of which a little shall be said presently. As to the latter, see title *Confusion, property by*. 8. *Literary Property*; as to which see this Dictionary under that title.

As to property arising from *accession*. By the *Roman* laws, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement. This has also long been the law of *England*; for it is laid down in the Year-books, that whatever alteration of form any property has undergone, the owner may seize it in its new shape if he can prove the identity of the original materials; as if leather be made into gloves, cloth into a coat; or if a tree be squared into timber, or silver melted or beat into a different figure. 5 *H*. 7. 15: 12 *H*. 8. 10. But if the thing itself by such operation were changed into a different species, as by making wine, oil, or bread, from another's grapes, olives, or wheat, the civil law held, that it belonged to the new operator, who was only to make a satisfaction to the former proprietor for the materials which he had so converted. These doctrines are implicitly copied and adopted by *Bracton*, and hav. since been confirmed by many resolutions of the Courts. *Bract* *l*. 2. *cc*. 2, 3: *Bro. Ab.* title *Property* 23: *Moor* 20: *Poph*. 38. It hath even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman. *Moor* 214. See 2 *Comm*. *c*. 26, and the notes there.

OCCUPATION, *occupatio*.] Use or tenure: as we say, such land is in the tenure, or Occupation, of such a man, that is, in his possession or management; also it is used for a trade or mystery. *Stat*. 12 *Car*. 2 *c*. 18. Occupations at large are taken for purprestures, intrusions and usurpations; and particularly for usurpation upon the King, by the *stat. de Bigamis*, *c*. 4: 2 *Inst*. 272.

OCCUPAVIT, A writ that lay for him who was ejected out of his freehold in time of war; as the writ of *novel disseisin* lay for one disseised in time of peace. *Ingham*.

OCTAVE, The eighth day after any feast, inclusive. See *Utas*.

ODHAL RIGHT; See *Tenure*, I. 1.

ODIO ET ATIA, Was a writ anciently called *breve de bono & malo*, directed to the Sheriff to inquire whether a man, committed to prison upon suspicion of murder, were committed on just cause of suspicion, or only upon malice and ill-will; and if upon the inquisition it were found that he was not guilty, then there issued another writ to the Sheriff to bail him. See *Reg. Orig*. 133: *Bract. lib*. 3. *cap*. 20: *Stats. West*. 1. *cap*. 11; 28 *Ed*. 3. *cap*. 9: *S. P. C*. 77: 2 *Inst*. 42: 9 *Rep*. 506.

The party committed, if entitled to be bailed, may now have the cause of his commitment inquired into, and be discharged on bail, by suing out an *habeas corpus*. See this Dictionary, title *Habeas Corpus*.

Blackstone remarks, that according to *Bracton*, *l*. 3. *tr*. 2. *c*. 8, this writ ought not to be denied to any man; it being expressly ordered to be made out *gratis*, without any denial, by *Magna Charta*, *c*. 26: and *stat*. *West*. 2. 13 *E*. 1. *c* 29 But the statute of *Gloucester*, 6 *Ed*. 1. *c*. 9, restrained it in the case of killing by misadventure or self-defence; and the *stat*. 28 *Ed*. 3. *c*. 9, abolished it in all cases whatsoever: but as the *stat*. 42 *Ed* 3. *c*. 1, repealed all the statutes then in being, contrary to the Great Charter, Sir *Edward Coke* is of opinion, that the writ *de Odio et Atia* was thereby revived. 2 *Inst*. 43, 55, 315. See 2 *Comm*. *c*. 8. *p*. 129.

ŒCONOMUS, Is sometimes taken for an advocate or defender; as, *summus secularium* Œconomus & *protector Ecclesiæ*. *Matt. Par. anno* 1245.

ŒCONOMICUS, A word used for the executor of a last will and testament, as the person who had the œconomy or fiduciary disposal of the goods of the deceased. *Hist. Dunelm. apud Whartoni Angl. Sacr. par*. 1. *pag*. 784.

OFFENCE, *delictum*.] An act committed against a law, or omitted where the law requires it, and punishable by it. *West. Symb*. Offences are capital or not: capital, those for which the offender shall lose his life: not capital, where an offender may forfeit his lands and goods, be fined, or suffer corporal punishment, or both; but not loss of life. *H. P. C*. 2, 126, 134. Under capital Offences are comprehended high treason, petit treason, and felony. Offences not capital include the remaining part of the Pleas of the Crown, and come under the title of *Misdemeanors*. An Offence may be greater or less, according to the place wherein it is done. *Finch* 25. But the Offence will be in equal degree in them, who are equally tainted with it; and those who act and consent thereto, are alike offenders. 5 *Rep*. 80. See this Dictionary, title *Misdemeanor*.

OFFERINGS, Are reckoned among personal tithes, payable by custom to the parson or vicar of the parish, either occasionally, as at sacraments, marriages, christenings, churching of women, burials, &c. or at constant times, as at *Easter*, *Christmas*. See *Stat*. 2 & 3 *Ed*. 6. *cc*. 13, 20, 21. *Stat*. 32 *Hen*. 8. *cap*. 7. § 2, enforces the payment of Offerings according to the custom and place where they grow due. Vide *Oblations*.

By *stat*. 2 & 3 *Ed*. 6. *cap*. 13. § 10, all persons who ought to pay Offerings, shall yearly pay to the parson, vicar, proprietary, or their deputies, or farmers of the parishes where they dwell, at such four Offering-days as heretofore, within the space of four last years past, hath

been accuftomed, and in default thereof fhall pay for their faid Offerings at *Eafter* following.

The four Offering-days are *Chriftmas, Eafter, Whitfuntide*, and the Feaft of the dedication of the parifh-church. *Gibf.* 739.

OFFERINGS OF THE KING. All Offerings made at the Holy Altar by the King and Queen are diftributed amongft the poor by the dean of the chapel: there are twelve days in the year called *Offering Days*, as to thefe Offerings, viz. *Chriftmas, Eafter, Whitfunday, All Saints, New Year's Day, Twelfth Day, Candlemas, Annunciation, Afcenfion, Trinity Sunday, St. John Baptift*, and *Michaelmas Day*: all which are high feftivals. *Lex Conftitutionis*, 184.

The Offering commonly made by *James* I. was a piece of gold, having on one fide the portrait of the King kneeling before the altar, with four crowns before him; and circumfcribed with this motto, *Quid retribuam Domino pro omnibus quæ tribuit mihi?* and on the other fide, a lamb lying near a lion, with this infcription, *Cor contritum & humiliatum non defpiciet Deus. Ibid.*

OFFERTORIUM, A piece of filk or fine linen, ufed to receive and wrap up the offerings or occafional oblations in the church. *Statut. Eccl. S. Pauli, London, MS. fol.* 39. Sometimes this word fignifies the offerings of the faithful; or the place where they are made or kept; fometimes the fervice at the time of facrament, the *Offertory*, &c. See *Common Prayer* in the Communion fervice.

OFFICE.

Officium.] That function by virtue whereof a man hath fome employment in the affairs of another, as of the King, or of another perfon. *Cowell.*

Offices are claffed, by *Blackftone*, among incorporeal hereditaments; and an Office is defined to be, a right to exercife a public or private employment, and to take the fees and emoluments thereunto belonging; whether public as thofe of magiftrates, or private as of bailiffs, receivers, or the like. 2 *Comm. c.* 3. *p.* 36.

It is faid, that the word *officium* principally implies a duty, and in the next place the charge of fuch duty; and that it is a rule, that where one man hath to do with another's affairs againft his will, and without his leave, that this is an Office, and he who is in it is an officer. *Carth.* 478.

There is a difference between an Office and an employment, every Office being an employment; but there are employments which do not come under the denomination of Offices; fuch as an agreement to make hay, plough land, herd a flock, &c. which differ widely from that of fteward of a manor, &c. 2 *Sid.* 142.

By the ancient common law, officers ought to be honeft men, legal and fage, & *qui melius fciant & poffint officio illi intendere*; and this, fays Lord *Coke*, was the policy of prudent antiquity, that officers did ever give grace to the place, and not the place grace the officer. 2 *Inft.* 32, 456.

Officers are diftinguifhed into civil and military, according to the nature of their feveral trufts. *Carth.* 479.

Officers are public, or private; and it is faid, that every man is a public officer who hath any duty concerning the public; and he is not the lefs a public officer where his authority is confined to narrow limits; becaufe it is the duty of his Office, and the nature of that duty, which makes him a public officer, and not the extent of his authority. *Carth.* 479.

Alfo offices are diftinguifhed into ancient Offices, and thofe which are of a new creation; and herein it is obfervable, that conftant ufage hath not only fanctioned the firft eftablifhment of fuch ancient Offices as have exifted time out of mind, but alfo hath prefcribed and fettled the manner in which they have exifted and are to continue to exift; in what manner to be exercifed, how to be difpofed, &c. 9 *Co.* 97: *Cro. Eliz.* 636: 2 *Roll. Abr.* 182: *Cro. Car.* 513: 1 *Show.* 436.

There is alfo another diftinction of Offices into judicial and minifterial; the firft, relating to the adminiftration of juftice, or the actual exercife thereof, muft be executed by perfons of fufficient capacity, and by the perfons themfelves to whom they are granted; and herein alfo ancient ufage and cuftom muft govern. 1 *Jon.* 109: *Dav.* 35: 9 *Co.* 97.

I. *Who hath a Right to create and grant, or affign an Office; and how and to whom; and of one Office being incident to, or compatible with, another.*

II. *Of the Offence of buying and felling an Office, and what Offices are prohibited to be thus difpofed of.*

III. *What Remedies a Perfon, having a Right to an Office, muft purfue, to be let into the Enjoyment of it, and how a Difturbance is punifhable.*

IV. *Of the Forfeiture of an Office; and where, for Corruption, Bribery, Extortion, and oppreffive Proceedings, Officers are punifhable.*

I. The King is the univerfal Officer and difpofer of juftice within this realm, from whom all others are faid to be derived; yet he cannot create a new Office inconfiftent with our conftitution, or prejudicial to the Subject. 12 *Co.* 116: 1 *Roll. Rep.* 206: *Carth.* 478. See title *King*.

A man may have an eftate in Offices either to him and his heirs, or for life, or for a term of years, or during pleafure only; fave only that Offices of public truft cannot be granted for a term of years, efpecially if they concern the adminiftration of juftice, for then they might perhaps veft in executors or adminiftrators. 9 *Rep.* 97. Neither can any *judicial* Office be granted in reverfion, becaufe though the grantee may be able to perform it at the time of the grant, yet before the Office falls he may become unable and infufficient; but minifterial Offices may be fo granted, for thefe may be executed by deputy. 11 *Rep.* 4.

There are three things, fays Lord *Coke*, which have fair pretences, yet are mifchievous; 1ft, new Courts; 2d, new Offices; 3d, new Corporations for trade: and as to new Offices, either in Courts or out of them, thefe cannot be erected without act of parliament; for that, under the pretence of common good, they are exercifed to the intolerable grievance of the Subject. 2 *Inft.* 540.

An Office granted by letters patent for the fole making of all bills, informations, and letters miffive in the Council of *York*, was held unreafonable and void. 1 *Jon.* 231.

One *Chute* petitioned the King to erect a new Office for regiftering all ftrangers within the realm, except merchant

merchant-strangers, and to grant the Office to the petitioner with or without a fee; and it was resolved by all the Judges, that the erection of such new Office for the benefit of a private person was against all law, of what nature soever. 1 *Co.* 116: and several cases there cited to this purpose.

The King cannot grant to any person to hold a Court of Equity, though he may grant *tenere placita*; for the dispensation of equity is a special trust committed to the King, and not by him to be intrusted with any other, except his Chancellor. *Hob.* 63.

The grant of an Office, generally, may be made to any person whom the King pleases, for the King has an interest in his Subject, and a right to his service; and therefore an information lies against him who refuses an Office being duly elected; and he shall not be excused for his neglect to qualify himself according to law. 1 *Salk.* 168. But see titles *Dissenter*; *Papist*.

A woman may be an officer. Thus the grant of any Office of government which may be exercised by deputy is good, as Regent of the kingdom; so of the Keeper of a castle, Forester, Gaoler, Commissioner of sewers, Sexton, and Overseer of the poor. See *Com. Dig.* title *Officer* (B). So an Office of inheritance may descend or be granted to a woman, as the Office of *Earl-Marshal*; *Com. Dig.*—or Lord *Great Chamberlain of England*. *Bro. P. C.*

Wherever one Office is incident to another, such incident Office is regularly grantable by him who hath the principal Office; and on this foundation it hath been held, that the King's grant of the Office of County-clerk was void, it being inseparably incident to the Office of Sheriff, and could not by any law or contrivance be taken away from him. 4 *Co.* 32. *Mitton's case.*

So the Office of chamberlain of the King's Bench prison is inseparably incident to the Office of marshal; therefore a grant of the Office of marshal, with a reservation of the Office of chamberlain, is void. 1 *Salk.* 439: 1 *Leon.* 320, 321.

So it hath been resolved, that the Office of Exigenter of *London* and other counties in *England*, is incident to the Office of Chief Justice of C. B. and therefore a grant thereof by the King, though in the vacancy of a Chief Justice, is null and void. *Dyer* 175. *a. pl.* 25: 1 *And.* 152: and see *Show. Par. Ca. Sir Rowland Holt's case.*

Lord *Coke* says, that the Justices of Courts did ever appoint their clerks, some of which after, by prescription, grew to be Officers in their Courts; and this right which they had of constituting their own officers, is further confirmed to them by *stat. West.* 2. 13 *E.* 1. *st.* 1. *c.* 30. The reasons are; 1st, For that the law ever appoints those who have the greatest knowledge and skill to perform that which is to be done. 2dly, The officers and clerks are but to enter, inrol, or effect that which the Justices adjudge, award, or order; the insufficient doing whereof maketh the proceeding of the Justices erroneous; than which nothing can be more dishonourable and grievous to the Justices and prejudicial to the party. 2 *Inst.* 425: 4 *Mod.* 173.

If two offices are incompatible, by the acceptance of the latter, the first is relinquished and vacant; even though it should be a superior Office. 2 *Term Rep.* 81. The subsequent acceptance of an incompatible Office vacates that which was previously held, whether superior or inferior. See 2 *Term Rep.* 8: and *Doug. in n. R. v. Godwin.*

II. The taking or giving of a reward for Offices of a public nature is said to be bribery; and nothing can be more prejudicial to the good of the public, than to have places of the highest concern, (on the due execution whereof the happiness of both King and People depends,) disposed of, not to those who are most able to execute, but to those who are most able to pay for them; nor can any thing be a greater discouragement to industry and virtue, than to see those places of trust and honour, which ought to be the rewards of those who by their industry have qualified themselves for them, conferred on such who have no other recommendation but that of being highest bidders; neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expences they were at in gaining their places, and the necessity of sometimes straining a point, to make their bargain answer their expectations. 2 *Inst.* 148: 1 *Hawk. P. C.* It is said to be *malum in se*, and indictable at common law. *Noy* 102: *Moor* 781.

For which reasons, among many others, it is expresly enacted by *stat.* 12 *R.* 2. *c.* 2, that the chancellor, treasurer, keeper of the Privy seal, steward of the King's house, the King's chamberlain, clerk of the rolls of the justices of the one Bench and of the other, barons of the Exchequer, and all others who shall be called to ordain, name, or make justices of the peace, sheriffs, escheators, customers, comptrollers, or any other officer or minister of the King, shall be firmly sworn that they shall not ordain, name, or make any of the above-mentioned officers for any gift or brokage, favour or affection; nor that none who sueth by himself, or by others, privily or openly, to be in any manner of Office, shall be put in the same Office, or in any other; but that they make all such officers and ministers of the best and most lawful men, and sufficient, to their estimation and knowledge.

And by *stat.* 4 *H.* 4. *c.* 5, it is enacted, that no Sheriff shall let his bailiwick to farm to any man for the time he occupieth such Office.

But the principal statute relating to this matter is *stat.* 5 & 6 *Ed.* 6. *c.* 16; whereby it is enacted, "That if any person bargain or sell any Office, or deputation of any Office, or any part of any of them, or receive any money, fee, &c. directly or indirectly, or take any promise, &c. to receive any money, &c. directly or indirectly, for any Office, or for the deputation of any office, or any part of any of them; or to the intent that any person should have, exercise, or enjoy any office, or the deputation of any Office, or any part of any of them, which shall in anywise concern the administration or execution of justice, or the receipt, &c. of any of the King's treasure, &c. or the keeping of any of the King's towns, &c. being for a place of strength and defence; or which shall concern or touch any clerkship to be occupied in any manner of Court of record wherein justice is to be ministered; that then every person that shall so offend shall not only lose and forfeit all his and their right, interest, and estate, in or to any of the said Office or Offices, &c. but also persons who shall give

give or pay any sum of money, &c. or shall make any promise, &c. shall immediately be adjudged a disabled person in the law to all intents and purposes to have, &c. the said Office, &c.

" It is further enacted, That bargains, sales, promises, bonds, agreements, covenants, and assurances shall be void to and against him and them by whom any such bargain, &c. shall be made.

" Provided always, That this act shall not extend to any Office whereof any person is seised of any estate of inheritance, nor to any Office of parkership, or of the keeping of any park house, manor, garden, chase, or forest, or to any of them.

" It is also provided, That this act shall not be prejudicial to the Chief Justices of the King's Bench or Common Pleas, or the Justices of assise; but that they may do in every behalf, concerning any Office to be given or granted by them, as they might have done before the making this act."

In the construction of this last mentioned statute, the following opinions have been holden:

The Office of Chancellor, Registrar, and Commissary in Ecclesiastical Courts are within the meaning of the statute; inasmuch as these Courts do not only determine matters which are brought before them *pro salute animæ*, but also have the decision of disputes concerning the lawfulness of matrimony, and legitimation of children, which touch the inheritance of the Subject; and also hold plea of legacies and tithes, &c. in which respects they are Courts of justice. *Cro. Jac.* 269: 3 *Inst* 148: 12 *Co.* 78: *Salk.* 468: 3 *Lev.* 237: 2 *Vent.* 1?7, 267.

Offices in fee are out of the statute; for if the King be seised in fee of a bailiwick, and he demise the same to *A.* who demises to *B.* rendering, &c. the demise to *B.* is not within the statute; for Offices in fee being excepted out of the statute, under leases of such Offices are also excepted inclusively. 2 *Lev.* 151.

The place of cofferer is within this statute, and a person having once purchased this place is for ever disabled to enjoy the same; and the King is bound by this statute, and could not dispense with it by any *non obstante*. 3 *Bulst.* 91: *Co Lit.* 234: *Cro. Jac.* 385.

The sale of a bailiwick of a hundred is not within the statute, for such an offence doth not concern the administration of justice, nor is it an Office of trust. 4 *Leon.* 33: 4 *Mod.* 223.

A seat in the Six-clerks' Office is not within the statute, being a ministerial Office only; and they are but under clerks, who have so much a sheet for copying, &c. but one Judge held it not saleable at common law for the following reasons: 1st, Discouragement of merit and industry. 2dly, It occasions extortion and exaction of excessive fees. 3dly, From its being a great charge to suitors. 4thly, It exempts the persons, who enter, by these means, in a great measure, from the due regulations under which they ought to be; for they are not so easily removed, as if they were at the will of him who hath the disposal of them. *Pasch.* 26 *Car.* 2. in C. B. *Sparrow* v. *Reynolds.*

This statute doth not extend to military officers; and *stat.* 7 *W.* & *M.* which requires, that every commission officer, before his commission is registered, should take the oath there mentioned, that he had not directly or indirectly given any thing for procuring the commission but the usual fees, extended only to horse, foot, and dragoons, but not to the marines. *Preced. Chanc.* 199.

The sale of the deputation of the Office of Provost-Marshal of *Jamaica* is not within this statute, because this statute does not extend to the plantations. 4 *Mod.* 222: *Salk.* 411: 2 *Mod.* 45. *S. P.* undetermined; and there said *arguendo*, that so good a law should have as extensive a construction as possible.

In a writ on a judgment in *Ireland*, it was held clearly that the Office of clerk of the Crown, and clerk of the peace, was within the statute; but that this law did not extend to *Ireland*, not being enacted there. *Trin.* 9 *Geo.* 2. in B. R. *Maccarty* v. *Wickford.*

One who makes a contract for an Office, contrary to the purport of this statute, is so far disabled to hold the same that he cannot at any time during life be restored to a capacity of holding it by any grant or dispensation whatsoever. *Hob.* 75: *Co. Lit.* 234: *Cro. Car.* 361: *Cro. Jac.* 386.

Where an Office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good; so if the profits be uncertain arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits of the Office, it is good: for in these cases the deputy by his constitution is in place of his principal, yet he has no right to his fees, they still continue to be the principal's; so that as to him it is only reserving a part of his own, and giving away the rest to another; but where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond for performance of such agreement is void by the statute. *Salk.* 468: 6 *Mod.* 234: *Comb.* 356.

This being a public law, the judges *ex officio* are to take notice of it, but yet it seems the more regular and safe way to plead it: but it hath been resolved, that a person in pleading this statute need not alledge that the party against whom it is pleaded is not within any of the provisoes or exceptions in the statute; but that if he be, it must come on his side to shew it. *Trin.* 9 *Geo.* 2. in *B. R.* *Maccarty* v. *Wickford.* *Sed quære?* Also *vide* 2 *And.* 55, 107: *Ld. Raym.* 1245.

III. It is held clearly, that an assise lay at common law for an Office, and that therefore though the statute of *West.* 2. 13 *Ed.* 1. *st.* 1. *c.* 25, speaks only of Offices in fee, yet an assise lies for an Office in tail, or for life; but this is to be understood of Offices of profit, for of an Office of charge and no profit an assise doth not lie. 8 *Co.* 47. *a*: 2 *Inst.* 412.

But a man shall not have an assise of the whole Office, unless he be disseised of the whole; yet if a man be disseised of parcel of the profits of an Office, he may have an assise for that parcel only. 8 *Co.* 49. *b*: 2 *Inst.* 412.

In an assise for an Office newly erected and constituted, the demandant in his plaint must shew what fee or profit is granted for the exercise thereof; for this Office cannot have a fee or profit appurtenant to it, as an ancient Office may, and for an Office without fee or profit no assise lies. 8 *Co.* 49.

But in assise for an ancient Office, the demandant in his plaint need not shew what fee or profit is belonging to

to it, for it shall be intended there is some fee or profit. 8 *Co.* 49.

In an assise for an Office, the demandant must shew a seisin; but it hath been held, that taking 3*d.* for a *capias* against *B.* is sufficient seisin of the office of *Filazer de banco.* 1 *Roll. Abr.* 270.

Also in an assise for an Office, the demandant in his patent must set forth a title. 3 *Mod.* 273.

An assise lies for the Office of Registrar of the Admiralty; for though their proceedings are according to the civil law, yet the right of their Office is determinable at the common law: so of the mastership of an hospital, being a lay fee. 8 *Co.* 47: 2 *Inst.* 412: 11 *Co.* 99. *b*: *Dyer* 152.

A man may bring an action on the case for the profits of an Office, though he never had seisin. 1 *Mod.* 122. And, in general, an action by a person claiming an Office against the person in actual possession, and receiving the fees, is now perhaps the most eligible method that can be pursued to try the question of right.

If the King grant the Office of Comptroller of the customs to *A.* and *B. durante beneplacito*, and *A.* dies, and afterwards the King grants the said Office to *C.* and yet *B.* under pretence of survivorship, exercises the said Office, and receives the profits thereof; *C.* may have an *indebitatus assumpsit* for so much money had and received to his use. 2 *Mod.* 260. See 2 *Lev.* 108: 1 *Mod.* 122: and further, title *Mandamus.*

IV. It is laid down in general, that if an officer acts contrary to the nature and duty of his Office, or if he refuses to act at all, that in these cases the Office is forfeited. 11 *Ed.* 4. 1. *b*: 2 *Roll. Abr.* 155.

But herein it will be necessary to consider more minutely what shall be said to be such acts as are contrary to the duty of his Office; and how far the same (whether they are acts of omission or commission) amount to a forfeiture; wherein it hath been clearly agreed, that a gaoler by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in gaol after having been legally discharged and paid their just fees, forfeits his Office; for that in the grant of every Office it is implied, that the grantee execute it faithfully and diligently. *Co. Litt.* 233: 9 *Co.* 50: 3 *Mod.* 143.

If a gaoler leave his prison door unlocked, and the prisoners escape, it is not only a negligent but a voluntary escape. *Cro. Car.* 492.

But it is held, that one negligent escape is not a forfeiture, though a voluntary one is, but that two negligent escapes amount to a forfeiture. 39 *Hen.* 6. 33: 2 *Roll. Abr.* 195: 2 *Vern.* 173: and see *stat.* 8 & 9 *W.* 3. *cap.* 27; this Dictionary, title *Gaoler.*

There are, says Lord *Coke*, three causes of forfeiture or seizure of Offices by matter in deed. 1st, By abuser. 2dly, Non-user. 3dly, Refusal.

1st, Abuser; as by a marshal or other gaoler's permitting escapes.

2dly, By Non-user; in which there is this difference, when the Office concerns the administration of justice or the commonwealth, the officer *ex officio* ought to attend without request, there by non-user or non-attendance the Office is forfeited; but where an officer is not obliged to attend, but upon demand or request made by him whose officer he is, there without such demand or request there can be no forfeiture; and herein also Lord *Coke* in another place takes the following diversity, *viz.* that non-user, of itself, without some special damage, is no forfeiture of private Offices, but that it is otherwise of a public one, which concerns the administration of justice.

3dly, As to refusal, he says, that in all cases where an officer is bound upon request to exercise his Office, if he does not do it upon request, he forfeits it; as if the steward of a manor be requested by the lord to hold a Court, if he does not do it, it is a forfeiture. 6 *Co.* 50: *Co. Litt.* 233. *b.*

If conditions in law, which are annexed to Offices, be not observed and fulfilled, the Office is lost for ever, for these conditions are as strong and binding as express conditions; therefore if the Office of forester, &c. descend to an infant or feme covert, (where by law they may so descend,) and these are not exercised by sufficient deputies, they become forfeited. *Co. Litt.* 233. *b*: 8 *Co.* 44: *Cro. Car.* 556: *Hard.* 11.

Insufficiency is an original incapacity which creates the forfeiture of an Office; so if a superior puts in a deputy into an Office, which may be exercised by deputy, who is ignorant and unskilful, this is a forfeiture of the Office. 4 *Mod.* 29. *arguendo.*

If the King grants an Office in any of the Courts at *Westminster*, the judges may remove an officer for insufficiency, and they are the proper judges of his abilities. 4 *Mod.* 30. *arguendo.* Where an officer may be removed, but not abridged of his fee, see 1 *Roll. Rep.* 82-3.

A Filazer of *C. B.* being absent two years, and having farmed out his Office from year to year, without licence of the Court, was discharged by the Chief Justice, *ex assensu sociorum suorum*, by word, spoken openly in Court; and though there was no record made of the discharge, nor no legal summons for him to answer to any accusation, yet the discharge was held good. *Dyer* 114. *b. pl.* 64: 1 *Roll. Abr.* 155.

An officer was turned out, because that he *spoliavit quaedam recorda contra officii sui debitum*; and it was objected, 1st, That it was not certain enough, because not shewn what records; to which the Court answered, that it would be prolix, and then he having spoiled the records, they are not perhaps to be had. 2dly, That it may be he did it by chance, and not wilfully; to which the Court said, that the conclusion *contra officii sui debitum* includes that. 1 *Keb.* 597.

But if the King grants an Office which concerns trust and diligence to two, and one is attainted, the entire Office is forfeited to the King; for he cannot make one occupy in common with another. *Plow.* 180.

Wherever an officer, who holds his Office by patent, commits a forfeiture, he cannot regularly be turned out without a *scire facias*, nor can he be said to be completely ousted or discharged without a writ of discharge; for his right appearing of record, the same must be defeated by matter of as high a nature. But for this see *Dyer* 155, 198, 211: 9 *Co.* 98: *Co. Litt.* 233: *Cro. Car.* 60, 61: 1 *Sid.* 81, 134: 8 *Co.* 44. *b*: 1 *Roll. Abr.* 580: 3 *Mod.* 325: 3 *Lev.* 288.

All officers are punishable for corruption and oppressive proceedings, according to the nature of the offence, either by indictment, attachment, action at the suit of the party injured, loss of their Office, &c. 6 *Mod.* 96.

But

But besides the punishment by indictment, &c. all Courts of record have a discretionary power over their officers, and are to see that no abuses are committed by them, which may bring disgrace on the Courts themselves: the Court of King's Bench, by the plenitude of its power, exercises a superintendency over all inferior Courts; and may grant an attachment against the judges of such Courts for oppressive, unjust, or irregular practice, contrary to the obvious rules of natural justice. *Dyer* 218: *Palm.* 564: 1 *Salk.* 210.

As to extortion by officers, it is so odious, (being more heinous, as Lord *Coke* says, than robbery, as it is usually attended with the aggravating sin of perjury,) that it is punishable at common law by fine and imprisonment, and also by removal from the Office in the execution whereof it was committed; and is defined to be, the taking of money, by any officer, by colour of his Office, either where none is due, or not so much is due, or where it is not yet due. *Co. Litt.* 368. *b*: 2 *Inst.* 209: 10 *Co.* 102: 2 *Roll. Abr.* 32, 57: *Cro. Car.* 438, 448: *Raym.* 315.

But the stated and known fees allowed by the Courts of justice to their respective officers, for their labour and trouble, are not restrained by the Common Law, or by the statute of *Westm.* 1. Therefore such fees may be legally demanded, without danger of extortion. 21 *Hen* 7. 17: *Co. Litt.* 368. See further this Dictionary, titles *Extortion*; *Fees*; *Bribery*.

In general, all wilful breaches of the duty of an Office are forfeitures of it, and punishable by fine, &c. for since every Office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just than that he, who either neglects or refuses to answer the end for which his Office was ordained, should give way to others who are both able and willing to take care of it, and that he should be punished for his neglect or oppressive execution; but the particular instances wherein a man may be said to act contrary to the duty of his Office, though various, are yet so generally obvious, that it is needless to enumerate them. *Co. Litt.* 233, 234.

For further matter connected with this title see this Dictionary, titles *Mandamus*; *Quo Warranto*, &c.

See also 2 *Inst.* 43: *Cro. Car.* 491: 3 *Mod.* 146: 9 *Co.* 50. *a*: *Cro. Eliz* 389: 1 *And.* 29: *Poph.* 117: *Moor* 707: 2 *Mod.* 121: *Cro. Jac.* 17, 18: 11 *Ed.* 4. 1: 20 *Ed* 4 56: 39 *Hen.* 6. 32: 22 *Ass.* 34: 8 *H.* 4. 18: 2 *H.* 7 11: 14 *Hen.* 7. 1: 2 *Roll. Abr.* 155: 7 *Co.* 34: *Poph.* 119: 1 *Lev.* 71: *Raym.* 216: 3 *Lev.* 288: 3 *Mod.* 146: *Skin.* 114: 2 *Vern.* 189, 269: *Bridgm.* 27: *Plowd.* 378: 1 *Sid.* 91, 94, 152: 1 *Lev.* 75: 1 *Keb.* 349: *Raym.* 94: 5 *Mod.* 431: *Carth.* 438: 4 *Inst.* 200: *Moor* 808.

OFFICE FOUND, Is where an inquisition is made to the King's use, of any thing by virtue of his Office who inquireth, and it is found by the inquisition. In this signification it is used in *stat.* 33 *H.* 8. *c.* 20. *Staundford's Prærog. pag.* 60; where to traverse an Office, is to traverse an inquisition taken of Office; and to return an Office, is to return that which is found by virtue of the Office. *Kitch.* 177.

There are two kinds of Offices issuing out of the Exchequer by commission, *viz.* an Office to entitle the King in the thing inquired of, and an Office of instruction. 6 *Rep.* 52. The Office of entitling doth vest the estate and possession of the land, &c. in the King, who had therein before only a right or title; as where an alien purchases lands, a person is attaint of felony, or the like; and the other Office is where land is vested and settled before in the King, but the particulars thereof do not appear upon record. 4 *Rep.* 58: *Plowd.* 484. The effect of this Office is, that the King, from the time of finding, shall be answered the profits without entry, &c. 5 *Rep.* 32: 10 *Rep.* 115. If any Office be wrongfully found, those who are grieved may be relieved by a traverse, or *monstrans de droit*, by pleading or petition; for every Office is in nature of a declaration, to which any man may plead, and either deny or confess, &c. *Plowd.* 448: *Bro.* 506. Where Offices are found before the escheators, they must be delivered by indenture under the hands and seals of the jurors. *Dyer* 170. See title *Inquest of Office*.

OFFICIAL, *officialis*] In the ancient civil law, signifies him who is the minister of, or attendant upon, a magistrate. In the canon law, it is he to whom any bishop generally commits the charge of his spiritual jurisdiction; and in this sense there is one in every diocese called *Officialis Principalis*, whom the law styles *Chancellor*; and the rest, if there are more, are by the canonists termed *Officiales foranei*, but by us Commissaries. In our statutes, this word signified properly him whom the archdeacon substitutes for the executing his jurisdiction. The archdeacon hath an Official or church-lawyer to assist him, who is judge of the archdeacon's Court. *Wood's Inst.* 30, 505.

OFFICIARIS NON FACIENDIS VEL AMOVENDIS, A writ directed to the magistrates of a corporation, requiring them not to make such a man an officer, or to put one out of the Office he hath, until inquiry is made of his manners, &c. *Reg. Orig.* 126.

OFFICIUM CURTAGII PANNORUM, Granted to *William Osborne*, *anno* 2 *Ed.* 2. *Extract. Fin. Cancell.*

OIL. The lord mayor of *London*, and the master and wardens of the tallow-chandlers' company, are to search all Oils brought to *London*; and if any is deceitfully mixed, they may throw it away, and punish the offenders: and head officers in corporations have like power. *Stat.* 3 *Hen.* 8. *cap.* 14.

No lamps to be used in private houses but of fish Oil. 8 *Ann. c.* 9 § 18. See title *Candles*.

OLD JURY, *Vetus Judaismus.*] The place or street where the Jews lived in *London*. See *Jews*.

OLD STILE; See *Year*.

OLERON LAWS, *Uliarenses Leges.*] The laws of King *Rich.* I. relating to maritime affairs, so called, because made by him when he was at *Oleron*; which is an island lying in the bay of *Acquitain*, at the mouth of the river *Charent*, and now belongs to the *French* King. *Co. Litt.* 260. These laws are recorded in the Black Book of the Admiralty, and are accounted the most excellent composition of Sea Laws in the world. See *Selden's Mare Clausum*, 222, 254: 1 *Comm.* 418: 4 *Comm.* 423: and this Dictionary, title *Navy*.

OLYMPIAD, *Olympias.*] An account of time among the *Greeks*, consisting of four complete years, having its name from the *Olympic* games, which were kept every fourth year, in honour of *Jupiter Olympius*, near the city

city of *Olympia*; when they entered the names of the conquerors on public records. The first *Olympiad* began in the year 3938 of the *Julian* period, 505 years after the taking of *Troy*, 776 before the birth of Christ, and 24 years before the founding of *Rome*. *Æthelred*, King of the *English Saxons*, computed his reign by *Olympiads*. *Spelm.*

OMISSIONS, Are placed among crimes and offences; and Omission to hold a Court-leet, or not swearing officers therein, *&c.* is a cause of forfeiture. Omissions in law proceedings render them vicious and defective; *vide* title *Amendment*; *Office*.

ONCUNNE, Sax. *On cunnen*.] *Accusatus*. *Leg. Alfred*, *c.* 29.

ONERANDO PRO RATA PORTIONIS, A writ that lies for a joint-tenant, or tenant-in-common, who is distrained for more rent than his proportion of the land comes to. *Reg. Orig.* 182. See title *Joint-tenants*.

O. NI. It is the course of the Exchequer, as soon as the Sheriff enters into and makes up his account for issues, amerciaments, and mean profits, to mark upon each head *O. Ni*; which denotes *Oneratur Nisi habeat sufficientem exonerationem*, and presently he becomes the King's debtor, and a *debet* is set upon his head; whereupon the parties *paravaile* become debtors to the Sheriff, and are discharged against the King, *&c.* 4 *Inst.* 116. See title *Sheriff*.

ONUS EPISCOPALE, Ancient customary payments from the clergy to their diocesan bishop, of synodals, pentecostals, *&c.* See *Episcopalia*.

ONUS IMPORTANDI, The charge or burden of importing merchandise, mentioned in the *stat.* 13 *Car.* 2.

ONUS PROBANDI, The burden of proving: upon whom it shall be imposed, see title *Evidence*.

OPEN LAW, *Lex Manifesta*.] The making or waging of law; which bailiffs may not put men to, upon the bare assertion, except they have witnesses to prove the truth of it. *Magna Charta*, *c.* 21.

OPEN THEFT, Sax. *Opentheof*.] A theft that is manifest. *Leg. Hen.* 1. *c.* 13.

OPEN TIDE, The time after corn is carried out of the common fields. *Brit.*

OPERARII, Such tenants, under feodal tenures, who had some little portions of land by the duty of performing many bodily labours and servile works for their lord, being no other than the *servi* and bondmen: they are mentioned in several ancient surveys of manors.

OPERATIO, One day's work performed by a tenant for his lord. *Paroch. Antiq.* 320.

OPPOSER, An officer belonging to the Green Wax in the Exchequer. See *Exchequer*.

OPPRESSION, In a private sense, is the trampling upon or bearing down one, on pretence of law, which is unjust: but where the law is known and clear, though it appear hard or unequitable, the judges must determine according to that. *Vaugh.* 37. As to the remedy for the *Oppression of the Crown*, see title *King*, V. 2.

OPTION, When a new suffragan bishop is consecrated by the Archbishop of the province, by a customary prerogative the Archbishop claims the collation of the first vacant dignity or benefice in that see, at his own choice; which is called his *Option*. *Cowell*. See title *Bishops*.

OPTIONAL WRIT. A *præcipe* is an Optional writ, *i. e.* it is in the alternative, commanding the defendant to do the thing required, *or* shew the reason wherefore he hath not done it. There is another species of original writs called *Peremptory*, or a *Si fecerit te securum*, from the words of the writ, which directs the Sheriff to cause the defendant to appear in Court, without any Option given him, provided the plaintiff gives the Sheriff security effectually to prosecute his claim. 3 *Comm.* 274. See titles *Original*; *Writ*.

ORA, A *Saxon* money or coin, valued at sixteen pence, and sometimes, according to variation of the standard, at twenty pence. The word often occurs in *Domesday*, and the laws of King *Canutus*.

ORANDO PRO REGE ET REGNO, An ancient writ. Before the Reformation, while there was no standing collect for a sitting parliament, when the Houses of Parliament were met, they petitioned the King that he would require the bishops and clergy to pray for the peace and good government of the realm, and for a continuance of the good understanding between his Majesty and the Estates of the kingdom; and accordingly the writ *De Orando pro Rege & Regno* was issued, which was common in the time of King *Edw.* III. *Nichols. Engl. Hist. par.* 3. *p.* 66.

ORARIUM, The hem or border of a garment. *Cowell.*

ORBIS, A bonney, a swelling or knot in the flesh, caused by a blow. *Bract. lib.* 3. title *De Corona*, *cap.* 23. *num.* 2.

ORCHARDS AND GARDENS. Robbing them, or destroying trees in them, how punished, see *stat.* 43 *Eliz. c.* 7: 9 *Geo.* 1. *c.* 22. The Hundred answerable for the damages. 9 *Geo.* 1. *c.* 22. § 7. See *Gardens*.

ORCHEL, or ORCHAL, mentioned in *stats.* 1 *Ric.* 3. *c.* 8: 3 & 4 *Ed.* 6. *c.* 2. Seems to be a kind of stone like allum, which dyers use in their colours. It is among the articles liable to a duty on importation.

ORDEAL, or ORDAL, *Saxon*, compounded of *or*, *magnum*, and *deal*, or *dele*, *judicium*; or as others, from *or*, privative, and *del*, part, that is, *expers criminis*, or Not guilty.] An ancient manner of trial in criminal cases; for when an offender being arraigned pleaded Not guilty, he might choose whether he would put himself for trial upon God and the country, by twelve men, as at this day, or upon God only; and then it was called *The Judgment of God*, presuming that he would deliver the innocent. *Terms de Ley*: 9 *Rep.* 32.

This trial, according to *Blackstone*, arose from the superstition of our *Saxon* ancestors, who, like other northern nations, were extremely addicted to divination; they therefore invented this among the methods of purgation or trial to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless. 4 *Comm.* 342.

There were of this, two sorts, one by fire, another by water. Of these see *Lambard*, in his *Explication of Saxon Words*, verbo *ordalium*: *Holingshed*, *fol.* 98, and *Hotoman* especially, *Disput. de Feud. p.* 41. See *Skene de verbor. Significat.* verbo *Machainum*.

This seems to have been in use in the time of *Henry* the Second, as appeareth by *Glanville*, *lib.* 14. *cap.* 1, 2.

See also *Verstegan*, *c.* 3. *pag.* 63, &c. and *Hoveden* 556. This Ordalian law was condemned by Pope *Stephen* the Second, and afterwards totally abolished here by Parliament, as appears by *Rot. Paten. de anno* 2 *Hen.* 3. *membr.* 5: *Cowell. Vide Leg Edw. Confess. cap.* 9. *Blackstone* says, Ordeal was abolished in our Courts of justice, by an act of parliament in 3 *H.* 3. according to *Coke*; or rather by an order of the King in council. See 4 *Comm.* 344, 5: and 9 *Rep.* 32: 1 *Rym Fœd.* 228: *Spelm. Gloss.* 326: 2 *Pryn Rec. Ap.* 20: *Seld. Eadm. fol* 48. According to the record in *Spelman*, it appears that the order of council alluded to the trial by Ordeal, as condemned by the Church of *Rome*; and substituted the punishment of imprisonment, abjuration of the realm, and security for good behaviour in the case of suspicion of certain crimes specified.

The water Ordeal was performed either in hot or cold: in cold water, the parties suspected were adjudged innocent, if their bodies were not borne up by the water contrary to the course of nature; in hot water, they were to put their bare arms or legs into scalding water, which if they brought out without hurt, they were taken to be innocent of the crime.

Those that were tried by the fire ordeal, passed barefooted and blindfold over nine hot glowing plowshares; or were to carry burning irons in their hands, usually of one pound weight, which was called *Simple Ordeal*; or of two pounds, which was *duplex*; or of three pounds weight, which was *triplex ordalium*; and accordingly as they escaped, they were judged innocent or guilty, acquitted or condemned; this fire Ordeal was for freemen, and persons of better condition; and the water Ordeal for bondmen and rustics. *Glanv. lib.* 4. *c.* 1.

And the horrible trial by fire Ordeal, in the first degree, Queen *Emma*, mother of *Edward* the Confessor, is said to have undergone on a suspicion of her chastity; though the truth of the story is now, we believe, nearly exploded.

Both sorts of Ordeal might be performed by deputy, but the principal was to answer for the success of the trial; the deputy only venturing some corporal pain for hire, or perhaps for friendship. 4 *Comm.* 342, 3.

ORDEFFE, or ORDELFE, *effossio metalli*, from the Saxon *ore*, *metallum*, and *delfan*, *effodere*.] A word often used in charters of privileges; signifying a liberty, whereby a man claims the ore found in his own ground; but properly is the ore lying under ground. A delfe of coal, is coal lying in veins under ground, before it is dug up. *Cowell.*

ORDELS, Oaths and Ordels, was part of the privileges and immunities granted in old charters, meaning the right of administering oaths, and adjudging ordeal trials, within such a precinct or liberty. *Cowell.*

ORDERS, Are of several sorts, and by divers Courts; as of the Chancery, King's Bench, *&c.* Orders of the Court of Chancery, either of course or otherwise, are obtained on the petition or motion of one of the parties in a cause, or of some other interested in or affected by it; and they are sometimes made on hearings, sometimes by consent of parties. They are to be pronounced in open Court, and drawn up by the Registrar from his notes; and if there be any difficulty in adjusting the notes, a summons is given by the Registrar for the clerk or solicitor of the other side to attend, whereupon they are settled, or the Court is applied to if it cannot be otherwise done: before the Orders are entered and passed by the Registrar, the other side hath four days allowed to object against them, for which purpose copies are delivered; and when they are perfected, they are to be served on the parties, or the clerk or solicitor employed by them. If an Order is of course, the solicitor usually draws up the notes or minutes, and gives them to the Registrar's clerk, to draw up the Order from; and when the Order is drawn up, it is to be entered by the entering clerk, which must be within eight days from the pronouncing; then the Registrar passes and signs it, after which is the service, *&c.* For not obeying an Order, personally served, a party may be committed. See the Books of Practice.

ORDERS OF THE COURT OF KING'S BENCH, Rules made by the Court in causes there depending; which when drawn up and entered by the clerk of the Rules, become Orders of the Court. 2 *Lill.* 261.

See Sir *George Cooke's Rules and Orders in the Courts of King's Bench and Common Pleas, and Cases in Practice*, 2 vols. 8vo. a very excellent work, from which many things in our modern books of practice are taken, though the authors have seldom been so ingenuous as to acknowledge from whence they were taken, or to refer to any authorities, in many of those instances. And see also this Dictionary, title *Motion*.

ORDERS OF JUSTICES OF PEACE, or of the SESSIONS; See *Justices of the Peace*; *Sessions*.

ORDINALE, A book which contains the manner of performing divine offices, *in quo* ordinatur *modus*, *&c.*

ORDINANCE, *ordinatio*.] Is a law, decree, or statute, variously used.

ORDINANCE OF THE FOREST, *ordinatio forestæ*.] A statute made touching matters and causes of the forest, *anno* 34 *Ed.* 1. *st.* 5.

ORDINANCE OF PARLIAMENT, Is said to be the same with Act of parliament; for in the Parliament-Rolls acts of parliament are often called Ordinances, and Ordinances, Acts; but originally there seems to be this difference between them; that an Ordinance was but a temporary act, by way of prohibition, which the Commons might alter or amend at their pleasure; and an act of parliament is a perpetual law, not to be altered but by King, Lords, and Commons. *Rot. Parl.* 37 *Ed* 3: *Pryn on* 4 *Inst.* 13. *Coke* says, that an Ordinance of Parliament is to be distinguished from an act; inasmuch as the latter can be only made by the King and the three Estates, whereas the former is by one or two of them. *Co. Litt.* See *Statute*.

ORDINARY, *ordinarius*.] A civil-law term, for any judge who hath authority to take cognizance of causes in his own right, and not by deputation; by the common law it is taken for him who hath Ordinary or exempt and immediate jurisdiction in causes ecclesiastical. *Co. Litt.* 344: *Stat. Westm.* 2. 13 *Ed.* 1. *st.* 1. *c.* 19.

This name is applied to a Bishop who hath original jurisdiction; and an Archbishop is the Ordinary of the whole province, to visit and receive appeals from inferior jurisdictions, *&c.* 2 *Inst.* 398: 9 *Rep.* 41: *Wood's Inst.* 25.—The word Ordinary is also used for every commissary or official of the bishop, or other ecclesiastical judge having

having judicial power; an archdeacon is an Ordinary; and Ordinaries may grant administration of intestates' estates, &c. *Stat*. 31 *Ed*. 3. *c*. 11: 9 *Rep*. 36. But the bishop of the diocese is the true and only Ordinary to certify excommunications, lawfulness of marriage, and such ecclesiastical and spiritual acts to the judges of the common law; for he is the person to whom the Court is to write in such things. 2 *Shep*. *Abr*. 472.

For the Ordinary's power, it is declared by many statutes; as relating to visiting hospitals, by *stat*. 2 *H*. 5. *st*. 1. *c*. 1. The certifying of bastardy, &c. *Stat*. 9 *H*. 6. *c*. 11. Concerning questions of tithes, that shall come in debate before him. *Stat*. 27 *H*. 8. *c*. 20. Allowance of school-masters, &c. *Stats*. 23 *Eliz*. *c*. 1: 1 *Jac*. 1. *c*. 4. If a man may keep a school without licence of the Ordinary, see Ld. *Raym*. 603: and this Dictionary, title *Schoolmaster*. And the authority of Ordinaries in general is restored, by *stat*. 13 *Car*. 2 *st*. 1. *c*. 12.

The Ordinary's power and interest in a church is of admitting, instituting, and inducting parsons; of seeing and taking care that it be provided with a pastor, by the patron who has the right of presenting; or in his default to bestow the church on some proper person to serve the cure, &c. 1 *Roll*. *Rep*. 453. Before presentation to a church, the Ordinary may sequester the profits; and during the vacation, it is said, he may make a lease. 1 *Keb*. 370. When the Ordinaries or their ministers have committed extortion or oppression, they may be indicted, putting the things in certain, and in what manner, &c. 25 *Ed* 3. *st*. 3. *c*. 9.

Formerly clerks accused of crimes were delivered to the Ordinary, and the bodies of such clerks kept in the Ordinary's prison until tried before him by a jury of twelve clerks; and if condemned, they were liable to no greater punishment than degradation, loss of goods, and the profits of their lands; unless they had been guilty of apostacy, &c. This was when they had the privilege of being tried only by ecclesiastical judges; which was so far indulged them, that after they had been once delivered to the Ordinary, they could not be remanded to any temporal Court, until the *stat*. 8 *Eliz*. *c*. 4. See this Dictionary, title *Clergy*, *Benefit of*.

No ornaments can be set up in a church without consent of the Ordinary. 1 *Stran*. 576: see 9 *Co*. 36; and *stats*. *Westm*. 2. *cap*. 19: 31 *E*. 3. *c*. 11: 21 *H*. 8. *cap*. 5: 2 *Inst*. *cap*. 19. See further *Brooke*, title *Ordinary*; *Lindewode* in *cap*. *de Constitutionibus* verbo *Ordinarii*; and this Dictionary, titles *Administrator*; *Bishop*; *Clergy*.

ORDINARY OF NEWGATE, The clergyman who is attendant in ordinary upon condemned malefactors in that prison, to prepare them for death; and who records the behaviour of those unhappy culprit.

ORDINATIONE CONTRA SERVIENTES, A writ that lay against a servant for leaving his master contrary to the statute. *Reg*. *Orig*. 189.

ORDINATION OF THE CLERGY. By common law, a deacon of any age might be instituted and inducted to a parsonage or vicarage: but now, by statute, no man is capable of taking any ecclesiastical benefice with cure, promotion, or dignity, unless he be ordained a priest, to qualify him for the same. A clerk is to be twenty-three years old, and have deacon's orders, before he can be admitted into *any share* of the ministry: and a priest must be twenty-four years of age, before he shall be admitted into orders to preach, or to administer the sacraments; but the archbishop may dispense with one to be made deacon at what age he pleases, though he cannot with one who is to be made a priest. See *stats*. 13 *Eliz*. *c*. 12; 13 & 14 *C*. 2. *c*. 4.

Deacons and priests are to be ordained only on the four Sundays immediately following the *Ember Weeks*, except on urgent occasions; and it is to be done in the cathedral or parish church where the bishop resides, in time of divine service, and in the presence of the archdeacon, dean, and two prebendaries, or of four other grave divines. And no bishop shall admit any person into orders, without a title or assurance of being provided for; and before any are admitted, the bishop shall examine them in the presence of the ministers, who assist him at the imposition of hands; on pain, if he admits any not qualified, &c. of being suspended by the archbishop from making either deacons or priests for two years. *Can*. 31, 34.

If any impediment be objected against one who is to be made either priest or deacon, at the time he is to be ordained, the bishop is bound to surcease from ordaining him, until he shall be found clear of that impediment; and it is generally held, that whatever are good causes of deprivation, are also sufficient causes to deny admission to orders; as incontinency, drunkenness, illiterature, perjury, forgery, simony, heresy, outlawry, bastardy, &c. 2 *Inst*. 631: 5 *Rep*. A person to be ordained priest, must bring a testimonial of four persons, known to the bishop, of his life and doctrine; and be able to give an account of his faith in *Latin*: and a deacon is not to be made a priest, unless he produce to the bishop such a testimonial of his life, &c. and that he hath been found faithful and diligent in executing the office of a deacon.

A bishop shall not make any one deacon and minister on the same day; for there must be some time to try the behaviour of a deacon in his office, before he is admitted to the order of priesthood, which time is generally a year, but it may be shorter, on reasonable cause allowed by the bishop; priests and deacons are not only to subscribe the thirty-nine articles, but take the oath of the King's supremacy, &c. as directed and altered by *stat*. 1 *W*. & *M*. *st*. 1. *c*. 1, 8. A priest by his ordination receives authority to preach the word, and administer the Holy Sacraments, &c. But he may not preach without licence from the bishop, archbishop, or one of the universities.

The *stat*. 31 *Eliz*. *cap*. 6, punishes corrupt Ordination of priests, &c. (which, says *Blackstone*, seems to be the true, though not the common notion of Simony). If any persons shall take any reward, or other profit, to make and ordain a minister, or to license him to preach, they shall by this statute forfeit 40*l*. and the party so ordained, &c. 10*l*.; and be incapable of any ecclesiastical preferment for seven years afterwards. See further titles *Parson*; *Clergy*.

ORDINES, A general chapter, or other solemn convention of the religious of such a particular order. *Paroch*. *Antiq*. *p*. 576.

ORDINES MAJORES ET MINORES, The holy orders of priest, deacon, and subdeacon, any of which did qualify for presentation and admission to an ecclesiastical

ecclesiastical dignity or cure were called *Ordines majores* and the inferior orders of chantor, psalmist, ostiary, reader, exorcist, and acolyte were called *Ordines minores*; for which the persons so ordained had their *prima tonsura* different from the *tonsura clericalis*. *Cowell.*

ORDINUM FUGITIVI, Signified those of the religious who deserted their houses, and throwing off the habits, renounced their particular order, in contempt of their oath and other obligations. *Paroch. Antiq.* 388.

ORDNANCE, Letters patent for making it, are not within the statute of monopolies, 21 *Jac.* 1. *c.* 3. § 10.

ORDO, That rule which the monks were obliged to observe. *Eadmer. vita S. Anselmi*, 3.

ORDO ALBUS, The White Friars, or *Augustines*; the *Cistercians* also wore white.

ORDO NIGER, The Black Friars. *Ingulphus*, *p.* 851. The *Cluniacs* likewise wore black. *Mat. Paris*, 321, 514.

ORFGILD, or CHEAPGELD, from Sax. *orf*, *pecus*, and *gild*, *solutio vel redemptio*.] A delivery or restitution of cattle. But *Lambard* says, it is a restitution made by the hundred, or county, for any wrong done by one who was in pledge; or rather a penalty for taking away cattle. *Lamb. Arch.* 125.

ORFRAIES, *aurifrisium*.] A sort of cloth of gold, frizled or embroidered, formerly made and used in *England*, worn by our Kings and nobility; and the clothes of the King's guards were called Orfraies, because adorned with such works of gold. Mention is made of these Orfraies in the *Records of the Tower*.

ORGALLOUS, More truly *Orguillous*, that is, proud and high minded, derived from the French *orgueil*, pride. 4 *Inst.* 89.

ORGEYS, mentioned in *stat.* 31 *E.* 3. *st.* 3. *c.* 2; is the greatest sort of *North-sea* fish (for the statute says they are greater than lob fish); which we call *organ-ling*, corruptly from *Orkney-ling*, because the best are near that island. *Cowell.*

ORGILD, *sine compensatione*.] Without recompence; as where no satisfaction was to be made for the death of a man killed, so that he was judged lawfully slain. *Spelman.*

ORIEL COLLEGE, A prebend of *Rochester*, how annexed to its provostship; see *stat.* 12 *Ann. st.* 2. *c.* 6. § 7.

ORIGINAL, or ORIGINAL WRIT, The beginning or foundation of a suit. When a person has received an injury and thinks it worth his while to demand a satisfaction for it, he must apply for that specific remedy which he is advised or determined to pursue. To this end he is to sue out an Original, or Original Writ, from the Court of Chancery, the *officina justitiæ*, wherein all the King's writs are framed.

This Original Writ is a mandatory letter from the King in Chancery, sealed with his great seal; and lies in all personal actions, against every person not privileged as an attorney, officer, or prisoner of the Court. Formerly, indeed, it was not usual to proceed in the King's Bench by Original Writ, in *debt*, *detinue*, or other action of a mere civil nature. But the modern practice is different, and where the defendant pleaded to the jurisdiction, in an action of *debt* commenced by Original Writ, the Court gave judgment on demurrer for the plaintiff; and declared that if such a plea should come before them again they would inquire by whom it was signed. See *Hardw.* 317. On the other hand an Original Writ was formerly the most common, if not the only ground of proceeding against *peers* and *members* of the House of Commons; but now by *stat.* 12 & 13 *W.* 3. *c.* 3. § 2, they may also be sued by Original *bill* and summons, attachment and distress infinite. Still, however, an Original Writ is the only ground of proceeding against a *Corporation* or *Hundredors* on the statutes of hue and cry, &c. or where by reason of the defendant's being abroad, or keeping out of the way, he cannot be arrested or served with process; [and it is intended to sue him to outlawry]. There is also this benefit attending it, in other cases; that after judgment in an action by Original, a writ of error will not lie in the Exchequer-chamber where it is often brought for the mere purpose of delay; but only in Parliament. 1 *Sid.* 424. The reason is, that at common law no writ of error lay, except in Parliament, from the judgment of the Court of K. B. and the *stat.* 27 *Eliz. c.* 8, which gave a writ of error in the Exchequer-chamber, only extends to such actions as are *first* commenced in the King's Bench; therefore, though a writ of error will lie in the Exchequer-chamber, on a judgment by *bill*, which originates in the King's Bench, yet it is otherwise where the judgment is upon an Original Writ, which issues out of Chancery, where the action in that case is first commenced. *Run. Ej.* 83, &c: *Gilb. K. B.* 319.

Original Writs are calculated for the commencement or removal of actions. And they are either *de cursu*, or *magistralia*; the former were framed in the King's Court, before the division of it; the latter were made out by the *Masters* in Chancery pursuant to the *stat. Westm.* 2. 13 *E.* 1. *stat.* 1. *c.* 24. In personal actions they are *ex contractu*, *vel ex delicto*, upon contracts, or for wrongs immediate or consequential. See *Tidd's Pract. K. B. cap.* 1, and the authorities there cited.

In actions of *covenant*, *debt*, and *detinue* the Original Writ is called a *Præcipe*, by which the defendant has an *option* given him, either to do what he is required, or shew cause to the contrary; but in *assumpsit*, and actions for wrongs, it is called a *pone*, or *si te fecerit securum*; by which the defendant is peremptorily required to shew cause in the first instance. *Finch L.* 257.

The use of the *præcipe* is where something certain is demanded by the plaintiff, which it is incumbent on the defendant himself to perform; as to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like; in all which cases the writ is drawn up in the form of a command, to do thus, or shew cause to the contrary; giving the defendant his choice to redress the injury, or stand the suit. The other sort of Original is in use where nothing is specifically demanded, but only a satisfaction in general; to obtain which, and administer complete redress, the intervention of some judicature is necessary. Such are writs of *trespass*, or *on the case*, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant is immediately called upon to appear in Court, provided the plaintiff gives good security of prosecuting his claim. 3 *Comm. c.* 18. *p.* 274.

In point of form the Original Writ is special or general; *nominatum vel innominatum*. 1 *Bac. Abr.* 29: *Gilb. C. P.* 3. The former contains the time, place, and other circumstances of the demand, very particularly; the latter only a general complaint, without expressing the particulars, as the writ of trespass *quare clausum fregit*, &c. But in order to save the great and unnecessary expence of suing forth *special* writs in small and trifling suits, and to avoid oppression which might otherwise arise, it is enacted by *stat.* 5 *Geo.* 2. *c.* 27. § 5, that "no special writ or process shall be issued out of any superior Court where the cause of action shall not amount to the sum of ten pounds or upwards." And by a rule of Court *M.* 23 *Geo.* 3. "in all actions in which the plaintiff shall proceed against the defendant by special Original Writ, and shall recover less than the sum of fifty pounds, he shall not, on taxing costs, be allowed any more or other costs than he would be entitled to in case he had proceeded by bill; except in such actions in which he could not proceed by bill, or in which any defendant shall be actually outlawed."

The Original Writ should be directed to the Sheriff or Sheriffs of the county where the action is brought and intended to be tried, and the VENUE should be laid in that county. But as to this latter circumstance there is a difference between local and transitory actions; as to which see titles *Action*; *Venue*.

The Original Writ, issuing out of Chancery, should be *teste'd*, (that is witnessed) in the King's name at *Westminster*, or wherever else the Chancery is holden: and as that Court is supposed to be always open, it may be teste'd in vacation as well as in term-time. It should, however, be always teste'd after the cause of action accrued, and should be made returnable on a general return day in term-time, *ubicunque*, i. e. wheresover the King shall then be in *England*. In proceeding to outlawry, if the instructions be carried to the Cursitor within the first week of a term, and the cause of action will admit of it, he will, for the sake of expedition, make the Original returnable on the first or any other return of the preceding term. Otherwise it is usually made returnable in the same or the next term; or, as it does not affect the liberty of the defendant, it may be made returnable at the distance of two or three terms. But there should be fifteen days at least between the *teste* and return of an Original; the law requiring that distance of time, between the *service* and return of it, to enable the defendant to come from any part of the kingdom, though if there be less, it will be aided by the defendant's appearing and pleading in chief.

The want of an Original is aided after verdict, by *stat.* 18 *Eliz. c.* 14; but not after judgment by default, &c. And a *bad* Original is not aided, even after verdict; nor a *good* one, which does not warrant the declaration: the Court, however, will *amend* any defect in the Original, arising from the misprision of the clerk, in not pursuing his instructions; or from his ignorance in form, though not in substance. See title *Amendment*.

See farther titles *Latitat*; *Practice*; *Process*, &c.

ORIGINALIA. In the treasurer's-remembrancer's office in the Exchequer, the transcripts, &c. sent thither out of the Chancery are called by this name, and distinguished from *recorda*, which contain the judgments and pleadings in suits tried before the Barons.

ORPED, Some Orped knight, *i. e.* a knight whose cloaths shone with gold. *Blount*.

ORPHAN, *orphanus*.] A fatherless child: and in the city of *London* there is a Court of Record established for the care and government of orphans. 4 *Inst.* 248.

The Lord Mayor and Alderman of *London* had the custody of Orphans under age and unmarried, of freemen that died, and the keeping of their lands and goods: and if they committed the custody of an Orphan to any man, he should have the writ of ravishment of ward, if the Orphan were taken away; or the Mayor and Aldermen might imprison the offender until he produced the infant. 2 *Danv. Abr.* 311. If any one, without consent of the Court of Aldermen, marries such an Orphan under the age of twenty-one years, though out of the city, they may fine, and imprison him until the fine is paid. 1 *Lev.* 32: 1 *Ventr.* 178. Executors and administrators of freemen dying, are to exhibit true inventories of their estates before the Lord Mayor and Aldermen in the Court of Orphans, and must give security to the Chamberlain of *London* and his successors, by recognisance, for the Orphan's part; which if they refuse to do, they may be committed to prison until they obey. *Wood's Inst.* 522. If any Orphan, who by the custom of *London* is under the government of the Lord Mayor and Aldermen, sue in the Spiritual Court for any legacy, &c. a prohibition shall be granted; because the Lord Mayor and Aldermen only have jurisdiction of them. 5 *Rep.* 73. But an Orphan may waive the benefit of suing in the Court of Orphans, and file a bill in equity for discovery of the personal estate, &c.

The Lord Mayor and Commonalty of *London* being answerable for the Orphans' money paid into the chamber of the city, and having become indebted to the Orphans and their creditors, in a greater sum than they could pay; by *stat.* 5 & 6 *W. & M. cap.* 10, it is enacted, that the lands, markets, fairs, &c. belonging to the city of *London*, shall be chargeable for raising eight thousand pounds *per ann.* to be appropriated for a perpetual fund for Orphans; and, towards raising such a fund, the Mayor and Commonalty may assess two thousand pounds yearly upon the personal estates of inhabitants of the city, and levy the same by distress, &c. Also a duty is granted of four shillings *per* ton on wines imported, and on coals; and every apprentice shall pay 2*s.* 6*d.* when he is bound; and 5*s.* when he is admitted a freeman, for raising the fund; the fund is to be applied for payment of the debts due to Orphans, by interest after the rate of 4*l.* *per cent.* &c. And by § 18 of the said statute, no person shall be compelled, by virtue of any custom in the city, to pay into the chamber of *London* any sum of money or personal estate belonging to an Orphan of any freeman for the future. By *stat.* 21 *Geo.* 2. *c.* 29, the duty of 6*d.* *per* chaldron on coals, given by the *stat.* 5 & 6 *W. & M. c.* 10, towards the Orphan debt, is continued for thirty-five years; and by *stat.* 7 *Geo.* 3. *c.* 37, for forty-six years more; and various provisions are made for the security and application of the Orphans' fund.

ORTELLI, *Fr.*] A forest word, signifying the claws of a dog's foot. *Kitch.*

ORTOLAGIUM, A garden plot, or *hortilage*. *Mon. Angl. tom.* 1.

ORYAL, *oriolum*] A room, or cloister, of a monastery, priory, &c. whence it is presumed that *Oriel* or *Oryel* College in *Oxford* took name. *Matt. Paris, in vit. Abb. St. Alban.*

OSCULUM PACIS, A custom formerly of the church, that in the celebration of the mass, after the priest had spoke these words, viz. *Pax Domini vobiscum*, the people kissed each other, was called *Osculum Pacis*; afterwards, when this custom was abrogated, another was introduced; which was, whilst the priest spoke the aforementioned words, a deacon offered the people an image to kiss, which was commonly called *Pacem. Matt. Paris, anno* 1100.

OSMONDS, A kind of iron ore, antiently brought into *England*. See the obsolete statute 32 *H.* 8. *c.* 14.

OSTENSIO, A tribute antiently paid by merchants for leave to expose their goods for sale in markets. *Leg. Ethelred. c.* 23.

OSWALD'S LAW, *Lex Oswaldi.*] The law by which was effected the ejecting married priests, and introducing monks into churches, by *Oswald* Bishop of *Worcester*, about the year 964.

OSWALD'S LAW HUNDRED, An ancient hundred in *Worcestershire*, so called from Bishop *Oswald*, who obtained it of King *Edgar*, to be given to St. *Mary's* church in *Worcester*; it is exempt from the jurisdiction of the Sheriff, and comprehends 300 hides of lands. *Camd. Brit.*

OTHO, Was a deacon-cardinal of St. *Nicholas, in carcere Tulliano*, a legate for the Pope here in *England*, 22 *H.* 3, whose constitutions we have at this day. *Stow's Annals*, 303. *Cowell.*

OTHOBONUS, Was a deacon-cardinal of St. *Adrian*, and the Pope's legate here in *England*, 15 *H.* 3, as appeareth by the award made betwixt the said King and his Commons at *Kenilworth*. His Constitutions we have at this day in use. *Cowell.*

OUCH, A collar of gold, or such like ornament, worn by women about their necks. See the old statute 24 *H.* 8. *c.* 13. *Cowell.*

OVEALTY; Equality; see *Owelty.*

OVER, Sax. *ofer*, ripa.] In the beginning or ending of the names of places, signifies a situation near the bank of some river; as St. *Maryover*, in *Southwark*, *Andover*, in *Hampshire*, &c.

OVERCYTED, or OVERCYHSED, from the Sax. *ofer*, i. e. super, & *cythan*, offendere.] Proved guilty or convict. Is used where a person is convicted of any crime; that it is found upon the offender: this word is mentioned in the laws of *Edward*; *apud Brompton, p.* 836. *Blount*: *Cowell.*

OVERHERNISSA, Contumacy, or contempt of Court. In the laws of *Athelstan, cap.* 25, it is used for Contumacy: but in a council held at *Winchester, anno* 1027, it signifies a forfeiture paid to the bishop by one who came in after excommunication. See *Spelman.*

OVERSAMESSA, Seems to have been an ancient fine before the statute for hue and cry, laid upon those who, hearing of a murder or robbery, did not pursue the malefactor. 3 *Inst.* 116: *Lib. Rub. cap.* 36. See *Cowell*, who says it is elsewhere written *Oversegenesse* and *Oversenesse*. It seems confounded with the preceding word, *Overhernissa*; and that all these terms signify *a forfeiture for contempt or neglect.*

OVERSEERS OF THE POOR, Are public officers created by the *stat.* 43 *Eliz. c.* 2, to provide for the poor of every parish; and are sometimes two, three, or four, according to the extent of parishes. Churchwardens by this statute are called Overseers of the Poor, and they join with the Overseers in making a Poor's rate, &c. But the churchwardens having distinct business of their own, usually leave the care of the Poor to the Overseers only; though anciently they were the sole Overseers of the Poor. *Dalt.* ch. 27: *Wood's Inst.* 93. See title *Poor.*

OVERSEWENESSE; See *Overhernissa.*

OVERT, *Fr.*] Open; *Overture*, an opening, also a proposal. *Law Fr. Dict.*

OVERT-ACT, *apertum factum.*] An open act which by law must be manifestly proved. 3 *Inst.* 12. Some Overt-act is to be alleged in every indictment for high treason; such as for treason in compassing the death of the King, the providing arms to effect it, &c. 3 *Inst.* 6, 12. And no evidence shall be admitted of any Overt-act, that is not expresly laid in the indictment, by *stat.* 7 *W.* 3. *c.* 3. See title *Treason.*

OVERT-WORD, An open plain word, not to be mistaken. *Stat.* 1 *Mar. sess.* 2. *c.* 3.

OVRES, *Fr.*] Acts, deeds, or works: *Ovrages*, or *Ouvrages*, are days' works. 8 *Rep.* 131.

OURLOP, The leirwite or fine paid to the lord by the inferior tenant, when his daughter was corrupted or debauched. *Petr. Bles. Contin. Hist. Croyland*, 115.

OUSTED, from the Fr. *ouster*, to put out.] As Ousted out of possession is where one is removed or put out of possession. 3 *Cro.* 349.

OUSTER LE MAIN, *amovere manum.*] A livery of land out of the King's hand, on a judgment given for him that sued a *monstrans de droit*; for when it appeared upon the matter, that the King had no title to the land he seised, judgment was given in the Chancery that the King's hands be amoved; and thereupon an *amoveas manus* was awarded to the escheator, to restore the land, it being as much as if the judgment were given that the party should have his land again. *Staundf. Prærog. cap.* 24: see *stat.* 28 *Ed.* 1. *stat.* 3. *cap.* 19. It was also taken for the writ granted upon a petition for this purpose. *F. N. B.* 256. But now all wardships, liveries, and Ouster le Mains, &c. are taken away by *stat.* 12 *Car.* 2. *cap.* 24. See titles *Monstrans de Droit*; *Tenures.*

OUSTER LE MER, *oultre*, i. e. ultra, & *le mer*, mare.] One cause of essoign or excuse, if a man appeared not in Court on summons, for that he was then *beyond the seas*. See *Essoign.*

OUTFANGTHEF, from the Sax. *ut*, i. e. extra, *fang*, captus, & *theof*, fur.] A liberty or privilege, as used in the ancient Common Law, whereby a lord was enabled to call any man dwelling in his manor, and taken for felony in another place out of his fee, to judgment in his own Court. *Rastal*: *Bract. lib.* 2. *tract.* 2. *cap.* 35: *stat.* 1 & 2 *P.* & *M. c.* 15.

OUTHEST, or Outhorn; A calling men out to the army, by the sound of an horn.

OUTHOUSES, Are those belonging and adjoining to dwelling-houses; and taking away any money, goods, &c. from such Out-houses, in the day-time, of 5s. value, is felony without benefit of clergy. *Dalt. c.* 99. See *Larceny* II. 2.

OUTLAND. The *Saxon Thanes* divided their hereditary lands into *Inland*, such as lay nearest their dwelling, which they kept to their own use; and *Outland*, which lay beyond the demeans, and was granted out to tenants, at the will of the lord, like copyhold estates. This Outland they subdivided into two parts; one part they disposed amongst those who attended their persons, called *Theodans*, or lesser *Thanes*; the other part they allotted to their husbandmen, or churls. *Spelm. de Feud. cap.* 5.

OUTLAW, Sax. *utlaghe*, Lat. *utlagatus*.] One deprived of the benefit of the law, and out of the King's protection. *Fleta, lib.* 1. *cap.* 47. When a person is restored to the King's protection, he is inlawed again. See *Outlawry*.

OUTLAWRY,

Utlagaria.] The being put *out of the Law*—The loss of the benefit of a subject, that is, of the King's protection. *Cowell.*

Outlawry is a punishment inflicted for a contempt, in refusing to be amenable to the justice of that Court, which hath authority to call a defendant before them; and as this is a crime of the highest nature, being an act of rebellion, against that State or Community of which he is a member, so it subjects the party to forfeitures and disabilities; for he loseth his *liberam legem*, is out of the King's protection, &c. *Co. Litt.* 128: *Doct. & Stud. dial.* 2. *cap.* 3: 1 *Roll. Abr.* 802.

And as to forfeitures for refusing to appear, the law distinguishes between Outlawries in capital cases, and those of an inferior nature; for as to Outlawries in treason and felony, the law interprets the party's absence a sufficient evidence of his guilt, and without requiring further proof, accounts him guilty of the fact, on which ensues corruption of blood, and forfeiture of his estate, real and personal. *Co. Litt.* 128: 3 *Inst.* 161.

But Outlawry in personal actions does not occasion the party to be looked on as guilty of the fact, nor does it occasion an intire forfeiture of his real estate, yet it is very fatal and penal in its consequences; for hereby he is restrained of his liberty, if he can be found; forfeits his goods and chattels, and the profits of his lands, while the Outlawry remains in force. *Plow.* 541: 9 *H.* 6. 20. *b*: *Show. Parl. Ca.* 73.

Outlawry in civil actions, is putting a man out of the protection of the law, so that he is not only incapable of suing for the redress of injuries, but may be imprisoned and forfeits all his goods and chattels, and the profits of his lands; his *personal* chattels *immediately* upon the Outlawry, and his chattels real, and the profits of his lands, when found by inquisition. 1 *Salk.* 395. So penal were the consequences of an Outlawry, that until some time after the Conquest, no man could have been outlawed except for Felony, the punishment whereof was death; but in *Bracton*'s time, and somewhat earlier, process of Outlawry was ordained to lie in all actions *vi et armis*. *Bract. lib.* 5. *p.* 425. and since, by a variety of statutes, (the same as introduced the *capias*,) process of Outlawry lies in *account*, *debt*, *detinue*, and divers other common or civil actions. See *post*, *Div.* I.

If the defendant be a woman, the proceeding is called a *waiver*; for as women were not sworn to the law, by taking the oath of allegiance in the leet, (as men anciently were when of the age of twelve years, or upwards,) they could not properly be *outlawed*, or put out of the law, but were said to be waived; that is, *derelicta*, left out, or not regarded. *Litt.* § 186: *Co Litt.* 122 *b*. And for this same reason, an *infant* cannot be outlawed under the age of *twelve* years. *Co. Litt.* 128. *a*. See *post*, *Div.* II.

Anciently Outlawry was looked upon as so horrid a crime, that any one might as lawfully kill a person outlawed, as he might a wolf, or other noxious animal; but the law herein was changed in *Edward* the Third's time, which provides, that a person outlawed shall be put to death by the Sheriff only, having lawful authority for that purpose. *Co. Litt.* 128. *b*: See *post*, *Div.* IV.

It is now holden that no man is entitled to kill an outlaw wantonly or wilfully; but in so doing is guilty of murder. 1 *Hal. P. C.* 497: unless it happens in the endeavour to apprehend him. *Bracton*, *fol.* 125.

Also, from the heinousness of the offence, the Sheriff may, on a *capias utlagatum*, break open the house of the person outlawed; for it would be unreasonable, that the protection, allowed in other cases, should extend to him who is declared a contemner and violator of the law; therefore the seizing him as an outlaw, implies the liberty of entering and seizing him wherever he lies hid. 2 *Hale's Hist. P. C.* 202: 9 *Co.* 91: 1 *Bulst.* 146: *Cro. Eliz.* 908: *Moor* 606, 668: *Yelv.* 28: *Cro. Car.* 537: 4 *Leon.* 41: 2 *Jon.* 233.

I. Where the defendant is abroad, or keeps out of the way, so that he cannot be arrested or served with process, the plaintiff, on the return of *Non est inventus* to the *pluries capias* (see *Capias*), may have a writ of *exigi facias* (see *post* III.) and proceed to Outlawry: or if there be several defendants in a joint action, and one of them be abroad, or keep out of the way, the plaintiff may have a writ of *exigi facias* against that defendant, and must proceed to Outlawry against him before he can go on against the others. 1 *Stra.* 473: 1 *Wils.* 78: 2 *Stra.* 1269: 1 *Black. Rep.* 20. See *Tidd's Pract. K. B. cap.* 4.

Process of Outlawry lies in all appeals, and in all indictments of conspiracy and deceit, or other crimes of a higher nature than trespass *vi & armis*; but it lies not in an action, nor, as some say, on an indictment on a statute, unless it be given by such statute, either expressly, as in the case of *præmunire*; or impliedly, as in cases made treason or felony by statute; or where a recovery is given by an action in which such process lay before, as in case of forcible entry. *Staundf.* 192: *Bro.* title *Outlawry*, 26, 36, 59: *Co. Litt.* 128. *b*: *Dyer* 213, 214: 2 *Hawk. P. C. c.* 27. § 113: and several authorities there cited.

In

In an assise, a *capias pro fine* lies; and, upon that, process of Outlawry, if the assise be found with force; but being a mixt action, as favouring of the realty, it is out of the statute of Additions, 1 *Hen.* 5. *cap.* 5, which extends only to personal actions, appeals, and indictments. 2 *Inst.* 665: 6 *Mod.* 85.

So process of Outlawry lies in replevin, and is given by the statute 25 *Ed.* 3. *st.* 5. *cap.* 17, which gives the *capias* in this manner; when on the *pluries replegiari facias* the Sheriff returns *averia elongata*, then a *capias in withernam* issues, and on that being returned *nulla bona*, a *capias* issues, and so to Outlawry; but it does not lie on the Original writ of replevin, which is *vicontiel* and determined; therefore as no addition is required in such Original writ, so neither ought there to be any in the second writ; for where a writ or process is founded on a former, it must pursue the former, and cannot vary from it. 6 *Mod.* 84: 1 *Salk.* 5.

By the Common Law, in all actions of trespass *quare vi & armis*, and in which there is a fine to the King, a *capias* was the process; and herein process of Outlawry lay by the Common Law. 35 *H.* 6. 6. *b*: 22 *H.* 6. 13: *Rast. Ent.* 239: 10 *Co.* 72: 2 *Roll. Abr.* 805.

But in account, debt, detinue, annuity, covenant, and such actions as are grounded upon negligence or laches merely, no *capias* lay at Common Law, but only summons and distress infinite; therefore the *capias* and Outlawry in these actions were introduced by acts of parliament. *Co. Litt.* 128 *b*: 3 *Co.* 12: 2 *Bulst.* 63: 2 *Inst.* 143: *Cro. Jac.* 222, 261: *Yelv.* 158: *Raym.* 128: 1 *Keb.* 890, 908: 1 *Sid.* 248, 258: of detinue of charters. *Dyer* 223. *a. dubitatur.*

By the statute of *Marlbridge*, (52 *H.* 3.) *cap.* 23, the writ of *monstravit de compto* was given, where before the process in account was summons, attachment, and distress infinite: and by *stat. Westm.* 2. (13 *E.* 1. *st.* 1.) *cap.* 11, process of Outlawry is given in account. 2 *Inst.* 145, 380: *F. N. B.* 259.

By *stat.* 25 *Ed.* 3. *stat.* 5. *cap.* 17, such process shall be made in a writ of debt and detinue of chattels, and taking of beasts, by writ of *capias*, and by process of *exigent*, by the Sheriff's return, as is used in a writ of account. 3 *Co.* 12: 2 *Roll. Rep.* 295: 2 *Bulst.* 63.

And by *stat.* 19 *Hen.* 7. *cap.* 9, it is enacted, that like process be had in actions upon the case, as in actions of trespass, or debt.

But it hath been adjudged, that process of Outlawry lies in no case but where a *capias* lies; that therefore where the proceeding is by bill, and not by original, as there can be no *capias*, so there can be no process of Outlawry, as in a bill of privilege by or against an attorney. 1 *Leon.* 329: 1 *Roll. Abr.* 76: 1 *Sid.* 159: 1 *Keb.* 577. See title *Original.*

Outlawry is either upon *mesne* process before, or upon *final* process after, judgment: upon *mesne* process the plaintiff cannot proceed to Outlawry, unless the action be commenced by *original* writ. 1 *Sid.* 159. Nor can the defendant be outlawed after judgment, unless the action were so commenced; therefore where the defendant was outlawed after judgment, in an action commenced by *bill* of privilege, it was holden, that process of Outlawry did not lie, as there was no *capias* in the Original action. 1 *Leon.* 329. See title *Original.* After judgment the plaintiff may have an *exigi facias*, and proceed to Outlawry, upon a *capias ad satisfaciendum* without an *alias* or *pluries*; because the defendant, having been already in Court before judgment, and having cognisance of the debt ought to pay it on the first suing out of the *capias*; and his not performing the judgment is a contumacy, for which he is put out of the King's protection. *Gilb. C. P.* 17. And no writ of *Proclamation* is required upon an *exigent* after judgment, but only upon mesne process. *Cro. Jac.* 577. See *post* III.

It is clear, that the Courts at *Westminster* may issue process of Outlawry, and that the Court of King's Bench, either upon an indictment originally taken there, or removed thither by *certiorari*, may issue process of *capias* and *exigent* into any county of *England*, upon a *non est inventus* returned by the Sheriff of the county where he is indicted, and a *testatum* that he is in some other county. 2 *Hale's Hist. P. C.* 198.

Also Justices of oyer and terminer may issue a *capias* or *exigent*, and so proceed to the Outlawry of any person indicted before them, directed to the Sheriff of the same county where they hold their sessions at Common Law; and by the statute of 5 *Ed.* 3. *cap.* 11, they may issue process of *capias* and *exigent* to all the counties of *England*, against persons indicted or outlawed of felony before them. 2 *Hale's Hist. P. C.* 31, 199.

But Justices of gaol delivery regularly cannot issue a *capias* or *exigent*; because their commission is to deliver the gaol *de prisonibus in eâ existentibus*; so that those whom they have to do with, are always intended in custody already. 2 *Hale's Hist. P. C.* 199.

Justices of the peace may make out process of Outlawry upon indictments taken before themselves, or upon indictments taken before the Sheriff, and returned to the justices of the peace, by the statute of 1 *Ed.* 4. *cap.* 2; but the power of the Sheriff, to make any process upon indictments, taken before him, is taken away by that statute. 2 *Hale's Hist.* 199.

It is made a *quære* by *Hale*, whether a coroner can by law, make out process of Outlawry, against a man indicted by inquisition before him. 2 *Hale's Hist. P. C.* 199.

It hath been held, that though the process in inferior Courts be a *capias*, that yet they cannot proceed to outlaw the party. *Yelv.* 158: *Cro. Jac.* 222, 261: *Raym.* 128: 1 *Sid.* 248, 259: 1 *Keb.* 890, 908.

The process to the Outlawry, *viz.* the *capias* and *exigent*, must be in the King's name, and under the judicial seal of the King, appointed to that Court, which issues that process, and with the *teste* of the chief justice or chief judge of that Court or Sessions. 2 *Hale's Hist. P. C.* 199.

II. If a Peer of the realm be indicted, and cannot be found, process of Outlawry shall be awarded against him, and he shall be outlawed *per judicium coronatorum*. 2 *Inst.* 49: 3 *Inst.* 31: *Staundf.* 130: 2 *Hawk. P. C.* c. 44. § 16.

But in civil actions, between party and party, regularly a *capias* or *exigent* lies not against a peer; yet in case of an indictment for treason or felony, or for trespass *vi & armis*, as an assault or riot, process of Outlawry shall issue against a peer; for the suit is for the King, and the offence a contempt against him; therefore, if a rescue be returned against a peer; or if a peer be convict of a disseisin with force, or denies his deed, and it be found against him, a *capias pro fine* and *exigent* shall issue,

issue, for the King is to have a fine; and the same reason holds upon an indictment of trespass or riot, much more in the case of felony. 2 *Hale's Hist. P. C.* 199, 200: *Cro. Eliz.* 170, 503: 5 *Co.* 54: 1 *Roll. Abr.* 220.

An infant above the age of fourteen may be outlawed, and the Outlawry is not erroneous; but an infant under the age of fourteen cannot be outlawed; if he be, it is erroneous. 3 *Hen.* 5. *Utlagat.*: *Fitz.* title *Outlawry* 11: 2 *Roll. Abr.* 805: *Dyer* 104: 2 *Hale's Hist. P. C.* 207, 208. Lord *Coke* says, within the age of twelve years. 1 *Inst.* 128. *a.*

But the Outlawry of such infant is not void, it being of record, but is voidable only by writ of error. *Dyer* 239. *a*: 2 *Roll. Abr.* 805.

A woman, it has been already remarked, is said to be waived, and not outlawed; therefore where a *capias* and *exigent* were awarded against three men and two women, and the return was *utlagati existunt*, where, as to the women, it ought to have been *waiviatæ existunt*, this was held to be error. *Cro. Jac.* 358: 1 *Rol. Rep.* 407: 1 *Rol. Abr.* 804.

If in an action against husband and wife, the husband is outlawed, and wife waived, and she is taken upon the *capias utlagat.*, though she is to be discharged of the imprisonment, (because the plaintiff cannot proceed against her alone,) yet she still remains waived; and when her husband is taken he must bring her in. See *Dyer* 271. *b*: *Cro. Jac.* 445: *Cro. Eliz.* 370: *Hut.* 86: 1 *Sid.* 21: *Cro. Car.* 58, 59: *Hut.* 86.

If two are sued in a joint action, and neither of them will appear, process of Outlawry must be taken out against both. *Cro. Eliz.* 648.

If an *exigent* be awarded against two, and the return *primo exacti fuerunt* & *non comparuerunt*, without saying *nec eorum aliquis comparuit*, it is erroneous. 2 *Roll. Abr.* 802.

As to Outlawry in action of account, *vide* 41 *Ed.* 3. 3: 1 *Roll. Abr.* 127: 1 *Brownl.* 25: 41 *Ed.* 3. 13. *b*: *Moor* 188: 2 *Leon.* 76: *Dyer* 239. *pl.* 203: *N. Bendl.* 148. *pl.* 205: *Moor* 74. *pl.* 203: 1 *And.* 10: 1 *Sid.* 173: 1 *Keb.* 642.

As to awarding Outlawry against principal and accessary, by the *stat.* of *Westm.* 1. 3 *E.* 1. *cap.* 14, it is provided, that none be outlawed upon appeal of commandment, force, aid, or receipt, unless he who is appealed of the deed be attainted, so that one like law be used therein through this realm; nevertheless he that will so appeal, shall not, by reason of this, intermit or leave off to commence his appeal at the next county, against them, no more than against their principals which he appealed of the deed; but their *exigent* shall remain, until such as be appealed of the deed, be attainted of Outlawry or otherwise.

In the construction of this statute, the following particulars are laid down by *Hawkins*, as most remarkable:

1st, That it seems agreed, that it extends as well to indictments as to appeal; not only because the word *appeal* in the statute may in a large sense be taken for any accusation in general; but because indictments are certainly as much within the reason of the statute as appeals; and the Common Law (for the settling whereof this statute was made) did not make any distinction in this respect between appeals and indictments. 2 *Inst.* 183: 2 *Hawk. P. C. c.* 27. § 129.

2dly, That it seems agreed, that wherever some of the defendants are expresly charged as principals, and others as accessaries, before the award of this *exigent*, the Outlawry thereon, of those charged as accessaries, cannot but be reversible; because it appears upon record that the *exigent* issued, contrary to the direction of the statute; but if several be outlawed, on a writ of appeal, which chargeth them all alike without any distinction, there can be no advantage taken of the appellant's not having pursued the statute, since it appears not, but that he might have charged them all as principals. 2 *Hawk. P. C. c.* 27. § 130, 306: 2 *Hale's Hist. P. C.* 200.

3dly, That it is strongly holden, that if an appellant take out the *exigent*, at the same time, against all the defendants, he must, when they appear, count against them all as principals, and shall be concluded from charging any of them as accessaries, because he has taken out such process as is erroneous, where all are not principals; but he makes a doubt, whether this be law at this day, since all errors, as the law seems now to be holden, are salved by appearance. 2 *Hawk. P. C. c.* 27. § 131: and *vide* 2 *Hale's Hist. P. C.* 200.

4thly, That it seems the better opinion, that where there are more than one principal, the *exigent* shall not issue, till all of them are arraigned; and herein it is said by *Hale*, that if *A.* and *B.* be indicted as principals in felony, and *C.* as accessary to them both, the *exigent* against the accessary shall stay till both be attainted by Outlawry or plea; for that it is said, if one be acquitted, the accessary is discharged, because indicted as accessary to both, therefore shall not be put to answer till both be attaint; but hereof he adds a *dubitatur*, because though *C.* be accessary to both, he might have been indicted as accessary to one, because the felonies are in law several; but if he be indicted as accessary to both, he must be proved so. 2 *Hawk. P. C. c.* 27. § 132: 2 *Hale's Hist. P. C.* 200, 201.

In treason all are principals; therefore process of Outlawry may go against him who receives, at the same time as against him that did the fact. 1 *Hale's Hist. P. C.* 238.

III. Formerly the *exigent* must have been sued in the county where the party really resided, for there all actions were originally laid; and because Outlawries were at first only for treason, felony, or very enormous trespasses, the process was to be executed at the *Torn*, which is the Sheriff's criminal Court; and this held not only before the Sheriff, but before the coroners, who were ancient conservators of the peace, being the best men in each county, to preside with the Sheriff in his Court, and who pronounced the Outlawry in the county Court on the party's being *quinto exactus*; therefore anciently there was no occasion for any process to any other county than that in which the party actually resided. *Fitz. Exigent.* 26: *Dyer* 295.

It is enacted by *stat.* 6 *Hen.* 6. *cap.* 1, "That before any *exigents* be awarded against persons indicted in the King's Bench, of treason or felony, writs of *capias* shall be directed as well to the Sheriff of the county in which they are indicted, as to the Sheriff of the county whereof they may be named in the indictments; the *capias* having at least six weeks before the return thereof."

And

And it is further enacted, by *stat.* 8 *H.* 6. *cap.* 10, "That upon every indictment or appeal, before any *exigent* awarded, presently after the first writ of *capias* returned, another writ of *capias* shall be awarded, directed to the Sheriff of the county, whereof he who is indicted is or was supposed to be conversant, by the same indictment, containing, according to the circumstances, three, or four, months from the date to the return; by which second writ of *capias*, the Sheriff shall be commanded to take him, if he can be found within his bailiwick; and if he cannot, to make proclamation in two counties, before the return of the same writ; after which writ so served and returned, if he which is so indicted or appealed, come not at the day of such writ returned, the *exigent* shall be awarded."

This statute not to extend to indictments, or appeals, taken within the county of *Chester*.

It is enacted by *stat.* 10 *H.* 6. *cap.* 6, "That such second *capias* as is required by 8 *Hen.* 6. *cap.* 10, shall be awarded upon indictments or appeals removed into the King's Bench, or elsewhere, by *certiorari* or otherwise."

In the construction of these statutes, the following opinions have been holden:

That though the words are express, that any Outlawry pronounced, contrary to the directions of the statute, shall be void; yet it is not to be taken, as if such Outlawries were absolutely void, but only voidable by writ of error. *Cro. Eliz.* 179: 3 *Co.* 59: *Plowd.* 137: *Hob.* 166.

If a defendant be expressly named of the same county wherein he is indicted, or appealed, and be also named under an *alias dictus* of another, it hath been adjudged that there is no need of any *capias*, with a command for proclamation according to 8 *Hen.* 6. *c.* 10, because that which comes under the *alias dictus* is not traversable nor material; also if a defendant be named of *B.* and late of *D.* there is no need of any *capias* to the Sheriff of the county wherein *D.* lies; because it appears, the defendant is at present conversant at *B*; but if a defendant be named of no certain place at present, but only late of *B.* and late of *D.* and late of *E.* &c. being all in different counties from that in which the prosecution is commenced, a *capias* shall go to the Sheriff of each county. 2 *Hawk. P. C. c.* 27. § 126: 2 *Hale's Hist. P. C.* 195, 6. *Vide Cro. Jac.* 167.

In civil cases, the writ of *exigi facias* (see this Dictionary, title *Exigent*) is a judicial writ made out by the *filazer*, as clerk of the *exigents* and directed to the Sheriff of the county where the action is laid; commanding him to cause the defendant to be *required* or *exacted* from county Court to county Court, or from *husting* to *husting*, if in *London*; that is, at five *successive* county Courts or hustings, until he be outlawed, if he do not appear, and if he appear to take him, &c. This writ should be teste'd on the *quarto die post* of the return of the *pluries capias* before, or of the *capias* after, judgment; and if there be not five county Courts between the teste and return of it, there issues an *exigent de novo*, grounded upon the Sheriff's return to the former writ with a clause (from whence it is called an *allocatur exigent*), directing the Sheriff to *allow* the several county Courts at which the defendant has already been required. 1 *Plowd.* 371. In *London* the Hustings are holden once every fortnight; on which account the action is generally laid there, when the plaintiff intends to proceed to Outlawry. See *Tidd's Pract. K. B.*

It hath been holden, that in *London*, where the holding of the Hustings is uncertain, no *exigi facias* shall issue with an *allocatur* Hustings; because the Court cannot take notice of the set times of holding it, as they may of the times of holding the county Courts; but it is now agreed, that if an *exigent* issues in *London*, and they begin "Husting *de placito terræ*," (as they may,) they shall proceed along at that Hustings to the Outlawry, without mingling their Husting *de communibus placitis*; but if an *allocato* Husting comes, they shall proceed without omitting any Husting. *Palm.* 287: 2 *Leon.* 14; 2 *Hale's Hist. P. C.* 202.

In addition to the *exigent*, a writ of *Proclamation* was introduced by *stat.* 6 *Hen.* 8. *c.* 4, which requires it to be directed to the Sheriff of the county of which the defendant is called, or described in the original; for there he was supposed to dwell; and if he did not in fact dwell there, he might have avoided the Outlawry, by the statute of Additions. *Dyer* 214. See *Gilb. C. P.* 19: *Thes. Brev.* 88. But the writ of Proclamation is at present governed by *stat.* 31 *Eliz. c.* 3. § 1, which enacts, that, "in every action personal, wherein any writ of *exigent* shall be awarded out of any Court, a writ of *Proclamation* shall be awarded and made out of the same Court, having day of teste and return, as the said writ of *exigent* shall have directed, and delivered of record to the Sheriff of the county where the defendant at the time of the *exigent* so awarded shall be dwelling; which writ of Proclamation shall contain the effect of the same action; and that the Sheriff of the county unto whom any such writ of Proclamation shall be delivered, shall make three Proclamations, *one* in the open county Court, *another* at the general quarter sessions of the peace, in those parts where the defendant at the time of the *exigent* awarded shall be dwelling, and the *third* one month at the least before the *quinto exactus* by virtue of the said writ of *exigent*, at or near the most usual door of the church or chapel of that town or parish where the defendant shall be so dwelling; and if the defendant shall be dwelling, out of any parish, (*i. e.* in any extraparochial place) then in such place as aforesaid of the next adjoining parish in the same county, and upon a Sunday immediately after divine service, and sermon, (if there be one,) and if there be no sermon, then forthwith after divine service; and that all Outlawries had and pronounced, whereupon no writs of proclamations shall be awarded and returned according to the form of this statute, shall be utterly void and of none effect."

IV. Upon the defendant's being put in *exigent*, he is either taken by the Sheriff, appears voluntarily, or makes default. If he be taken, he either remains in custody of the Sheriff, or gives bail, &c. as upon a common arrest. Formerly, if the defendant had appeared voluntarily, at any time before the return of the *exigent*, he might have obtained a writ of *supersedeas* from the *filazer*, as clerk of the *supersedeas*, on entering a *common* appearance of the term in which the *exigent* issued, and he may still do so where the action does not require *special* bail. But upon a question, whether in a case originally requiring *special* bail, if the defendant stand out to an *exigent*,

gent, he can come in and appear to the *exigent*, without putting in special bail; it was ruled by the Court of K. B. that there ought to be special bail. It would be very unreasonable, they said, that the defendant should gain an advantage, by standing out till process of Outlawry: he certainly ought not to be in a better condition then than if he had appeared at first. And accordingly the direction given was, that the filazer should not issue a *supersedeas* till the defendant should put in special bail. 3 *Burr.* 1920.

If the defendant be neither arrested nor appear, but make default at five successive county Courts, or Hustings, he is *outlawed* if a man, or if a woman, she is *waived*, by the judgment of the *coroners*, or of the *Recorder* in *London*; and the judgment of Outlawry being returned by the Sheriff upon the *exigent*, the *filazer*, as clerk of the Outlawries, will make out a writ of *capias utlagatum*, which is either *general* or *special*, and may be issued into any county, without a *testatum*; nor is there any occasion upon an Outlawry *after* judgment, to revive the judgment by *scire facias*, after a year and a day.

By the general writ of *capias utlagatum*, the Sheriff is commanded, "that he do not omit by reason of any liberty of his county, but that he take the defendant, if he be found in his bailiwick, and him safely keep, so that he may have his body in Court on a *general* return day, &c. *wheresoever*, &c. *to do and receive what the Court shall consider of him.*" The defendant, being taken by the Sheriff on this writ, either gives bail to appear and reverse the Outlawry, or remains in custody until he actually reverse it, or obtain a charter of pardon, or be relieved under an insolvent act.

At Common Law the defendant could not have been bailed, when taken by the Sheriff on a *capias utlagatum*. 3 *Burr.* 1484: 4 *Burr.* 2540. And this case is particularly excepted out of the *stats.* 23 *H* 6. *c.* 9: 13 *Car.* 2. *st.* 2. *c.* 2. § 4; by the latter of which statutes it is expressly declared, that "no Sheriff, &c. shall discharge any person or persons taken upon any writ of *capias utlagatum* out of custody without a lawful *supersedeas* first had and received for the same." But now by *stat.* 4 & 5 *W.* & *M. c.* 18. §§ 4, 5, "if any person outlawed in the Cout of King's Bench, other than for treason and felony, shall be taken and arrested upon any *capias utlagatum* out of the said Court, the Sheriff making the arrest may, *in all cases where special bail is not required by the said Court*, take an attorney's engagement under his hand to appear for the defendant, and reverse the Outlawry, and may thereupon discharge the defendant from such arrest; and *in those cases where special bail is required by the said Court*, the said Sheriff shall and may take security of the defendant by bond, with one or more, sufficient Surety or Sureties in the penalty of double the sum for which special bail is required, and no more, for his appearance, by attorney in Court, at the return of the writ, and to do and perform such things as shall be required by the said Court; and after such bond taken may discharge the defendant from the said arrest. Or in case the defendant shall not be able to give security as aforesaid, *before the return of the writ*, he shall and may be discharged, whenever he shall find sufficient security to the Sheriff for his appearance by attorney in the said Court, at some return in the ensuing term, to reverse the Outlawry, and to do and perform such other thing and things as shall be required by the said Court." This statute has been construed not to extend to *criminal* cases, at least not to misdemeanors after conviction. 4 *Burr.* 2539. And even in *civil* cases the defendant cannot be bailed where he was not bailable upon the process to Outlawry. *Id.* 2540. For it was the design of the statute, to put him in the same condition as if he had not been outlawed; and therefore he is not bailable when taken upon an Outlawry *after* judgment; neither upon this statute will the Court restore goods taken upon a special *capias utlagatum*, but they will of course be restored upon the reversal of the Outlawry. *Carth.* 459: 1 *Ld. Raym.* 349.

When there is no affidavit of a bailable cause of action, the Sheriff is authorised by the statute to discharge the defendant on an attorney's undertaking to appear and reverse the Outlawry; but when an affidavit has been made, he ought not to be discharged without giving the security required by the statute; which is not a common bail bond, but a bond with one or more sufficient Surety or Sureties for appearance by attorney at the return of the writ, and to do and perform such things as shall be required by the Court, that is, to put in bail to a new action, plead within a limited time, put the plaintiff in the same condition, and such like matters. 3 *Burr.* 1483: 4 *Burr.* 2540; and it is not necessary that the affidavit should be made *before* the Outlawry. 2 *Stra.* 1178, 9: 1 *Wils.* 3: *Fort.* 39. Or the sum sworn to be indorsed, on the *capias utlagatum*. 2 *Burr.* 1482. But it is sufficient if there be an affidavit before the defendant is discharged; the Court having determined that process of Outlawry is not within the statute for preventing frivolous and vexatious arrests. See 3 *Burr.* 1483.

By the special writ of *capias utlagatum* the Sheriff is commanded not only to take the defendant, as by the general writ, but also "to enquire by the oath of honest and lawful men of his county, what *goods and chattels, lands and tenements*, he hath or had on the day of his Outlawry, or at any time afterwards; and by their oath to extend and *appraise* the same according to the true value, and to take them into the King's hands, and safely keep them, so that he may answer to the King for the true value and issues of the same, making known what he shall do thereupon to the Court, on the return day." *Off. Brev.* 35: *Thes. Brev.* 59. Upon this writ the Sheriff is to impannel a jury who are to make enquiry of the goods and chattels of the defendant including his debts. *Co.* 95: *Lane* 23: *Lutw.* 329, 1513: *Gilb. C. P.* 200. And also of his leasehold and freehold lands and tenements; to appraise the goods, and to extend or value the lands, &c. but they are not to enquire of his copyholds, *Parker* 190. Or trust property, *Cro. Jac.* 513: *Sty.* 41. But see the *statute* of *Frauds* 29 *Car.* 2. *c.* 3. § 10.

Witnesses may be subpœnaed to attend the execution of the enquiry, and when made, the Sheriff is to take possession of the goods and chattels of the defendant, and of the leasehold tenements in his own occupation. 9 *Hen.* 6. 20, 21. But he must not oust or disturb the possession of his tenants. *Id.* 21 *H.* 7. 7. And can only take the issues or profits of his freehold tenements. *Id*: *Plowd.* 541: *Hardr.* 166, 176: *Bunb.* 103, 105. The inquisition should set forth, with convenient

certainty

certainty, the appraised value of the goods; the particulars of the debts; of what lands, &c. the defendant is seised or possessed; the different parcels; in whose tenure; and of what annual value beyond reprises. But the inquisition, being merely an office of instruction or information, does not require so much certainty as an office of entitling. 2 *Salk*. 469: *Bunb*. 103. And if the lands, &c. be undervalued, there may be a *melius inquirendum*. *Hard*. 106.

When the special writ of *capias utlagatum* is returned, it should be delivered, with the inquisition annexed, to the *filazer*, as clerk of the *exigents* and *Outlawries*, and afterwards filed in the office of the *custos brevium*, 3 *T. R*. 578, 9; from whence a transcript is sent into the Exchequer. *Gilb. C. P*. 16. Out of this Court there issues a *venditioni exponas* to sell the *goods*, a *scire facias* to recover the debts, and a *levari facias* to levy the issues and profits; under which latter writ the Sheriff may not only take the rent and moveables of the party outlawed, but also the cattle of a *stranger*, *levant* and *couchant*, on the lands extended. 1 *Ld. Raym*. 305, and the cases there cited in the last edition. In aid of these writs a bill may be exhibited in the Exchequer against the outlaw to compel a discovery of his real and personal estate, &c. either by the plaintiff to enable him to take out execution, or by the Attorney General on behalf of the Crown. *Hardr*. 22; And it is said to be the course of that Court, upon an Outlawry, to prefer an *information* in the nature of an action of trover and conversion against him who hath the goods of the party outlawed. 1 *Mod*. 90.

The money raised by the Sheriff under these writs belongs to the Crown, but the plaintiff may have it paid to him in satisfaction of his debt and costs, by applying to the Court of Exchequer, or Lords of the Treasury; and he may also obtain a lease of the lands, &c. under the Exchequer seal. *Hardr*. 106, 422: *T. Raym*. 17: 1 *Lev*. 33. Or a grant of the King's right to levy the profits. 9 *H*. 6. 20: 2 *Roll. Abr*. 808: *Gilb. C. P*. 17. If the money raised by the Sheriff do not exceed the sum of fifty pounds, the Court of Exchequer, *on motion*, will order it to be paid to the plaintiff; but if it exceed that sum, the plaintiff must petition for it to the Lords of the Treasury, stating the amount of his debt, a short abstract of the proceedings, with the expences he has been put to, and praying, in respect thereof, that the Attorney General may be authorized to consent, on behalf of the Crown, that the money remaining in the Sheriff's hands may be paid over to the petitioner. The petition is referred by the Lords of the Treasury to their solicitor, who should be furnished with an affidavit, sworn before a baron, of the amount of the debt and costs, and a certificate of the proceedings from the clerk in Court, whereupon he will make his report, which should be filed with the clerk of the Treasury. A *warrant* is then issued under the King's sign-manual for the Attorney General to give his consent to an order pursuant to the prayer of the petition; upon which a *motion* is made in the Court of Exchequer, and the Attorney General consenting, an order is framed accordingly; this order must be engrossed, and put under seal, with a subpoena annexed to perform it; and the Sheriff being served therewith must pay over the money, or will be liable to an attachment. 2 *Cromp*. 47. See *Tidd's Pract. K. B. cap*. 4, and the authorities there cited.

V. There are two ways of reversing an Outlawry; first, by writ of error returnable *coram nobis*. *Co. Litt*. 259. *b*: *Fort*. 38. 2dly, By motion founded on a plea, averment or suggestion of some matter apparent; as in respect of a *supersedeas*, omission of process, variance, or other matter apparent on the record; and yet in these cases some have holden that in another term the defendant is driven to his writ of error. But for any matter of fact, as death, imprisonment, beyond sea at the time of the *exigent* awarded; (*Carth*. 259: 1 *Ld. Raym*. 349: 2 *Stra*. 1178: 1 *Wils*. 3;) service of the King, &c. he is driven to his writ of error, unless it be in the case of felony, and there *in favorem vitæ* he may plead to it. It seems, however, to be discretionary in the Court to relieve by motion, or put the parties to a writ of error; and of late years they have gone farther than heretofore upon motion, the more effectually to expedite justice, save expence, and preserve the credit and character of the defendant. *Tidd's Pract. K. B. c*. 4.

Regularly, in all Outlawries, as well personal as criminal, the party, in order to reverse the same, was to appear in person, and could not appear by attorney. 2 *Leon*. 22: *Cro. Jac*. 462: 2 *Salk*. 496.

But now by *stat*. 4 & 5 *W. & M. cap*. 18, already referred to, no person who shall be outlawed in the Court of *B. R*. for any cause whatsoever (treason and felony only excepted,) shall be compelled to appear in person in the said Court to reverse such Outlawry; but may appear by attorney and reverse the same without bail in all cases, except where special bail shall be ordered by the said Court.

By *stat*. *Westm*. 1. (3 *E*. 1.) *cap*. 9, it is expresly provided, that those who are outlawed, have abjured the realm, &c. should be excluded the benefit of replevin; yet it hath been always held, that the Court of King's Bench may in their discretion, in special cases, bail a person upon an Outlawry of felony; as where he pleads that he is not of the same name, and therefore not the same person with him that was outlawed, or alleges any other error in the proceedings. 2 *Hawk. P. C. c*. 15. § 40.

By *stat*. 31 *Eliz. cap*. 3. § 3, it is enacted, "That before any allowance of any writ of error, or reversing of any Outlawry be had by plea, or otherwise, through or by want of any proclamation to be had or made according to the form of this statute, the defendant and defendants in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit in a new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the said Outlawry."

On reversing the Outlawry for any other error in law, besides the want of proclamations, it was long unsettled whether the defendant should be obliged to put in special bail. In the earliest cases upon the subject, it was determined that he should. *Litt. Rep*. 301: *Carth*. 459: 1 *Ld. Raym*. 349: *Gilb. C. P*. 19. But there are cases to the contrary in the time of *Holt*, Chief Justice, 12 *Mod*. 545: 1 *Ld. Raym*. 605: 2 *Salk*. 496: And in one of them (2 *Salk*. 496,) it is said, that if the party outlawed come in *gratis*, upon the return of the *exigent*, &c. he may be admitted, by motion, to reverse the Outlawry,

lawry, for any other cause but want of proclamations without putting in bail; but if he come in by *cepi corpus*, he shall not be admitted to reverse it without appearing in person, as in such case he was obliged to do at Common Law; or putting in bail with the Sheriff for his appearance upon the return of *cepi corpus*, and for doing what the Court shall order. In two subsequent cases, however, special bail was put in upon reversing the Outlawry, for errors in law, though it does not appear the party came in *gratis*. *Wall* v. *Walton*, E. 12 G. 3. cited, 1 *Wils.* 47: 2 *Stra.* 951: 2 *Barn. K. B.* 298. At length, in the case of *Stevenold* v. *Hampson*, the Court upon considering the words of *stat.* 4 & 5 *W. & M.* c. 18. § 3, which empowers the outlaw to appear by attorney, and says, "the Outlawry shall be reversed without bail in all cases, except where special bail shall be ordered by the Court," declared they were of opinion they had a *discretionary* power to require it or not; and that the want of an affidavit before the Outlawry was no objection, because that is only requisite to warrant an arrest; and though the *stat.* 31 *Eliz.* c. 3. § 3. be the only act that expressly requires bail, it is not to be inferred from thence that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money. 2 *Stra.* 1178, 9: 1 *Wils.* 3. And it is now settled, that on reversing an Outlawry, for any other error in law, besides the want of proclamations, the bail is *common or special*, in like manner as upon the arrest. Where *special* bail is required, it need not be put in before the allowance of the writ of error, but it is well enough if put in at any time before the reversal. 1 *Ld. Raym* 605: 2 *Stra.* 951: 2 *Barn. K. B.* 928. The recognizance, in such case, is usually taken in the common form; but see 12 *Mod.* 545, *per Holt*, and 2 *Salk.* 496. And it is settled that the bail may render the defendant, and are not, at all events, answerable for the debt. *Tidd's Pract. K. B.* and the authorities there cited.

In general, an Outlawry can only be reversed upon payment of *costs*; but if the process have been abused, and made subservient to purposes of oppression, as where a man has been outlawed, who was already in prison at the plaintiff's suit, or being at large, did not abscond but appeared publickly, and might have been arrested or served with process, the Court on motion will order the plaintiff to reverse the Outlawry at his own expence. 2 *Vent.* 46: 2 *Salk.* 495: *Barnes* 321: *T. Jon.* 211: *Comb.* 19: 12 *Mod.* 415.

It is clearly agreed, that an attainder of felony of a person who had any lands shall never be reversed by writ of error, without a *scire facias* against all the tertenants and lords mediate and immediate; but it is settled, that such *scire facias* is not necessary in the case of high treason. *Dyer* 34. *pl.* 20: *Cro. Eliz.* 235: 1 *Keb.* 241: 1 *Sid.* 316: 3 *Keb.* 29: 3 *Mod.* 32, 47: 4 *Mod.* 366: *Ld. Raym.* 154.

Also it is said, that it is not necessary in the case of felony, when it is suggested on the roll that the party had no lands, and the Attorney General confesses it. 2 *Salk.* 495.

It is agreed, that after an Outlawry of treason or felony is reversed, the party shall be put to plead to the indictment, for that still remains good, and he may be tried at the King's Bench bar; or the record may be remitted into the country, if it were removed into the King's Bench by *certiorari*, with a command to the justices below, to proceed by the statute of 6 *Hen.* 6 c. 1: *Cro. Jac.* 646: *Cro. Car.* 365: 3 *Mod.* 42: 6 *Mod.* 115: 2 *Hale's Hist. P. C.* 209.

So if a man be outlawed by process in an information, and comes in and reverses the Outlawry, he must plead *instanter* to the information. 1 *Salk.* 371: 5 *Mod.* 141.

The law is the same in civil cases; and therefore, if an Outlawry in a personal action be reversed, the original remains. *March* 9: 3 *Lev.* 245.

Generally speaking, when the Outlawry is reversed, or the defendant has obtained a charter of pardon, he may be discharged, if in custody, by writ of *supersedeas*. See *stat.* 13 *Car.* 2. *st.* 2. c. 2. § 4. And his property, if taken into the King's hands, shall be restored to him by writ of *amoveas manus*, or otherwise, according to the course of the Exchequer. As to chattels real, see *Cro. Eliz.* 278: 2 *Vern.* 312: *Bunb.* 105. And as to chattels personal, see 5 *Mod.* 61. Where he has obtained a charter of pardon, he must sue out a *scire facias* to give notice thereof to the plaintiff, in order that he may further prosecute his action, if he think proper. See *Tidd's Pract. K. B.* c. 4.

It hath been adjudged, that if the King grant over the lands of a person outlawed for treason or felony, and afterwards the Outlawry be reversed, the party may enter on the patentee, and need neither sue a petition to the King, nor a *scire facias* against the patentee. 1 *And.* 188. A person shall, after Outlawry reversed, be restored to his law, and be of ability to sue. *Co. Litt* 288. *b.*

If the goods of a person outlawed are sold by the Sheriff upon a *capias utlagatum*, and after the Outlawry is reversed by writ of error, he shall be restored to the goods themselves; because the Sheriff was not compellable to sell these goods, but only to keep them to the use of the King. 5 *Co.* 90: 1 *Roll. Abr.* 778.

If an advowson come to the King, by forfeiture upon an Outlawry, and the church becoming void, the King presents, and then the Outlawry is reversed: yet the King shall enjoy that presentment, because the presentment there came to the King as the profit of the advowson. *Moor* 269.

But if the church be void at the time of the Outlawry, and the presentation is thereby forfeited as a chattel principally and distinct of itself, there, upon reversal of the Outlawry, the party shall be restored to the presentation. *Cro. Eliz.* 170.

If a termor being outlawed for felony, grants over his term, after the Outlawry is reversed, the grantee may have trespass for the profits taken between the reversal of the Outlawry and the assignment; for by the reversal it is as if no Outlawry had been, and there is no record of it. *Cro. Eliz.* 170: 13 *Co.* 20, 22.

It is said, that if a man be outlawed in the King's Bench, and the party's goods are seized into the King's hands, and then the Outlawry is reversed, there can be no restitution; the reason whereof is, for that the Court of King's Bench cannot send a writ to the treasurer; and the Court of Exchequer have no record before them to issue out a warrant for restitution. 5 *Mod.* 61. See 2 *Vern.* 312: 2 *Lev.* 49.

For more learning on this subject, see 3 *New Abr.* and 22 *Vin. Abr.* title *Outlawry*.

OUT-

OUTPARTERS, mentioned in *stat.* 9 *H.* 5. *st.* 1. *c.* 7. A kind of thieves in *Riddesdale*, that stole cattle, or other things without that liberty; some are of opinion, that those which in the fore-named statute are termed Outparters, are now called *outputters*, being such as set matches for the robbing any man or house. *Cowell.* See *Intakers*.

OUTRIDERS, Bailiffs errant, employed by the Sheriffs, or their deputies, to ride to the farthest place of their counties or hundreds, with the more speed to summon such as they thought good to their county or hundred courts. See *stat.* 14 *E.* 3. *st.* 1. *c.* 9.

OWEL, An old *French* word for equal. *Law Fr. Dict.*

OWELTY, *Equality. Co. Litt.* 169. When there is lord, mesne, and tenant, and the tenant holds of the mesne by the same service that the mesne holds over of the lord above him, this is called Owelty of services. *F. N. B.* 136.

OWLERS, Persons that carry wool, &c. to the sea-side by night, in order to be shipped off contrary to law. See *Wool*.

OWLING, The offence of exporting, &c. *wool* by night. See *Wool*.

OXEN; See *Cattle*.

OXFILD, A restitution anciently made by a hundred or county, for any wrong done by one that was within the same. *Lamb. Archaion*, 125.

OXFORD. See *University*: Courts of Universities.

OXGANG, from *Ox*, i. e. *bos*, and *gang*, or gate, *iter*.] Is commonly taken for fifteen acres of land, or as much as one ox can plough in a year. *Skene* says 13 acres. See *Spelman*.

Six Oxgangs of land, is so much as six oxen can plough. *Cromp. Jurisd.* 220. But an Oxgang seemeth properly to be spoken of such land as lieth in *Gaynour*. *Old Nat. Br. fol.* 117. See *Co. Litt.* 69. *Cowell*.

OYER. This word was anciently used for what we now call assises. *Anno* 13 *Ed.* 1. See *Oyer and Terminer*.

OYER, Fr. *Audire*, Lat. To hear.] Previous and preparatory to pleading in bar, the defendant may crave Oyer of the writ, or bond, or other specialty upon which the action is brought, that is, *to hear* it read to him; the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves: whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration. 3 *Comm.* c. 20. *p.* 299.

To demand Oyer of an obligation, is not only to desire the plaintiff's attorney to read the same; but to have a copy thereof, that the defendant may consider what to plead to the action. *Hob.* 217.

Oyer *of Deeds*, &c. is demandable by the plaintiff, or by the defendant. If the plaintiff in his declaration *necessarily* makes a *profert in curia* of any deed, writing, letters of administration, or the like, the defendant may pray Oyer, and must have a copy thereof delivered to him, if demanded; paying for the same after the rate of 4*d. per* sheet, and also for the stamps. 2 *Salk.* 497: *R. T.* 5 & 6 *Geo.* 2. So likewise if the defendant in his plea makes a necessary *profert in curia* of any deed, &c. the plaintiff may pray Oyer, and shall have a copy at the like rate. *Id*: 6 *Mod.* 122. And the party of whom Oyer is demanded, is bound to carry it to the adverse party. 2 *Term Rep.* 40. Formerly, all demands of Oyer were made in Court (as it is now in case of criminal appeals,) where the deed is, by intendment of law, when it is pleaded with a *profert in curiâ*. 12 *Mod.* 598: 3 *Salk.* 119. And therefore when Oyer is craved, it is supposed to be of the Court, and not of the party; and the words *ei legitur in hæc verba*, &c. are the act of the Court. *Id*: 1 *Sid.* 108. But see 2 *Lutw.* 1644, *contra*. In practice, however, Oyer is now usually demanded, and granted by the attornies. 6 *Mod.* 28. And where the plaintiff is entitled to have Oyer of a deed, it cannot be dispensed with by the Court, nor can the defendant be compelled to plead without it, even though the deed be lost. 2 *Lill. P. R.* title *Oyer* 266: 2 *Keb.* 274: 6 *Mod.* 28: 2 *Str.* 1186: 1 *Wils.* 16. But where the deed is in the hands of a third person, the Court will oblige him to give Oyer, and produce it. 2 *Str.* 1198.

When a deed is shewn in Court, it remains there in contemplation of law, all the term in which it is shewn; for all the term is considered in law but as one day. And at the end of the term, if the deed be not denied, the law doth adjudge it to be in the custody of the party to whom it belongs; but if it be denied, then it shall remain in Court till the plea is determined, and if it eventually turn out not to be the plaintiff's deed, it shall be destroyed. *Co. Litt.* 231. *b*: 5 *Co.* 74. *b*: 2 *Lutw.* 1644. But letters testamentary, or of administration, are not supposed to remain in Court all the term; for the plaintiff may have occasion to produce them elsewhere. 2 *Salk.* 497: 12 *Mod.* 598; hence it is, that Oyer of a deed cannot, in strictness, be demanded, but during the same term it is pleaded. 5 *Co.* 74. *b*: 2 *Lutw.* 1644: 1 *Term Rep.* 149. And as a general imparlance is always to a subsequent term, it follows that Oyer of a deed cannot be demanded after such imparlance. 1 *Keb.* 32: 2 *Lev.* 142: *Prœm.* 400: 3 *Keb.* 480, 491: 6 *Mod.* 28. A different doctrine is, indeed, laid down in one place, which must be understood of a *special* imparlance to another day in the same term. 12 *Mod.* 29, and see 2 *Show.* 310.

Though Oyer is not, in strictness, demandable of a *record*, (1 *Ld. Raym.* 347, 4*th edition, note* (*a*): *Dougl.* 476, 7: 1 *Term Rep.* 149, 50.) yet if a judgment or other matter of record in the *same* court be pleaded, the parties pleading it must give a note in writing, of the term and number-roll whereon such judgment or matter of record is entered and filed; or in default thereof the plea is not to be received. *Keilw.* 96: *Carth.* 454: 1 *Ld. Raym.* 347: *Carth.* 517: 1 *Ld. Raym.* 550: 2 *Str.* 823: *R. T.* 5 & 6 *Geo.* 2. (*b*). And probably, on this account, the party was not anciently permitted to plead *nul tiel record* of a judgment or matter of record in the *same* Court. 5 *H.* 7. 24, *per Brian*. 3 *Keb.* 76. But where a judgment or matter of record is pleaded in a different Court, the party not being entitled to an account of the term and number-roll, must plead *nul tiel record*. And it seems, that Oyer is not demandable of an act of parliament. *Dougl.* 476: *Godb.* 186, *contra*.

Formerly the defendant was allowed Oyer of the *Original Writ*, in order to demur or plead in abatement, for any apparent insufficiency or variance. *Gilb. C. P.* 52: 12 *Mod.* 35, 189: 2 *Lutw.* 1644: 6 *Mod.* 27: 2 *Salk.*

498: 2 *Ld. Raym.* 970: *R. T.* 5 & 6 *Geo.* 2. *b*: 2 *Wilf.* 97: *Co. Ent.* 320. But this indulgence having been abused and made an instrument of delay, it is now holden, that if the defendant demand Oyer of the Original Writ, the plaintiff may proceed, as if no such demand had been made. *Dougl.* 227, 8: *Barnes* 340: and see *Bro. Abr.* title *Oyer*, *pl.* 19.

The demand of Oyer is a kind of plea, and should regularly be made, before the time of pleading is expired. If it be not made till after that time, the plaintiff may consider the demand as a nullity, and sign judgment. *Tidd's Pract. K. B.* But though Oyer be not in strictness demandable, yet if it be given, the party demanding has a right to make use of it. *Dougl.* 476, 7. If the defendant would insist upon his demand of Oyer, he should move the Court to have it entered upon record. 6 *Mod.* 28. If the plaintiff on the other hand would contest the Oyer, he may either counterplead it, or strike out the rest of the pleading, and demur. 2 *Lev.* 142: 2 *Salk.* 497: and see 2 *Ld. Raym.* 970. Upon which the judgment of the Court is, either that the defendant have Oyer, or that he answer without it. 2 *Lev.* 142. On the latter judgment, the defendant may bring a writ of error; for to deny Oyer where it ought to be granted is error, but not *è converso.* 2 *Salk.* 497: 6 *Mod.* 28: 2 *Ld. Raym.* 970: 2 *Stra.* 1186: 1 *Wilf.* 16.

There is no settled time prescribed for the plaintiff to give Oyer, though if not given when demanded, the defendant shall have the same time to plead, after Oyer given, as he had at the time of demanding it. 1 *Str.* 705: *R. T.* 5 & 6 *Geo.* 2. (*b*). And he may either set forth the Oyer in his plea, or not, at his election. 2 *Str.* 1241: 1 *Wilf.* 97. If he set it forth, the Court must adjudge upon it, as parcel of the record, though it was not strictly demandable at the time of granting it. 3 *Salk.* 119: *Carth.* 513: 6 *Mod.* 27: *Dougl.* 160. But the defendant is not bound to set it forth in his plea. 2 *Str.* 1241: 1 *Wilf.* 97: *Barnes* 127, *contra*; and if he do not, the plaintiff may pray an inrollment, and so make it part of his replication.

The time allowed for the defendant to give Oyer of a deed, &c. to the plaintiff, is two days exclusive after it is demanded. *Carth.* 454: 2 *Term Rep.* 40. And if it be not given in that time, the plaintiff may sign judgment, as for want of a plea. 6 *Mod.* 122. If given, the plaintiff shall have the same time to reply after Oyer given him by the defendant, as he had at the time of demanding it. *R. T.* 5 & 6 *Geo.* 2. (*b*).

Where there may be Oyer, the party demanding it is not bound to plead without it, but defendant may plead without it if he will, on taking upon him to remember the bond or deed; though if he plead without Oyer, he cannot after waive his plea, and demand Oyer. *Mod. Caf.* 28: 3 *Salk.* 119. After a plea in abatement, Oyer may not be had the same term, to plead another dilatory plea. *Mod. Caf.* 27: 2 *Lill.* 267.

When on Oyer of a deed, it is entered, the whole case appears to the Court as if the deed were in the plea, and the deed is become parcel of the record: though Oyer of a deed can only be demanded during the time it is produced in Court; and then it may be entered *in hæc verba*, and there may be a demurrer, or issue upon it, &c. 5 *Rep.* 76: *Lutw.* 1644: 3 *Salk.* 119.

If a bond is brought into Court, Oyer is grantable only the first term, for afterwards it is adjudged in the possession of the party. Yet Oyer of a recognizance was granted in a term subsequent to the declaration. *Ld. Raym.* 84.

A defendant ought to crave Oyer of the plaintiff's deed, on which he hath declared; and cannot set forth another to plead performance thereof. *Mod. Caf.* 154: 2 *Nelf. Abr.* 1225.

So where a deed is pleaded, the other party cannot allege that there is other matter contained in the deed, but must set it forth on Oyer. *Strange* 227.

If the defendant after craving *Oyer* of a deed, do not set forth the whole of it, the plaintiff may sign judgment as for want of a plea. 4 *Term Rep.* 370.

If there is misnomer in a bond, &c. the defendant is to plead the misnomer, and that he made no such deed without craving Oyer; for if he doth, he admits his name to be right. 1 *Salk.* 7.

If defendant will take advantage of a variance between the writ and count, he must crave Oyer of the writ, and spread it on the record, *i. e.* shew it to the Court. 2 *Wilf.* 395.

OYER of RECORD, *audire recordum.*] A petition made in Court, that the Judges, for better proof-sake, will hear or look upon any record. See the preceding title *Oyer.*

OYER AND TERMINER, Fr. *Ouir & Terminer*, Lat. *Audiendo & Terminando.*] A commission directed to the Judges, and other gentlemen of the county to which it is issued, by virtue whereof they have power *to hear and determine* treasons, and all manner of felonies and trespasses. *Cromp. Jurisd.* 121: 2 *Inst.* 419: 4 *Inst.* 152. In our statutes the term is often printed *Oyer and Determiner*, 4 *Inst.* 162. See this Dictionary, title *Justices of Oyer*, &c. and the references there, to which the following observations may be added.

The usual commission of Oyer and Terminer of Justices of assise is general; and when any sudden insurrection, or trespass is committed, which requires speedy reformation, then a special commission is immediately granted. See *stat. Westm.* 2. 13 *Ed.* 1. *c.* 29: *F. N. B.* 110.

A man may have a special commission of Oyer and Terminer, to inquire of extortions and oppressions of under-sheriffs, bailiffs, clerks of the markets, and all other officers, &c. on the complaint and suit of any one who will sue it out: and the King may make a writ of *Associations* unto the Justices of Oyer and Terminer, to admit those into their company whom he hath associated unto them; also another writ may be sent to the Judges to proceed, although all the Justices do not come at the day of the sessions; and this writ is called the writ of *Si non omnes*, &c. *New Nat. Brev.*

As to these commissions it is said, that if a commission of Oyer and Terminer, &c. be awarded to certain persons to inquire at such a place, they can neither open their commission at another, nor adjourn it thither, or give judgment there; if they do, all their proceedings are, as *coram non judice.* But it is held, that justices appointed *pro hac vice* may adjourn their commission from one day to another, though there be no words in their commission to such purpose; for a general commission authorising persons to do a thing, implicitly allows them convenient time for the doing it. 2 *Hawk. P. C. c.* 5. § 14.

Upon the general commission of Oyer and Terminer, there should issue a precept to the Sheriff in the name of the

the commissioners, bearing date fifteen days before their sessions, that he return twenty-four persons for a grand jury *ad inquirendum*, &c. on such a day; and the Sheriff is to return his panel annexed to the precept; and by the statute 5 *Ed.* 3. *c.* 11, Justices of Oyer and Terminer may issue process of outlawry in any county of *England*, against persons indicted before them; but all their processes are regularly to be in the names and under the seals of the commissioners, *viz.* three of them, one being of the *quorum*. 2 *Hale's Hist. P. C.* 26, 31. See this Dictionary, title *Outlawry*.

As the same justices, at the same time, may execute the commission of Oyer and Terminer, and also that of gaol delivery, they may proceed, by virtue of the one, in those cases where they have no jurisdiction by the other, and make up their records accordingly. 2 *Hale P. C.* 20; and see 2 *Hawk. P. C. c.* 5. On indictments found before the Justices of Oyer and Terminer, they may proceed the same day against the parties indicted.

There is a special commission of Oyer and Terminer, granted upon urgent occasions; and the party suing it might thereupon take out a writ to the Sheriff, commanding him to arrest goods wrongfully taken away, and keep them in safe custody, till order made concerning them by the Justices assigned to determine the matter. *Reg. Orig.* 126: *F. N. B.* 112.

OYES, A corruption of the Fr. *Oyez*, i. e. *Audite*, hear ye.] The term used by a public crier, to enjoin silence and attention.

OYSTER-FISHERY, (in the river *Medway*,) is regulated by *stat.* 2 *Geo.* 2. *c.* 19; and a Court is kept for that purpose at *Rochester* yearly, where, by a jury of free dredger-men of the Oyster-fishery, the same is to be inquired into; and they may make rules and orders when Oysters shall be taken, what quantities in a day, and to preserve the brood of Oysters, &c. And may impose penalties not exceeding 5*l.* Also water-bailiffs shall be appointed to examine boats, &c. By *stat.* 31 *Geo.* 3. *c.* 51, for regulating Oyster-fishing in general, fine and imprisonment may be inflicted on persons unlawfully fishing for Oysters. But this act not to affect any other local statutes. See titles *Fish*; *Navigation Acts*.

OZE, or Ozy ground, *solum uliginosum*.] Moist, wet, and marshy land. *Lit. Dict.*

P.

PAAGE, *paagium*, The same with *passagium*. *Mat. Paris* 767: See *Passagium*.

PACABILIS, Payable or passable. *Ex Regist. Greenfeld. Archiep. Ebor. MS.*

PACARE, To pay; as *tolnetum pacare*, is to pay toll, *Mon. Angl tom.* 1. *pag.* 384. Hence *pacatio*, payment, *Mat. Paris, sub an.* 1248.

PACE, *passus*.] A step in going, containing two feet and a half, the distance from the heel of the hinder foot to the toe of the fore-foot; and there is a Pace of five foot, which contains two steps, a thousand whereof makes a mile; but this is called *passus major*.

PACEATUR. *Et recipiat Agenfrida carnem ejus, & carnem, & Paceatur de caetero*, i. e. Let him be free, or discharged, for the time to come. *Ll. Ina. c.* 45.

PACIFICATION, *pacificatio*.] A peace-making, quieting, or appeasing; relating to the wars between *England* and *Scotland*, *anno* 1638, mentioned in the statute 17 *Car.* 1. *c.* 17.

PACK OF WOOL, A horse-load, which consists of seventeen stone and two pounds, or 240 pounds weight. *Merch. Dict.*: *Fleta, lib.* 2. *c.* 12.

PACKAGE, A duty set and rated in a table taken of goods and merchandizes; and all goods not specified in the table, are to pay for package duties, after the rate of one penny in the pound, according as they are valued in the *Book of Rates*.

PACKERS, Are persons appointed, to pack up herrings, and sworn to do it pursuant to statute. See title *Herrings*.

PACKETS. Packet vessels, exporting or importing goods, what to forfeit; *stat.* 13 & 14 *Car.* 2. *c.* 11. § 22.

PACKING WHITES, A kind of cloth so called, mentioned in *stat.* 1 *R.* 3. *c.* 8.

PACT, *Fr.*] A contract or agreement. *Law French Dictionary*.

PAGUS, A word used in ancient records, for a county: *Alfred Rex Anglo Saxonum natus est in Villa Regia quae dicitur Wantage in illa paga quae nominatur Berksh.* &c.

PAIN, or PEINE, FORT ET DURE, *Fr.*—Lat. *poena fortis & dura.*] A special punishment heretofore inflicted on those who, being arraigned of felony, refused to put themselves on the ordinary trial, but stubbornly stood mute; vulgarly called *Pressing to Death*. See title *Mute*.

PAINS AND PENALTIES. Acts of parliament to attaint particular persons of treason or felony, or to inflict Pains and Penalties, beyond or contrary to the Common Law, to serve a special purpose, are to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. 4 *Comm. c.* 19. § 1.

An act passed in the ninth year of King *George* I. for inflicting Pains and Penalties on the bishop of *Rochester*, Mr. *Kelly*, and others, for being concerned in *Layer's* conspiracy; by virtue of which statute, the bishop was deprived and banished, and disabled to hold any office, dignity, benefice, &c. And the others were imprisoned during life, and to forfeit all their lands and goods; and escaping from prison, or the bishop returning from banishment, to be guilty of felony without benefit of clergy, &c. Also persons corresponding with the bishop, except licensed under the sign-manual, were adjudged felons by the statute. *Stat.* 9 *Geo.* 1. *cc.* 16, 17. See title *Attainder*.

PAINTERS. The Price of Painters' work is limited by statute; they shall not take above 16*d.* a day, for laying any flat colour mingled with oil or size upon timber, stone, &c. And plasterers are forbid using the trade of a painter in *London*, or to lay any colour of painting, unless they are servants to Painters, &c. on pain of 5*l.* But they may use whiting, blacking, red lead, oker, &c. mixt with size only. Plasterers not to exercise the trade of Painters in *London*, without serving an apprenticeship, *stat.* 1 *Jac.* 1. *c* 20.

PAIS, A county or region, *pagus*; *g*, *in i* [illegible] *conversio. Spelm.*] Trial *per Pais*, by the country, *i. e.* a Jury.

PAISSO, Pasnage, or liberty for hogs to run in forests or woods to feed on mast. *Mon. Angl.* i. 682. See *Passing*.

PALACES, The steward, treasurer, and comptroller may inquire by a jury of the King's servants, if any of the servants conspire the death of the King, or of any councillor, &c. *Stat.* 3 *Hen.* 7. *c.* 14. The limits of the Palace of *Westminster*, *stat.* 28 *Hen* 8. *c.* 12. The great master of the King's house to have the same authority as the Lord Steward, *stat.* 32 *Hen.* 8. *c.* 39, repealed, *stat.* 1 *Mar. st.* 3. *c.* 4: The penalty of striking in the King's Court, *stat.* 33 *Hen.* 8. *c.* 12. inquiries of murders, &c. within the verge, *Ib.* See *Striking*; *Murder*.

PALAGIUM, A duty to lords of manors, for exporting and importing vessels of wine in any of their ports.

PALATINE, County: see *County*.

PALFREY, *Palfredus, palafredus, palefredus, palifredus.*] One of the better sorts of horses used by noblemen or others for State: and sometimes of old taken for a horse fit for a woman to ride. *Camden* says, that *William Fauconberg* held the manor of *Cukeny*, in the county of *Nottingham* in serjeanty, by the service of shoeing the King's Palfrey, when the King should come to *Mansfield*. See 1 *Inst.* 149.

PALICEA, A park pale. *Cowell.*

PALINGMAN,

PALINGMAN, mentioned in *stats.* 22 *Ed.* 4. *c.* 23: 11 *H.* 7. *c.* 23; seems to be a merchant denizen, one born within the *English* pale. But *Skinner* judges it to signify a fishmonger, or merchant of fish. *Cowell.*

PALLA, A canopy; also often used for an altar-cloth. *Matt. Paris, sub ann.* 1236.

PALLIO COOPERIRE. It was anciently a custom where children were born out of wedlock, and their parents afterwards intermarried, that those children, together with the father and mother, stood under a cloth extended while the marriage was solemnizing, which was in the nature of adoption; and by such custom, the children were taken to be legitimate. *Epist. Rob. Grosthead Episc. Lincoln.* Such children, however, were never legitimate in this country at Common Law, though the clergy wanted to have a law pass to render them legitimate. See *Bastard.*

PALL; PALLIUM, The pontifical vesture made of lambs' wool, in breadth not exceeding three fingers cut round that it may cover the shoulders; it has two labels or strings on each side, before and behind, and likewise four purple crosses on the right and left, fastened with pins of gold, whose heads are *Sapphire*: these vestments the Pope gives or sends to archbishops and metropolitans, and upon extraordinary occasions to other bishops; who wear them about their necks at the altar, above their other ornaments. The Pall was first given to the bishop of *Ostia*, by Pope *Marcus* the Second, *anno* 336.

Durandus, in his *Rationale*, tells us that it is made after the following manner, *viz.* The nuns of St. *Agnes* every year, on the feast-day of their saint, offer two white lambs on the altar of their church, during the time they sing *Agnus Dei* in a solemn mass; which lambs are afterwards taken by two of the canons of the *Lateran* church, and by them given to the Pope's subdeacons, who put them to pasture till shearing time, and then they are shorn, and the Pall is made of their wool, mixed with other white wool; the Pall being thus made is carried to the *Lateran* church, and there placed on the high altar by the deacons of that church on the bodies of St. *Peter* and St. *Paul*; and after the usual watching, it is carried away in the night, and delivered to the subdeacons who lay it up safe. *Selden's Hist. Tithes* 227. See also *Cressy's Church Hist.* 972.

PALMISTRY, A kind of divination, practised by looking upon the lines and marks of the hands and fingers; being a deceitful art used by *Egyptians*, prohibited by *stat.* 1 & 2 *P. & M. c.* 4. See title *Egyptians.*

PAMPHLETS, Of a certain size, are among the articles liable to a stamp duty.

PANDECTS, The books of the Civil Law, compiled by *Justinian.* See title *Civil Law.*

PANDOXATRIX, An ale-wife who both brews and sells ale or beer; from *pandoxatorium*, a brewhouse, *Statut. & consuetud. burgi villæ de Montgom. temp. Hen.* 2.

PANEL, *panella, pannellum.*] According to Sir *Edward Coke*, denotes a little part; but *Spelman* says, that it signifies *schedula* vel *pagina*, a schedule or page; as a Panel of parchment, or a counterpane of an indenture; but it is used more particularly for a schedule or roll, containing the names of such jurors as the Sheriff returns to pass upon any trial. *Kitch.* 226: *Reg. Orig.* 223. And the impannelling a jury is the entering their names by the Sheriff into a Panel or little schedule of parchment; *in panello assisæ. Stat.* 8 *H.* 6. *c.* 12. See titles *Jury*; *Trial.*

PANES DE MANDATO; See *Mandato.*

PANETIA, A pantry, or place to set up cold victuals. *Cowell.*

PANIS ARMIGERORUM, The bread distributed to servants. *Mon. Angl.* i. 240.

PANIS BISUS, Coarse bread. *Mon. Angl.* i. 240.

PANIS BLACKWHYTLOF, Bread of a middle sort, between white and brown, such as in *Kent* is called *Ravel-bread.* In religious houses it was their coarser bread, made for ordinary guests, and distinguished from their household loaf, or *Panis conventualis*, which was pure manchet, or white bread. *Cowell.*

PANIS MILITARIS, Hard biscuit, brown George, camp bread, coarse and black. The prior and convent of *Ely* grant to *John Grove*, a corody or allowance,—*Ad suum victum quolibet die unum panem monachalem, i. e.* a white loaf; and to his servant *unum panem nigrum militarem, i. e.* a little brown loaf or biscuit. *Cartular. Ely. MS. f.* 47.

PANNAGE, or PAWNAGE, *pannagium*, Fr. *Pasnage.*] That food which the swine feed upon in the woods, as mast of beech, acorns, &c. Also it is the money taken by the *Agisters* for the food of hogs in the King's forest. *Cromp. Jurisd.* 155 *Stat. West.* 2. 13 *E.* 1. *st.* 1. *c.* 25. *Manwood* says *pannage* signifies most properly the mast of the woods or hedge rows. And see *Linwood.* It is mentioned in the statute 20 *Car.* 2. *c.* 3. And in ancient charters this word is variously written; as *pannagium, pasnagium, pathnagium, paunagium & pessona.* See 8 *Rep.* 47.

PANNUS, A garment made with skins. *Fleta, lib.* 2. *cap.* 14.

PANTILES, Are among the articles liable to certain duties of excise.

PAPER. The duties on this article, form a very productive branch of the public revenue, and are under the survey of the Commissioners of *Excise.* See that title, and titles *Customs*; *Books*, &c.

PAPER-BOOKS, The issues in actions, &c. upon special pleadings, made up by the clerk of the Papers, who is an officer for that purpose. Upon an issue in law, it is termed the *Demurrer-book.* The clerks of the Papers of the Court of King's Bench, in all copies of pleas and Paper-books by them made up, shall subscribe to such Paper-books, the names of the counsel who have signed such pleas, as well on the behalf of the plaintiff as defendant; and in all Paper-books delivered to the judges of the Court, the names of the counsel who did sign those pleas are to be subscribed to the books, by the clerks or attornies who deliver the same. *R. Pasch.* 18 *Car.* 2: 2 *Lill. Abr.* 268. See titles *Issue*; *Practice*; *Pleading.*

PAPER-OFFICE, An ancient office within the palace of *Whitehall*, wherein all the public Papers, writings, matters of state and council, letters, intelligences, negotiations of the King's ministers abroad, and generally, all the Papers and dispatches that pass through the offices of the two principal Secretaries of State, are lodged and transmitted, and there remain disposed in the way of library. There is also an office belonging to the Court of King's Bench so called. *Dict.*

PAPISTS,

PERSONS *professing the* Popish *religion*; now, more liberally, distinguished by the denomination of ROMAN-CATHOLICS.

The word *Papist* seems to be considered by the Roman-Catholics themselves as a nick-name of reproach, originating in their maintaining the supreme ecclesiastical (and heretofore temporal) power of the *Pope, Papa*.—For this reason, probably, the word Papist is not to be found in the Index to a most valuable production by a gentleman of that persuasion; though in one of the notes on the work he has given perhaps a more clear and explicit summary of the law on this subject, than has any where else appeared; and which is therefore here introduced, corrected from some trifling errors, and modified so as to answer the present purpose. See 1 *Inst*. 391, *a*. in *the Notes*, and the words *Roman-Catholics* in the Index to the Notes. See also 4 *Comm. c*. 4, and Mr. *Christian's Notes there*.

As to papal provisions, and papal process, see this Dictionary, title *Præmunire*.

I. *Of the Laws passed against Papists since the Reformation*.

And herein,

1. *Of the Penalty on Papists for exercising their religious Worship; including the Laws respecting their Places of Education, and Ministers, or as they are usually termed Priests*.
2. *Of the Penalties for not conforming to the Established Church*; and see this Dictionary, title *Non-conformists*.
3. *Of the Penalties for refusing to take the Oath of Supremacy, and the Declaration against Popery*. [With respect to the not taking the Sacrament, and the Declaration against Transubstantiation, see this Dictionary, title *Non-conformists*, as regards the Corporation and Test Acts.]
4. *Of the Laws affecting the Landed Property of Papists*.

II. *Of the Laws past in the present Reign* (Geo. III.) *to relieve the Papists*.

III. *Of the comparative Situations of Papists and Protestant Dissenters; and of the Disabilities to which the former are still liable*. [As relates to the Operation of the Corporation-Act and Test-Act, see title *Non conformists*.]

I. 1. By various statutes, if any *English* priest of the church of *Rome*, born in the dominions of the Crown of *England*, came to *England* from beyond the seas, or tarried in *England* three days without conforming to the church, he was guilty of high treason; and they also incurred the guilt of high treason who were reconciled to the see of *Rome*, or procured others to be reconciled to it. By these laws also Papists were totally disabled from giving their children any education in their own religion. If they educated their children at home, for maintaining the schoolmaster, if he did not repair to church, or was not allowed by the bishop of the diocese, they were liable to forfeit 10*l*. a month, and the schoolmaster was liable to forfeit 40*s*. a day; if they sent their children for education to any school of their persuasion abroad, they were liable to forfeit 100*l*. and the children so sent were disabled from inheriting, purchasing, or enjoying any lands, profits, goods, debts, duties, legacies, or sums of money.—Saying mass was punishable by a forfeiture of 200 marks: hearing it, by a forfeiture of 100. See *stats*. 1 *Eliz. c*. 2: 23 *Eliz. c*. 1: 27 *Eliz. c*. 2: 29 *Eliz. c*. 6: 35 *Eliz. c*. 2: 2 *Jac*. 1. *c*. 4: 3 *Jac*. 1. *cc*. 4, 5: 7 *Jac*. 1. *c*. 6; 3 *Car*. 1. *c*. 2: 25 *Car*. 2. *c*. 2: 7 & 8 *W*. 3. *c*. 27: 1 *Geo*. 1. *st*. 2. *c*. 13.

By *stat*. 11 & 12 *W*. 3. *c*. 4, where the parents of Protestant children are Papists, the Lord Chancellor may take care of the education of such Protestant children, and make order for their maintenance suitable to the ability of the parent.

2. Under this head are to be classed those laws which are generally called the Statutes of Recusancy. It should be observed, that absence from church alone and unaccompanied by any other act, constitutes Recusancy, in the true sense of that word. Till the *stat*. 35 *Eliz. c*. 2, all Non-conformists were considered as Recusants, and were all equally subject to the penalties of Recusancy; that statute was the first penal statute made against Popish Recusants, by that name, and as distinguished from other Recusants. From that statute arose the distinction between *Protestant* and *Popish* Recusants; the former were subject to such statutes of Recusancy as preceded that of the 35th of *Elizabeth*, and to some statutes against Recusancy made subsequently to that time; but they were relieved from them all by the act of Toleration, *stat*. 1 *W*. & *M*. *st*. 1. *c*. 18. From the *stat*. 35 *Eliz c*. 2, arose also the distinction between Papists or persons professing the Popish religion, in general, and Popish Recusants, and Popish Recusants Convict. Notwithstanding the frequent mention, in the statutes, of Papists or persons professing the Popish religion, neither the statutes themselves, nor the cases adjudged upon them, present a clear notion of the acts or circumstances that, in the eye of the law, constituted a Papist, or a person professing the Popish religion. When a person of that description absented himself from church, he came under the legal description of a Popish Recusant; when he was convicted in a Court of law of absenting himself from church, he was termed a Popish Recusant Convict; to this must be added the constructive Recusancy, incurred by a refusal to take the Oath of Supremacy. With respect to the statutes against Recusancy; by these statutes, Popish Recusants Convict were punishable by the censures of the church, and by a fine of 20*l*. for every month during which they absented themselves from church; they were disabled from holding offices or employments; from keeping arms in their houses; from maintaining actions or suits at law, or in equity; from being executors or guardians; from presenting to advowsons; from practising in the law or physic; and from holding offices civil or military; they were subject to the penalties attending excommunication; were not permitted to travel five miles from home, unless by licence, upon pain of forfeiting all their goods; and might not come to Court under pain of 100*l*. [No marriage or burial of such Recusant, or baptism of his child, should be had otherwise than by ministers of the church of *England*, under severe penalties imposed by *stat*. 3 *Jac*. 1. *c*. 5.]

A married

A married woman, when convicted of Recusancy, was liable to forfeit two thirds of her dower or jointure. She could not be executrix or administratrix to her husband, nor have any part of his goods; and during her marriage she might be kept in prison, unless her husband redeemed her at the rate of 10*l.* a month, or the third part of his lands; Popish Recusants Convict were, within three months after conviction, either to submit and renounce their religious opinions, or, if required by four justices, to abjure the realm; and if they did not depart, or if they returned without licence, they were guilty of felony, and were to suffer death as felons. See the statutes referred to under the former head; and, for the cases applicable to them, this Dictionary, title *Recusant*.

3. It must be premised, that the Roman-Catholics make no objection to take the Oath of Allegiance in *stat.* 1 *Geo.* 1. *st.* 2. *c.* 13; or the Oath of Abjuration in *stat.* 6 *Geo.* 3. *c.* 53.—With respect to the Oath of Supremacy, by *stat.* 1 *Eliz.* *c.* 1, the persons therein mentioned were made compellable to take the Oath of Supremacy contained in that act: by *stat.* 3 *Jac.* 1. *c.* 4, another oath was prescribed to be taken, commonly called the Oath of Allegiance and Obedience; these oaths were abrogated by *stat.* 1 *W.* & *M.* *st.* 1. *c.* 8; and a new Oath of Allegiance and a new Oath of Supremacy were introduced, and required to be taken in their stead; the *stat.* 1 *Geo.* 1. *st.* 2. *c.* 13, contains an Oath of Supremacy, in the same words as the Oath of Supremacy required to be taken by *stat.* 1 *W.* & *M.* *st.* 1. *c.* 8. By that oath persons are made to swear, that "no foreign prince, person, prelate, State, or potentate, hath, or ought to have, any jurisdiction, power, supremacy, pre eminence, or authority, ecclesiastical or spiritual, within the realm." It was required to be taken by the persons therein named; it might be tendered to any person, by any two justices of the peace; and persons refusing the Oath so tendered were adjudged to be Popish Recusants Convict, and to forfeit and to be proceeded against as such. This was the constructive Recusancy referred to above. See also title *Oaths*. It was not the offence itself of Recusancy, which, as already observed, consisted merely in the party's absenting himself from church; it was the offence of not taking the Oaths of Supremacy, and the other Oaths prescribed by the *stat.* 1 *Geo.* 1. *st.* 2. *c.* 13, the refusal of which was, by that statute, placed on the same footing as a legal conviction on the statutes of Recusancy; and subjected the party refusing to the penalties of those statutes. This was the most severe of all the laws against Papists. The punishment of Recusancy was penal in the extreme; and the persons objecting to the oath in question might be subjected to all the penalties of Recusancy, merely by their refusing the oath when tendered to them. It added to the penal nature of these laws, that the oath in question might be tendered, at the mere will of two justices of peace, without any previous information or complaint, before a magistrate, or any other person. Thus by refusing to take the Oath of Supremacy, when tendered to them, they became liable to all the penalties of recusancy; and the same refusal, by *stats.* 7 & 8 *W.* 3. *c.* 4: 1 *Geo.* 1. *st.* 2. *c.* 13, restrained them from practising the law as advocates, barristers, solicitors, attornies, notaries, or proctors; and from voting at elections. With respect to the declaration against popery, the *stat.* 30 *Car.* 2. *st.* 2. *c.* 1, contains the declaration, and prescribes it to be made by members of either House of Parliament before they take their seats. By it, they declare their disbelief of the doctrine of transubstantiation, and their belief that the invocation of saints, and the sacrifice of the mass, are idolatrous.

4. How the landed property of Papists was affected by the laws against Recusancy has been already mentioned. By *stat.* 11 & 12 *W.* 3. *c.* 4, it was enacted, that a person educated in the Popish religion, or professing the same, who did not in six months, after the age of sixteen, take the Oaths of Allegiance and Supremacy, and subscribe the declaration prescribed by *stat.* 30 *C.* 2. *st.* 2. *c.* 1, should, in respect of himself only, and not of his heirs or posterity, be disabled to inherit or take lands by descent, devise, or limitation, in possession, reversion, or remainder; and that, during his life, till he took the oaths, and subscribed the declaration against Popery, his next of kin, who was a Protestant, should enjoy the lands, without accounting for the profits; and should be incapable of purchasing; and that all estates, terms, interests, or profits out of lands, made, done, or suffered to his use, or in trust for him, should be void.

By *stat.* 3 *Jac.* 1. *c.* 5: 1 *W.* & *M.* *c.* 26: 12 *Ann.* *st.* 2. *c.* 14: 11 *G.* 2. *c.* 17, Papists, or persons professing the Popish religion, were disabled from presenting to advowsons, and other ecclesiastical benefices, and to hospitals and other charitable establishments. By annual acts of the legislature, Papists being of the age of eighteen years, and not having taken the Oaths of Allegiance and Supremacy, were subjected to the burthen of the double land-tax. By *stat.* 1 *Geo.* 1. *st.* 2. *c.* 55, they were required to register their names and estates in the manner, and under the penalties, therein mentioned; and by *stat.* 3 *Geo.* 1. *c.* 18, continued by several subsequent statutes, an obligation of inrolling their deeds and wills was imposed on them. Such were the principal penal laws against Roman Catholics, at the time of the accession of the House of *Brunswick*.

The above summary of the laws against Papists is extracted from the publication of a Roman-Catholic; it is observable that it does not exactly tally with the enumeration made by *Blackstone*, in 4 *Comm.* *c.* 4; but it is presumed, the above statement is as correct as interest and conscience, two powerful incentives, could possibly make it. As an apology for the origin of these laws, the learned Commentator observes, that they are seldom exerted; and are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved, on a cool review, as a standing system of laws. The Student will perceive the necessity of their being recapitulated in this work; as most of them are now only repealed on certain conditions (see *post* II.), which, if not complied with, leave the Popish Recusant in a state, even yet by no means enviable; though, as it appears, absolutely necessary for the preservation of our constitution.

II. The only act of any importance which, till the reign of his present Majesty, was passed for thier relief, (and that operated but in an indirect manner for their benefit,) was *stat.* 3 *Geo.* 1. *c.* 18. On the construction of *stat.* 11 & 12 *W.* 3. *c.* 4, it had been held, that as it expressly confined the disability of Papists to take by

descent to themselves only, and preserved their heirs and posterity from its operation, it was not to be construed as preventing the vesting of the freehold and inheritance in them, in cases of descent, or transmitting them to their posterity; but that the disability respected only the pernancy of the profits, or beneficial property of the lands, of which it deprived them, during their non-conformity. Whether that part of the statute which relates to their taking by purchase should receive the same construction was a frequent subject of discussion, the statute being, in that branch of it, without any limitation. To remedy this, the said *stat.* 3 *Geo.* 1. *c.* 18, was passed; it enacts, that no sale for a full and valuable consideration, by the owner or reputed owner of any lands, or of any interest therein, theretofore made, or thereafter to be made, to a Protestant purchaser, shall be impeached, by reason of any disability of such Papist, or of any person under whom he claims, in consequence of *stat.* 11 & 12 *W.* 3. *c.* 4; unless the person taking advantage of such disability shall have recovered before the sale, or given notice of his claim to the purchaser; or before the contract for sale, shall have entered his claim at the quarter sessions, and *bona fide* pursued his remedy. The statute then recites the clauses of *stat.* 11 & 12 *W.* 3. *c.* 4, disabling Papists from purchasing; and afterwards enacts, that these clauses shall not be thereby altered or repealed, but shall remain in full force. This proviso is couched in such general words, that it created a doubt in some, whether it did not nearly frustrate the whole effect of the act. To this it was answered, that, notwithstanding the proviso, the enacting part of the statute was in full force, for the benefit of a Protestant purchaser; and that, the proviso operated only to declare that Papists themselves should not derive any benefit from the act, in any purchases they should attempt to make, under the foregoing clauses. This was considered the better opinion, and on the authority of it, many purchases of considerable consequence were made. See also *stat.* 6 *Geo.* 2. *c.* 5.

During the present reign, two statutes, each of great importance, have been passed in favour of the Roman-Catholics; by *stat.* 18 *Geo.* 3. *c.* 60, it was enacted, that so much of *stat.* 11 & 12 *W.* 3. *c.* 4, as related to the prosecution of Popish priests and jesuits, and imprisoning for life Papists who keep schools, or to disable Papists from taking by descent or purchase, should be repealed, as to all Papists, or persons professing the Popish religion, claiming under titles not thentofore litigated, who, within six months after the act passed, or their coming of age, should take the oath therein prescribed.

This is an oath expressive of allegiance to his Majesty, abjuration of the Pretender, renunciation of the Pope's civil power, and abhorrence of the doctrines of destroying, and not keeping faith with, heretics; and of deposing or murdering princes excommunicated by authority of the See of *Rome*.

Upon this statute a case was decided in Chancery, *Dec.* 18, 1783, *Bunting* v. *Williamson*. A bill had been filed, claiming an estate given to a person professing the Popish religion, by will, alleging the incapacity occasioned by *stat.* 11 & 12 *W.* 3. *c.* 4. The testator died many years before, and after his death a suit had been instituted by another person, who claimed as his heir at law, and that suit was depending at the time when the *stat.* 18 *Geo.* 3. *c.* 60, was passed; but was afterwards dismissed for want of prosecution. The plaintiff filed his bill some time after the act, claiming in right of his wife as heir at law. The defendants pleaded their title under the testator's will; and that the defendant, who was beneficially interested, having or claiming the estate under that will, had taken the oath prescribed by the act; and concluded with an averment, that the title had not been before litigated by the plaintiff, or any person under whom he claimed. The plaintiffs, on argument of the plea, contended, that the words *not hitherto litigated*, extended to the case then before the Court, because the title had been litigated, and was in litigation at the time the act passed. But the lords commissioners *Ashburst* and *Hotham* were clearly of opinion, that the plaintiff not having before litigated the title, nor claiming under any person who had litigated it, the case of the defendants was within the benefit of the act, notwithstanding the prior litigation; and the plea was allowed.

The *Stat.* 31 *Geo.* 3. *c.* 32, has afforded the most effectual relief yet bestowed on the Roman-Catholics. That statute may be divided into six parts: the 1st contains the declaration and oath afterwards referred to in the body of the act, and prescribes the method of taking it: the 2d is a repeal of the statutes of Recusancy, in favour of persons taking the oath thereby prescribed: the 3d is a toleration, under certain regulations, of the religious worship of the Roman-Catholics, qualifying in like manner, and of their schools for education: the 4th enacts, that in future no one shall be summoned to take the Oath of Supremacy prescribed by *stats.* 1 *W.* & *M. st.* 1. *c.* 8: 1 *Geo.* 1. *st.* 2. *c.* 13: or the declaration against transubstantiation required by *stat.* 25 *Car.* 2. *c.* 2; that the *stat.* 1 *W.* & *M. st.* 1. *c.* 9, for removing Papists, or reputed Papists, from the cities of *London* and *Westminster* shall not extend to Roman-Catholics taking the appointed oath; and that no peer of *Great Britain* or *Ireland*, taking that oath, shall be liable to be prosecuted for coming into his Majesty's presence, or into the Court or house where his Majesty resides, under *stat.* 30 *Car.* 2. *st.* 2 *c.* 1. The 5th part of the act repeals the laws requiring the deeds and wills of Roman-Catholics to be registered or inrolled: the 6th excuses persons acting as counsellors at law, barristers, attornies, clerks, or notaries, from taking the Oath of Supremacy or the declaration against transubstantiation.

To state this statute something more particularly: Roman-Catholics, who are willing to comply with the requisitions contained in it, must appear at some of the Courts at *Westminster*, or at the Quarter Sessions held for the county, city, or place where they shall reside, and shall make and subscribe a declaration, that they profess the Roman-Catholic religion; and also an oath, which is nearly similar to that required by *stat.* 18 *Geo.* 3. *c.* 60, the substance of which is stated above; the chief difference in the oath is, that the words of that in *stat.* 31 *Geo.* 3. *c.* 32, are stronger, and more adapted to present times and circumstances, and probably intended to be less liable to equivocation or evasion. Of this declaration and oath being duly made by any Roman-Catholic, the officer of the Court shall grant him a certificate; and such officer shall yearly transmit to the Privy Council, lists of all persons who have thus qualified themselves

ſelves within the year in his reſpective Court. The ſtatute then provides, that a Roman-Catholic thus qualified ſhall not be proſecuted under any ſtatute for not repairing to a pariſh church, nor ſhall he be proſecuted for being a Papiſt, nor for attending or performing maſs or other ceremonies of the church of *Rome*; provided that no place ſhall be allowed for an aſſembly to celebrate ſuch worſhip until it is certified to the Seſſions; nor ſhall any miniſter officiate in it until his name and deſcription are recorded there. And no ſuch place of aſſembly ſhall have its doors locked or barred during the time of meeting or divine worſhip.

And if any Roman-Catholic whatever is elected conſtable, churchwarden, overſeer, or into any parochial office, he may execute the ſame by a deputy, to be approved as if he were to act for himſelf as principal. But every miniſter who has qualified ſhall be exempt from ſerving upon juries, and from being elected into any parochial office. And all the laws for frequenting divine ſervice on *Sundays* ſhall continue in force; except where perſons attend ſome place of worſhip allowed by this ſtatute, or the Toleration Act of the *Diſſenters*; *ſtat.* 1 *W.* & *M.* *ſt.* 1. *c.* 8.

And if any perſon diſturb a congregation allowed under this act, he ſhall, as for diſturbing a diſſenting meeting, be bound over to the next ſeſſions, and, upon conviction there, ſhall forfeit 20*l.*

No Roman-Catholic miniſter ſhall officiate in any place of worſhip having a ſteeple and a bell, or at any funeral in a church or church-yard, or ſhall wear the habits of his order, except in a place allowed by this ſtatute, or in a private houſe where there ſhall not be more than five perſons beſides the family. This ſtatute ſhall not exempt Roman-Catholics from the payment of tithes, or other dues, to the church; nor ſhall it affect the ſtatutes concerning marriages, or any law reſpecting the ſucceſſion to the Crown. No perſon who has qualified ſhall be proſecuted for inſtructing youth, except in an endowed ſchool, or a ſchool in one of the *Engliſh* Univerſities; and except alſo, that no Roman-Catholic ſchoolmaſter ſhall receive into his ſchool the child of any Proteſtant father; nor ſhall any Roman-Catholic keep a ſchool until his or her name be recorded as a teacher at the ſeſſions.

No religious order is to be eſtabliſhed; and every endowment of a ſchool or college by a Roman-Catholic ſhall ſtill be ſuperſtitious and unlawful.

The firſt part of the above act gives riſe to two obſervations. The declaration preſcribed by the act is contained in theſe words: "I. *A. B.* do hereby declare, that I do profeſs the Roman-Catholic religion." Till the paſſing of this act, the perſons who were the ſubject of it were known in the *Engliſh* law by the name of Papiſts, reputed Papiſts, or perſons profeſſing the Popiſh religion. By requiring this declaration from them, the law has impoſed on them, and probably will in future recogniſe them by, the name of Roman-Catholics. Still, when the antient penal laws againſt them are to be mentioned with profeſſional accuracy, it ſeems abſolutely neceſſary to mention them under the name applied to them by the abrogated law. The other obſervation is of more importance. As the bill was originally framed, and as it ſtood, when, having paſſed the Commons, it was brought into the Houſe of Lords, the firſt clauſe in it directed, that the oath contained in the *ſtat.* 18 *Geo.* 3. *c.* 60, ſhould be taken no longer; but that the oath appointed by the bill ſhould, in future, be adminiſtered in its ſtead, and ſhould give the ſame benefits and advantages, and ſhould operate to the ſame effects and purpoſes, as the oath contained in the ſtatute 18 *Geo.* 3. *c.* 60. This clauſe was altered, in the Houſe of Lords, to the form in which it now ſtands. It does not expreſs that the oath contained in it ſhall entitle the perſons taking it to the benefits of the *ſtat.* 18 *Geo.* 3. *c.* 60, it only expreſſes that it ſhall be lawful for Catholics to take the oath preſcribed at the places and times, and in manner, therein mentioned. Thus it is very uncertain whether perſons taking only the oath preſcribed by the *ſtat.* 31 *Geo.* 3. *c.* 32, will be entitled to the benefit of the *ſtat.* 18 *Geo.* 3. *c.* 60, ſo as to be relieved from the penalties and diſabilities from which the perſons taking the oath preſcribed by that act were releaſed by it. The chief of theſe penalties and diſabilities were thoſe inflicted by *ſtat.* 11 & 12 *W.* 3. *c.* 4, which diſabled them from taking by deſcent or purchaſe. From theſe penalties and diſabilities they are expoſed to much real grievance. It ſeems, therefore, adviſable for every Roman-Catholic, who wiſhes to be ſecure in the enjoyment of his landed property, to take both the declaration and oath preſcribed by the *ſtat.* 31 *Geo.* 3. *c.* 32; and the oath preſcribed by the former *ſtat.* 18 *Geo.* 3. *c.* 60.

As to the double land-tax, that, being impoſed by the annual land-tax act, a repeal of it could not be effected by any proſpective act. It is repealed, by omitting from the annual land-tax act the clauſe impoſing it. The land-tax act of the year 1794 contains alſo a clauſe, which, after reciting that lands formerly liable to a double aſſeſſment were then poſſeſſed by Proteſtants, enacted, that where any place, in conſequence of that circumſtance, ſhould be rated at more than four ſhillings in the pound, the commiſſioners might, on application, examine into the truth of the complaint, and certify the ſame to the barons of the Exchequer, before the 29th of the following *September*, who were to diſcharge the exceſs by the following *November*.

III. The Statute 1 *W.* & *M.* *ſt.* 1. *c.* 18, (commonly called the *Toleration-Act*,) exempts all Diſſenters, except Papiſts and ſuch as deny the Trinity, from all penal laws relating to religion; provided they take the Oaths of Allegiance and Supremacy, and ſubſcribe the declaration againſt Popery, and repair to ſome congregation regiſtered in the Biſhop's Court, or at the Seſſions. But there is nothing in this act which diſpenſes either with the Teſt-Act or the Corporation-Act, ſo far as they impoſe the obligation of receiving the ſacrament of our Lord's Supper on perſons ſerving in offices, or elected to ſerve in corporations; and there is nothing in the ſtatute 31 *Geo.* 3. *c.* 32, which diſpenſes Catholics from that obligation, in caſe of their ſerving in offices, or being admitted into corporations. With reſpect therefore to the Teſt-Act and Corporation-Act, theſe are the only ſtatutes which ſubject the Proteſtant diſſenters to any penalties or diſabilities; to theſe the Roman-Catholics are ſubject equally with the Proteſtant diſſenters: there is, therefore, no penalty or diſability that affects the Proteſtant diſſenters, to which Roman-Catholics are

not subject equally; but there still remain several penalties and disabilities to which Roman-Catholics are subject, that do not in any respect whatever affect the Protestant Dissenters.

The principal of these are, that by *stat.* 30 *Car.* 2. *st.* 2. *c.* 1, Roman-Catholics, in consequence of refusing the Oath of Supremacy, or the declaration against Popery, *are disabled from sitting in either House of Parliament.* By *stat.* 7 & 8 *W.* 3. *c.* 27, those who refuse to take the Oath of Supremacy *are disabled from voting at elections*; and by several statutes, Roman-Catholics are disabled *from presenting to advowsons.* This latter is peculiar to them; Quakers, and even Jews, having the full enjoyment of the right of presentation. This restraint seems the more unnecessary, as no person can be presented to a living who has not been ordained according to the rites of the Church of *England.* Previously to his ordination he is examined on his faith and morals by his bishop; he takes the Oath of Allegiance and Supremacy, and subscribes the Thirty-nine Articles; and previously to his admission, he subscribes the three articles respecting the Supremacy, the Common Prayer, and the Thirty-nine Articles; and he makes the Declaration of Conformity. By the Act of Conformity, *stat.* 13 & 14 *Car.* 2. *c.* 4, he is bound to use the Common Prayer, and other rites and ceremonies of the Church of *England.*

Under the *stat.* 3 *Jac.* 1. *c.* 5, which disables Popish Recusants Convict from presenting to benefices, it has been adjudged, that the person is only disabled to present; and that he continues patron to all other purposes. *Cawley* 230. That such a person, by being disabled to grant an avoidance, is not hindered from granting the advowson itself, in fee, or for life, for good consideration. 1 *Jon.* 19, 20. And that if an advowson or avoidance belonging to a Papist come into the King's hands, by reason of an Outlawry, or conviction of Recusancy, &c. the King, and not the Universities, shall present. 1 *Jon.* 20: *Hob.* 126. But where a presentment is vested in the University, at the time when the church becomes void, it shall not be divested again by the patron's conforming, &c. 10 *Rep.* 57.

Grants of advowsons, or right of presentation to churches, &c. by any Papists, or person anywise in trust for him, to be void, except made for valuable consideration to some Protestant purchaser, for the benefit of a Protestant only; and persons claiming under such grant shall be deemed as trustees for a Papist, and they and their presentees be compelled to make discovery thereof, and the intent. See *stats.* 12 *Ann.* *st.* 2. *c.* 14: 11 *Geo.* 2. *c.* 17.

And bishops are required to examine parsons presented, on oath, before institution, whether the person presenting be the real patron, and made the presentation in his own right, or whether he be not a trustee for a Papist, &c. And if the parson presented refuse to be examined, his presentation shall be void.

Upon the Corporation-Act, it seems to have been the prevailing opinion, that the election of a person who did not comply with the requisites of that statute, and all the acts done by him, were void. To prevent the consequences of this, the *stat.* 5 *Geo.* 1. *c.* 6, was passed, intituled, "An Act for quieting and establishing Corporations;" by which it was enacted, that no incapacity, disability, forfeiture, or penalty should be incurred, unless the person were removed, or a prosecution against him commenced, within six months after his election. It was also enacted, that the acts of the person omitting to qualify should not be avoided. Upon this act an important question arose, whether dissenters, being ineligible to public offices, could be obliged to fine for not serving them. This point came to a direct issue, in the case of *Harrison* v. *Evans*, (see this Dictionary, title *Dissenters*,) when it was determined in favour of the dissenters. For the relief of those who omit to qualify for serving in offices, or for being elected into corporations, an act of parliament is past annually, by which, after mentioning the Corporation and Test Acts, and some others which do not relate to the point under consideration, it is enacted, that persons who, before the passing of the act, have omitted to qualify in the manner prescribed by those acts, and who shall properly qualify before the 25th of the ensuing *December*, shall be indemnified against all penalties, forfeitures, incapacities, and disabilities; and their elections, and the acts done by them, are declared to be good. There is nothing in this act which excludes Catholics from the benefit of it.

By the *Militia Act*, it is enacted, that no person shall be inrolled in the militia unless he takes the following oath: "I, *A. B.* do sincerely promise and swear, that I will be faithful and bear true allegiance to his Majesty King *George*, his heirs and successors. And I do swear, *that I am a Protestant*, and that I will faithfully serve in the militia, within the kingdom of *Great Britain*, for the defence of the same, during the time for which I am inrolled, unless I shall be sooner discharged." It seems to deserve consideration, whether, under the existing laws, Catholics may not claim to be exempted from serving in the militia, upon the same ground as, in the case of *Harrison* v. *Evans*, the Protestant dissenters claimed, and were allowed, to be exempted from the obligation of serving in offices, *viz.* That by law they are ineligible, and consequently are not compellable to fine for not serving.

With respect to the right of Roman-Catholics to serve on *Juries*, there does not appear to have ever been any law which subjected them to any such disability, except the statutes generally called the Statutes of Recusancy. The *stat.* 13 *Car.* 2. *st.* 2. *c.* 1, commonly called the Corporation-Act, relates to those offices only which concern the government of cities and corporations. The *stat.* 25 *Car.* 2. *c.* 2, commonly called the Test-Act, since explained by *stat.* 9 *Geo.* 2. *c.* 26, regards only civil and military offices. Neither of these acts, therefore, abridges Catholics of the right in question. With respect to the statutes of Recusancy, among other penalties to which these subjected Popish Recusants Convict, one was, that they became liable, upon conviction, to all the consequences of excommunication; and it has been generally understood, that persons excommunicated are disabled from serving on juries. It has been already observed, that, in the proper sense of the word, not attending the service of the Church of *England* alone, and unaccompanied by any other circumstance, constitutes Recusancy. Of this non-attendance at church every Roman-Catholic, necessarily, was guilty, and he might be convicted of it by a very summary process. But till his

guilt

guilt was established in a judicial manner, the law did not take notice of it; and therefore, unless an actual conviction had taken place, he was not subject to any of the penalties consequent on Recusancy. But it has been mentioned, that there was, besides this, a species of constructive Recusancy, to which every Catholic was liable, by refusing to make the declaration against Popery, and to take the Oath of Supremacy. This had a more direct operation on their ability to serve as Jurors. Now, as well the declaration against Popery as the Oath of Supremacy might be tendered to a Catholic in the very Court where he presented himself to serve as a juryman: A refusal amounted to conviction; on conviction he became subject to all the penalties of excommunication, and one of those penalties, (at least, by the opinion of the old lawyers,) was a disqualification to serve on juries. Thus, it was always in the power of the Court, and perhaps of any two Magistrates present, to convict, on the spot, a Catholic of Recusancy, and thereby render problematical at least his capacity to serve as a juror. Such appears to have been the situation of Catholics, in this respect, previously to the *stat.* 31 *G.* 3. *c.* 32. Since the passing of that act, they stand, as to the serving upon juries, in the same predicament as the rest of his Majesty's Subjects. By that statute, they are freed from the penalties incident either to positive or to constructive Recusancy. It has been stated, that ministers of Roman-Catholic congregations are exempted from serving on juries, by § 8 of the statute; it seems to follow, therefore, that, without this clause, they would have been liable to serve; and consequently, that all persons out of the reach of this clause are in the eye of the law subject to the duty, and have, of course, the capacity of serving.

It has been heretofore said, that persons convicted of Popish Recusancy may be taken up by the writ *de excom. capiend.*, and shall not be admitted as competent *witnesses* in a cause: but this seems to be carried beyond the intent of the statute. 2 *Bulst.* 155, 156.

With respect to the right of Roman-Catholic merchants to be summoned to the meetings of *British* factories abroad, it appears, that they have, and always had, a right to be admitted to them. The meetings of the factory in *Portugal* were regulated by *stat.* 8 *Geo.* 1. *c.* 17, but that act contains nothing which discriminates Roman-Catholic from other merchants. All the foreign factories are, therefore, in this respect, in the same predicament. Now, if Roman-Catholics are excluded from factories by any act, it must be either by the Corporation-Act or by the Test-Act. But with respect to the Corporation Act, it is to be observed, that a factory is not a corporation, in the legal acceptation of that word; and even if it were, it would not fall within the operation of the Corporation Act, as that is confined to cities, corporations, &c. within *England* and *Wales*, and the town of *Berwick upon Tweed*. The operation of the Test Act is more extensive than the operation of the Corporation-Act; it expressly mentions his Majesty's Navy, the islands of *Jersey* and *Guernsey*, and persons who should be admitted into any service or employment in his Majesty's or the Prince of *Wales*'s household within the districts therein mentioned. A factory abroad does not, therefore, fall within the operation of that act. Besides, the privilege of being admitted to the meetings of a foreign factory is not an office, or even a right, of that description which falls within either of those acts. There is reason to suppose, that, in point of fact, Roman-Catholics have not generally been summoned to attend meetings of factories since the year 1720. But the operation and tendency of the laws against Catholics seem to have been such as induced them to forbear asserting some of their most valuable rights, even such as were of the most indisputable nature, rather than obtrude themselves into public notice. If they wish to enforce their right of admission, or their right of voting, they should give notice of their desire to be summoned, and offer to attend at the meetings; then, if admittance should be refused them, or their votes rejected, the proceedings will be illegal; and not only they, but all other persons subject to the proceedings of the factory, will be justified in refusing to pay their contribution-money, or to comply in any other manner with the resolutions or orders of the meeting. Besides, a refusal to admit them to the meetings is certainly a personal injury; and wherever a personal injury is done to an *English* Subject abroad, the remedy must be sought in the jurisdiction where the cause of action happens, if it is subject to the King's jurisdiction; if the King has no jurisdiction in that place, this necessarily gives the King's Court a jurisdiction, within which it is brought, by the known fiction of laying the venue in some county of *England*. This is explained by Lord *Mansfield*, in his argument in *Fabrigas* v. *Mostyn*, *Cowp.* 170: See also *Phillybrown* v. *Ryland*, *Stra* 624: *Ld. Raym.* 1388: 8 *Mod.* 354. And as to the general principle of such an action, see *Ashby* v. *White*, 6 *Mod.* 45: 1 *Salk.* 19: 3 *Bro. Parl. Ca.*: and this Dictionary, title *Parliament*, VI. B. 3.

What has been said of the right of Roman Catholics to insist on being admitted to the meetings of *English* factories abroad, and of their means of redress, in case of refusal, applies, with proper qualifications, to every other case, of a similar description, where their right of admission, acting, or voting, is refused them.

With respect to the right of Roman-Catholics to hold offices exercisable abroad, it has been observed, that the Corporation Act extends only to cities, &c. within *England* and *Wales*, and the town of *Berwick upon Tweed*; that the Test Act mentions only those places, and his Majesty's Navy, and *Jersey* and *Guernsey*; and that the *stat.* 31 *Geo.* 3. *c.* 32, repeals the statutes of Recusancy, and relieves Roman-Catholics from the penalties imposed on them for refusing the Oath of Supremacy, and the declaration against Popery: it seems therefore to follow, that there is now in force no law which disables Roman-Catholics from holding offices wholly exercisable abroad, or from serving or holding offices under the *East-India* Company, in their foreign possessions. Besides, upon the construction of these laws, and every other law supposed to affect the Roman-Catholics, there seems reason to think, that the same spirit which induced the Legislature to repeal so large a proportion of the penal code against them, will influence the judicature in their construction of the unrepealed part of that code, or of any other statute unfavourable to them, in its apparent tendency or operation, so far as it may be open to a doubtful interpretation.

PAR, A term in Exchange, where a man to whom a bill is payable receives of the acceptor just so much in value, *&c.* as was paid to the drawer by the remitter. *Merch. Dict.* And in exchange of money, Par is defined to be a certain number of pieces of the coin of one country, containing in them an equal quantity of silver to that of another number of pieces of the coin of some other country; as where thirty-six shillings of the money of *Holland* have just as much silver as twenty shillings *English* money; and bills of exchange drawn from *England* to *Holland*, at the rate of thirty-six shillings *Dutch*, for each pound sterling, is according to the Par. *Locke's Consid. of Money* 18.

PARACIUM, The tenure between parceners, *viz.* that which the youngest oweth to the eldest. *Domesday.*

PARAGE, *paragium.*] Equality of name, blood, or dignity; but more especially of land, in the partition of an inheritance between coheirs: hence comes to disparage and disparagement. *Co. Litt.* 166. *Paragium* was also commonly taken for the equal condition betwixt two parties, to be contracted in marriage; for the old laws did strictly provide, that young heirs should be disposed in matrimony *cum paragio*, with persons of equal birth and fortune, *sine disparagatione.* See title *Tenure.*

PARAMOUNT, From the French *par*, i. e. *per* and *monter*, ascendere.] Signifies in our law the highest lord of the fee, of lands, tenements, or hereditaments. *F. N. B.* 135.—As there may be a lord mesne, where lands are held of an inferior lord, who holds them of a superior under certain services; so this superior lord is lord Paramount: and all honours, which have manors under them, have lords Paramount. The King is said to be chief lord, or lord Paramount of all the lands in the kingdom. *Co. Litt.* 1. See title *Tenures.*

PARAPHARNALIA, or PARAPHERNALIA, from the *Greek* Παρὰ, *Præter*, and Φερνὴ *Dos.*] Those goods which a wife is entitled to [*secum fert*] over and above her dower or jointure, after her husband's death. See title *Baron and Feme* IV. 7.

PARASITUS, A domestic servant. *Blount.*

PARAVAIL, *per-availe.*] Tenant *Paravail* is the lowest tenant of the fee, or he who is immediate tenant to one who holdeth over of another; and he is called tenant Paravail, because it is presumed he hath profit and avail by the land. *F. N. B.* 135: 2 *Inst.* 296: 9 *Rep.* See title *Tenure.*

PARCELLA TERRÆ, A parcel of land; used in some ancient charters.

PARCEL-MAKERS, Two officers in the Exchequer that make the Parcels of the escheators' accounts, wherein they charge them with every thing they have levied for the King's use within the time of their being in office, and deliver the same to the auditors to make up their accounts therewith. *Practice Excheq.* 99.

PARCENERS,

QUASI *Parcellers*; i. e. *rem in parcellas dividentes.*] Persons holding lands in copartnership, and who may be compelled to make division. See *Litt.* § 241. These are of two sorts; *viz.* Parceners according to the course of the Common Law; and Parceners according to custom.

I. *Of the Nature of an Estate in Parcenary, or Coparcenary.*

II. *How such Estate may be parted or dissolved, and the Consequences thereof.*

I. PARCENERS by the Common Law, are where a man or woman seised of lands or tenements in fee-simple or fee-tail hath no issue but daughters, and dieth, and the tenements descend to such daughters, who enter into the lands descended to them, then they are called Parceners, and are but as one heir to their ancestor; and they are termed Parceners, because by the writ *de partitione faciendâ* the law will constrain them to make partition; though they may do it by consent, *&c.* *Litt.* 243: 1 *Inst.* 164. And if a man seised of lands in fee-simple, or in tail, dieth without any issue of his body begotten, and the lands descend to the sisters, they also are Parceners; and in the same manner where he hath no sisters, but the lands descend to his aunts, or other females of kin in equal degree, they are also Parceners; but where a person hath but one daughter, she shall not be called Parcener, but daughter and heir, *&c.* *Litt.* § 242.

If a man hath issue two daughters, and the eldest hath issue divers sons and daughters, and the youngest hath issue divers daughters; the eldest son of the eldest daughter shall not inherit alone, but all the daughters of the youngest shall inherit, and the eldest son is coparcener with the daughters of the youngest sister, and shall have one moiety, *viz.* his mother's part; so that men descending of daughters may be Parceners as well as women, and shall jointly plead and be impleaded, *&c.* 1 *Inst.* 164. None are Parceners by the Common Law, but either females, or the heirs of females, who come to lands or tenements by descent. *Litt.* 254.

Parceners by custom is, where a person seised in fee-simple, or in fee-tail of lands or tenements of the tenure called *gavelkind*, hath issue divers sons, and dies; such lands shall descend to all the sons as Parceners by the custom, who shall equally inherit and make partition as females do, and writ of partition lies in this case, as between females, *&c.* *Litt.* § 265. Women Parceners make but one heir, and have but one freehold; but between themselves they have in judgment of law several freeholds, to many purposes; for one of them may enfeoff the other of her part; and the parcenary is not severed by the death of any of them; but if one dies, her part shall descend to her issue, *&c.* 1 *Inst.* 164, 165. If one Parcener make a feoffment in fee of her part, this is a severance of the coparcenary, and several writs of *præcipe* shall lie against the other Parceners and the feoffee. 1 *Inst.* 167. Though if two coparceners by deed alien both their parts to another in fee, rendering to them two, and their heirs, a rent out of the land, they shall have the rent in course of parcenary; because their right in the land out of which the rent is reserved was in parcenary. *Ibid.* 160.

If there be two Parceners, and each of them taketh husband, and have issue, and the wives die, the parcenary is divided, and here is a partition in law. 1 *Inst.* 160. Partition of lands held in tail, by the death of one sister without issue is made void, and the other sister as heir in tail will be entitled to the whole land, and may have writ of *formedon* where the other Parcener hath aliened.

aliened. *New Nat. Br.* 476. And a writ of *nuper obiit* lies for one Parcener deforced by another, &c. *F. N B.* 197.

If any Parceners or their issues be disseised, they must join in an assise against the disseisor; so if they have cause to bring any action of waste, &c. 1 *Inst.* 95, 198. Two Parceners are of land, one enters and claims the whole, and is disseised, she alone may maintain assise; but if the disseisin be of rent, the other Parceners must be named, or the writ shall abate. *Jenk. Cent.* 41, 42.

The possession of one Parcener, &c. of land, without an actual ouster, gives possession to the other of them. *Hob.* 120: *Dyer* 128. One Parcener may justify detaining the deeds, concerning the lands, against another, as they belong to one as well as the other. 2 *Roll. Abr.* 31.

Parceners are to make partition of the lands descended; and estates of coparcenary at Common Law are applicable only to inheritances: partition may be made between Parceners of inheritances which are entire and dividable, as of an advowson, rent-charge, or such like; but it is otherwise of inheritances which are not entire and indivisible, as of a piscary, common with out number, or such uncertain profits out of lands; for in such case the eldest Parcener shall have them, and the others have contribution from her out of some other inheritance left by the ancestor; but if there be no such inheritance, then the eldest shall have these uncertain profits for one time, and the youngest for another time. *Dyer* 153. See *post* II.

Parceners cannot make partition, so as for one to have the land for one time, and another for another, &c. for each is to have her part absolutely: but if an advowson descend to them, they may present by turns; and if there be a common, &c. which may not be divided, one may have it for one year, and another for another year, &c. 1 *Inst.* 164.

An advowson is an entire thing, and yet, in effect, the same may be divided betwixt Parceners, for they may present by turns; and if there be coparceners of an advowson appendant to a manor, and they make partition of the manor, without mentioning the advowson, the same is still appendant, and they may present by turns. 8 *Rep.* 79. If two Parceners be of an advowson, and they agree to present by turns, this is a good partition as to the possession; but it is not a severance of the estate of inheritance. 1 *Rep.* 87. And where there are coparceners of an advowson, the eldest hath privilege to present first; not in respect of her person, but estate: and if one Parcener hath a rent granted to her upon a partition made, to make her part equal with the other, she may distrain for the arrears of common right; and so shall the grantee of the rent, because it is not annexed to her person only, but to her estate. 3 *Rep.* 32. See *post* II.

In the case of coparceners of a title of honour the King may direct which one of them and her issue shall bear it; and if the issue of that one become extinct, it will again be in abeyance, if there are descendants of more than one sister remaining. But upon the failure of the issue of all, except one, the descendant of that one being the sole heir, will have a right to claim, and to assume the dignity.

There are instances of a title, on account of a descent to females, being dormant, or in abeyance, for many centuries. *Harg. Co. Litt.* 165.

Lord *Coke* says, there is a difference in an office of honour, which shall be executed by the husband or deputy of the eldest. *Ibid.* Yet when the office of Great Chamberlain had descended to two sisters, coheiresses of the Duke of *Ancaster*, one of whom was married to *Peter Burrell* Esq. the Judges gave it as their opinion in the House of Lords, "that the office belongs to both sisters; that the husband of the eldest is not of right entitled to execute it; and that both sisters may execute it by deputy, to be approved of by them; such deputy not being of a degree inferior to a knight, and to be approved of by the King." See *Bro. P. C.*

The *properties* of Parceners are in some respects like those of joint-tenants; they having the same unities of *interest, title,* and *possession.* They may sue and be sued jointly for matters relating to their own lands. *Co. Litt.* 164. And the entry of one of them shall in some cases enure as the entry of them all. *Co. Litt.* 188, 243. They cannot have an action of trespass against each other; but they differ from joint-tenants, in that that they are also excluded from maintaining an action of waste, 2 *Inst.* 403; for coparceners could at all times put a stop to any waste by writ of partition; but till the statute of *Hen.* 8, joint-tenants had no such power. See title *Joint-tenants.*

Parceners also differ materially from joint-tenants in four other points: 1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not Parceners but joint-tenants. *Litt.* § 254. And hence it likewise follows, that no lands can be held in coparcenary but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy.

2. There is no unity of *time* necessary to an estate in coparcenary: for if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or when both are dead, their two heirs are still Parceners; the estate vesting in them each at different times, though it be the same quantity of interest, and held by the same title. *Co. Litt.* 164, 174.

3. Parceners, though they have an *unity,* have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety, *Co. Litt.* 163, 4; and of course there is no *jus accrescendi,* or survivorship, between them, for each part descends severally to their respective heirs, though the unity of possession continues; and as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called Parceners. But if the possession be once severed by partition, they are no longer Parceners, but tenants in severalty; or if one Parcener aliened her share, though no partition be made, then no longer are the lands held in *coparcenary,* but in common. *Litt.* § 309: and see 2 *Comm. c.* 12. *p.* 187, 8.

II. Partition, between Parceners, may be made four ways: *viz. First,* When they themselves divide the lands equally into as many parts, as there are Parceners, and each chooses one share or part, the eldest first, and so one after another, &c.

Secondly,

Secondly, When they agree to choose certain friends to make division for them.

Thirdly, Partition by drawing lots, where having divided the lands into as many parts as there are Parceners, and written every part in a distinct scroll, being wrapt up, they each draw one.

And *fourthly*, Partition by writ *de partitione facienda*, which is by compulsion, where some agree to partition, and others do not; and when judgment is given on a writ of partition, it is that the Sheriff shall go to the land, and by the oaths of twelve men make partition between the parties, to hold to them in severalty, without any mention of preference to the eldest sister, &c. *Litt.* 248: 1 *Inst.* 164. But if there be a capital messuage on the land to be divided, the Sheriff must allot that wholly to the eldest of the Parceners. 1 *Inst.* 165. The partition, made and delivered by the Sheriff and jurors, ought to be returned into Court under the seal of the Sheriff, and the seals of the twelve jurors; for the words of the judicial writ of partition, which command the Sheriff to make partition, are *Assumptis tecum duodecim, &c. et partitionem inde scire facias justiciariis, &c. sub sigillo tuo et sigillis eorum per quorum sacramentum partitionem illam fecerit*, &c. If partition be made by force of the King's writ, and judgment thereof given, it shall be binding to all parties, because it is made by the Sheriff, by the oath of twelve men, by authority of law; and the judgment is, that the partition shall remain firm and stable for ever 1 *Inst.* 171.

Blackstone says, there are many methods of making partition, four of which are by consent, and one by compulsion; to which latter may now be added, or indeed for which may be substituted, the proceedings in a Court of equity to obtain a decree for partition. See this Dictionary, title *Joint-tenants* III. 2.

The four modes of partition by consent are thus stated by *Blackstone*: The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part, according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay, her husband, or her assigns, shall present alone, before the younger. *Co. Litt.* 166: 3 *Rep.* 22. And the reason given is, that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition, and therefore is merely personal; the latter, of presenting to the living, arises from the act of law, and is annexed not only to her person, but to her estate also. [It has been doubted whether the grantee of the eldest sister shall have the first and sole presentation after her death. *Harg. Co. Litt.* 166. But it was expressly determined in favour of such a grantee, in 1 *Ves.* 340.] A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio alterius est electio*. The fourth method is, where the sisters agree to cast lots for their shares.

But there are some things which are in their nature impartible. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance; or if that cannot be, then they shall have the profit of the thing by turns in the same manner as they take the advowson. *Co. Litt.* 164, 165.

There is yet another consideration attending the estate in coparcenary; that if one of the daughters has had an estate given with her in *frankmarriage* by her ancestor, (which is a species of estate-tail, freely given by a Relation for advancement of his kinswoman in marriage,) in this case, if lands descend from the *same* ancestor to her and her sisters, in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage in equal proportion with the rest of the lands descending. *Bract. l.* 2. *c.* 34: *Litt.* § 266—273. This is denominated bringing the lands into *hotch-pot*; *Britton, c.* 72; which term *Littleton* § 267, 8, thus explains: "It seemeth that this word *hotch pot* is, in *English*, a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together." By this housewifely metaphor our ancestors meant to inform us, that the lands, both those given in frankmarriage and those descending in fee-simple, should be mixed and blended together, and then divided in equal proportions among all the daughters. But this was left to the choice of the donee in frankmarriage; and if she did not choose to put her lands into hotch-pot, she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her other sisters. The law of hotch-pot took place then only, when the other lands descending from the ancestor were fee-simple; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotch-pot. *Litt.* § 274. And the reason is, because lands descending in fee-simple are distributed by the policy of law, for the maintenance of all the daughters, and if one has a sufficient provision out of the same inheritance equal to the rest, it is not reasonable that she should have more; but lands descending in tail are not distributed by the operation of the law, but by the designation of the giver, *per formam doni*; it matters not therefore how unequal this distribution may be. Also no lands but such as are given in frankmarriage shall be brought into hotch-pot, for no others are looked upon in law as given for the advancement of the woman, or by way of marriage portion. *Litt.* § 275. And therefore, as gifts in frankmarriage are fallen into disuse, the law of hotch-pot would not now deserve much notice, had not this method of division been revived and copied by the statute for distribution of personal estates. See this Dictionary, title *Executor* V. 9.

The estate in coparcenary may be *dissolved*, either by partition, which disunites the possession; by alienation of one Parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty. See 2 *Comm. c.* 12. *p.* 189, &c.

In a writ of partition, the judgment was *quod partitio fiat*; and before it was executed by the Sheriff, a writ

of

of error was brought; and it was adjudged that a writ of error doth not lie upon this first judgment, because this is not like other actions, where error lies before the *habere facias seisinam* is returned, and the judgment is final; but it is not so in this case, as there must be another judgment, *i. e. quod partitio stabilis maneat*, which cannot be till the partition is made, and returned by the Sheriff. *Hetley* 36: *Dyer* 67.

If there are two Parceners of a *manor*, and, on partition made, each hath demesnes and services allotted; in this case each is said to have a manor. 1 *Leon*. 26: *Davis* 61. A partition may not be made of franchises, as goods of felons, waifs, estrays, &c. which are casual. 5 *Rep*. 3.

Where two persons hold lands *pro indiviso*, and one would have his part in severalty, and the other refuseth to make partition by deed; there the writ *de partitione faciendâ* lies against him who refuses, directed to the Sheriff; and he *must be present* when the partition is made; and if it is objected before the return of the writ, that he was not present, he may be examined by the Court; but after the writ is returned and filed, it is too late. *Cro. Eliz*. 9.

A writ of partition was taken forth, and the Sheriff made partition, but was not upon the land; and on motion that the return might not be filed, but that a new writ might be awarded, because the Sheriff was not on the land, the Court staid the filing, and on examining the Sheriff, ordered a new writ. *Cro. Car*. 9, 10.

On writ of partition to the Sheriff to make partition of lands, part of the lands were allotted to one, and the jury would not assist the Sheriff to make partition of the other part; which appearing on the return of the writ, the Court was moved for an attachment against the jury, and a new writ to the Sheriff. *Godb*. 265. Partition was brought by tenant in fee of one moiety, against tenant for life of the other moiety, on the *stat*. 32 *Hen*. 8. *c*. 32. And though it has been resolved, if partition be made between one who hath an estate of inheritance, and another who hath a particular estate for life; that the writ ought to be framed upon the statute, and to be made special, setting forth the particular estate: yet it was held to be good where the writ was general. *Goldsb*. 84: 2 *Lutw*. 1015.

By *stat*. 8 & 9 *W*. 3. *c*. 31, a partition may be made of any estate of freehold, or for term of years, &c. of manors, lands, tenements, and hereditaments whereof the partition is demanded; and if after process of *pone* returned upon a writ of partition, and affidavit of notice given of the writ to the tenant to the action, and a copy left with the tenant in possession at least forty days before the return of the said *pone*, &c. there be no appearance entered in fifteen days; the demandant having entered his declaration, the Court may give judgment by default, and award a writ to make partition, whereby the demandant's part or purpart will be set out severally; which writ being executed after eight days' notice, and returned, and thereupon final judgment entered, shall conclude all persons, &c. But the Court may suspend or set aside the judgment, if the party concerned move the Court in a year, and shew good matter in bar. And by this statute, if the High Sheriff, by reason of distance, &c. *cannot be present* at the execution of any judgment in partition, then the Undersheriff *in the presence of two justices of peace of the county*, shall proceed to the execution of the writ by inquisition, and the High Sheriff is to make the return, &c. When the partition is made and returned, the persons who were tenants of the lands or any part thereof, before divided, shall continue tenants of the lands they held to the respective owners, under such conditions and rents as before; and no plea in abatement shall be admitted or received in any suit of partition; nor shall the same be abated by the death of any tenant, &c.

In a writ of partition the defendant pleaded, that he formerly brought writ of partition against the plaintiff, and had judgment to have partition: and held a good plea; but it was a question, whether it should be pleaded in bar or abatement, or by way of estoppel. *Dyer* 92. No damages can be recovered on a writ of partition, though the writ and declaration conclude *ad damnum*. *Hetl*. 35: *Noy* 143.

Where judgment for debt is had against one Parcener, the lands, &c. of both may be taken in execution; and the moiety undivided is to be sold, and then the vendee will be tenant in common with the other Coparcener: if the Sheriff seize only a moiety and sell it, the other Parcener will have a right to a moiety of that money. 1 *Salk*. 392. All partitions ought to be according to the quality and true value of the lands, and be equal in value: but if partition be made by Parceners of full age, and unmarried, and *sanæ memoriæ*, it binds them for ever, although the value be unequal, if it be made of lands in fee; and if it be of lands intailed, it shall bind the parties themselves for their lives, but not their issue, unless it be equal: if it be unequal, the issue of her who hath the lesser part, may, after her decease, disagree, and enter and occupy in common with the aunt; also if any be covert, it shall bind the husband, but not the wife, or her heirs; or if any be within age, it shall not bind the infant, but she may at her full age disagree, &c. 1 *Inst*. 166, 170: 2 *Lil. Abr*. 283. Though if a wife, after coverture, or the infant at her age, accept of the unequal part, they are concluded for ever. 1 *Inst*. 170. And where there be two Coparceners, and one hath seven daughters, and dieth; if the other Parcener releaseth to any one of the daughters her whole part, here, although she to whom the release is made, have not an equal part, the release is good. *Ibid*. 193. It hath been adjudged, that notwithstanding a partition is unequal, if it be by writ, it can not be avoided; but if it be by deed, it may be avoided by entry. 1 *Inst*. 171.

If the estate of a Parcener be in part evicted, that shall defeat the whole partition; partition implying a warranty and condition in law to enter upon the whole on eviction, as in case of exchange of lands. 1 *Inst*. 173: 1 *Rep*. 87. And if after partition, one of the parts is recovered from a Parcener by lawful title, she shall compel the others to make a new partition. *Cro. Eliz*. 902. But as to eviction of Parceners, if one sell her part, and then the part which the other Parcener hath, is evicted; in this case she who loseth her part, cannot enter on the alienee, for by alienation the privity is destroyed. 1 *Inst*. 173. Among Parceners, a partition upon the land may be good without deed; but not among joint-tenants, &c. *Dyer* 29, 194. See title *Joint-tenants*.

Form of a common Writ of Partition.

GEORGE *the Third*, &c. *to the Sheriff of* S. *greeting: If* A. B. *make you secure*, &c. *then summon* E. B. *that she be before*, &c. *to shew wherefore, whereas the said* A. B. *and* E. B. *together and undivided hold the manor of*, &c. *with the appurtenances, twenty messuages, one mill, one dove-house, twenty gardens, three hundred acres of land, two hundred acres of meadow, a hundred and fifty acres of pastures, one hundred acres of wood, two hundred acres of furze and heath, and twenty shillings rent, with the appurtenances of the inheritance which was of* N. B. *father of the said* A. B. *and* E. B. *whose heirs they are, in*, &c. *the said* E. B. *doth deny partition thereof to be made between them, according to the law and custom of* England, *and unjustly will not permit that to be done, as it is said: And have you there the summons and this writ. Witness*, &c.

PARCENARY, The holding of lands jointly by Parceners, when the common inheritance is not divided. *Litt.* 56.

PARCHMENT, Is one of the articles liable to a duty of excise; and, in case of deeds, &c. written on it, to stamps. See *Paper*.

PARCO FRACTO, A writ against him who violently breaks a pound, and takes out beasts from thence, which for some trespass done, &c. were lawfully impounded. *Reg. Orig.* 166. If a person hath authority to take beasts out of the pound, if he breaks the pound before he demands the cattle of the keeper thereof, and he refuseth or interrupts him in the taking of them, &c. the writ *Parco fracto* lies. *Dr. & Stud.* 112. Damages are recoverable in this writ; and the party may be punished, as for a pound-breach in the Court-leet. 1 *Inst.* 47: *F. N. B.* 100. The word *parcus* was frequently used for a pound to confine trespassing or straying cattle; whence *imparcare* to impound, *imparcatio* pounding, and *imparcamentum*, right of pounding, &c.

PARDON,

Pardonatio; venia.] The remitting or forgiving of an offence committed against the King; and is either *ex gratiâ Regis*, or by course of law. *Staundf. Pl. Cor.* 47.

Pardon *ex gratiâ Regis* is that which the King affords by virtue of his prerogative. See this Dictionary, title *Judges*. Pardon by course of law is that which the law in equity affords for a light offence; as casual homicide, when one killeth a man, having no such meaning. *West. Symbol. par.* 2. title *Indictments*, § 46.

The power of pardoning offences is inseparably incident to, and is the most amiable prerogative of, the Crown; and this high prerogative the King is entrusted with upon a special confidence, that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules; which the wisdom of man cannot possibly make so perfect as to suit every particular case. 1 *Show.* 284.

Anciently the right of pardoning offences, within certain districts, was claimed by lords, who had *jura regalia* by ancient grants from the Crown, or by prescription. But by *stat.* 27 *H.* 8. *cap.* 24. it was enacted, "That no person shall have power to pardon any treasons or felonies, nor any accessaries, nor outlawries; but that the King shall have the authority thereof, united to the Crown of this realm, as of right it appertaineth." *Co. Litt.* 114: 3 *Inst.* 233. And this power belongs only to a King *de facto*, and not to a King *de jure*, during the term of usurpation. *Bro. Abr.* title *Chamber de Pardon* 22.

The power of pardoning offences is stated by *Blackstone* to be one of the great advantages of Monarchy in general, above every other form of government; and which cannot subsist in Democracies. Its utility and necessity are defended by him, on all those principles which do honour to human nature. See 4 *Comm. c.* 31. *p.* 396, 7.

He then proceeds to consider Pardons under the following heads; a distribution here followed, as most convenient:

I. *The Object of Pardon; that is, in what Cases, and for what Offences, a Pardon may be granted; or not.*

II. *The Manner of pardoning; wherein how far a Pardon is grantable of common Right; and by what Words Offences may be pardoned.*

III. *The Method of allowing a Pardon.*

IV. *The Effect of such Pardon when allowed.*

I. The King may pardon all offences merely against the Crown, or the Public; excepting, 1; That, to preserve the liberty of the Subject, the committing any man to prison out of the realm is by the *habeas-corpus* act, *stat.* 31 *Car.* 2. *c.* 2, made a *præmunire*, unpardonable even by the King. Nor, 2; can the King pardon, where private justice is principally concerned in the prosecution of offenders: "*non potest rex gratiam facere cum injuriâ et damno aliorum.*" 3 *Inst.* 236. Therefore in criminal appeals of all kinds (which are the suit, not of the King, but of the party injured,) the prosecutor may release, but the King cannot pardon. *Ibid.* 237. Neither can he pardon a common nusance, while it remains unredressed, or so as to prevent an abatement of it; though afterwards he may remit the fine; because though the prosecution is vested in the King to avoid multiplicity of suits, yet, during its continuance, this offence savours more of the nature of a private injury to each individual in the neighbourhood, than of a *public* wrong. 2 *Hawk. P. C. c.* 37. § 33. Neither, lastly, can the King pardon an offence against a popular or penal statute, after information brought; for thereby the informer hath acquired a private property in his part of the penalty. 3 *Inst.* 338.

There is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments; *viz.* that the King's Pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of *Charles* II. the Earl of *Danby* was impeached by the House of Commons of high treason, and other misdemeanors, and pleaded the King's Pardon in bar of the same, the Commons alleged, "that there was no precedent, that ever any Pardon was granted to any person impeached by the Commons of high treason, or other crimes *depending the impeachment*;" and thereupon resolved, "that the Pardon so pleaded was illegal and void; and ought not to be allowed *in bar* of the impeachment of the Commons

Commons of *England*:" for which resolution they assigned this reason to the House of Lords; "that the setting up a Pardon to be a *bar* of an impeachment, defeats the whole use and effect of impeachments; for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the Government would be destroyed." *Com. Journ. 28th Apr.* 1679: 5 *May* 1679: 26 *May* 1679. Soon after the Revolution the Commons renewed the same claim, and *voted*, "that a Pardon is not *pleadable in bar* of an impeachment." And at length it was enacted by the Act of Settlement, *stat.* 12 & 13 *W.* 3. *c.* 2, "that no Pardon under the great seal of *England*, shall be *pleadable* to an impeachment by the Commons in Parliament." But, after the impeachment has been solemnly heard and determined, it is not understood that the King's royal grace is farther restrained or abridged; for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the Crown, and at length received the benefit of the King's most gracious Pardon; and a remarkable record is cited by Mr. *Christian*, *Rot. Parl.* 50 *E.* 3. *n.* 188; in which it is asserted by the King, and acknowledged by the Commons, that the King's prerogative, to pardon delinquents *convicted* on impeachment, is an antient as the Constitution itself.

It is laid down in general, that the King may pardon any offence, so far as the public is concerned in it, after it is over, consequently may prevent a popular action on a statute, by pardoning the offence before the suit is commenced; but it seems, that he cannot wholly pardon a public nusance, while it continues such, because such Pardon would take away the only means of compelling a redress; yet it is said, that such a Pardon will save the party from any fine, to the time of the Pardon. *Plowd.* 487: *Keilw.* 134: 12 *Co.* 29, 30: 3 *Inst.* 237: *Vaugh.* 333.

It seems agreed, that the King can by no previous licence, Pardon, or dispensation, make an offence *dispunishable*, which is *malum in se*; as being either against the law of nature, or so far against the public good as to be indictable at Common Law; and that a grant of this kind, tending to encourage the doing of evil, which it is the chief end of government to prevent, is against the common good, therefore void. *Dav.* 75: 5 *Co.* 35: 12 *Co.* 29: *Vide* 2 *Hawk. P. C. c.* 37: 3 *H.* 7. 15. *pl.* 30.

Where a thing, in its own nature lawful, was made unlawful by Parliament, it was formerly taken as a general rule, that the King might dispense with it, as to a particular time or place, or person, so far as the public was concerned in it; unless such dispensation could not but be attended with an inconvenience, as the introducing a monopoly; or frustrating the end for which the law was made; as the licensing a particular person to import foreign cards or wines, &c. in which case it was commonly taken to be void; also, where a statute gave a particular interest, or right of action to the party grieved, it was always agreed, that no charter from the King, could bar the right of the party, grounded on such statute; also where a statute was express, that the King's charter against the purport of it, though with the clause of *non obstante*, should be void; it seems to have been always generally agreed, that regularly no such clause could dispense with it. 2 *Hawk. P. C. c.* 37. § 28.

It seems to have been agreed, that no dispensation of any statute, except the statutes of mortmain, was of any force without a clause of *non obstante*; neither is such clause now of any effect, for it is declared and enacted by *stat.* 1 *W.* & *M. st.* 2. *c.* 2, that no dispensation by *non obstante* of or to any statute, or any part thereof, be allowed; but that the same shall be held void, except a dispensation be allowed in such statute; but it is provided, that no charter, grant, or Pardon, granted before the 23d of *October* 1699, shall be any ways invalidated by that act, but that the same shall be and remain of the same force, and no other, as if the said act had never been made. See this Dictionary, titles *King* V. 3: *Non obstante*.

The King cannot by any charter bar any right of entry or action, real or personal, on contract, or for wrong done, or any legal interest, or benefit before vested in the Subject; therefore it seems clear, that he cannot bar any action on a statute by the party grieved, nor even a popular action commenced before his Pardon, nor a recognizance for the peace before it is forfeited. *Plowd.* 487: 2 *Roll. Abr.* 178: *Cro. Car.* 199: *Keilw.* 134: *Moor.* 863.

Neither can the King pardon an appeal, except only where it is carried on at his suit, after a nonsuit of the party; therefore if a person attainted, on an appeal carried on at the suit of the party, get the King's Pardon, he must sue a *scire facias* against the appellant, before the Pardon shall be allowed. And if the appellant appear on the *scire facias*, he may pray execution notwithstanding the Pardon; but if the Sheriff return a *scire feci*, or two *nihils*, and the appellant appear not, on demand, or if he return the appellant dead, the appellee shall be discharged; but some have holden, that in this last case, a *scire facias* shall go against the heirs of the deceased. 2 *Hawk. P. C. c.* 37. § 35, 36.

But there is no need of any *scire facias* against the lord by escheat; because the Pardon no way tends to reverse the attainder whereon the title of escheat is founded. 2 *Hawk. P. C. c.* 37. § 37.

It hath been strongly holden, that the King may pardon the burning of the hand, on a conviction of manslaughter on an appeal, as being no part of the judgment at the suit of the party; but collateral and exemplary punishment inflicted by the statute, and intended only by way of satisfaction to public justice; like the finding of sureties by one convicted on the statute against trespass in parks. But for this see 2 *Hawk. P. C. c.* 37. § 39.

In an *appeal* in which the defendant was found guilty of *manslaughter*, it was doubted whether the King could pardon the burning in the hand, and the defendant compounded with the appellant for forty marks. 4 *Comm.* 317, *n.* cites 3 *P. Wms.* 453.

II. First, a Pardon must be under the great seal. A warrant under the privy seal, or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the King's Pardon when obtained in proper form, yet is not of itself a complete irrevocable Pardon. 5 *St. Tr.* 166, 173.

Next, it is a general rule, that wherever it may reasonably be presumed that the King is deceived, the Pardon is void. 2 *Hawk. P. C. c.* 37. § 8. Therefore any suppression of truth, or suggestion of falsehood, in a charter of Pardon, will vitiate the whole; for the King was misinformed. 3 *Inst.* 238.

General words have also a very imperfect effect in Pardons. A Pardon of all felonies will not pardon a *conviction* or *attainder* of felony; for it is presumed the King knew not of those proceedings; but the conviction or attainder must be particularly mentioned. 2 *Hawk. P. C. c.* 37. § 8. And a Pardon of felonies will not include piracies; for that is no felony punishable at the Common Law. 1 *Hawk. P. C. c.* 37. § 6, &c.

It is also enacted by *stat.* 13 *R.* 2. *st.* 2. *c.* 1, that no Pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein; and particularly in murder it shall be expressed, whether it was committed by laying in wait, assault, or malice prepense. Upon which *Coke* observes, that it was not the intention of the Parliament that the King should ever pardon murder, under these aggravations; and therefore they prudently laid the Pardon under these restrictions, because they did not conceive it possible that the King would ever excuse an offence by name, which was attended with such high aggravations. 3 *Inst.* 236. And it is remarkable enough, that there is no precedent of a Pardon in the register for any other homicide, than that which happens *se defendendo*, or *per infortunium*; to which two species the King's Pardon was expresly confined by the *stats.* 2 *E.* 3. *c.* 2: and 14 *E.* 3. *c.* 15; which declare that no Pardon of homicide shall be granted, but only where the King may do it *by the oath of his Crown*, that is to say, where a man slayeth another in his own defence, or by misfortune. But the *stat.* 13 *Ric.* 2. *st.* 2. *c.* 1, before mentioned, enlarges by implication the royal power; provided the King is not deceived in the intended object of his mercy. And therefore Pardons of murder were always granted with a *non obstante* of the statute of King *Richard*, till the time of the Revolution; when the doctrine of *non obstantes* ceasing, it was doubted whether murder could be pardoned generally; but it was determined by the Court of King's Bench, that the King may pardon on an indictment of murder, as well as a subject may discharge an appeal. *Salk.* 499. Under these and a few other restrictions, it is a general rule, that a Pardon shall be taken most beneficially *for* the Subject, and most strongly against the King.

A Pardon may also be *conditional*; that is, the King may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the Pardon will depend; and this by the Common Law. 2 *Hawk. P. C. c.* 37. § 45. Which prerogative is daily exerted in the Pardon of felons, on condition of being confined to hard labour for a stated time; or of transportation to some foreign country for life, or for a term of years; such transportation or banishment being allowed and warranted by the *habeas-corpus* act, 31 *Car.* 2. *c.* 2. § 14; and both the imprisonment and transportation rendered more easy and effectual by *stats.* 8 *Geo.* 3. *c.* 15: 19 *Geo.* 3. *c.* 74: 24 *Geo.* 3. *c.* 56: 31 *Geo.* 3. *c.* 46. See this Dictionary, title *Transportation*.

By the statute of *Gloucester*, 6 *E.* 1. *cap.* 9, it is enacted, "That if it be found by the country, that a person tried for the death of a man, did it in his defence, or by misfortune, then, by the report of the justices to the King, the King shall take him to his grace, if it please him." 2 *Inst.* 316.

But it seems to be settled at this day, agreeable to the ancient Common Law, in affirmance whereof this statute was made, that in such a case, or where one indicted of homicide *se defendendo* confesses the indictment, if the party cause the record to come into Chancery, the Chancellor will of course make him a Pardon, without speaking to the King, and that by such Pardon the forfeiture of goods may be saved; for these words, "If it shall please the King," shall be taken as spoken only by way of reverence to him, and not intended to make such a Pardon discretionary. But if the party be found to have fled, it is made a *quære*, if the Pardon save the forfeiture of the flight, for that is not grounded on the homicide, but on the contempt of law? 2 *Hawk. P. C. c.* 37. § 2.

If an approver convict all the appellees, whether by battel or verdict, the King, *ex merito justitiæ*, ought to pardon him as to his life, and also give him his wages from the time of appeal, to the time of conviction. 3 *Inst.* 139: 2 *Hawk. P. C. c.* 25. § 27: 2 *Hale's Hist. P. C.* 233.

As to persons entitled to Pardons on discovering their accomplices, see *stats.* 4 & 5 *W.* & *M. c.* 8: 6 & 7 *W.* & *M. c.* 17: 10 & 11 *W.* 3. *c.* 23: 5 *Ann. c.* 31, &c.: and this Dictionary, titles *Accessaries*; *Receivers*.

It has been already mentioned as a general rule, that wherever it appears, by the recital of the Pardon, that the King was misinformed, or not rightly apprised, both of the heinousness of the crime, and also how far the party stands convicted upon record, the Pardon is void, upon a presumption that it was gained from the King by imposition. See also *Yel.* 43, 47: *Cro. Jac.* 18, 34, 548: 2 *Roll. Abr.* 188: *Dyer* 352. *pl.* 26: *Raym.* 13: 1 *Sid.* 41: 3 *Inst.* 338. And on this ground it hath been holden, that the Pardon of a person convicted by verdict, of felony, is void, unless it recite the indictment and conviction; also it hath been questioned, if the Pardon of a person barely indicted of felony be good, without mentioning the indictment; but it hath been adjudged, that such a defect is saved by the words *sive indictatus sive non*. 2 *Hawk. P. C. c.* 37. § 8.

Anciently a Pardon of all felonies, included all treasons as well as felonies; and it seems to be taken for granted in many books, that such a general *Pardon* is, even at this day, pleadable to any felony, except murder, rape, and piracy; and that the only reason why it may not also be pleaded to murder and rape is, because *stat.* 13 *Rich.* 2. *st.* 2. *c.* 1, requires an express mention of them; and that the only reason why it is not pleadable to piracy is because it is a felony by the Civil Law. 1 *Hale's Hist. P. C.* 466: 2 *Hale's Hist. P. C.* 45: See *ante*; and 2 *Hawk. P. C. c.* 37. § 9.

No Pardon of felony shall be carried beyond the express purport of it; therefore if the King reciting an attainder of robbery, pardon the execution, he thereby neither pardons the felony itself, nor any other consequence of it, besides the execution. 6 *Co.* 13: 2 *Hawk. P. C. c.* 37. § 12.

It was formerly adjudged, that murder might be pardoned under the general description of a felonious killing, with a clause of *non obstante*. 1 *Sid.* 366: 1 *Show.* 283: *Keling* 24: 3 *Mod.* 37. And Pardons of manslaughter still remain as they were at Common Law before the doctrine of *non obstante* was exploded; therefore

ſore the Pardon of the felonious killing of *J. S.* may be pleaded to an indictment of manſlaughter in killing him; but where ſuch a Pardon is pleaded to a coroner's inqueſt of manſlaughter, the Court may refuſe to allow it, till the fact be found manſlaughter by a jury directed by a higher Court. 2 *Keb.* 363, 415: *Keling* 24: 2 *Jon.* 56.

If a general act expreſsly pardon petit treaſon, and except murders, it cannot be avoided by indicting a perſon guilty of petit treaſon for murder only, omitting the word *proditoriè*; for the leſs offence being included in the greater is pardoned by the Pardon of it; therefore ſuch an exception of murder is to be intended of ſuch murder only as is ſpecially ſo called, and doth not amount to petit treaſon. *Dyer* 50. *pl.* 4; 235. *pl.* 19: 6 *Co.* 13.

Neither doth the exception of murder, in a general act of Pardon of all felonies, extend to *ſelo de ſe*; for though this offence be in ſtrictneſs murder, yet in common ſpeech, according to which ſtatutes are commonly expounded, it is generally underſtood as a diſtinct offence, the word murder ſeeming *primâ ſacie* to import the murder of another. 1 *Lev.* 8, 120: 1 *Sid.* 150: 1 *Keb.* 66, 548.

It is ſaid, that a general act of Pardon of all felonies, miſdemeanors, and other things done before ſuch a day, pardons a homicide from a wound before the day, whereof the party died not till after; becauſe the ſtroke being pardoned, the effects of it are conſequently pardoned. *Plowd.* 401, *Cole*'s caſe: 1 *Hale's Hiſt. P. C.* 426: *Dyer* 99. *pl* 65.

It is ſaid, that a Pardon of all miſpriſions, treſpaſſes, offences, and contempts, will pardon a contempt in making a falſe return, and a ſtriking in *Weſtminſter Hall*, and barratry, and even a *præmunire*; alſo it is laid down in general, that it will pardon any crime not capital. 1 *Lev.* 106: 1 *Sid.* 211: 2 *Mod.* 52: *vide* 2 *Hale's Hiſt. P. C.* 252: *Dyer* 308. *a.*

III. A Pardon by act of Parliament is more beneficial than by the King's charter; for a man is not bound to plead it, but the Court muſt, *ex officio*, take notice of it. *Foſt* 43. Neither can a man loſe the benefit of it by his own *laches* or negligence, as he may of the King's charter of Pardon. 2 *Hawk. P. C. c.* 37. § 64. The King's charter of Pardon muſt be ſpecially pleaded, and that at a proper time; for if a man is indicted, and has a Pardon in his pocket, and afterwards puts himſelf upon his trial by pleading the general iſſue, he has waived the benefit of ſuch Pardon. *Ibid.* § 59. But if a man avails himſelf thereof, as ſoon as by courſe of law he may, a Pardon may either be pleaded upon arraignment, or in arreſt of judgment, or in the preſent ſtage of proceedings, in bar of execution. Antiently, by *ſtat.* 10 *E.* 3. *c.* 2, no Pardon of felony could be allowed, unleſs the parties found ſureties for the good behaviour before the Sheriff and coroners of the county. *Salk.* 499. But that ſtatute is repealed by the *ſtat.* 5 & 6 *W. & M. c.* 13; which, inſtead thereof, gives the judges of the Court a diſcretionary power to bind the criminal pleading ſuch Pardon, to his good behaviour, with two ſureties, for any term not exceeding ſeven years. See title *Larceny.*

IV. The effect of ſuch Pardon by the King is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence, for which he obtains his Pardon; and not ſo much to reſtore his former, as to give him a new credit and capacity. But nothing can reſtore or purify the blood when once corrupted, if the Pardon be not allowed till after attainder, except the high and tranſcendant power of Parliament. Yet if a perſon attainted receives the King's Pardon, and afterwards hath a ſon, that ſon may be heir to his father, becauſe the father, being made a new man, might tranſmit new inheritable blood; though had he been born before the Pardon, he could never have inherited at all. See title *Attainder.*

A Pardon will not only diſcharge any ſuit in the Spiritual Court *ex officio*, but alſo any ſuit in ſuch Court *ad inſtantiam partis pro reformatione morum*, or *ſalute animæ*; as for defamation, or laying violent hands on a clerk, &c. See 5 *Co.* 51: *Latch.* 190: *Cro Eliz.* 684: *Hob.* 81: *Cro. Jac.* 335: 2 *Hawk. P. C. c.* 37. § 41, &c.

If a perſon be impriſoned on an *excommunicato capiendo* for non-payment of coſts, and the King pardons all contempts, it is ſaid, that he ſhall be diſcharged without any *ſcire facias* againſt the party, and that the party muſt begin anew to compel payment of coſts; becauſe the impriſonment was grounded on the contempt, which is wholly pardoned. 1 *Jon* 227: 2 *Roll. Abr.* 178. *Cro. Jac.* 159: 8 *Co.* 68, 69.

But no Pardon will diſcharge a ſuit in the Spiritual Court, any more than in a temporal, for a matter of intereſt or property in the plaintiff; as for tithes, legacies, matrimonial contracts, and ſuch like; alſo it is agreed, that after coſts are taxed in a ſuit, in ſuch Court, at the proſecution of the party, whether for a matter of private intereſt, or *pro reformatione morum*, or *pro ſalute animæ*, or for defamation, &c. they ſhall not be diſcharged by a ſubſequent Pardon. 5 *Co.* 51: *Latch.* 190: *Cro. Car.* 46, 7. And with reſpect to coſts, ſee 2 *Roll. Abr.* 304. *Noy* 85: *Latch.* 155.

For more learning on this ſubject, ſee 3 *New Abr.* title *Pardon.*

PARDONERS, Perſons who carried about the Pope's indulgencies, and ſold them to any who would buy them. *An.* 22 *H.* 8.

PARENT, *parens.*] A father or mother; but generally applied to the father; Parents have power over their children by the law of nature, and the Divine law; and by thoſe laws they muſt educate, maintain, and defend their children. *Wood's Inſt.* 63. The Parent or father hath an intereſt in the profits of the children's labour while they are under age, if they live with and are maintained by him; but the father hath no intereſt in the eſtate of a child, otherwiſe than as his guardian. *Ibid.* The eldeſt ſon is heir to his father's eſtate at Common Law; and if there are no ſons, but daughters, the daughters ſhall be heirs, &c. And there being a reciprocal intereſt in each other, Parents and children may maintain the ſuits of each other, and juſtify the defence of each other's perſon. 2 *Inſt.* 564.

A Parent may lawfully correct his child being under age in a reaſonable manner: for this is for the benefit of his education. The conſent or concurrence of the Parent to the marriage of a child under age is neceſſary: but theſe and all other powers of a Parent ceaſe in law, when a child arrives at the age of twenty-one. See 1 *Comm. c.* 16, and this Dictionary, titles *Age*; *Baſtard*; *Poor*; *Marriage*; *Guardian*; and other appoſite titles.

PARENTELA, or DE PARENTELA SE TOLLERE, To renounce his kindred, which was done in open Court before the Judge, and in the presence of twelve men, who made oath, that they believed it was done lawfully, and for a just cause. We read it in the laws of *H.* 1. *cap.* 88. See *Vill.*

PARISH, *parochia.*] Did anciently signify what we now call the *diocese* of a bishop: but at this day it is the circuit of ground in which the people who belong to one church do inhabit, and the particular charge of a secular priest. It is derived from the *Saxon* Preost-scyre *Preost scyre*; which signifies the precinct of which the priest had the care, in *English* priest-shire.

How ancient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that in the early ages of Christianity in this island, Parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some: or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion. 1 *Comm. Introd.* § 4.

Camden (in his *Britannia*) says, *England* was divided into Parishes by archbishop *Honorius* about the year 630. Sir *Henry Hobart* lays it down, that Parishes were first erected by the council of *Lateran*, which was held *anno Domini* 1179. Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. *Selden* has clearly shewn, (of Tithes, *c.* 9.) that the clergy lived in common without any division of Parishes, long after the time mentioned by *Camden*. And it appears from the *Saxon* laws that Parishes were in being long before the date of that council of *Lateran*, to which they are ascribed by *Hobart*. 1 *Comm. ub. sup.*

We find the distinction of Parishes, nay, even of mother churches, so early as in the laws of King *Edgar*, about the year 970. Before that time the consecration of tithes was in general arbitrary; that is, every man paid his own (as before observed) to what church or Parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying, and with either jealousies or mean compliances in such as were competitors for receiving them; it was ordered by the law of King *Edgar*, (*c.* 1.) That "*dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet.*" However, if any thane, or great lord, had a church within his own demesnes, distinct from the mother church, in the nature of a private chapel; then, provided such church had a cœmetery or consecrated place of burial belonging to it, he might allot one third of his tithes for the maintenance of the officiating minister: but, if it had no cœmetery, the thane must himself have maintained his chaplain by some other means; for in such case all his tithes were ordained to be paid to the *primariæ ecclesiæ* or mother church. 1 *Comm. ub. sup.*

This proves that the kingdom was then universally divided into Parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of Parishes were originally ascertained by those of a manor or manors: since it very seldom happens that a manor extends itself over more Parishes than one, though there are often many manors in one Parish. But at present the boundaries of the one afford no inference or evidence whatever of the boundaries of the other. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general: and this tract of land, the tithes whereof were so appropriated, formed a distinct Parish: which will account well enough for the frequent intermixture of Parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a Parish of itself, it was natural for him to endow his newly-erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels. Thus Parishes were gradually formed, and Parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any Parish, and therefore continue to this day extraparochial; and their tithes are now by immemorial custom payable to the King instead of the bishop, in trust and confidence that he will distribute them for the general good of the church. 2 *Inst.* 647: 2 *Rep.* 44: *Cro. Eliz.* 512. Yet extraparochial wastes and marsh lands, when improved and drained, are by the statute 17 *Geo.* 2. *c.* 37, to be assessed to all parochial rates in the Parish next adjoining. 1 *Comm. ub. sup.* and see 1 *Wilf.* 182.

Lord *Holt* held, that Parishes were instituted for the ease and benefit of the people, not of the parson; and the reason why parishioners must come to their Parish church is, because, having charged himself with the cure of their souls, he might be enabled to take care of that charge. 3 *Salk.* 88, 89. A Parish may comprise many vills; but generally it shall not be accounted to contain more than one, except the contrary be shewn, because most Parishes have but one vill within them. *Hil.* 23 *Car.* 1. *B. R.* And it shall not be intended that there is more than one Parish in a city, if it be not made to appear; for some cities have but one Parish. *Ibid.* Where there are several vills in a Parish, they may have peace-officers, and overseers of the poor, for every particular vill: and an ancient vill in a Parish, that time out of mind hath had a church of its own, and churchwardens and parochial rights, being reputed a Parish, is a Parish within the *stat.* 43 *Eliz. c.* 2, to provide for its own poor; and shall not pay to the poor of the Parish wherein it lies. *Cro. Car.* 92, 384, 396. But to make a vill a reputed Parish within *stat.* 43 *Eliz. c.* 2, it must have a parochial chapel, chapelwardens and sacraments at the time that statute was made. 2 *Salk.* 501. Parishes in reputation are within that statute, especially when it has been the constant usage of such Parishes to choose their own overseers; who may distrain for a poor-tax, *&c.* 2 *Roll. Rep.* 160: 2 *Nelf. Abr.* 1235. See titles *Poor*; *Overseers*; *Vill.*

Money given by will to a Parish, shall be to the poor of the Parish. *Chanc. Rep.* 134. If a highway lie in a Parish, the Parish is obliged to repair it; and it is the most convenient and equal for the parishioners in every Parish, to repair the ways within it, if they are able. 2 *Lil.* 272. See title *Highways*.

PARISH-CLERK. In every parish the parson, vicar, &c. hath a Parish Clerk under him, who is the lowest officer of the church. They were formerly clerks in orders, and their business was at first to officiate at the altar, for which they had a competent maintenance by offerings; but now they are laymen, and have certain fees with the parson, on christenings, marriages, burials, &c. besides wages, for their maintenance. *Count. Pars. Compan.* 83, 84. They are to be twenty years of age at least, and known to be of honest conversation, sufficient for their reading, singing, &c. And their business consists chiefly in responses to the minister, reading lessons, singing psalms, &c. And in the large parishes of *London* some of them have deputies, to dispatch the business of their places, which are more gainful than common rectories. The law looks upon them as officers for life; they are regarded by the Common Law, as persons who have freeholds in their offices; and therefore though they may be punished, yet they cannot be deprived, by ecclesiastical censures. 1 *Comm.* 395. And they are generally appointed by the minister, unless there is a custom for the parishioners or churchwardens to choose them; in which case the canon cannot abrogate such custom; and when chosen it is to be signified to, and they are to be sworn into their office by, the archdeacon. *Cro. Car.* 589: *Can.* 91. And if such custom appears, the Court of *B. R.* will grant a *Mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right. 1 *Comm.* 395. He may make a deputy without licence of the Ordinary; *Strange* 942; and cannot sue in the Spiritual Court for fees as being a temporal officer. 2 *Strange* 1108.

PARISHIONER, *parochianus*.] An inhabitant of or belonging to any parish, lawfully settled therein. Parishioners are compellable to put things in decent order; but the judgment of the majority is the only rule for the degrees of that decency; and the Court inclined that a rate for that purpose is binding; as for moving the communion-table out of the body of the church into the chancel, or raising it higher, &c. 7 *Mod.* 70.

Parishioners have a right to view parish books. 11 *Mod.* 134.

Parishioners are a body politic to many purposes; as to vote at a vestry if they pay scot and lot; and they have a sole right to raise taxes for their own relief, without the interposition of any superior Court; may make by-laws to mend the highways, and to make banks to keep out the sea, and for repairing the church, and making a bridge, &c. or any such thing for the public good; and by *stat.* 3 & 4 *W.* 3. *c.* 11, to tax and levy poor rates, and to make and maintain fire-engines; and by *stat.* 9 *Geo.* 1. *c.* 28, for purchasing workhouses for the poor. *Arg.* 8 *Mod.* 354. See further, titles *Churchwardens*; *Overseers*; *Poor*; *Vestry*.

PARISH OFFICERS. Divers persons are exempted from serving parish offices on account of their professions, *viz.* Physicians and surgeons, apothecaries, dissenting teachers, and persons having prosecuted any felon to conviction, &c. See this Dictionary, titles *Churchwarden*; *Constable*; *Reward*.

PARK, Lat. *parcus*, Fr. *parque*, i. e. *locus inclusus*.] A large quantity of ground inclosed and privileged for wild beasts of chase, by the King's grant or by prescription. 1 *Inst.* 233.

Manwood defines a Park to be a privileged place for beasts of venary, and other wild beasts of the forest and chase, *tam sylvestres, quam campestres*: and differs from a chase or warren, in that it must be inclosed; for if it lies open, it is good cause of seizure into the King's hands, as a thing forfeited; as a free chase is, if it be inclosed; besides, the owner cannot have an action against such as hunt in his Park, if it lies open. *Manw. Forest Laws*: *Cromp. Jurisd.* 148. No man can erect a Park without licence under the broad seal; for the Common Law does not encourage matter of pleasure, which brings no profit to the commonwealth. But there may be a Park in reputation, erected without lawful warrant; and the owner may bring his action against persons killing his deer. *Wood's Inst.* 207.

To a Park three things are required: 1. A grant thereof; 2. Inclosures by pale, wall or hedge; 3. Beasts of a Park, such as the buck, doe, &c. And where all the deer are destroyed, it shall no more be accounted a Park; for a Park consists of vert, venison, and inclosure; and if it is determined in any of them, it is a total disparking. *Cro. Car.* 59, 60.

The King may by letters patent dissolve his Park. 2 *Lil. Abr.* 273.

Parks as well as chases are subject to the Common Law, and are not to be governed by the forest laws. 4 *Inst.* 314.

Pulling down Park walls or pales, the offenders shall be liable to the same penalty as for killing deer, &c. See *Deer-stealers*.

A *Park*, says *Blackstone*, is an inclosed chase extending only over a man's own grounds. The word Park, indeed, properly signifies an inclosure; but yet it is not every field or common which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal Park; for the King's grant, or at least immemorial prescription, is necessary to make it so. 1 *Inst.* 233: 2 *Inst.* 199: 11 *Rep.* 86. Though now the difference between a real Park, and such inclosed grounds, is in many respects not very material; only that it is unlawful, *at Common Law*, for any person to kill any beasts of Park or chase, except such as possess the franchises of forest, chase, or Park. 2 *Comm. c.* 3. *p.* 38. But this latter doctrine is strenuously combated by Mr. *Christian* in his Annotations on the Commentaries. See this Dictionary, title *Game*; as also titles *Forest*; *Chase*; *Warren*, &c.

PARK-BOTE, Signifies to be quit of inclosing a Park, or any part thereof. 4 *Inst.* 308.

PARLE HILL, *Spelman* gives this description of it; *Collis vallo plerumque munitus, in loco campestri, ne insidiis exponatur; ubi convenire olim solebant centuriæ aut vicinæ incolæ ad lites inter se tractandas & terminandas:* Scotis reor Grith hail, *q. Mons pacificationis, cui asyli privilegia concedebantur: & in* Hiberniâ *frequentes vidimus*, the *Parle* and *Parling Hills*. Spelm. Gloss.

PARLIAMENT.

Parliamentum. The derivation of the word is uncertain; and its *etymon*, if we were to follow the imaginations of various authors, subject even to some degree of ridicule. It seems properly to be derived from the French *Parler*, to speak. Freedom of speech being of the essence of representation, and without which such a National Council can have no effect. The word (which was first applied to general assemblies of the States under *Louis* VII. in *France*, about A. D. 1150,) was not used in *England* till the reign of *Hen*. III. and the first mention of it, in our statute law, is in the preamble to *stat. Westm*. 1. 3 *Ed*. 1. A. D. 1272. When therefore it is said *Parliaments* met before that æra, it is by a licence of speech considering every national assembly as a Parliament. See 1 *Comm. c*. 2. *p*. 147; and the notes there.] Parliament may be defined to be

The Legislative Branch *of the Supreme Power of* Great Britain; consisting of the King, the Lords Spiritual and Temporal; and the Knights, Citizens, and Burgesses, Representatives of the Commons of the Realm; in Parliament assembled.

I. *Of the Antiquity and Origin of Parliament.*

II. *The Manner and Time of its assembling.*

III. *Its constituent Parts.*

IV. *The Laws and Customs of Parliament as an aggregate Body.*

1. *As relates to its Power and Jurisdiction.*

2. ——— *the Privileges of its Members*; and see this Dict. titles *Peers*; *Privilege.*

V. *The Laws and Customs of the House of* Lords.

VI. ——————— *The House of* Commons.

V. 1. *As Members of Parliament.*

VI. (A) *As relates to Taxes.*

2. *In their judicial Capacity*; *and see ante* IV. 1: and this Dictionary, title *Peers.*

(B) *As relates to Election of Members to serve in Parliament.*

And herein,

1. *Of the Qualifications of Electors*;

(*a*) *in Counties*; (*b*) *in Cities*, &c.

2. *Of the Qualifications of the Elected.*

3. *Proceedings at Elections*; *wherein, of the Duty of returning Officers, and Proceedings before Election-Committees.*

VII. *The Method of Business, and particularly in the passing of Statutes in both Houses*; and see this Dictionary, title *Statute.*

VIII. *Of the Adjournment, Prorogation, and Dissolution of Parliaments.*

I. Some authors say, that the ancient *Britons* had no such assemblies; but that the *Saxons* had; which may be collected from the laws of King *Ina*, who lived about the year 712. And *William the First*, called the Conqueror, having divided this land among his followers, so that every one of them should hold their lands of him *in capite*, the chief of these were called *Barons*, who thrice every year assembled at the King's Court, *viz*. at *Christmas*, *Easter*, and *Whitsuntide*, among whom the King used to come in his royal robes, to consult about the public affairs of the kingdom. This King called several Parliaments, wherein it appears, that the freemen or Commons of *England* were also there, and had a share in making laws: he by settling the Court of Parliament so established his throne, that neither *Briton*, *Dane*, nor *Saxon* could disturb his tranquillity, the making of his laws were by act of Parliament, and the accord between *Stephen* and him was made by Parliament; though all the times since have not kept the same form of assembling the States. *Doddridge's Antiq. Parliament.*

There was a Parliament before there were any barons; and if the Commons do not appear, there can be no Parliament; for the knights, citizens, and burgesses represent the whole Commons of *England*, but the peers only are present for themselves, and none others. *Doddr.*

Coke affirms, that many Parliaments were held before the Conquest; and produces an instance of one held in the reign of *Alfred*: he likewise gives us a conclusion of a Parliament holden by *Athelstan*, where mention is made, that all things were enacted in the great synod, or council at *Gratel*y, whereat was archbishop *Wolfehelme*, with all the noblemen and wise men, whom the King called together. 1 *Inst*. 110. It is apparent, (says Mr. *Prynne*) from all the precedents before the time of the Conquest, that our pristine synods and councils were nothing else but Parliaments; that our Kings, nobles, senators, aldermen, wise men, knights and Commons, were present and voting in them as members and judges: And Sir *Henry Spelman*, *Camden*, and other writers, prove the Commons to be a part of the Parliament in the time of the *Saxons*, but not by that name, or elected as consisting of knights, citizens, and burgesses. *Pryn. Sovereign Pow. Parliament*

As to the origin of the present House of Commons, our authors of antiquity vary very much; many are of opinion that the Commons began not to be admitted as part of the Parliament, upon the footing they are now, until the 49 *H*. 3, because the first writ of summons of any knights, citizens, and burgesses, is of no ancienter date than that time. But the Great Charter in the 17th year of King *John*, (about which time the distinction of *barones majores* and *minores* is supposed to have begun) was made *per Regem, barones, & liberos homines totius regni.*

Selden says, that the borough of *St. Albans* claimed by prescription in the Parliament, 8 *Ed*. II, to send two burgesses to all Parliaments, as in the reigns of *Edw*. I. *and his progenitors*, which must be the time of King *John*; and so before the reign of King *Henry* II. And in the reign of *Henry* V. it was declared and admitted, that the Commons of the land were ever a part of the Parliament. *Selden's Tit. Hon*. 709: *Polydore Virgil Hollinshed*, *Speed*, and others mention, that the Commons were first summoned at a Parliament held at *Salisbury*, 16 *Hen*. I. Sir *Walter Ralegh*, in his treatise of the *Prerogative of Parliaments*, thinks it was *anno* 18 *Hen*. I. And Dr. *Heylin* finds another beginning for them, *viz*. in the reign of King *Hen*. II.

On this part of the subject *Blackstone* thus expresses himself; and in his Commentaries will be found, as on other subjects, the summary of former opinions, illuminated by the powerful mind of that great Commentator. See 1 *Comm. c*. 2.

The

The original, or first institution, of Parliaments is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. But it is certain, that long before the introduction of the *Norman* language into *England*, all matters of importance were debated and settled in the great councils of the realm; a practice which seems to have been universal among the northern nations; particularly the *Germans*, and carried by them into all the countries of Europe, which they over-ran at the dissolution of the *Roman* empire.

With us in *England* this general council hath been held immemorially, under the several names of *Michel Synoth*, or great council; *Michel Gemote*, or great meeting; and more frequently *Wittena gemote*, or the meeting of wise men. It was also styled in Latin, *Commune concilium regni*; *Magnum concilium*; *Regis curia magna*; *Conventus magnatum, vel procerum*; *Assisa generalis*; and sometimes *Communitas regni Angliæ*. *Glan. l.* 13. *c.* 32; *l.* 9. *c.* 10: *Pref.* 9 *Rep*: 2 *Inst.* 526. We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to mend the old; or as *Fleta*, *l.* 2. *c.* 2, expresses it, "*novis injuriis emersis nova constituere remedia*;" so early as the reign of *Ina*, King of the *West Saxons*; *Offa*, King of the *Mercians*; and *Ethelbert*, King of *Kent*, in the several realms of the heptarchy. And, after their union, the *Mirror*, *c.* 1. § 3, informs us, that King *Alfred* ordained for a perpetual usage, that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding *Saxon* and *Danish* monarchs held frequently councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted, either by the King with the advice of his *Wittena-gemote*, or wise men, as, "*hæc sunt instituta, quæ Edgarus rex consilio sapientum suorum instituit*;" or to be enacted by these sages with the advice of the King, as, "*hæc sunt judicia, quæ sapientes consilio regis Ethelstani instituerunt*:" or lastly, to be enacted by them both together, as, "*hæc sunt institutiones, quas rex Edmundus, et episcopi sui, cum sapientibus suis instituerunt*."

There is also no doubt but these great councils were occasionally held under the first princes of the *Norman* line. *Glanvil*, who wrote in the reign of *Henry* II. speaking of a particular amount of an amercement in the Sheriff's Court, says, it had never yet been ascertained by the General Assise, or Assembly, but was left to the custom of particular counties. *Glanv. l.* 9. *c.* 10. Here the general assise is spoken of as a meeting well known, and its statutes or decisions are put in a manifest contradistinction to custom, or the common law. And in *Edward* III.'s time, an act of Parliament, made in the reign of *William* the Conqueror, was pleaded in the case of the abbey of *St. Edmund's Bury*, and judicially allowed by the Court. *Year-Book*, 21 *E.* 3. *c.* 60.

Hence it indisputably appears, that Parliaments or general councils are coeval with the kingdom itself. How those Parliaments were constituted and composed is another question, which has been matter of great dispute among our learned antiquaries; and particularly whether the Commons were summoned at all; or if summoned, at what period they began to form a distinct assembly. It is however generally agreed, that in the main the constitution of Parliament, as it now stands, was marked out so long ago as the seventeenth year of King *John*, A. D. 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the Crown, by the sheriff and bailiffs; to meet at a certain place, with forty days' notice, to assess aids and scutages, when necessary. And this constitution has subsisted, in fact, at least from the year 1266, 49 *Hen.* III; there being still extant writs of that date, to summon knights, citizens, and burgesses to Parliament; the former of which may be seen in *Elsynge*, *c.* 1. § 2.

In fine, Parliament is the highest and most honourable, and absolute Court of justice in *England*; consisting of the King, the Lords of Parliament, and the Commons; the Lords being divided into spiritual and temporal; and the Commons divided into knights of shires or counties; citizens out of cities; and burgesses from boroughs; the words of the old *Latin* writ to the Sheriff for the election, being *Duos milites gladiis cinctos magis idoneos & discretos comitatûs tui; & de quâlibet civitate comitatûs tui duos cives; & de quolibet burgo duos burgenses, de discretioribus & magis sufficientibus*, &c. 1 *Inst.* 109.

II. The Parliament is regularly to be summoned by the King's writ or letter issued out of Chancery, by advice of the Privy Council, at least forty days before it begins to sit.

This is a provision of the *Magna Charta* of King *John*: *Faciemus summoneri*, &c. *ad certum diem, scilicet ad terminum quadraginta dierum, ad minus; et ad certum locum*. *Black. Mag. Ch. Joh.* 14. It is enforced by *stat.* 7 & 8 *W.* 3. *c.* 25, which enacts that there shall be forty days between the teste and the return of the writ of summons, and this time is by the uniform practice, since the Union, extended to fifty days. This practice was introduced by the 22d article of the act of union, *stat.* 5 *Ann.* *c.* 8, which required that time between the teste and the return of the writ of summons for the first Parliament of *Great Britain*. See 2 *Hats.* 235.

It is a branch of the royal prerogative, that no Parliament can be convened by its own authority; [meaning by the authority of the Lords and Commons only, who in common parlance, though not in strictness of law, are considered as the Parliament;] or by the authority of any, except the King alone. And this prerogative is founded upon a very good reason; for supposing the Lords and Commons had a right to meet spontaneously without being called together, it is impossible to conceive that all the members, and each of the Houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the Parliament should be called together at a determinate time and place; and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts: and of the three constituent parts, this office can only appertain to the King, as he is a single person, whose will may be uniform and steady; the first person in the nation, being superior

perior to both Houses in dignity; and the only branch of the Legislature that has a separate existance, and is capable of performing any act at a time when no Parliament is in being. Nor is it an exception to this rule, that by some modern statutes, on the demise of a King or Queen, if there be then no Parliament in being, the last Parliament revives, and it is to sit again for six months, unless dissolved by the successor; for this revived Parliament must have been originally summoned by the Crown.

It is true, that by *stat.* 16 *Car.* 1. *c.* 1. it was enacted, that, if the King neglected to call a Parliament, for three years, the Peers might assemble and issue out writs for choosing one; and, in case of neglect of the Peers, the constituents might meet and elect one themselves. But this, if ever put in practice, would have been liable to all the inconveniences just stated; and this act itself was deemed so highly detrimental and injurious to the royal prerogative, that it was repealed by *stat.* 16 *Car.* 2. *c.* 1. From thence therefore no precedent can be drawn; and in fact it is an exception which fully proves the rule.

It is also true, that the Convention Parliament, which restored King *Charles* the Second, met above a month before his return; the Lords by their own authority, and the Commons in pursuance of writs issued in the name of the keepers of the liberty of *England* by authority of Parliament; and that the said Parliament sat till the twenty-ninth of *December*, full seven months after the Restoration, and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the King's return was to pass an act, declaring this to be a good Parliament, notwithstanding the want of the King's writs. See *stat.* 12 *Car.* 2. *c.* 1. So that as the royal prerogative was chiefly wounded by their so meeting, and as the King himself, who alone had a right to object, consented to waive the objection, this cannot be drawn into an example in prejudice of the rights of the Crown. Besides, we should also remember, that it was at that time a great doubt among the lawyers, whether even this healing act made it a good Parliament; and held by very many in the negative; though it seems to have been too nice a scruple. 1 *Sid.* 1. And, perhaps out of abundant caution, it was thought necessary to confirm its acts in the next Parliament, by *stat.* 13 *Car.* 2. *c.* 7. & *c.* 14.

It is likewise true, that at the time of the Revolution, A. D. 1688, the Lords and Commons by their own authority, and upon the summons of the Prince of *Orange* (afterwards King *William*), met in a Convention, and therein disposed of the Crown and kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the Restoration; that is, upon a full conviction that King *James* II. had abdicated the government, and that the throne was thereby vacant: which supposition of the individual members was confirmed by their concurrent resolution when they actually came together. And in such a case as the palpable vacancy of the throne, it follows *ex necessitate rei*, that the form of the royal writs must be laid aside, otherwise no Parliament can ever meet again. For let us put another possible case, for the sake of argument, that the whole royal line should at any time fail and become extinct, which would indisputably vacate the throne; in this situation it seems reasonable to presume, that the body of the nation, consisting of Lords and Commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this, and no other principle, did the Convention in 1688 assemble. The vacancy of the throne was precedent to their meeting, without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant by the King's abdication; but the throne being previously vacant by the King's abdication, they assembled without writ, as they must do if they assembled at all. Had the throne been full, their meeting would not have been regular; but, as it was really empty, such meeting became absolutely necessary. And accordingly it is declared by *stat.* 1 *W.* & *M. st.* 1. *c.* 1. that this Convention was really the two Houses of Parliament; notwithstanding the want of writs or other defects of form. So that notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity, (and each of which by the way induced a revolution in the government,) the rule laid down is, in general, certain, that the King only can convoke a Parliament. And this by the antient statutes of the realm, 4 *E.* 3. *c.* 14: 36 *E.* 3. *c.* 10. he is bound to do *every year, or oftener, if need be*. Not that he is, or ever was, obliged by these statutes to call a *new* Parliament every year, but only to permit a Parliament to sit annually for the redress of grievances, and dispatch of business, *if need be*. These last words are so loose and vague, that such of our monarchs as were inclined to govern without Parliaments, neglected the convoking them sometimes for a very considerable period, under pretence that there was no need for them.

Mr. *Granville Sharp*, in a treatise published some years ago, argued ingeniously against this construction of the *stat.* 4 *E.* 3; and maintained that the words *if need be*, referred only to the preceding word *oftener*; so that the true signification was, that a Parliament should be held once every year at all events; and, if there should be any need to hold it oftener, then, more than once. The contemporary records of Parliament, in some of which it is so expressed without any ambiguity, prove beyond all controversy that this is the true construction. See *Christian's* note on 1 *Comm.* c. 2. p. 153.

To remedy the evil of discontinuing Parliaments it was enacted, that the sitting and holding of them shall not be intermitted above three years at the most. And by *stat.* 1 *W.* & *M. st.* 2. *c.* 2. it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, Parliaments ought to be held *frequently*. This indefinite frequency is again reduced to a certainty by *stat.* 6 *W.* & *M. c.* 2. which enacts, as the statute of *Charles* the Second had done before, that a new Parliament shall be called within three years after the determination of the former.

Though the *stat.* 6 *W.* & *M. c.* 2. confirms the statute 16 *Car.* 2. *c.* 1. in declaring, that there shall not be a longer interval than three years after a dissolution; yet the *stat.* 16 *Car.* 2. seems to be more extensive in its operation; by providing, that there shall not be an intermission of more than three years after any sitting of Parliament,

Parliament, which will extend also to a prorogation. But as the mutiny-act, and the land-tax and malt-tax acts are passed for one year only, the statutes enforcing the meeting of Parliament are now of little avail; for the Parliament must necessarily be summoned, for the dispatch of business, once every year. In antient times, indeed, especially before the abolition of the feudal tenures at the restoration of *Charles* II. our Kings had such a revenue, independent of Parliament, that they were enabled to reign many years together without the assistance of Parliament, and in defiance of the statutes made to compel their calling it together. 1 *Comm.* 153, *in n.*

An old statute, *stat.* 5 *R.* 2. *st.* 2. *c.* 4, ordains, that every person and commonalty, having summons to Parliament, shall come thither, on pain to be amerced, or otherwise punished: and if the Sheriff doth not summon the cities and boroughs as usual, he shall likewise be amerced, &c.

III. The constituent parts of a Parliament are, *The King's Majesty*, sitting there in his royal political capacity; and the three Estates of the Realm, *the Lords Spiritual, the Lords Temporal*, (who sit together with the King in one house,) and the *Commons*, who sit by themselves in another. Others however, more consonantly with the common understanding of the nature and powers of Parliament, consider the three Estates of the Realm to be *King, Lords*, and *Commons*. See *post*. And the King, and these three Estates together, form the great corporation or body politic of the kingdom, of which the King is said to be *caput, principium, et finis*. 4 *Inst.* 1, 2: *stat.* 1 *Eliz.* c. 3: *Hale of Parl.* 1. For, upon their coming together, the King meets them either in person or by representation, without which there can be no beginning of a Parliament; and he also has alone the power of dissolving them. 4 *Inst.* 6: 1 *Comm.* c. 2. *p.* 153.

The learned commentator then proceeds to shew how highly necessary it is, for preserving the balance of the Constitution, that the Executive Power should be a branch, though not the whole, of the Legislative; and how each branch of our civil polity supports and is supported, regulates and is regulated, by the rest. See 1 *Comm. p.* 153—155; and as to the general extent of the King's power, prerogative, &c. this Dictionary, title *King*.

On holding a Parliament, the King, the first day, sits in the Upper House, and by himself, or the Lord Chancellor, shews the reason of their meeting; then the Commons are commanded to choose their Speaker; which done, two or three days afterwards he is presented to the King, and after some speeches is allowed, and sent down to the House of Commons; when the business of Parliament proceeds. 12 *Rep.* 115. See *post* VI.

A Parliament cannot begin, on return of the writs, without the King in person, or by representation; and by representation two ways, either by a Guardian of *England*, by letters patent under the great seal, when the King is out of the realm; or by commission, to certain Lords in case of indisposition, &c. when his Majesty is at home. 4 *Inst.* 6, 7. And if any Parliament is to be holden before a Guardian of the Realm, there must be a special commission to begin the Parliament; but the teste of the writs of summons is to be in the guardian's name: and by an ancient law, *stat.* 8 *H.* 5. *c.* 1, if the King, being beyond sea, cause a Parliament to be summoned in this kingdom, by writ under the *teste* of his lieutenant, and after the King returns hither, the Parliament shall proceed without any new summons.

In the 5th year of *Henry* V. a Parliament was holden before *John* Duke of *Bedford*, brother to the King, and guardian of the kingdom. *Anno* 3 *Ed.* IV. a Parliament was begun in the presence of the King, and prorogued to a further day; and then *William* Archbishop of *York*, the King's commissary by letters patent, held the same Parliament, and made an adjournment, &c. And 28 *Eliz.* the Queen by commission under the great seal, (reciting, that for urgent occasions she could not be present in her royal person,) did authorise *John Whitgift* Archbishop of *Canterbury*, *William* Lord *Burleigh*, Lord Treasurer of *England*, and *Henry* Earl of *Derby*, Lord Steward, to hold a Parliament, &c. *Ad faciendum omnia et singula, &c. necnon ad* Parliamentum *adjornand. et prorogand.* &c. And in the upper part of the page, above the beginning of the commission is written, *Domina Regina repræsentatur per commissionarios, viz.* &c. These commissioners sat on a form before the cloth of state, and after the commission read, the Parliament proceeded.

A Parliament may be holden at any place the King shall assign. See 1 *Comm. p.* 153, *in n.*

The constituent parts of Parliament, next in order, are the Spiritual Lords. These consist of two Archbishops, and twenty-four Bishops; and at the dissolution of monasteries by *Henry* VIII. consisted likewise of twenty-six mitred abbots, and two priors. *Seld. Title Hon.* 2, 5, 27. A very considerable body; and in those times equal to half the number of the temporal nobility; *Co. Litt.* 97: See 4 *Inst.* 1; by which it appears, that the number of the temporal nobility was one hundred and six. All these hold, or are supposed to hold, certain antient baronies under the King; for *William* the Conqueror thought proper to change the spiritual tenure, of frankalmoign or free alms, under which the bishops held their lands during the *Saxon* Government, into the feodal or *Norman* tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt; *Gilb. Hist. Exch.* 55: *Spelm. W.* 1. 291, and in right of succession to those baronies, which were unalienable from their respective dignities, the bishops and abbots were allowed their seats in the House of Lords. *Glanv.* 7, 1: *Co. Litt.* 97: *Seld. Tit. Hon.* 2, 5, 19. But though these Lords Spiritual are, in the eye of the law, a distinct estate from the Lords Temporal, and are so distinguished in most of our acts of Parliament, yet in practice they are usually blended together under the one name of *the Lords*; they intermix in their votes, and the majority of such intermixture binds both Estates. And from this want of a separate assembly, and separate negative, of the prelates, some writers have argued, (*Whitelocke on Parl. c.* 72: *Warburt. Alliance, b.* 2, *c.* 3.) very cogently, that the Lords Spiritual and Temporal are now in reality only one Estate; *Dyer* 60: which is unquestionably true in every effectual sense; though the antient distinction between them still nominally continues. For if a bill should pass their House, there is no doubt of its validity, though every Lord Spiritual should vote against it; of which *Selden* and Sir *E. Coke* give many instances; as on the other hand, it seems that it

It would be equally good, if the Lords Temporal present were inferior to the bishops in number, and every one of those Temporal Lords gave his vote to reject the bill; though Sir *E. Coke* seems to doubt whether this would not be an ordinance, rather than an act of Parliament, 4 *Inst.* 25: see *Selden's Baronage*, *p.* 1. *c.* 6: *Gibs. Cod.* 286. See also 2 *Inst.* 585, 6, 7: and *Keilw* 184; where it is holden by the Judges, 7 *Hen.* VIII, that the King may hold a Parliament without any Spiritual Lords. This was also exemplified in fact in the two first Parliaments of *Charles* II, wherein no bishops were summoned; till after the repeal of the *stat.* 16 *Car.* 1. *c.* 27, by *stat.* 13 *Car.* 2. *st.* 1. *c.* 2.

No rational or antient principle can perhaps be suggested, why the bishops should not have exactly the same legislative functions, as the other Peers of Parliament; the style of the House of Lords, *viz.* the Lords Spiritual and Temporal, was probably intended as a compliment to the bishops; to express the precedence that they are entitled to, before all the temporal barons; which originally was the only character that gave a claim to a seat in the House of Lords. Unless precedents could be found to the contrary, there seems to be no reason to doubt, but that any act at this day would be valid, though all the Temporal Lords or all the Spiritual Lords were absent. 1 *Comm.* 156, *n.*

In the *stat.* 1 *Eliz. c.* 2, the style of the Parliament is, the Lords and Commons in Parliament assembled; but there is the same style used also in *stat.* 1 *Eliz. c.* 11, a revenue act. On the 18th of *February* 1641, a motion was made in the *Irish* House of Lords, "That as all the bishops were against a representation about certain grievances, the Lords Spiritual should not be named: upon which the Judges were consulted; and their opinion was, that in any act or order which passed, it must be entered "by the Lords Spiritual and Temporal." 1 *Mountm.* 344.

The *Lords Temporal* consist of all the Peers of the realm; (the bishops not being in strictness held to be such, but merely Lords of Parliament, *Staundf. P. C.* 153;) by whatever title of nobility distinguished; Dukes, Marquisses, Earls, Viscounts, or Barons; as to which dignities, see this Dictionary, under those titles, and title *Peers.* Some of these sit by descent, as do all antient Peers; some by creation, as do all new made ones; others, since the union with *Scotland*, by election, which is the case of the sixteen Peers, who represent the body of the Scots nobility. The number of Lords Temporal is indefinite, and may be increased, at will, by the power of the Crown; and once, in the reign of Queen *Anne*, there was an instance of creating no less than twelve together; in contemplation of which, in the reign of *George* I, a bill passed the House of Lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought by some to promise a great acquisition to the Constitution; by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new-created Lords. But the bill was ill relished and miscarried in the House of Commons, whose leading members were then desirous to keep the avenues to the other House as open and easy as possible. 1 *Comm.* 157.

The utility of this body is defended by the learned Judge, on the ground that distinction of rank and honours is necessary in every well-governed State; and the advantages resulting from those, whom he compares to pillars, reared from among the people, more immediately to support the Throne, are stated with the constitutional accuracy, for which that writer is so eminent.

The Commons, according to the present ordinary acceptation of the term, consist of all such men of property in the kingdom as have not seats in the House of Lords; indeed in its largest sense the word comprehends all who are not Peers of the realm: but it appears, in it original signification, to have been confined to those only who had a right to sit, or had a right to vote for representatives in the House of Commons; and in its strict parliamentary sense, in which alone it ought to be here understood, it means the *Knights*, *Citizens*, and *Burgesses* who are the representatives, in the House of Commons, of the various counties, cities, and boroughs in the kingdom. In a free state, every man who is supposed a free agent ought to be in some measure his own governor; and therefore a branch, at least, of the legislative power should reside in the whole body of the People. In the State of *Great Britain* it is wisely contrived, that the people should do that, by their representatives, which it is impracticable to perform in person; representatives chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are therefore represented by knights, elected by the proprietors of lands: the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed trading interest, of the nation. The number of *English* representatives is five hundred and thirteen, and of *Scotch* forty-five; in all, five hundred and fifty eight. And every member, though chosen by one particular district, when elected and returned, serves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the *common-wealth*; to advise his Majesty (as appears from the writ of summons) "*de communi consilio, super negotiis quibusdam arduis et urgentibus, regem, statum, et defensionem regni Angliæ, et ecclesiæ Anglicanæ, concernentibus.*" 4 *Inst.* 14. And therefore (says *Blackstone*) he is not bound to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper or prudent so to do. See 1 *Comm.* 157. 9, and the notes there.

These are the constituent parts of a Parliament; the King, the Lords Spiritual and Temporal, and the Commons; Parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three, is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in times of madness and anarchy, the House of Commons once passed a vote (which, as has been well observed, was a natural prologue to the tragical drama immediately afterwards performed), "that whatsoever is enacted or declared for law, by the Commons in Parliament assembled, hath the force of law; and all the people of this nation are concluded thereby, although the consent and concurrence of the King or House of

Peers

Peers be not had thereto;" yet, when the Constitution was restored in all its forms, it was particularly enacted by *stat.* 13 *Car.* 2. *c.* 1, that if any person shall maliciously or advisedly affirm, that both or either of the Houses of Parliament have any legislative authority, without the King, such person shall incur all the penalties of *a præmunire*: we must, however, remember the exceptions to this rule; arising, as has been already mentioned, from State necessity.

IV. 1. The power and jurisdiction of Parliament, says Sir *Edward Coke*, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. 4 *Inst.* 36. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws; concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted, by the Constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of law, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the Crown; as was done in the reign of *Henry* VIII. and *William* III. It can alter the established religion of the land; as was done, in a variety of instances, in the reigns of king *Henry* VIII. and his three children. It can change and create afresh even the Constitution of the kingdom, and of Parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament; an expression, however, which in fact seems to signify nothing more than the supreme sovereign power of the State; or a power of action uncontrolled by any superior." In this sense, the King in the exercise of his prerogatives, and the House of Lords in the intepretation of laws, are also omnipotent; that is, free from the control of any superior provided by the Constitution. True it is, that what the Parliament doth, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apophthegm of the great lord treasurer *Burleigh*, "that *England* could never be ruined but by a Parliament;" and as Sir *Matthew Hale* observes, this being the highest and greatest Court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the Subjects of this kingdom are left without all manner of remedy of Parliament. *Hale of Parl.* 49. To the same purpose *Montesquieu* (though it is earnestly to be hoped too hastily,) presages, that as *Rome*, *Sparta*, and *Carthage* have lost their liberty and perished, so the Constitution of *England* will in time lose its liberty, will perish; it will perish whenever the Legislative Power shall become more corrupt than the Executive. *Sp. L. l.* 11. *c.* 6.

It must be owned that Mr. *Locke*, and other theoretical writers have held, that "there remains still inherent in the people a supreme power to remove or alter the Legislature, when they find that Legislature act contrary to the trust reposed in them; for when such trust is abused, it is thereby forfeited, and devolves to those who gave it." *Locke on Gov. part* 2. § 149. 227. But, however just this conclusion may be in theory, we cannot practically adopt it; nor take any legal steps to carry it into execution, under any dispensation of government at present actually existing. For this devolution of power to the people at large, includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality, and by annihilating the sovereign power, repeals all positive laws whatsoever, before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for such a desperate event, as must render all legal provision ineffectual. So long, therefore, as the *English* Constitution lasts, we may venture to affirm, that the power of Parliament is absolute and without control.

In order to prevent the mischiefs that might arise by placing this extensive authority in hands, either incapable or improper to manage it, it is provided by custom and the law of Parliament, that no one shall sit or vote in either House unless he be twenty-one years of age. *Whitel. c.* 50: 4 *Inst.* 47. This is also expressly declared by *stat.* 7 & 8 *W.* 3, *c.* 25. § 8, with regard to the House of Commons; doubts having arisen from some contrary adjudications whether or not a minor was incapacitated from sitting in that House. This provision has not always been strictly attended to; one of the warmest advocates for the Constitution (if his own professions are to be credited, though not according to universal opinion,) having, it is believed, first taken his seat when a minor. It is also enacted by *stat.* 7 *Jac.* 1. *c.* 6, that no member be permitted to enter into the House of Commons, till he hath taken the Oath of Allegiance before the Lord Steward, or his deputy. The Lord Steward, on the first day of the meeting of a new Parliament, attends in a room adjoining to the House of Commons, and administers the oath to the members present; and he then executes a commission or deputation, empowering any one or more of a great number of members specified to administer the oath to others. By *stats.* 30 *Car.* 2. *st.* 2: 1 *Geo.* 1. *c.* 13, no member shall vote or sit in either House till he hath, in presence of the House, taken the Oath of Allegiance, Supremacy, and Abjuration; (the latter now as altered by *stat.* 6 *Geo.* 3. *c.* 53, see title *Oaths*;) and subscribed and repeated the declaration against transubstantiation, and invocation of *Saints*, and the sacrifice of the Mass. *Aliens*, unless naturalized, were likewise by the law of Parliament incapable to serve therein; and now it is enacted, by *stat.* 12 & 13 *W.* 3. *c.* 2, that no alien, even though he be naturalized, shall be capable of being a member of either House of Parliament.

There are not only these standing incapacities, but if any person is made a Peer by the King, or elected to serve in the House of Commons by the people, yet may the respective Houses, upon complaint of any crime in such person, and proof thereof, adjudge him disabled, and incapable to sit as a member, and this by the law and custom of Parliament. 1 *Comm. c.* 2. *p.* 163; cites *Whitel.*

of Parl. c. 102; and refers to *Lords Journ.* 3 *May* 1620: 13 *May* 1624: 26 *May* 1725: *Comm. Journ.* 14 *Feb.* 1580: 21 *Ju.* 1628: 9 *Nov.*: 21 *Jan.* 1640: 6 *Mar.* 1676: 6 *Mar.* 1711: 17 *Feb.* 1769.

The sentence immediately preceding was not in the first editions of the Commentaries, but was added, no doubt, with an allusion to the *Middlesex* election; the circumstances of which were briefly these: On *January* 19-20, 1764, *J. W.* was expelled the House of Commons for being the author of a seditious libel: at the next election in 1768 he was elected, for the county of *Middlesex*; and on *February* 3, 1769, it was resolved, that *J. W.* Esq. who had acknowledged himself to be the author and publisher of a paper which the House had previously pronounced to be an insolent, scandalous, and seditious libel, (not the same for which he was expelled in the former Parliament), and who had been convicted in the Court of K. B. of having printed and published a seditious libel, and *three obscene* and *impious libels*, and been sentenced to twenty-two months' imprisonment, *be expelled this House*. A new writ having been ordered for the county of *Middlesex*, Mr. *W.* was re-elected without opposition; and on *February* 17, 1769, it was resolved, "that *J. W.* Esq. having been, in this session of Parliament, expelled this House, was and is incapable of being elected a member to serve in this present Parliament:" and the election was declared void, and a new writ ordered. He was a second time re-elected without opposition; and on *March* 17, 1769, the House again declared the election void, and ordered a new writ: At the next election Mr. *Luttrell*, who had vacated his seat for the purpose, by accepting the Chiltern Hundreds, offered himself a candidate against Mr. *W.* Mr. *W.* had 1143 votes, and Mr. *Luttrell* 296. Mr. *W.* was again returned by the Sheriff. On *April* 15, 1769, the House resolved, that Mr. *Luttrell* ought to have been returned, and ordered the return to be amended; allowing fourteen days for a petition against the return: one was accordingly presented on *April* 29, by certain freeholders of *Middlesex*; and on the 8th of *May* the House resolved that Mr. *Luttrell* was duly elected. On the 3d of *May* 1783, (fourteen years afterwards) it was resolved, that the resolutions of the 17th *February* 1769 should be expunged from the Journals of the House, *as being subversive of the rights of the whole body of electors of this kingdom*. And at the same time it was ordered, that all the declarations, orders, and resolutions respecting the election of *J. W.* should be expunged.

The history of *England* furnishes many instances of important constitutional questions that have deeply agitated the minds of the people of this country, which can raise little or no doubt in the minds of those who view them at a distance, uninfluenced by interest or passion. It has been thought by some that it was a *violent* measure in the House of Commons to expel a member for the libels which he had published; but that the subsequent proceedings were agreeable to the law of Parliament, that is, to the law of the land, the authorities referred to, by the learned commentator, seem most unanswerably to prove. But what shall be considered to be the law with regard to the incapacities of candidates, since these proceedings were expunged, it will be difficult indeed to determine. The resolution to expunge implies the correction of an error, after mature deliberation. If it had not been declared that a former resolution was subversive of the rights of electors, it might perhaps have been supposed that it was intended only as a personal compliment to the member expelled. But it does not state in what instance the former resolution was so subversive. They who wish for a certain knowledge of their rights and liberties must lament such a want of precision; but they must wait with patience till the wisdom of the House has occasion to explain its own judgment; and which, perhaps, if ever it should arise, would be attended with the same outrageous spirit of party, which too frequently influences the decision of public questions; acting rather upon grounds and motives, which ought to be discarded with the most religious impartiality, than on the broad basis of sound constitutional doctrine, or the real interest and welfare of the Subject. See 1 *Comm.* c. 2, p. 163, and *n.*

As every Court of justice hath laws and customs for its direction, some the civil and canon, some the Common Law, others their own peculiar laws and customs; so the high Court of Parliament hath also its own peculiar law, called the *Lex et consuetudo Parliamenti*: a law much better to be learned out of the rolls of Parliament, and other records, and by precedents and continual experience, than can be expressed by any one man. 4 *Inst.* 50. It will be sufficient to observe, that the whole of the law and custom of Parliament has its original from this one maxim, "that whatever matter arises, concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere." 4 *Inst.* 15. Hence, for instance, the Lords will not suffer the Commons to interfere in settling the election of a Peer of *Scotland*; the Commons will not allow the Lords to judge of the election of a member; nor will either House permit the subordinate Courts of law to examine the merits of either case. But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the Parliament itself; and are not defined and ascertained by any particular stated laws. See *post* VI. (B) 3.

It has indeed been well hinted, to all the members of this supereminent judicature, that when they are declaring what is the law of Parliament, their character is totally different from that with which, as Legislators, they are invested, when they are framing new laws; and that they ought never to forget the admonition of that great and patriotic chief justice Lord *Holt*, *viz.* "That the authority of Parliament is from the law, and as it is circumscribed by law, so it may be exceeded; and if they do exceed those legal bounds and authority, their acts are wrongful, and cannot be justified any more than the acts of private men." 1 *Salk.* 505. And for the position, that Parliament in their judicial capacity, are governed by the common and statute laws, as well as the Courts in *Westminster-Hall*; see 4 *Inst.* 14, 15: 2 *St. Tr.* 735.

The Courts at *Westminster* may judge of the privilege of Parliament, where it is incident to a suit the Court is possessed of; and Courts may proceed to execution between the sessions of Parliament, notwithstanding appeals lodged, &c. 2 *St. Tr.* 66, 209.

The King cannot take notice of any thing, said to be done in the House of Commons, but by the report of the House; and every member of the House of Parliament has

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a judicial place, and cannot be a witness. 4 *Inst.* 15. When *Charles* I. being in the House of Commons, and sitting in the Speaker's chair, asked the then speaker, whether certain members (whom the King named) were present? The Speaker, from a presence of mind which arose from the genius of that House, readily answered, "That he had neither eyes to see, nor tongue to speak, but as the House was pleased to direct him." *Atkin's Jurisd. and Antiquity of the House of Commons.* *Hen.* VIII, having commanded Sir *Thomas Gaudy* (one of the judges of the King's Bench) to attend the chief justices and know their opinion, whether a man might be attainted of high treason by Parliament, and never called to answer; the judges declared it was a dangerous question, and that the High Court of Parliament ought to give examples to inferior Courts, for proceeding according to justice, and no inferior Court could do the like. *Lex Constitution.* 161.

The House of Lords is a distinct Court from the Commons, to several purposes, and is the sovereign Court of justice, and dernier resort: they try criminal causes on impeachments of the Commons; and have an original jurisdiction for the trial of Peers, upon indictments found by a grand jury: they also try causes upon appeals from the Court of Chancery, or upon writs of error to reverse judgments in *B. R.* &c. And all their decrees are as judgments; and judgments given in Parliament may be executed by the Lord Chancellor. 4 *Inst.* 21: *Finch.* 233: 1 *Lev.* 165. It is said, that the judicial power of Parliament is in the Lords; but that the House of Lords hath no jurisdiction over original causes, which would deprive the Subject of the benefit of appeal. 2 *Salk.* 510. Also the House of Commons is a distinct Court to many purposes; they examine the right of elections, expel their own members, & commit them to prison, and sometimes other persons &c. See *post*. And the book of the clerk of the House of Commons is a record. 2 *Inst.* 536: 4 *Inst.* 23. The Commons, coming from all parts, are the grand inquest of the realm; to present public grievances and delinquents to the King and Lords to be punished by them: and any member of the House of Commons has the privilege of impeaching the highest Lord in the kingdom. *Wood's Inst.* 455.

The High Court of Parliament is the supreme Court in the kingdom, not only for the making, but also for the execution of laws; by the trial of great and enormous offenders, whether Lords or Commoners, in the method of parliamentary impeachment. Acts of Parliament to attaint particular persons of treason or felony, or to inflict pains and penalties, are new laws made *pro re natâ*, and by no means an execution of such as are already in being: but an impeachment before the Lords, by the Commons of *Great Britain*, in Parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme Court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom. 1 *Hal. P.C.* 150. A Commoner, it is said by *Blackstone*, who quotes authorities to prove his position, cannot be impeached before the Lords for any *capital* offence, but only for high misdemeanors; a Peer may be impeached for any crime: But it appears, that the right of impeaching a Commoner even in capital cases, has been claimed and asserted by the Lords. *See 4 Comm.* 260, *in n.*

The Commons usually, in case of an impeachment of a Peer for treason, address the Crown to appoint a Lord High Steward for the greater dignity and regularity of their proceedings; which High Steward was formerly elected by the Peers themselves, though he was generally commissioned by the King. 1 *Hal. P. C.* 350. But it hath been strenuously maintained, that the appointment of an High Steward in such cases is not indispensably necessary, but that the House may proceed without one.

This custom of impeachment has a peculiar propriety in the *English* Constitution; for though in general the union of the legislative and judicial powers ought to be most carefully avoided, yet it may happen that a Subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes as the ordinary magistrate either dares not or cannot punish. Of these the representatives of the people, or House of Commons, cannot properly *judge*; because their constituents are the parties injured; and can therefore only *impeach*. In the trial of such an impeachment, ordinary tribunals would naturally be swayed by the authority of so powerful an accuser. Reason, therefore, will suggest that this branch of the Legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who have neither the same interests nor the same passions as popular assemblies. It is proper that the nobility should judge, to insure justice to the accused; as it is proper that the people should accuse, to insure justice to the commonwealth. 4 *Comm. c.* 19. *p.* 261. See further this Dictionary, title *Impeachment*.

As to the Court of the Lord High Steward for the trial of a Peer, see this Dictionary, title *Peers*; and as to the civil appellate jurisdiction of the House of Lords, *Post* V. 2.

IV. 2. The privileges of Parliament are very large and indefinite; and therefore when in 31 *Hen.* 6, the House of Lords propounded a question to the Judges concerning them, the chief justice, Sir *John Fortescue*, in the name of his brethren, declared, "that they ought not to make answer to that question, for it hath not been used aforetime that the justices should, in any wise determine the privileges of the High Court of Parliament; for it is so high and mighty in its nature, that it may make law; and that which is law, it may make no law: and the determination and knowledge of that privilege belongs to the Lords of Parliament, and not to the justices." *Selds Baronage*, *p.* 1, *c.* 4. Privilege of Parliament was principally established, in order to protect its members, not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the Crown. If therefore all the privileges of Parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the Executive Power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member, and violate the freedom of Parliament. The dignity and independence of the two Houses are therefore in a great measure preserved by

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keeping the privileges indefinite. But in anſwer to this obſervation it has been juſtly remarked, that clearneſs and certainty are eſſentially neceſſary to the liberty of *Engliſhmen*; and that rights and privileges cannot well be claimed, unleſs they are aſcertained and defined.

There are ſeveral privileges of the members of either Houſe, which are ſufficiently certain and notorious These are, privilege of ſpeech, of perſon: [and before the *ſtat.* 10 *Geo.* 3. c. 50, of their domeſtics, and of their lands and goods]. As to the firſt, privilege of ſpeech, it is declared by the *ſtat.* 1 *W.* & *M. ſt.* 2. *c.* 2, as one of the liberties of the people, "that the freedom of ſpeech, and debates, and proceedings in Parliament, ought not to be impeached, or queſtioned, in any Court or place out of Parliament." And this freedom of ſpeech (with other privileges) is particularly demanded of the King in perſon, by the Speaker of the Houſe of Commons, at the opening of every new Parliament.

If any member of either Houſe, however, ſpeak words of offence in a debate, after the debate is over he is called to the bar, where commonly on his knees he receives a reprimand from the Speaker; and if the offence be great, he is ſent to the *Tower*. When the bill of attainder of the earl of *Strafford* was paſſing the Houſe of Commons, Mr. *Taylor*, a member of that Houſe, oppoſed it with great violence and indecency, and being heard, to explain himſelf, was commanded to withdraw; whereupon it was reſolved he ſhould be expelled the Houſe, be made incapable of ever ſerving as a member of Parliament, and ſhould be committed priſoner to the *Tower*, there to remain during the pleaſure of the Houſe: and he was called to the bar, where he kneeled down, and Mr. Speaker pronounced the ſentence accordingly. And Sir *John Elliot*, *Denzil Hollis*, and another perſon having ſpoken theſe words, *viz.* "The King's Privy Council, his judges and his counſel learned in the law, have conſpired to trample under their feet the liberties of the Subject, and of this Houſe," an information was filed againſt them by the Attorney General; and farther, for that the King having ſignified his pleaſure to the Houſe of Commons for the adjournment of the Parliament, and the Speaker endeavouring to get out of the chair, they *violenter*, &c. detained him in the chair, upon which there was a great tumult in the Houſe, to the terror of the Commons there aſſembled, and againſt their allegiance, in contempt of the King, his crown and dignity: the defendants pleaded to the juriſdiction of the Court; and refuſed to anſwer but in Parliament; but it was adjudged, that they ought to anſwer, the charge being for a conſpiracy, and ſeditious acts, to prevent the adjournment of the Parliament, which may be examined out of it; and not anſwering, judgment was given againſt them, that Sir *John Elliot* ſhould be committed to the *Tower*, and fined 2000*l.*; and the other two were fined and impriſoned. *Cro. Car.* 130.

The other privileges, of perſons, [and heretofore of ſervants, lands, and goods,] are immunities as antient as *Edward* the Confeſſor; in whoſe laws we find this precept, "*ad ſynodos venientibus, ſive ſummoniti ſint, ſive per ſe quid agendum habuerint ſit ſumma pax.*" *L. Ed. Conf.* c. 3. This included formerly not only privilege from illegal violence, but alſo from legal arreſts and ſeizures by proceſs from the Courts of law. And ſtill to aſſault by violence a member of either Houſe, or his menial ſervants, is a high contempt of Parliament, and there puniſhed with the utmoſt ſeverity. It has likewiſe peculiar penalties annexed to it in the Courts of law, by *ſtat.* 5 *Hen.* 4. c. 6, and 11 *Hen.* 6. c. 11. By this latter ſtatute, aſſaulting a member coming to or attending in Parliament incurs the penalty of double damages, and the offender ſhall make fine and ranſom.

Sir *Robert Brandling* made an aſſault upon Mr. *Witherington*, a member of the Houſe of Commons, in the country before his coming up to Parliament, and Sir *Robert* was ſent for by the Houſe, and committed to the *Tower*. And *anno* 19 *Jac.* I. ſome ſpeeches paſſed privately in the Houſe between two of the members, and one of them going down the Parliament ſtairs ſtruck the other, who catching at a ſword in his man's hand, endeavouring to return the ſtroke; on complaint to the Houſe of Commons they were both ordered to attend, where he who gave the blow was committed to the *Tower* during the pleaſure of the Houſe. *Dict.*

Neither can any member of either Houſe be arreſted and taken into cuſtody, unleſs for ſome indictable offence; without a breach of the privilege of Parliament. See *poſt*.

But all other privileges which derogate from the Common Law in matters of civil right are now at an end, ſave only as to the freedom of the member's perſon; which in a Peer (by the privilege of peerage) is for ever ſacred and inviolable; and in a Commoner (by the privilege of Parliament) for forty days after every prorogation, and forty days before the next appointed meeting: which is now, in effect, as long as the Parliament ſubſiſts, it ſeldom being prorogued for more than fourſcore days at a time. 2 *Lev.* 72. It does not appear that the privilege from arreſt is limited to any preciſe time after a diſſolution; but it has been determined by all the Judges, that it extends to a convenient time. *Col. Pit's* [illegible] *Prynne* is of opinion, that it continued [illegible] the number of days the member received wages after a diſſolution: which were in proportion to the diſtance between his home and the place where the Parliament was held. 4 *Parl. Writs* 68. As to all other privileges which obſtruct the ordinary courſe of juſtice, they were reſtrained by *ſtats.* 12 *W.* 3. c. 3: 2 & 3 *Ann.* c. 18: 11 *Geo.* 2. c. 24; and are now totally aboliſhed by *ſtat.* 10 *Geo.* 3. c. 50; which enacts, that any ſuit may at any time be brought againſt any Peer or member of Parliament, their ſervants, or any other perſon entitled to privilege of Parliament; which ſhall not be impeached or delayed by pretence of any ſuch privilege; except that the perſon of a member of the Houſe of Commons ſhall not thereby be ſubject to any arreſt or impriſonment. Likewiſe, for the benefit of commerce, it is provided by *ſtat.* 4 *Geo.* 3. c. 33, that any trader, having privilege of Parliament, may be ſerved with legal proceſs for any juſt debt to the amount of 100*l.* and unleſs he makes ſatisfaction within two months, it ſhall be deemed an act of bankruptcy; and that a commiſſion of bankrupt may be iſſued againſt ſuch privileged traders in like manner as againſt any other. See this Dictionary, title *Bankrupt*.

The *ſtat.* 12 *W.* 3. c. 3, enacted, that actions might be proſecuted againſt perſons entitled to privilege of Parliament, after a diſſolution or prorogation, until a new Parliament was called, or the ſame was re-aſſembled: and after adjournment for above fourteen days, the reſpective Courts might proceed to judgment, &c.

Proceedings

Proceedings were to be by summons and distress infinite, &c. until the parties should enter a common appearance; and the real or personal estates of the defendants to be sequestered for default of appearance; but the plaintiff not to arrest their bodies: and where any plaintiff should be staid or prevented from proceeding by privilege of Parliament, he should not be barred by any statute of limitation, or nonsuited, dismissed, or his suit discontinued for want of prosecution; but at the rising of the Parliament should be at liberty to proceed to judgment and execution. This act was, by *stat.* 10 *Geo.* 3. *c.* 50, extended to *Scotland*.

The *stat.* 2 & 3 *Ann. c.* 18, provided, that actions may be prosecuted against officers of the revenue, or in any place of public trust, for any forfeiture or breach of trust, &c. and shall not be staid by colour of privilege; but such officer being a member of Parliament, is not subject to arrest during time of privilege, but summons, attachment, &c.

The *stat.* 11 *Geo.* 2. *c.* 24, enacted, that any person might prosecute a suit in any Court of record, &c. in *Great Britain* or *Ireland*, against any Peer or Member of the House of Commons, or other person entitled to privilege, in the intervals of Parliaments, or of Sessions, if above fourteen days; and the said Courts, after dissolutions or prorogations, were to give judgment, and award execution: and no proceedings in law against the King's immediate debtor, as such, &c. to be delayed under colour of such privilege; only the person of a Member of Parliament, &c. shall not be arrested or imprisoned.

The *stat.* 10 *Geo.* 3. *c.* 50, already mentioned, provides, that suits may at any time be prosecuted in Courts of record, equity, or admiralty, and Courts having cognisance of causes [redacted] Peers and Members of the House of Commons, and their servants, &c. Process by *distringas* being found dilatory, the Court, out of which the writ proceeds, may order the issues to be sold, and the money arising thereby to be applied to pay the costs to the plaintiff, and the surplus to be retained till the appearance of the defendant, &c.—When the purpose of the writ is answered, the issues are to be returned; or, if sold, the money remaining is to be repaid.—Obedience to the rule of the Court of King's Bench, Common Pleas, or Exchequer may be enforced by distress infinite.

Judgment was had against the defendant, and afterwards he was chosen a member of Parliament, and after his election he was taken in execution, yet he had his privilege; though the book tells us *minus justè*. *Moor* 57. And where judgment being had against a defendant, he was taken in execution in the morning, and about three hours afterwards was chosen a member of Parliament; the House agreed, that being arrested before he was chosen, &c. he shall not have his privilege. *Moor* 340. See further this Dictionary, title *Privilege*.

To shew what the Subject has gained by the provisions of the several acts of Parliament, which have restrained the privileges of members, so far as they could be used as exceptions to, or infringements on, public justice, we need only recur to the cases in our books treating of the privileges of Parliament, relating to arrests of members of the House of Commons, and their servants, and the manner of their confinement, releasement, &c. In the first year of King *Jac.* I, Sir *Thomas Shirley*, a member of Parliament, was arrested four days before the sitting of the Parliament, and carried prisoner to the *Fleet*; on which a warrant issued to the clerk of the Crown for a *habeas corpus* to bring him to the House, and the serjeant was sent for in custody, who being brought to the bar, and confessing his fault, was excused for that time: but on hearing counsel at the bar for Sir *Thomas Shirley*, and the warden of the *Fleet*, and upon producing precedent, *Simpson* the prosecutor, who caused the arrest to be made, was ordered to be committed to the *Tower*; and afterwards the warden refusing to execute the writ of *habeas corpus*, and the delivery of Sir *Thomas* being denied, was likewise committed to the *Tower*; though on his agreeing to deliver up Sir *Thomas*, upon a new warrant for a new writ of *habeas corpus*, and making submission to the House, he was discharged: this affair taking up some time, the House entered into several debates touching their privilege, and how the debt of the party might be satisfied; which produced three questions: First, Whether Sir *Thomas Shirley* should have privilege? Secondly, Whether presently, or to be deferred? And, Thirdly, Whether the House should petition the King for some course for securing the debt of the party, according to former precedents, and saving harmless the warden of the *Fleet*? All which questions were resolved; and a bill was brought in to secure *Simpson*'s debt, &c. which also occasioned the statute 1 *Jac.* 1. *c.* 13, for relief of plaintiffs in writs of execution, where the defendants in such writs are arrested, and set at liberty by privilege of Parliament; by which a fresh prosecution and new execution may be had against them when that privilege ceases. *Lex Constitution.* 141. And *anno* 19 *Jac.* I. one *Johnson*, a servant to Sir *James Whitlock*, a member of the House of Commons, was arrested by two bailiffs; who being told Sir *James Whitlock* was a Parliament-man, answered, that they had known greater men's servants than his taken from their masters in time of Parliament: and this appearing, the two bailiffs were sentenced to ask pardon of the House and Sir *James Whitlock*, on their knees; that they should both ride on one horse bare backed, back to back, from *Westminster* to the *Exchange*, with papers on their breasts signifying their offence; all which was to be executed presently, *sedente curiâ*. *Lex Const.* 141.

In action of debt on a bond, conditioned that *B. B.* should render himself at such a day and place to an arrest; defendant pleaded, that by privilege of Parliament, the members, &c. and their servants ought not to be arrested by the space of forty days before the sitting of the Parliament, nor during the session, nor forty days afterwards; and that *B. B.* was at that time servant to such a member of Parliament, so as he could not render himself to be arrested: upon demurrer to this plea, it was adjudged ill, because he might have rendered himself at the time and place; but then it would be at their peril if he was arrested. 1 *Brownl.* 81.

The only way by which Courts of justice could anciently take cognizance of privilege of Parliament was by writ of privilege, in the nature of a *supersedeas*, to deliver the party out of custody when arrested in a civil suit. *Dyer* 59: 4 *Pryn. Brev. Parl.* 757. For when a letter

was

was written by the Speaker to the Judges to stay proceedings against a privileged person, they rejected it as contrary to their oath of office. *Latch.* 58, 150: *Noy* 83. But since the *stat.* 12 *W.* 3. *c.* 3, which enacts, that no privileged person shall be subject to arrest or imprisonment, it hath been held, that such arrest is irregular *ab initio*, and that the party may be discharged upon motion. *Stra.* 989. It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits: and that the *stat.* 1 *Jac.* 1. *c.* 13, and that of King *William* (which remedy some inconveniences arising from privilege of Parliament) speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes; or as it hath been frequently expressed of treason, felony, and breach (or surety) of the peace. See 4 *Inst.* 25. Whereby it seems to have been understood, that no privilege was allowable to the members, their families, or servants, in any *crime* whatsoever; for all crimes are treated by the law as being *contra pacem domini regis*: and instances have not been wanting wherein privileged persons have been convicted of misdemeanors; and committed or prosecuted to outlawry, even in the middle of a session; which proceeding has afterwards received the sanction and approbation of Parliament. *Mic.* 16 *E.* 4, in *Scac*: *Ld. Raym.* 1461: *Comm. Journ.* 1726. To which may be added, that in the year 1763, the case of writing and publishing seditious libels was resolved, by both Houses, not to be entitled to privilege; and that the reasons upon which that case proceeded extended equally to every indictable offence. It is not a little remarkable, that the contrary position had been determined, a short time before, by the Court of Common Pleas. A circumstance which serves to shew that the House, where the case of one of their own members and the dignity of the House were concerned, made a determination more consonant to the rules of general municipal justice, and more favourable to political subordination, than one of the Courts of law in *Westminster-Hall*. See 2 *Wils.* 251: *Comm. Journ.* 24 *Nov*: *Lords Journ. & Protest*, 29 *Nov.* 1763.

The chief, therefore, if not the only, privilege of Parliament in criminal cases, seems to be the right of each House to receive immediate information of the imprisonment or detention of any member, with the reason for which he is detained; a practice that is daily used upon the slightest military accusations, preparatory to a trial by a Court Martial; and which is recognized by the several temporary statutes for suspending the *Habeas Corpus* act (particularly *stat.* 34 *Geo.* 3. *c.* 54;) whereby it is provided, that no member of either House shall be detained, till the matter of which he stands suspected be first communicated to the House of which he is a member, and the consent of the said House obtained for his commitment or detaining. But yet the usage has uniformly been ever since the Revolution, that the communication has been subsequent to the arrest. 1 *Comm.* *c.* 2.

V. 1. One very ancient privilege of Peers, considered as members of Parliament, is that declared by the charter of the Forest, (*cap.* 11,) confirmed in Parliament, 9 *H.* 3; *viz.* That every Lord, spiritual or temporal, summoned to Parliament, and passing through the King's forests, may, both in going and returning, kill one or two of the King's deer without warrant; in view of the forester, if he be present, or on blowing a horn, if he be absent; that he may not seem to take the King's venison by stealth. 1 *Comm.* *c.* 2.

In the next place they have a right to be attended, and constantly are, by the Judges of the Courts of K. B. and C. P. and such Barons of the Exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the King's learned Counsel being serjeants, and by the Masters of the Court of Chancery; for their advice in point of law, and for the greater dignity of their proceedings. [The Lord Chancellor is usually the Speaker of the House.] The Secretaries of State, with the Attorney and Solicitor General, were also used to attend the House of Peers, and have to this day (together with the Judges, &c.) their regular writs of summons, issued out at the beginning of every Parliament, *ad tractandum & consilium impendendum*, though not *ad consentiendum*; but whenever, of late years, they have been members of the House of Commons, their attendance here hath fallen into disuse. See *stat.* 31 *H.* 8. *c.* 10: *Moor* 551: 4 *Inst.* 4, 48: *Hale of Parl.* 140. On account of this attendance there are several resolutions, before the Restoration, declaring the Attorney General incapable of sitting among the Commons. See *post.* VI. (B) 2. Sir *Henry Finch*, member for the University of *Oxford*, afterwards Lord *Nottingham*, and Chancellor, was the first Attorney-General who enjoyed that privilege. *Sim.* 28.

Another privilege is, that every Peer, by licence obtained from the King, may make another Lord of Parliament his *proxy*, to vote for him in his absence. *Seld. Baronage*, *p.* 1. *c.* 1. A privilege which a member of the other House can by no means have; as he is himself but [illegible] people. 4 *Inst.* 12. This licence has long ceased in *Ireland*; but the proxies in the *English* House of Lords are still entered, in Latin, *ex licentiâ regis*. This created a doubt in *Nov.* 1788, whether the proxies in that Parliament were legal, on account of the King's illness. 1 *Ld. Mountm.* 342. But it seems now to be so much a mere form, that the licence may be presumed. Proxies cannot be used in a committee. *Ib.* 106. A proxy cannot sign a protest in *England*; but he can in *Ireland*. 2 *Ld. Montm.* 191. The order that no Lord should have more than *two* proxies, (*i. e.* be a proxy for more than two absent Lords,) was made *anno* 2 *Car.* 1. because the Duke of *Buckingham* had no less than fourteen. 1 *Rushw.* 269. There is an instance, in *Wight* 50, where a proxy is called *litera attornatûs ad Parliamentum*; which it is in effect. The Peer who has the proxy is always called, in Latin, *procurator*. If a Peer, after appointing a proxy, appears personally in Parliament, his proxy is revoked and annulled. 4 *Inst.* 13. By the orders of the House no proxy shall vote upon a question of "guilty or not guilty:" and a spiritual Lord shall only be proxy for a spiritual Lord, and a temporal Lord for a temporal. Two or more Peers may be proxy for one absent Peer; but *Coke* is of opinion, that they cannot vote, unless they all concur. 4 *Inst.* 12: 1 *Woodd* 41.

Each Peer has also a right, by leave of the House, when a vote passes contrary to his sentiments, to enter his dissent on the Journals of the House with the reasons for such dissent, which is usually styled his Protest. 1 *Comm.* *c.* 2. Lord *Clarendon* relates, that the first instances

stances of protests, with reasons, in *England* were in 1641; before which time they usually only set down their names as dissentient to the vote. The first regular protest in *Ireland* was in 1662. 1 *Ld. Mountm.* 402.

All bills likewise that may, in their consequences, any way affect the right of the peerage, are by the custom of Parliament to have their first rise and beginning in the House of Peers; and to suffer no changes or amendments in the House of Commons.

There is also one statute peculiarly relative to the House of Lords, which regulates the election of the sixteen representative Peers of *North Britain*, in consequence of the twenty-second and twenty-third articles of the Union; and for that purpose prescribes the oaths, *&c.* to be taken by the electors; directs the mode of balloting; prohibits the Peers electing from being attended in an unusual manner; and expressly provides, that no other matter shall be treated of in that assembly, save only the election, on pain of incurring a *præmunire. Stat.* 6 *Ann. c.* 23.

2. Considered in its judicial capacity, the House of Peers is the supreme Court of judicature in the kingdom; having at present no original jurisdiction over causes, but only upon appeals and writs of error; to rectify any injustice or mistake of the law committed by the Courts below. But this House has original *criminal* jurisdiction in the cases of *impeachment* by the Commons, and of the trial of *Peers*. See this Dictionary under these titles: and see *ante* IV. 1.

To this authority, this august tribunal succeeded of course upon the dissolution of the *Aula Regia*; for as the Barons of Parliament were constituent members of that Court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great Court was derived. They are, therefore, in all causes the last resort, from whose judgment no further appeal is permitted; but every subordinate tribunal must conform to their determinations; the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those questions, upon which they undertake to decide; and in all dubious cases refer themselves to the opinions of the Judges, who are summoned by writ to advise them; since upon their decision all property must finally depend. 3 *Comm. c.* 4. *p* 57.

Hitherto also *Blackstone* refers the tribunal established by *stat.* 14 *E.* 3. *c.* 5, consisting (though now out of use) of one prelate, two earls, and two barons, who are to be chosen at every new Parliament, to hear complaints of grievances and delays of justice in the King's Courts; and (with the advice of the Chancellor, Treasurer and Justices of both benches) to give directions for remedying those inconveniences in the Courts below. This Committee seems to have been established, lest there should be a defect of justice, for want of a supreme Court of appeal, during any long intermission or recess of Parliament; for the statute further directs, "that if the difficulty be so great that it may not well be determined, without assent of Parliament, it shall be brought by the said prelate, earls, and barons unto the *next* Parliament, who shall finally determine the same." 3 *Comm.* 58.

VI. (A) As the House of Lords seem to be politically constituted, for the support of the rights of the Crown; so the province of the House of Commons is to stand for the preservation of the People's liberties. The Commons, in making and repealing laws, have equal power with the Lords; and for laying taxes on the Subject, the bill is to begin in the House of Commons. And as formerly the laying and levying of new taxes have caused rebellions and commotions, this has occasioned, (particularly *anno* 9 *E.* 3,) when a motion has been made for a subsidy of a new kind, that the Commons have desired a conference with those of their several counties and places, whom they have represented, before they have treated of any such matters. 4 *Inst.* 34.

It is the ancient indisputable privilege and right of the House of Commons, that all grants of subsidies or parliamentary aids, do begin in their House, and are first bestowed by them; although their grants are not effectual, to all intents and purposes, until they have the assent of the other two branches of the Legislature. 4 *Inst.* 29. The general reason given, for this exclusive privilege of the House of Commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable if the Commons taxed none but themselves; but it is notorious, that a very large share of property is in the possession of the House of Lords; that this property is equally taxable, and taxed, as that of the Commons; and therefore the Commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply. The true reason, arising from the spirit of our Constitution, seems to be this; the Lords being a permanent hereditary body, created at pleasure by the King, are supposed more liable to be influenced by the Crown, and when once influenced, to continue so, than the Commons, who are a temporary elective body, freely chosen by the people; it would therefore be extremely dangerous to give the Lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting, if they think the Commons too lavish or improvident in their grants. But, so reasonably jealous are the Commons of this valuable privilege, that herein they will not suffer the other House to exert any power, except that of rejecting. They will not permit the least alteration or amendment to be made by the Lords to the mode of taxing the people by a money bill; under which appellation are included all bills by which money is directed to be raised upon the Subject, for any purpose, or in any shape whatsoever; either for the exigencies of Government, and collected from the kingdom in general, as the land-tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like. This rule is even extended to all bills for canals, paving, provision for the poor, and to every bill in which tolls, rates, or duties are ordered to be collected; and also to all bills in which pecuniary penalties and fines are imposed for offences.

offences. 3 *Hats*. 110. But perhaps it is carried beyond its original spirit and intent, when the money raised is not granted to the Crown. Yet Sir *Matthew Hale* mentions one case, founded on the practice of Parliament in the reign of *Henry* VI. wherein he thinks the Lords may alter a money bill; and that is, if the Commons grant a tax, as that of tonnage and poundage, for *four years*; and the Lords alter it to a less time, as for *two years*; here, he says, the bill need not be sent back to the Commons for their concurrence, but may receive the royal assent without farther ceremony; for the alteration of the Lords is consistent with the grant of the Commons. See *Hale on Parliaments*, 65, 6: *Year-Book*, 33 *Hen*. 6, 17. But such an experiment will hardly be repeated by the Lords, under the present improved idea of the privilege of the House of Commons; and, in any case where a money bill is remanded to the Commons, all amendments in the mode of taxation are sure to be rejected. And, even if the Commons desire to agree with the amendment, the form is to reject the bill so amended by the Lords, and to bring in a *new bill* containing those amendments, solely for the purpose of preserving the privileges of the Commons. See *post*. VII. Upon the application of this rule, there have been many warm contests between the Lords and Commons, in which the latter seem always to have prevailed. See many conferences collected by Mr. *Hatsel*, in his Appendix to the third volume, and particularly in Appendix D; the conference of 20 and 22 *April* 1671; the general question is debated with infinite ability on both sides, but particularly on the part of the Commons, in an argument, drawn up by Sir *Heneage Finch*, then Attorney General; and who there answers the case alluded to by *Hale* from the Year-Book.

VI. (B) 1. In the election of knights, citizens, and burgesses, to represent the counties, cities, and boroughs of the kingdom, consists the exercise of the democratical part of the *British* Constitution: the only true *Sovereignty of the People* being shewn in their choice of their representatives. This choice is, therefore, a matter of such high importance, to the preservation of rational freedom, that the laws have very strictly guarded against any usurpation or abuse of this power by many salutary provisions; which shall be here considered according to the division of the subject made at the beginning of this article.

The true reason of requiring any qualification, with regard to property in voters is, to exclude such persons as are in so mean a situation, that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or wealthy man a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely, and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote; in electing those delegates, to whose charge is committed the disposal of his property, his liberty, his life. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular States have been obliged to establish certain qualifications, whereby some who are suspected to have no will of their own, are excluded from voting; in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other. 1 *Comm*. *c*. 2. *p*. 171.

This constitution of suffrages is framed upon the wisest principle; steering between the two extremes of too much regard to property on the one hand, or to mere numbers on the other. Only such persons are entirely excluded from being electors as can have no will of their own; there is hardly a free agent to be found who is not, [or may not if he pleases,] be entitled to a vote in some place or other of the kingdom. Nor is comparative wealth or property entirely disregarded in elections; for though the richest man has only one vote at one place, yet if his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives. This, says *Blackstone*, is the spirit of our Constitution; not that it is, in fact, quite so perfect as described; for, he candidly adds, if any alteration might be wished or suggested in the present frame of Parliaments, it should be in favour of a more complete representation of the people. 1 *Comm*. *c*. 2. *p*. 171. Perhaps this has been already, in some degree, accomplished; and as one step towards it, and more particularly in order to preserve the right of election as much as possible from being made the instrument of undue influence, it is enacted by *stat*. 22 *Geo*. 3. *c*. 41, that no person employed in managing or collecting the duty of excise, customs, stamps, salt, windows, or houses, or the revenue of the post-office, shall vote at any election; and if such person presumes to vote, he shall forfeit 100*l*. This act does not extend to freehold offices granted by letters patent.

(*a*). To consider, therefore, *first*, the qualifications of *Electors of Knights of the Shire*; or as they are more commonly termed, Members for the Counties.

By *stats*. 8 *H*. 6. *c*. 7: 10 *H*. 6. *c*. 2; (amended by *stat*. 14 *Geo*. 3. *c*. 58, which made the *residence* of the electors and the elected in their respective counties, cities, and boroughs no longer necessary;) the knights of the shire shall be chosen by people, whereof every man shall have freehold, to the value of 40*s*. by the year within the county; which, by subsequent statutes, is to be clear of all charges and deductions, except parliamentary and parochial taxes.

The *stat*. 7 & 8 *W*. 3. *c*. 25, requires, that every freeholder shall *take an oath* that he is a freeholder of the county, and has freehold lands or hereditaments of the yearly value of 40*s*. lying at such a place, within the said county, and that he hath not before polled at the election.

The voter's evidence of the value must, therefore, be received at the poll; but it is not conclusive, and may be contradicted by other evidence, upon a scrutiny, or before a committee. The *stat*. 7 & 8 *W*. 3. *c*. 25, expressly declares, that public taxes are not to be deemed charges payable out of the estate; and therefore it might be thought to be the plain and obvious construction of the act, that wherever a freeholder has an estate which would yield him 40*s*. before these taxes are paid, or for which he would receive a rent of 40*s*. if he paid the taxes himself, he would have a right to vote: yet an election-committee of the House of Commons

Commons [see *post* VI. (B) 3.] has decided, that where a tenant paid a rent, less than 40*s*. but paid parochial taxes, which, added to the rent, amounted to more than 40*s*. the landlord had no right to vote. 2 *Lud*. 475. Two committees have held that the interest of a mortgage is a charge, which, if it reduces the value under 40*s*. takes away the vote; though there is an intermediate decision of a committee in which the contrary was held.

The Knights of Shires are the representatives of the landholders or landed interest of the kingdom; their electors must therefore have estates in lands or tenements within the county represented; these estates must be freehold, that is, for term of life at least; because beneficial leases for long terms of years were not in use at the making of these statutes; and copyholders were then little better than villeins, absolutely dependent on their lords. This freehold must be of 40*s*. annual value; because that sum would, at the time of passing the statutes, with proper industry, furnish all the necessaries of life, and render the freeholder, if he pleased, an independent man. 1 *Comm*. 172. So that it should seem the first step towards a parliamentary reform, would be rather to restrain, than enlarge, the qualifications of electors; 40*s*. *per ann*. in the time of *Hen*. 6, being equal to 20*l*. or more, of the present day. A consideration not much adverted to, at least not brought forward, by those who seem very anxious to new-model Parliament, according to its antient constitution.

The other less important qualifications of the electors for counties, in *England* and *Wales*, may be collected from the following statutes, *viz*. *stats*. 7 & 8 *W*. 3. *c*. 25: 10 *Ann*. *c*. 23: 2 *Geo*. 2. *c*. 24: 18 *Geo*. 2. *c*. 18: 19 *Geo*. 2. *c*. 28: 31 *Geo*. 2. *c*. 14: 3 *Geo*. 3. *c*. 24: 20 *Geo*. 3. *c*. 17: and 30 *Geo*. 3. *c*. 35. These statutes direct;

That no person under twenty-one years of age, shall be capable of voting for any member. This extends to all sorts of members, as well for boroughs as counties, as does also the next, *viz*.

That no person convicted of perjury, shall be capable of voting in any election.

That no person shall vote in right of any freehold, granted to him fraudulently, to qualify him to vote. Fraudulent grants are such as contain an agreement to re-convey, or to defeat the estate granted; which agreements are made void, and the estate is absolutely vested in the person to whom it is so granted. And every person who shall prepare or execute such conveyance, or who shall give his vote under it, shall forfeit 40*l*. *Stat*. 10 *Ann*. *c*. 23. § 1.

To guard the better against such frauds, it is farther provided, that every voter shall have been in the actual possession or receipt of the profits of his freehold, to his own use, for twelve calendar months before; except it came to him by descent, marriage, marriage-settlement, will, or promotion to a benefice or office.

That no person shall vote, in respect of an annuity or rent-charge, unless registered with the clerk of the peace twelve calendar months before. Such annuity or rent-charge to be issuing out of a freehold estate; and if it accrues or devolves, by operation of law, within a year before the election, a certificate of it to be entered with the clerk of the peace, before the first day of the election. *Stat*. 3 *Geo*. 3. *c*. 24: *Heyw*. 145.

That in mortgaged or trust-estates, the person in possession, under the above-mentioned restrictions, shall have the vote.

That only one person shall be admitted to vote for any one house or tenement; to prevent the splitting of freeholds, and multiplying votes for election purposes. But this does not extend to cases which arise from operation of law as devises, descents, &c. As if an estate should descend to any number of females, the husband of each would have a right to vote, if his interest amounted to 40*s*. a year. And, by *stat*. 20 *Geo*. 3. *c*. 17. § 12, a husband may vote for his wife's right of dower, without an actual assignment of it by metes and bounds. It may happen that two or more votes may be given, successively, for the same estate or interest, at the same election; as where a freeholder votes and dies, his heir or devisee may afterwards vote at the same election. And it seems to be generally true, that where no length of possession is required, by any act of Parliament, the elector may be admitted to vote, though his right accrued since the commencement of the election. 1 *Dougl*. 272: 2 *Lud*. 427.

That no estate shall qualify a voter, unless *the estate* has been, at all events, assessed to some land-tax aid for at least twelve months next before the election; and, for six months before the election, either in the name of the voter, or his tenant, *or* of the tenant actually occupying the same; but if he has acquired it by marriage, descent, or other operation of law, in that case it must have been assessed to the land-tax, within two years before the election, either in the name of the predecessor, or person through whom the voter derives his title, *or* in the name of the tenants of such person, *or* in the name of the tenant actually occupying the same. And see *stat*. 30 *Geo* 3. *c*. 35; by which it is provided, that a person may vote for lands, &c. assessed for six months in his own (*i*. *e*. the voter's) name, or for lands coming by descent, &c. assessed within two years in the name of his predecessor, &c. *though the name of the tenant is not mentioned*. And a person may vote for lands, assessed for six months in the name of the actual tenant, *though the name of the voter, or his predecessor*, &c. *is not mentioned*. The statutes do not extend to fee-farm rents, (duly registered and issuing out of assessed lands,) chambers in Inns of Courts, or seats belonging to public offices, which are not usually assessed to the land-tax:

That no tenant by copy of Court-roll shall be permitted to vote as a freeholder. See title *Copyhold*.

(*b*). The *Electors of Citizens and Burgesses* are supposed to be the mercantile part, or trading interest, of the kingdom. But as trade is of a fluctuating nature, and seldom long fixed in a place, it was formerly left to the Crown to summon, *pro re natâ*, the most flourishing towns to send representatives to Parliament. So that as towns increased in trade, and grew populous, they were admitted to a share in the Legislature. But the deserted boroughs continued to be summoned, as well as those to whom their trade and inhabitants were transferred; except a few, which petitioned to be eased of the expence, then usual, of maintaining their members; 4*s*. a day being allowed for a knight of the shire, and 2*s*. for a citizen or burgess; which was the rate of wages established in the reign of *Edward* III. 4 *Inst*. 16. Hence the members for boroughs now bear above a quadruple proportion to those for counties; and the number of parliament-

liament-men is increased since *Fortescue*'s time, in the reign of *Henry* VI. from 300 to upwards of 500, exclusive of those for *Scotland*. The Universities were in general not empowered to send burgesses to Parliament; though once in 28 *E.* 1, when a Parliament was summoned to consider the King's right to *Scotland*, there were issued writs which required the University of *Oxford* to send up four or five, and that of *Cambridge* two or three, of their most discreet and learned lawyers for that purpose. *Prynne Parl. Writs*, i. 345. But it was King *James* I, who indulged them with the permanent privilege, to send constantly two of their own body, to serve for those students, who, though useful members of the community, were neither concerned in the landed nor the trading interest; and to protect, in the Legislature, the rights of the Republic of Letters. 1 *Comm. c.* 2. *p.* 174.

Mr *Christian*, in his note on the above passage, quotes *Prynne*, to shew that the wages formerly given to members of Parliament had no other origin than that principle of natural equity and justice, *qui sentit commodum sentire debet et onus*. Mr. *Christian* suggests, that representation, at the first, was nothing more than the attendance of part of a number who were all individually bound to attend, and where the attendance of the rest was dispensed with: and as all were under the same obligation to render this service, and it was left to themselves to determine which of them should undertake it, it became equitable, that all should contribute to the expence and inconvenience incurred. *Prynne* says, the first writs *de expensis militum*, &c. are coeval with our Kings' first writs of summons to elect and send knights, citizens, and burgesses to Parliament, *viz. anno* 49 *Hen.* 3; before which there are no memorials of either of those writs. These expences were reduced to the certainty abovementioned, of 2*s.* and 4*s. per* day, in the 16th of *E.* II; though there are some instances where a less sum was allowed; and even one in 3 *E.* 4, 1463, where Sir *John Strange*, the member for *Dunwich*, agreed to take a cade and half a barrel of herrings as a composition for his wages. *Glanv. Rep. Pref. p.* 23.

Andrew Marvell, member for *Hull*, in the Parliament after the Restoration, was, it is said, the last member who received these wages; and they were formerly of so much consequence, that many boroughs petitioned to be excused from sending members to Parliament, on account of the expence. *Pryn. on* 4 *Inst.* 32. And from 33 *E.* 3, uniformly through the five succeeding reigns, the Sheriff of *Lancashire* returned, that there were no cities or boroughs in his county that ought or were used, or could, on account of their poverty, send any citizens or burgesses to Parliament. 1 *Comm. c.* 174, *in n.*

From these exemptions, and from new creations, by royal charter, which commenced in the reign of *Ed.* IV; who, in the 17th year of his reign, granted to the borough of *Wenlock* the right of sending one burgess to Parliament, *Sim.* 97; the number of the members of the House of Commons perpetually varied. *Charles* II. in the 29th year of his reign, granted, by his charter, to *Newark*, the privilege of sending representatives to Parliament; and this was the last time that this prerogative of the Crown was exercised. 1 *Dougl. El.* 69. Since the beginning of the reign of *Henry* VIII. the number of the representatives of the Commons is nearly doubled; for in his first Parliament the House consisted only of 298 members: it does not appear that any place has lost its right, of sending representatives to Parliament, since that time; and 260 have since been added by act of Parliament, or by the King's charter, either creating new, or reviving old, boroughs. The Legislature added, 27 for *Wales*, by *stat.* 27 *Hen.* 8. *c.* 26; 4 for the county and city of *Chester*, by *stat.* 34 *Hen.* 8. *c.* 13; 4 for the county and city of *Durham*, by *stat.* 25 *Car.* 2. *c.* 9; and 45 for *Scotland*, by the act of union; in all 80; and 180 have been added by charter.

The number of the House of Commons may be stated thus:

In the first Parliament of *Hen.* VIII.		298	Memb.
Created since by statute		80	558
Created or restored by charter, *viz.* by *Hen.* VIII. 4: by *Ed.* VI. 48: *Mary*, 21: *Eliz.* 60: *Jac.* I. 27: *Car.* I. 18: *Car.* II. 2.	180	180	

The right of election in boroughs is various; depending entirely on the several charters, customs, and constitutions of the respective places, which have occasioned infinite disputes. In some measure to prevent this evil, the *stat.* 7 & 8 *W.* 3. *c.* 7, enacted, that the determination of the House of Commons, (the old judicature in cases of contested elections,) as to the right of election, should bind the returning officer, in taking the poll. That statute was enlarged by *stat.* 2 *Geo.* 2. *c.* 24; by the 4th section of which the last determination of the House of Commons was declared to be final. The statutes which established the modern judicature of election-committees, did not transfer to them the same power of specially determining on the right of election; but by *stats.* 28 *Geo.* 3. *c.* 52. § 25—30: 34 *Geo.* 3. *c.* 83, such committees are invested with the power of binding, by their decision, the right of election; and of appointing a returning officer where the right is litigated; subject to an appeal, by petition to the House within fourteen days after the commencement of the next sessions, and not otherwise. Such petition to be referred to another committee of the House, to be chosen according to the regulations of the said statutes. The determination of such appellate committee, (or of the first committee, if not appealed against,) is now, therefore, conclusive in all subsequent elections. See *post.* 3.

By *stat.* 3 *Geo.* 3. *c* 15, no freeman of any city or borough (other than such as claim by *birth*, *marriage*, or *servitude*) shall be entitled to vote therein, unless he hath been admitted to his freedom twelve calendar months before. This is called the *Durham* Act, and it was occasioned by the Corporation of *Durham* having, upon the eve of an election, in order to serve one of the candidates, admitted 215 honorary freemen. Some corporations have the power of admitting honorary freemen, *viz.* persons who, without any previous claim or pretension, are admitted to all the franchises of the corporation. The *Durham* Act is confined to persons of that description solely. It has frequently been contended, that if honorary freemen are created for the *occasion*, that is, merely for an election purpose, it is a fraud upon the rights of election; and that, by the Common Law, as in other cases of fraud, the admission and all the consequences would be null and void; that within the year, by the statute, fraud was presumed; but that after that time,

time, the statute left the necessity of proving it upon those who imputed it. But in the *Bedford* case, the committee were clearly of opinion, that the objection of occasionality did not lie against freemen made above a year before the election. 2 *Dougl. El.* 91. As to the right of election in the borough of *New Shoreham*, see *stat.* 11 *Geo.* 3. *c.* 55; and in the city of *Coventry*, *stat.* 21 *Geo.* 3. *c.* 54.

No length of possession is required from voters in burgage-tenure boroughs. There are about 29 burgage-tenure boroughs in *England*. 1 *Dougl.* 224. In these the right of voting is annexed to some tenement, house, or spot of ground, upon which a house in antient times has stood. Any number of these burgage-tenure estates may be purchased by one person, which, at any time before a contested election, may be conveyed to so many of his friends, who would each in consequence have a right to vote.

By *stat.* 26 *Geo.* 3. *c.* 100, it is enacted, that in boroughs, where the householders or inhabitants of any description claim to elect, no person shall have a right to vote as such inhabitant, unless he has actually been resident in the borough, six months previous to the day on which he tenders his vote.

By *stat.* 13 *Geo.* 2. *c.* 20, the statutes for preventing fraudulent conveyances to multiply votes on electing knights of shires, (see *ante a*,) are made to extend to lands or tenements, for which any persons shall vote for the election of members to serve in Parliament for any city or town, *that is a county of itself*; and if any person votes at such election as a freeholder, not having his estate a year before, he is liable to the penalties imposed on unqualified voters at county elections.

It has been already observed, that the question who are or ought to be the electors in boroughs, hath very much exercised the *British* House of Commons: *Anno* 22 *Jac.* 1, it was resolved, that where there is no charter or custom to the contrary, the election in boroughs is to be made by all the householders, and not freeholders only: and in a question whether the Commons, or the capital burgesses of a certain borough in *Lincolnshire*, were the electors of members of Parliament, *anno* 4 *Car.* 1, it was agreed, that the election of burgesses, in all boroughs, did of common right belong to the commoners; and that nothing could take it from them but a prescription and constant usage beyond the memory of man. It has been holden, that the commonalties of cities and burghs are only the ordinary and lower sort of citizens, burgesses or freemen; and that the right of election of burgesses to Parliament in all boroughs, belongs to the commoners, *viz.* the ordinary burgesses or freemen; and not the Mayor, Aldermen, and Common Council; though the meaning of the words *communitates civitatum & burgorum*, has always signified, rightly understood, the Mayor, Aldermen, and Common Council, where they were to be found; or the steward or bailiff, and capital burgesses, or the governing parts of cities and towns, by what persons soever they were governed, or titles called. *Dict.*

VI. (B) 2. As to the qualifications of persons to be *Elected* members of the House of Commons, some of these depend upon the law and custom of Parliament, declared by the House of Commons. 4 *Inst.* 47, 8. Others upon certain statutes. And from these it appears,

That they must not be aliens born, or minors.

They must not be any of the twelve Judges, because they sit in the Lords' House. But persons who have judicial places in the other Courts, ecclesiastical or civil, are eligible. 4 *Inst.* 47. Nor of the Clergy; the reason assigned for which is, that they might sit in the convocation. Nor persons attainted of treason or felony, for they are unfit to sit any where. 4 *Inst.* 47: 1 *Comm.* 175.

With respect to the Clergy, their right or capacity of sitting in Parliament seems yet disputable; and Mr. *Christian*, in his notes on this passage of the Commentaries, brings many arguments and authorities to prove, that as they are now allowed to be *electors*, in right of their glebe, they are certainly eligible as members. In the case of *Newport*, *A. D.* 1785, it was determined, by an election-committee, that a gentleman regularly admitted to deacon's orders was capable of being elected. 2 *Lud.* 269. And in the time of *Richard* II. there is a memorable instance of a clergyman, who signalized himself in the House of Commons, Sir *Thomas Haxey*, clerk. He brought in a bill, which passed the Commons, to lessen the expences of the King, and to remove *bishops!* and ladies from the Court; a proceeding which was then considered as treasonable. See *Rot. Parl.* 20 *R.* 2. *p.* 16, 23. Mr. *Christian* adds, that the reason why the Clergy, having no other lands than their glebes, never voted nor were elected in ancient times, seems not in any degree to depend either upon taxation or the convocation, but to be owing solely to the tenure of their glebe land, viz. *Frankalmoign*; which exempted them from attendance on the Courts of the King, Lords, and Sheriffs. 2 *Comm.* 101. And even if they held other lands, holy orders exempted them by the Common Law from secular services and temporal offices; and this was confirmed by *Magna Charta*, and the statute of *Marlbridge*. 2 *Inst.* 3, 121. This was an exemption, and not an exclusion; but what are now important rights were originally considered as duties and burdens; it is not, therefore, strange that the Clergy should avail themselves of this privilege, till the dis-user become regarded as an incapacity. 1 *Comm.* 175, *n.*

To this may be added, that as attendance of this nature is for the service of the public, the whole nation has such an interest therein, that the King cannot grant an exemption to any person from being elected as a knight, citizen, or burgess in Parliament; and for that elections ought to be free. 29 *Hen.* 6. And persons who are eligible might formerly in all cases, and may still in some, be compelled to serve in Parliament against their consent. See 1 *Dougl. El. Ca.* 284. See *post*, next page.

Sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers. *Bro. Abr.* title *Parliament* 7: *Hal of Parl.* 114. But Sheriffs of one county are eligible to be knights of another. *Whitelock of Parl.* ch. 99, 100, 101.

Thus it has been decided, that the Sheriff of *Berkshire* could not be elected for *Abingdon*, a borough within that county. 1 *Dougl. El. Ca.* 419. But a Sheriff of *Hampshire* may be elected for the town of *Southampton* within that county; because *Southampton* is a county of itself,

itself, and is as independent of *Hampshire* as of any other county. 4 *Doug*. 87. It seems that the expression, that Sheriffs of one county are eligible to be knights of another, is too confined; as they may be also members for any city or borough not in the county for which they are Sheriffs.

In strictness, all members ought to have been inhabitants of the places for which they are chosen. *Stats*. 1 *Hen*. 5. *c*. 1: 23 *Hen*. 6. *c*. 15; but this having been long disregarded, was at length entirely repealed, as has already been mentioned, by *stat*. 14 *Geo*. 3. *c*. 58.

No persons concerned in the management of any duties or taxes, created since 1692, (except the commissioners of the treasury; *stat*. 5 & 6 *W*. & *M*. *c*. 7;) nor any of the officers following, *viz*. commissioners of prizes, transports, sick and wounded, wine licences, navy and victualling; secretaries, or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations, and their deputies; officers of *Minorca* or *Gibraltar*; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine-licences, hackney-coaches, hawkers, and pedlars; nor any persons that hold any new office or place of profit under the Crown since 1705; are capable of being elected or sitting as members. See *stats*. 11 & 12 *W*. 3. *c*. 2; 12 & 13 *W*. 3. *c*. 10; 6 *Ann*. *c*. 7: 15 *Geo*. 2. *c*. 22

All the persons enumerated above are utterly incapable of sitting in the House of Commons, whilst they continue in their respective situations. But by *stat*. 15 *Geo*. 2. *c*. 22. § 3. the treasurer or comptroller of the navy, the secretaries of the treasury, the secretary to the Chancellor of the Exchequer, secretaries of the Admiralty, under-secretary to any of the secretaries of state, deputy pay-master of the army, and persons having an office or employment for life, or during good behaviour, are expressly excepted from the prohibition, and are therefore eligible.

The office or trust of a member of Parliament cannot be resigned; and every member is compellable to discharge the duties of it, unless he can shew such cause as the House, in its discretion, will think a sufficient excuse for his non-attendance, upon a call of the House; the only way, therefore, of vacating a seat, is by accepting a situation, in consequence of which the law declares his seat vacant. So where members wish to vacate their seats and retire from Parliament, it is now usual for the Crown to grant them the office of the stewardship of the Chiltern Hundreds. Mr. *Hatsel* observes, "that the practice of accepting this nominal office, which began (he believes) only about the year 1750, has been now so long acquiesced in, from its convenience to all parties, that it would be ridiculous to state any doubt about the legality of such a proceeding; otherwise (he believes) it would be found very difficult, from the form of these appointments, to shew that it is an office of profit under the Crown." 2 *Hats*. 41. It is observable, that the words of the act are, "office, or place of profit;" perhaps, therefore, it is sufficient if the office is new, though not of profit, for in another part of the act the words *office of profit* are used: the distinction may seem trifling, but for a good purpose it may be applicable. This mode of vacating a seat has been repeatedly denied to such members as, for any offences, are liable to expulsion from Parliament: and would thus wish to avoid the disgrace of such expulsion.

No person having a pension under the Crown during pleasure, or for any term of years, is capable of being elected or sitting. *Stats*. 6 *Ann*. *c*. 7: 1 *Geo*. 1. *st*. 2. *c*. 56.

If any member accepts an office of profit under the Crown, which was in existence prior to 1705, except an officer in the army or navy accepting a new commission, his seat is void; but such member is capable of being re-elected. *Stat*. 6 *Ann*. *c*. 7. § 26.

All knights of the shire shall be actual knights, or such notable esquires and gentlemen as have estates sufficient to be knights, and by no means of the degree of yeomen. *Stat*. 23 *Hen*. 6. *c*. 15. This by the *stat*. *de militibus*, 1 *E*. 2, was 20*l*. a year, and put in force against those who had 40*l*. a year till 16 *Car*. 1. *c*. 16. But it is now reduced to a certainty, by ordaining,

That every Knight of a Shire shall have a clear estate of freehold or copyhold, or mortgage, if the mortgagee has been seven years in possession, to the value of 600*l*. *per annum*; and every Citizen and Burgess to the value of 300*l*; except the eldest sons of Peers, and of persons qualified to be knights of shires, and except the members for the two Universities." *Stat*. 9 *Ann*. *c*. 5. This somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men; and of this qualification the member must make oath, and give in the particulars in writing, at the time of his taking his seat.

By *stat*. 22 *Geo*. 3. *c*. 45, no contractor with the officers of government, or with any other person for the service of the public, shall be capable of being elected, or of sitting in the House, as long as he holds any such contract, or derives any benefit from it. But this does not extend to contracts with corporations, or with companies, which then consisted of ten partners; or to any person to whom the interest of such a contract shall accrue by marriage or operation of law, for the first twelve months. And if any person disqualified by such a contract shall sit in the House, he shall forfeit 500*l*. for every day; and if any person who engages in a contract with government admits any member of Parliament to a share of it, he shall forfeit 500*l*. to the prosecutor.

With the exception of these standing restrictions and disqualifications, every Subject of the realm is eligible of common right; though there are instances wherein persons, in particular circumstances, have forfeited that common right, and have been declared ineligible *for that Parliament*, by a vote of the House of Commons; (see *ante*;) or *for ever*, by an act of the Legislature. *Stat*. 7 *Geo*. 1. *c*. 28. But it was an unconstitutional prohibition, which was grounded on an ordinance of the House of *Lords*, and inserted in the *King*'s writs, for the Parliaments holden at *Coventry*, 6 *Henry* 4, that no apprentice or other man of the law should be elected a knight of the shire therein. 4 *Inst*. 10, 48: *Prynne's Plea for Lords* 379: 2 *Whitelocke* 359, 368: *Prynne on* 4 *Inst*. 13. In return for which our law books and historians have branded this Parliament with the name of *Parliamentum indoctum*, or the lack-learning Parliament. And Sir *E*. *Coke* observes, with some spleen, that there was never a good law made thereat. *Walsingh*. *A*. *D*. 1405: 4 *Inst*. 48.

It

It is said by some writers, that in ancient times the King hath nominated the very persons to be returned, and did not leave it to the election of the people; for which an instance is given in the 45th year of *Ed.* III. And among the Parliament writs 14 *Eliz.* there appears to be an appointment and return of burgesses by the Lord of a town, *&c.* But these are single instances in their kind. *Dict.*

3. The Method of proceeding in *Elections* is regulated, from first to last, by the law of Parliament, and a vast variety of statutes; the effect of which is given in the ensuing columns, the provisions of the several statutes being blended together. The following are the statutes on which this abridgment is founded, *viz. Stats.* 7 *H.* 4. *c.* 15: 8 *H.* 6. *c.* 7: 23 *H.* 6. *c.* 14: 2 *W.* & *M. st.* 1. *c.* 7: 5 & 6 *W.* & *M. c.* 20: 7 *W.* 3. *c.* 4: 7 & 8 *W.* 3. *cc.* 7, 25: 10 & 11 *W.* 3. *c.* 7: 12 & 13 *W.* 3. *c.* 10: 6 *Ann. c.* 23: 9 *Ann. c.* 5: 10 *Ann. cc.* 19, 33: 2 *Geo.* 2. *c.* 24: 8 *Geo.* 2. *c.* 30: 18 *Geo.* 2. *c.* 18: 19 *Geo.* 2. *c.* 28: 10 *Geo.* 3. *c.* 16: 11 *Geo.* 3. *c.* 42: 28 *Geo.* 3. *c.* 52: and several others, which are occasionally particularized.

In case of a new Parliament, as soon as it is summoned by the King, the Lord Chancellor sends his warrant to the Clerk of the Crown in Chancery; who thereupon issues out writs to the Sheriff of every county, for the election of all the members to serve for that county, and every city and borough therein.

If a vacancy happens by the death, *&c.* of any member during the sitting of Parliament, the Speaker may, by order of the House, send his warrant to the Clerk of the Crown; who thereupon proceeds as in other cases where the warrant is sent by the Lord Chancellor. And with regard to a vacancy happening by death or peerage during the prorogation or recess of Parliament, the *stat.* 24 *Geo.* 3. *st.* 2. *c.* 26, which repeals the former statutes upon this subject, provides, that if, during any recess, any two members give notice to the Speaker, by a certificate under their hands, that there is a vacancy by death, or that a writ of summons has issued under the great seal, to call up any member to the House of Lords, the Speaker shall forthwith give notice of it to be inserted in the *Gazette*; and at the end of fourteen days after such insertion he shall issue his warrant to the Clerk of the Crown, commanding him to make out a new writ for the election of another member; but this shall not extend to any case where there is a petition depending for such vacant seat; or where the writ, for the election of the member so vacating, had not been returned fifteen days before the end of the last sitting of the House; or where the new writ cannot issue before the next meeting of the House for the dispatch of business. And to prevent any impediment in the execution of this act, by the Speaker's absence from the kingdom, or by the vacancy of his seat, at the beginning of every Parliament he shall appoint any number of members from three to seven inclusive, and shall publish the appointment in the *Gazette*; these members in the absence of the Speaker shall have the same authority as is given to him by the statute; these are the only cases provided for by act of Parliament; for any other species of vacancy, therefore, no writ can issue during a recess of Parliament.

Within three days, (or in the Cinque-Ports within six days, *stat.* 10 & 11 *W.* 3. *c.* 7,) after the receipt of this writ out of Chancery, the Sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs, commanding them to elect their members; and those returning officers are to proceed to election within eight days from the receipt of the precept, giving four days' notice of the same; and to return the persons chosen, together with the precept, to the Sheriff. In the borough of *New Shoreham* in *Sussex*, wherein certain freeholders of the county are entitled to vote by *stat.* 11 *Geo.* 3. *c.* 55, the election must be within twelve days, with eight days' notice of the same.

But elections of Knights of the Shire must be proceeded to by the Sheriffs themselves in person; and, according to former laws, at the next county Court after the delivery of the writ, to be holden at the most usual place in the county. If the county Court fell upon the day of delivering the writ, or within six days after, the Sheriff might have adjourned the Court, and election, to some other convenient time, not longer than sixteen days, nor shorter than ten; but he cannot alter the place without the consent of all the candidates. Now, by *stat.* 25 *Geo.* 3. *c.* 84, it is enacted, that the Sheriff having indorsed on the back of the writ the day on which he received it, shall, within two days after the receipt thereof, cause proclamation to be made, at the place where the ensuing election ought by law to be held, of a *special County-Court*, to be there held for the purpose of such election only; on any day, *Sunday* excepted, not later from the day of making such proclamation than the sixteenth day, nor sooner than the tenth; and that he shall proceed on such election, at such special County-Court, in the same manner as if the said election had been held at a County-Court, or at an adjourned County-Court, according to the former laws. And by *stat.* 33 *Geo.* 3. *c.* 64, all notices of the time and place of election of members of Parliament shall be publicly given, at the usual place, between eight in the morning and four in the afternoon, from *October* 25th to *March* 25th; and, during the other half year, between eight in the morning and six in the afternoon.

And as it is essential to the very being of Parliament, that elections should be absolutely free, all undue influence whatever upon the electors is illegal, and strongly prohibited. As soon, therefore, as the time and place of election within counties, or boroughs, are fixed, all soldiers quartered in the place are to remove, at least one day before the election, to the distance of two miles or more, and not to return till one day after the poll is ended, except in the liberty of *Westminster*, or other residence of the Royal Family, in respect of his Majesty's guards, and in fortified places; *stat.* 8 *Geo.* 2. *c.* 30. § 3. Riots likewise have been frequently determined to make an election void. By vote also of the House of Commons no Lord of Parliament, or Lord Lieutenant of a County, hath any right to interfere in the election of Commoners; and, by statute, the Lord Warden of the Cinque-Ports shall not recommend any members there. If any officer of the excise, customs, stamps, or certain other branches of the revenue, presume to intermeddle in elections, by persuading any voter, or dissuading him, he forfeits 100*l.* and is disabled to hold any office.

Consistently with the same principle also, it has been decided, that a wager between two electors, upon the success of their respective candidates, is illegal and void; for were it permitted, it would manifestly corrupt the freedom of elections. 1 *Term Rep.* 55.

Indeed, however the electors of one branch of the Legislature may be secured from any undue influence from either of the other two, and from all external violence and compulsion; the greatest danger is that, in which themselves co-operate, by the infamous practice of bribery and corruption; to prevent which it is enacted, that no Candidate shall, after the date (usually called the *teste*) of the writs; or after the ordering of the writs, that is, after the signing of the warrant of the Chancellor for issuing the writs, (*Sim* 165) or after any vacancy; give any money or *entertainment* to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his being elected, on pain of being incapable to serve for that place in Parliament; that is, incapable of serving upon that election. This is provided by *stat.* 7 *W.* 3. *c.* 4. commonly called the Treating-Act; and it has been decided by a committee, according to the plain and obvious meaning of the words of the statute, that treating vacates the election only; and that the candidate is no way disqualified from being re-elected, and sitting upon a second return. 3 *Lud.* 459. It has been supposed, that the payment of travelling expences, and a compensation for loss of time, were not treating, or bribery, within this or any other statute; and a bill passed the House of Commons to subject such cases to the penalties imposed by *stat.* 2 *Geo.* 2. *c.* 24. upon persons guilty of bribery. But this bill was rejected in the House of Lords by the opposition of Lord *Mansfield*, who strenuously maintained that the bill was unnecessary; since such conduct by the laws in being was clearly illegal; and subject, in a Court of law, to the penalty of bribery. 2 *Lud.* 89.

To guard against still more gross and flagrant acts of bribery, it is enacted by *stat.* 2 *Geo.* 2. *c.* 24. explained and enlarged by *stats.* 9 *Geo.* 2. *c.* 38; 16 *Geo.* 3. *c.* 11. that if any money, gift, office, employment, or reward be given, or promised to be given, to any voter, at any time, in order to influence him to give or withhold his vote, as well he that takes, as he that offers such a bribe, forfeits 500*l.* and is for ever disabled from voting and holding any office in any corporation, unless, before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offence. But these statutes do not create any incapacity of sitting in the House; that depends solely upon the Treating-Act above mentioned.

It has been held, that it is bribery if a Candidate gives an elector money to vote for him, though he afterwards votes for another. 3 *Burr.* 1235. And there can be no doubt but it would also be bribery in the voter; for the words of the statute clearly make the offence mutual. And it has been decided, that such note will not be available to the person to whom it may afterwards be given gratuitously; [illegible] the property of [illegible] election [illegible] 2 *Doug.* 696. An [illegible] in 4 *Doug.* [illegible] of an attorney, which [illegible] to the amount of 21 [illegible] against the defendant.

Besides the penalties, thus imposed by the Legislature, bribery is a crime at Common Law, and punishable by indictment or information; though the Court of King's Bench will not in ordinary cases grant an information within two years, the time within which an action may be brought for the penalties under the statute. 3 *Burr.* 1335, 1359. But this rule does not affect a prosecution by indictment, or information by the Attorney General; who in one case was ordered by the House to prosecute two persons who had procured themselves to be returned by bribery. They were convicted and sentenced by the Court of King's Bench to pay each a fine of 1000 marks, and to be imprisoned six months. 4 *Doug.* 292.

Undue influence being thus endeavoured to be effectually guarded against, the election is to be proceeded to, on the day appointed; the Sheriff or other returning officer first taking an oath against bribery, and for the due execution of his office. The Candidates, likewise, if required, must swear to their qualification, or their election shall be void, and the electors in counties to theirs; and the electors both in counties and boroughs are also compellable to take the Oaths of Allegiance and Supremacy, the Oath of Abjuration, and that against bribery and corruption. And it might not be amiss, says *Blackstone*, if the Candidates were bound to take the latter oath, as well as the former; which, in all probability, would be much more effectual, than administering it only to the electors.

By *stat.* 34 *Geo.* 3. *c.* 73. in order to expedite the business at elections, the returning officers are enabled, on request of the Candidates, to appoint persons to administer to voters the Oaths of Allegiance, Supremacy, the Declaration of Fidelity, the Oath of Abjuration, and the declaration or affirmation of the effect thereof, *previously to their coming to vote*; and to grant the voters certificates of their having taken the said Oaths; without which certificate the voters shall not be permitted to vote, if they are required to take the Oaths.

By *stat.* 25 *Geo.* 3. *c.* 84. all electors for cities and boroughs shall swear to their name, addition, or profession, and place of abode; and also, like freeholders in counties, that they believe they are of the age of twenty-one, and that they have not been polled before, at that election. And, by the same statute it is enacted, that if a poll is demanded at any election for any county or place in *England* or *Wales*, it shall commence either that day, or at the farthest upon the next, and shall be continued from day to day (*Sundays* excepted) until it be finished; and that it shall be kept open seven hours at the least each day, between eight in the morning and eight at night. But should it be continued to the 15th day, then the returning officer shall close the poll at or before three o'clock in the afternoon, and shall immediately, or on the next day, publicly declare the names of the persons who have a majority of votes; and he shall forthwith make a return accordingly, unless a scrutiny is demanded by any Candidate, or by two or more of the electors, and he shall deem it necessary to grant the same; in which case it shall be lawful for him to proceed thereupon; but so, as that, in all cases of a general election, (*i. e.* on the calling a new Parliament,) if he has the return of the writ he shall cause a return of the

the members to be filed in the Crown-office on or before the day on which the writ is returnable: If he is a returning officer acting under a precept, he shall make a return of the members at least six days before the day of the return of the writ. But if it is not a general election, then, in case of a scrutiny, a return of the member shall be made within thirty days after the close of the poll; upon a scrutiny the returning officer cannot compel any witness to be sworn, though the statute gives him power to administer an oath to those who consent to take it.

The election being closed, the returning officer in boroughs returns his precept, to the Sheriff; with the names of the persons elected by the majority: and the Sheriff returns the whole, together with the writ for the county, and the names of the Knights elected thereupon, to the Clerk of the Crown in Chancery, before the day of meeting, if it be a new Parliament; or within fourteen days after the election, if it be an occasional vacancy; and this under penalty of 500*l.* If the Sheriff does not return such Knights only as are duly elected, he forfeits, by the old statutes of *Hen.* VI. 100*l.* and the returning officer in boroughs, for a like false return, 40*l.* and they are besides liable to an action, in which double damages shall be recovered, by the latter statutes of King *William*: and any person bribing the returning officer shall also forfeit 300*l.*; but the members returned by him are the sitting members, until upon petition the return shall be adjudged to be false and illegal.

It has been adjudged on *stat.* 23 *H.* 6. *c.* 7, that though, according to the statute, no election should be made of any Knight of the Shire, but between eight and eleven of the clock in the forenoon; if the election be begun within that time, and cannot be determined in those hours, it may be made after. And if any electors give their voices before the precept for election is read and published, it will be of no force; for after the precept is thus read, &c. they may alter their voices and make a new election. 4 *Inst.* 48, 49.

By *stat.* 10 *Ann.* c. 23, it is enacted, that the returning officer, within twenty days after the election, is to deliver over to the clerk of the peace, all the poll books on oath made before two justices; to be preserved among the records of the sessions of the peace, &c.

By the *stat.* 7 & 8 *W.* 3. c. 7, which gives the action for double damages in case of a false return, all *such* returns, wilfully made, are declared to be illegal: and over and above the remedy which the party grieved has, by action under this statute, the returning officer or other person offending, is punishable by the House; which in such cases has generally committed him to custody, and sometimes to *Newgate*. And the accepting and returning of indentures of return, not signed by the proper returning officer in *Scotland*, has been held a false return, and the Under-Sheriff offending committed. *Sim.* 181, 2.

And in order to prevent the evil of *double returns*, it was by the same *stat.* 7 & 8 *W.* 3. c. 7, enacted, that if the returning officer return more persons than are required to be chosen by the writ or precept, the same remedy may be had by the party grieved, as in case of a false return. And by § 10 of the *stat.* 25 *Geo.* 3. *c.* 84, it is provided, that if *no return* shall be made to a *general* writ on or before the return day, or upon a new writ within fifty-two days after the *teste*, or if a special return be made, the party grieved may petition the House against the same; and a committee shall determine whether any and which of the persons named in such petition ought to have been returned, or whether a new writ ought to issue; and the House shall give the necessary orders. And for any offence against this statute, the returning officer is made liable to a prosecution by information or indictment. And if any returning officer shall wilfully delay, neglect, or refuse duly to return a person elected, such person, on the determination of a committee in his favour, may sue the returning officer, and recover double damages. See *stat.* 25 *Geo.* 3. *c.* 84. §§ 11, 14.

Where the right of election is doubtful, and consequently it is uncertain what Candidates are duly elected, the returning officer may, and for his own safety ought to, make a *double return*: But this must be done upon the returning officer's own judgment, not upon the agreement of the parties. If two or more sets of electors make each a return of a different member, (which is called a *Double Election*,) that return, only which the returning officer, to whom the Sheriff's precept was directed, has signed and sealed, is good. And the members by him returned shall sit, until displaced on petition. *Sim.* 184.

Where a false return, or a double return, is made, it may be amended at the bar of the House. The former either by taking the return off the file, if made by an illegal returning officer, and annexing to the writ the real return delivered by the legal officer to the Clerk of the Crown. Where the Christian name of the party returned is mistaken, it may be rectified; sometimes the amendment is made by erasure of the endorsement of the wrong name, and every thing belonging to it, and by a substitution of the right name. Formerly the returning officer himself used to amend the return; but now it is usually done by the Clerk of the Crown. The double return is amended by taking one off the file. When the return is made, in order to preserve it free from dispute, the Clerk of the Crown is directed to enter it, whether a single or a double return, in a book to be kept for that purpose in his office, within six days after the return; and no amendment or alteration must be made, by him or his deputy, or others, of the return, except by order of the House; and such book, or a copy thereof, is directed to be sufficient evidence of the return, in any action to be brought upon that statute; and for any default or omission in such particulars, or for certifying any person returned who was not returned, the Clerk of the Crown is liable to a penalty of 500*l.* to the party grieved, and forfeiture of his office. *Stat.* 7 & 8 *W.* 3. *c.* 7; made perpetual by *stat.* 12 *Ann.* *st.* 1. *c.* 15.

In double returns, it has been formerly a general practice in the House of Commons, that neither one nor the other should sit in the House until it be decided. In the year 1640, two returns were made for *Great Marlow*, and in both indentures one person was returned; and he was admitted to sit, but the others ordered to withdraw until the question was determined. And in the same year, it was ordered, that where some are returned by the Sheriff, or such other officer as by law hath power to return, and others returned by private hands; in such case, those returned by the Sheriff, or other officer, shall sit until the election is quashed by the House. *Ordinan.* 1640. If one be duly elected, and the Sheriff,

 &c.

&c. return another, the return must be reformed and amended; and he who is duly elected is to be inserted, for the election is the foundation, and not the return. 4 *Inst.* 49.

Double returns are to be determined before *double elections*; and the return immediately annexed to the writ must be first heard. *Sayer.* 184, *n.*

In an action *upon the case*, the plaintiff declared, that he was duly elected a member of Parliament for such a borough, and that the defendant returned two other persons; and that he petitioned the House of Commons, and was adjudged to be duly elected, and his name ordered to be inserted in the roll, and the name of the other to be rased out: the plaintiff had a verdict; but it was adjudged, in arrest of judgment, that this declaration was not founded on the *stat.* 7 & 8 *W.* 3. *c.* 7, because that statute gave an action where there was none before; therefore the fact must be made agreeable to it, which not being done, defendant had judgment. 2 *Salk.* 504. The Court will not meddle in an action upon a double return, until it is determined in Parliament. *Lutw.* 88. And it hath been holden, that for a double return, no action lay before the statute 7 & 8 *W.* 3. *c.* 7, because it is the only method the Sheriff had to secure himself; and when the right was decided in Parliament, then one indenture was taken off the file, so that it is not then a double return; neither can the party have an action for a false return, for the return may be determined in the House whether true or false, and if so, there will be an inconvenience in contrary resolutions, if they should determine one way, and the Court at law another; but after a dissolution the action may lie for a false return, for then the right cannot be determined in Parliament. 2 *Salk.* [illegible]

A double return is the same as a false return, as to action on the case, in both it is grounded on the falsity; but there is another reason why this action will not lie for a double return, because the law doth not take notice of such returns, it is only allowed by the usage of Parliament, and in cases where the proper officer cannot determine who is chosen; therefore, when he doubts, he makes a double return, and submits the choice to the determination of the House of Commons; and if that House [illegible] make determinations [illegible], it will [illegible] for the law to subject a man to an action [illegible] a fact to be determined by a Court which hath proper jurisdiction to determine it. *Lutw.* [illegible]

A Member elected and returned for several places, is to make his choice for which place he will serve; and if he doth not, by the time which the House shall appoint, the House may determine for what place he [illegible], and a new writ shall go out for the other place.

An action on the case lies, by a burgess against the returning officer of a borough, for refusing his vote at an election to serve [illegible]. This was decided in an action brought by [illegible], burgess of *Aylesbury*, against *White* [illegible], constables of the said borough, for refusing to receive [illegible] the election of a member of Parliament; [illegible] with 5*l.* damages; but [illegible] the opinion of three Judges, [illegible] not maintainable, because the constables [illegible] and the not receiving the plaintiff's vote is [illegible] for when the matter comes before the House, his vote will be received; that the right of electing members to serve in Parliament is to be decided in Parliament, and the plaintiff may petition the House for that purpose; and after it is determined there, he may then bring his action and not before. *Holt* Chief Justice *contra*; That the plaintiff had a right to vote; a freeholder has a right to vote by reason of his freehold; and it is a real right, and the value of his freehold was not material till the *stat.* 8 *Hen.* 6, which requires it to be 40*s. per annum*: that as it is *ratione liberi tenementi* in counties; so, in ancient boroughs, they have a right to vote *ratione burgagii*; and in cities and corporations, it is *ratione franchesiæ*, and a perpetual inheritance, vested in the whole corporation, but to be used by the particular members; that this is a noble privilege, which entitles the Subject to a share in the government and legislature; and that if the plaintiff hath a right, he must have a remedy to assert that right, for want of right and want of remedy is the same thing: that refusing to take the plaintiff's vote is an injury, and every injury imports a damage; and that where a parliamentary matter comes in, incidentally, to an action of property in the King's Court, it must be determined there, and not in Parliament; the Parliament cannot judge of the injury, nor give damages to the plaintiff, and he hath no remedy by way of petition: And, according to this opinion, the judgment of the other three judges was reversed, upon a writ of error brought in the House of Lords; who ordered that the plaintiff should recover his damages assessed by the jury. See *Bro. P. C.* and also 1 *Salk.* 19: 6 *Mod.* 45: 3 *Salk.* 17: 8 *St. Tr.* 89 *Holt* 524: *Ld. Raym.* 938: *Raym. Ent.* 479.

This determination occasioned much disturbance in both Houses of Parliament. and on the 25th of *January* 1704, the House of Commons resolved itself into a committee on the business: and, after a very long and animated debate, came to five resolutions; importing, that the Commons of *England*, in Parliament assembled, had the sole right to examine and determine all matters relating to the right of election of their own members; and that the right was not determinable elsewhere. That the practice of determining the qualifications of electors, in any Court of law, would expose all returning officers to a multiplicity of vexatious suits and insupportable expences; and subject them to different and independent jurisdictions, as well as to inconsistent determinations in the same case, without relief. That *Ashby* was guilty of a breach of privilege, as were all persons bringing actions, and all attornies, solicitors, counsellors, and serjeants at law, soliciting, prosecuting, or pleading *in any such of the same nature*. These resolutions, signed by the clerk, were fixed upon the gate of *Westminster-Hall*. The Lords, on their part, passed resolutions in support of their judgment, copies of which and the case itself were sent by the Lord Keeper to all the Sheriffs of *England*; to be circulated through all the boroughs of their respective counties. See *Bro. P. C.* title *Action. Smollet's Hist. Eng.* [illegible]

Several persons were in the next session committed to *Newgate*, under a warrant signed by *Robert Harley*, Speaker of the House of Commons, for prosecuting actions at law against the constables of the borough of *Aylesbury*, who refused to take their votes at the election of members of Parliament, *&c.* in contempt of the jurisdiction and privileges

vileges of the House; and this matter being returned by *habeas corpus* severally, and the several persons defendants brought into Court, counsel moved that they might be discharged; for that the prosecution of a suit at law could be no unlawful act, nor a breach of the privilege of the House of Commons: three Judges were of opinion, that the House were the proper judges of their own privileges; but *Holt* Chief Justice held, that *the authority of the Commons was circumscribed by laws*; and if they should exceed that authority, then to say they were judges of their own privileges, is to make their privileges to be what they would have them to be; and that if they should wrongfully imprison, there could be no redress; so that the Courts at *Westminster* could not execute the laws upon which the liberties of the Subject subsist. 2 *Salk.* 503: See *ante* IV. 1; V. 8.

The question, as to this right of action against a returning officer for refusing a vote, was intended to have been decided on a *writ of error*, to review the judgment of the Court of *K. B.* in refusing the *habeas corpus*; but was put an end to by the prorogation of Parliament; and the determination in *Ashby* and *White* has never since been disputed. See *Smollett's Hist. of Eng. l.* 1. *c* 8.

The question, as to the power of the House of Commons to commit for a contempt, was again brought before the Court of King's Bench in the Honourable *Alex. Murray's* case. 1 *Wils.* 299: And before the Court of Common Pleas in the case of *Brass Crosby.* 3 *Wils.* 188: *Black. Rep.* 754. In both which it was ruled, according to the decision in *Salkeld*, that a person committed by the House of Commons for a contempt, cannot be discharged by a Court of Common Law. See this Dictionary, title *Bail* II.

The form and manner of proceeding upon *Petitions* to the House of Commons, in cases of controverted elections, are now regulated by *statute*, 10 *Geo.* 3. *c.* 16; (made perpetual by *stat.* 14 *Geo.* 3. *c.* 15;) which directs the method of choosing, by lot, a select committee of fifteen members, who are sworn well and truly to try the same, and a true judgment to give according to the evidence.

This statute 10 *Geo.* 3. *c.* 16, is best known by the name of *Grenville's* Act; and has been much improved by *stats.* 11 *Geo.* 3. *c.* 42: 25 *Geo.* 3. *c.* 84: 28 *Geo.* 3. *c.* 52: 32 *Geo.* 3. *c.* 1: 36 *Geo.* 3. *c.* 59. By these statutes any person may present a petition, complaining of an undue election; but one subscriber to the petition must enter into a recognizance, himself in 200*l.* with two sureties in 100*l.* each, to appear and support his petition: and then the House shall appoint some day, beyond fourteen days after the commencement of the session, or the return of the writ, and shall give notice to the petitioners, and the sitting members, to attend the bar of the House on that day by themselves, their counsel or agents; this day, however, may be altered, but notice shall be given of the new day appointed. On the day fixed, if 100 members do not attend, the House shall adjourn from day to day; except over *Sundays*, and for any number of days, over *Christmas-day*, *Whitsunday*, and *Good Friday*: and on such day the House shall not proceed to any other business, previous to reading the order of the day for taking the petition into consideration, except swearing in members; receiving reports from committees; amending a return; attending his Majesty, or a commission, in the House of Lords; receiving messages from the Lords; proceeding in the prosecution of an impeachment before that House; or proceeding upon the order of the day for the call of the House; and making other orders for enforcing the attendance of members.

The names of all the members belonging to the House are then put into six boxes or glasses in equal numbers; and the clerk shall draw a name from each of the glasses in rotation, which name shall be read by the Speaker, and if the person is present, and not disqualified, it is put down: and in this manner they proceed till 49 such names are collected. But besides these 49, each party shall select, out of the whole number present, one person, who is called the *Nominee* of that party. Members who have voted at the election in question, or who are petitioners or petitioned against, cannot serve; and persons who are sixty years of age, or who have served before, are excused, if they require it; and others who can shew any material reason, may also be excused by the indulgence of the House. After 49 names are so drawn, lists of them shall be given to the respective parties; who shall withdraw, and shall alternately strike off one (the petitioners beginning) till they are reduced to 13; and these 13, with the two Nominees, constitute the select committee. If there are three parties they shall alternately strike off one, and in that case the 13 shall choose two others, as the Nominees. The members of the committee shall then be ordered by the House to meet within 24 hours: and they cannot adjourn for more than 24 hours, except over *Sunday*, *Christmas-day*, and *Good Friday*, without leave of the House; and no member of the Commons shall absent himself without the permission of the House. The committee shall not in any case proceed to business with fewer than 13 members, and they are dissolved if, for three successive days of sitting, their number is less than that; unless they have sate 14 days, and then they may proceed though reduced to 12, and if 25 days to 11; and they continue to sit notwithstanding a prorogation of the Parliament. All the 15 members of the committee take a solemn oath, in the House, that they will give a true judgment according to the evidence; and every question is determined by a majority. The committee may send for witnesses, and examine them upon oath, a power which the House of Commons does not possess; and if they report that the petition or defence is frivolous or vexatious, the party aggrieved shall recover costs. On the close of the whole business, the committee report their determination to the House; who order the return of the writ to be amended accordingly, if necessary, in the manner already stated; and thus the election is definitively decided. See, as to the effect of the decisions of these Committees, *ante* VI. B. 1. &c.

VII. THE MODE of making laws is much the same in both Houses. It is proper previously to premise, that for dispatch of business each House of Parliament has its Speaker. The Speaker of the House of Lords, whose office it is to preside there, and manage the formality of business, is the Lord Chancellor, or keeper of the King's [illegible] Seal, or any other appointed by the King's com[illegible]: and, if none be so appointed, the House of Lords [illegible]id) may elect; and an instance of that nature has occurred in the *Irish* House of Lords. The Speaker of the House of Commons is chosen by the House; but must

must be approved by the King. And herein the usage of the two Houses differs, that the Speaker of the House of Commons cannot give his opinion or argue any question in the House; but the Speaker of the House of Lords, if a Lord of Parliament, may.

The Commons anciently had no continual Speaker, but, after consultation, their manner of proceeding was to agree upon some person of great abilities, to deliver their resolutions. In the reign of *William Rufus*, at a great Parliament held at *Rockingham*, a certain knight came forth, and stood before the people, and spake in the name and behalf of them all; who was undoubtedly the Speaker of the House of Commons at that time. The first Speaker certainly known was *Peter de Montford*, 44 *H.* 3, when the Lords and Commons sat in several Houses, or at least gave their assents severally. *Lex Constitutionis* 162.

Hume is mistaken, who says that *Peter de la Mare*, chosen in the first Parliament of *Ric.* II. was the first Speaker of the Commons. *Vol.* 3. *p.* 3. And in the rolls of Parliament, 51 *Ed.* 3. *No.* 87, it appears, that Sir *Thomas Hungerford* chevalier, *qui avoit les paroles des communes en cest parlement*, addressed the King, in the name of the Commons, in that jubilee year, to pray that he would pardon several persons who had been convicted on impeachments. And there he is not mentioned as if his office was a novelty. 1 *Comm.* 181. *in n.*

Sir *Richard Waldgrave*, 5 *R.* 2, was the first Speaker who made any formal apology for inability, as now practised: *Richard Rich*, Esq. *an.* 28 *H.* 8, was the first Speaker who is recorded to have made request for access to the King. *Thomas Moyle*, Esq. *an.* 34 *H.* 8, is said to be the first Speaker who petitioned for freedom of speech; and Sir *Thomas Cargrave*, *an.* 1 *Eliz.* was the first who made the request for privilege from arrests, &c. Sir *John Bussby*, *an.* 17 *R.* 2, was the first Speaker presented to the King, in full Parliament, by the Commons. And when Sir *Arnold Savage* was Speaker, *an.* 2 *H.* 4, it was the first time that the Commons were required by the King to choose a Speaker *Ibid.* The salary of the Speaker is now settled at 1500*l.* a quarter, or 6000*l.* a year, under *stat.* 50 *Geo.* 3. *c.* 10; which prohibits his holding any office under the Crown during pleasure.

In each House the act of the majority binds the whole; and this majority is declared by votes openly and publicly given.

In the House of Commons the Speaker never votes except when there is an equality without his casting vote, which in that case creates a majority; but the Speaker of the House of Lords has no casting vote, his vote being connected with the rest of the House; and in the case of an equality the *Non-contents*, or negative voices, have the same effect and operation as if they were in fact a majority. *Lords' Journ.* 25 *June* 1661. The House of Lords in *Ireland* observes the same rule, and in cases of equality *semper præsumitur pro negante*. *Ld. Mountm.* i. 105. Hence the order in putting the question, on appeals and writs of error, is this; "Is it your Lordships' pleasure, that this decree or judgment should be reversed?" for if the votes are equal, the judgment of the Court below is affirmed. *Ib.* ii. 81.

Here it may not be improper to observe, that there is no *casting vote* in Courts of justice; but in the superior Courts, if the Judges are equally divided, there is no decision; and the cause is continued in Court till a majority concur; which they frequently do by consent, merely for the purpose of sending the cause, by appeal, to a higher jurisdiction. At the sessions, the justices, in cases of equality, ought to respite the matter till the next session; but if they are equal one day, and the matter is duly brought before them on another day in the same sessions, and there is then an inequality, it will amount to a judgment: for all the time of the session is considered but as one day. A casting vote sometimes signifies the single vote of a person who never votes but in the case of an equality; sometimes the double vote of a person who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote. A casting vote neither exists in corporations nor elsewhere, unless it is expressly given by statute or charter; or, what is equivalent, exists by immemorial usage. 1 *Comm.* 181, *in n.*

With respect to other formalities in the two Houses it may be observed, there are no places of precedency in the House of Commons as there are in the House of Lords; only the Speaker has a chair or seat fixed towards the upper end, in the middle of the house; and the clerk, with his assistant, sits near him at the table, just below the chair. The members of the House of Commons never had any robes, as the Lords ever had, except the Speaker and clerks, who in the House wear gowns, as professors of the law do during term-time. No knight, citizen, or burgess of the House of Commons, shall depart from the Parliament without leave of the Speaker and Commons assembled; and the same is to be entered in the book of the Clerk of the Parliament. *Stat.* 6 *H.* 8. *c.*16. And in the 1*st* & 2*d* of *P.* & *M.* informations were preferred by the Attorney General against thirty-nine of the House of Commons, for departing without licence, whereof six submitted to fines; but it is uncertain whether any of them were paid.

Calling the House is to discover what members are absent, without leave of the House, or just cause; in which cases fines have been often imposed: On the calling over, such of the members as are present, are marked; and the defaulters being called over again the same day, or the day after, and not appearing, are summoned, or sent for by the serjeant at arms. *Lex Constitutionis* 159.

Forty members are requisite to make a House of Commons for dispatch of business; and the business of the House is to be kept secret among themselves. In the 23d year of Queen *Elizabeth*, *Arthur Hall*, Esq. member of Parliament, for publishing the conferences of the House, and writing a book which contained matters of reproach against some particular members, derogatory to the general authority, power, and state of the House, and prejudicial to the validity of the proceedings, was adjudged by the Commons to be committed to the *Tower* for six months, fined 500*l.* and expelled the House. But the Speaker of the House of Commons, according to the duty of his office, as a servant to the House, may publish such proceedings as he shall be ordered, by the Commons assembled; and he cannot be liable for what he does that way by the command of others, unless those other persons are liable.

All bills, motions, and petitions, are by order of Parliament to be entered on the Parliament rolls, although they

they are denied, and never proceed to the establishment of a statute, together with the answers. *Lex Constitutionis* 154.

The Speaker of the House of Commons is not allowed to persuade or dissuade in passing a bill, only to make a short narrative of it; opening the parts of the bill, so that all may understand it; if any question be upon the bill, he is to explain, but not enter into argument or dispute. When Mr. Speaker desires to speak, he ought to be heard without interruption; and when the Speaker stands up, the member standing up is to sit down: if two stand up to speak to a bill, he who would speak against the bill, if it be known, is to be first heard; otherwise he who was first up, which is to be determined by the Speaker: no member is to be taken down, unless by Mr. Speaker, in such cases as the House do not think fit to admit; and if any person speak impertinently, or besides the question, the Speaker is to interrupt him, and know the pleasure of the House whether he shall be further heard: but if he speaks not to the matter, it may be moderated: and whosoever hisses or disturbs any person in his speech, shall answer it at the bar of the House. *Dict.*

In enacting laws, and other proceedings in *Parliament*, the Lords give their voices in their House, from the puisne Lord *seriatim*, by the word *Content*, or *Not Content*: the manner of voting in the House of Commons, is by *Yea* and *No*; and if it be difficult to determine which are the greater number, the House divides, and four tellers are appointed by the Speaker, two of each side, to number them, the Ay's going out, and the No's staying in; and thereof report is made to the House. When the members of the House go forth, none is to stir, until Mr. Speaker rises from his seat; and then all the rest are to follow after. *Dict.*

To bring a bill into the House, if the relief sought by it is of a private nature, it is first necessary to prefer a petition; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the House; and then (or otherwise, upon the mere petition) leave is given to bring in the bill. In public matters the bill is brought in upon motion made to the House, without any petition at all. Formerly, all bills were drawn in the form of petitions, which were entered upon the Parliament rolls, with the King's answer thereunto subjoined; not in any settled form of words, but as the circumstances of the case required: and at the end of each Parliament the judges drew them into the form of a statute, which was entered on the statute rolls. (See, among numberless other instances, the *articuli cleri*, 9 *Edw.* 2.) In the reign of *Henry* V, to prevent mistakes and abuses, the statutes were drawn up by the Judges before the end of the Parliament; and in the reign of *Henry* VI, bills in the form of acts, according to the modern custom, were first introduced.

It appears that, prior to the reign of *Henry* V, it had been the practice of the Kings to add and enact more than the Commons petitioned for. In consequence of this, there is a very memorable petition from the Commons an. 2 *Hen.* 5, which states, that it is the liberty and freedom of the Commons, that there should be no statute without their assent, considering that they have ever been *assenters*, as well as *petitioners*; and therefore they pray that for the future there may be no additions to, or diminutions from, their petitions. And in answer to this the King granted, that from thenceforth they should be bound in no instance without their assent; saving his royal prerogative to grant and deny what he pleases of their petitions. *Ruff. Pref.* xv: *Rot. Parl.* 2 *Hen.* 5. *No.* 22.

Any member may move for a bill to be brought in, except it be for imposing a tax, which is to be done by order of the House; and leave being granted, the person making the motion, and those who second it, are ordered to prepare and bring in the same.

Public bills or acts of Parliaments, are commonly drawn by such members of the House of Commons as are most inclined to effect the good of the public, particularly in relation to the bill designed, taking advice thereupon; and acts for the revival, repeal, or continuance of statutes, are penned by lawyers, members of the House, appointed for that purpose.

The persons directed to bring in the bill, present it in a competent time to the House, drawn out on paper, with a multitude of blanks, or void spaces, where any thing occurs that is dubious, or necessary to be settled by the Parliament itself; (such, especially, as the precise date of times, the nature and quantity of penalties, or of any sums of money to be raised;) being indeed only the skeleton of the bill. In the House of Lords, if the bill begins there, it is (when of a private nature) referred to two of the Judges; to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and after each reading the Speaker opens to the House the substance of the bill, and puts the question, whether it shall proceed any farther. The introducing of the bill may be originally opposed, as the bill itself may at either of the readings; and, if the opposition succeeds, the bill must be dropped for that session; as it must also, if opposed with success in any of the subsequent stages.

After the second reading, it is committed that is, referred to a committee; which is either selected by the House in matters of small importance, or else, upon a bill of consequence, the House resolves itself into a committee of the whole House. A committee of the whole House is composed of every member; and to form it, the Speaker quits the chair, (another member being appointed chairman,) and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new modelled. After it has gone through the committee, the chairman reports it to the House with such amendments as the Committee have made; and then the House reconsiders the whole bill again, and the question is repeatedly put, upon every clause and amendment. When the House hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be engrossed, or written in a strong gross hand, on one or more long rolls (or presses) of parchment sewed together. When this is finished, it is read a third time, and amendments are

sometimes

sometimes then made to it; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a Rider. *Nov* 84. The Speaker then again opens the contents; and holding it up in his hands, puts the question, whether the bill shall pass. If this is agreed to, the title to it is then settled; which used to be a general one for all the acts passed in the session, till in the first year of *Henry* VIII. distinct titles were introduced for each chapter. After this, one of the members is directed to carry it to the Lords, and desire their concurrence; who, attended by several more, carries it to the bar of the House of Peers, and there delivers it to their Speaker, who comes down from his woolsack to receive it.

It there passes through the same forms as in the other House; (except engrossing, which is already done;) and, if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the Lords send a message by two Masters in Chancery, (or upon matters of high dignity or importance, by two of the Judges,) that they have agreed to the same: and the bill remains with the Lords, if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill to receive the concurrence of the Commons. If the Commons disagree to the amendments, a conference usually follows between members deputed from each house; these meet in the *painted chamber*, and debate the matter, and for the most part settle and adjust the difference; but, if both Houses remain inflexible, the bill is dropped. If the Commons agree to the amendments, the bill is sent back to the Lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the House of Lords. But, when an act of grace or pardon is passed, it is first signed by his Majesty, and then read once only in each of the Houses, without any new engrossing or amendment. *D'Ewes's Journ.* 20: 73: *Com. Journ.* 17 *June* 1747. And when both Houses have done with any bill, it is always deposited in the House of Peers, to wait the royal assent; except in the case of a bill of Supply, which after receiving the concurrence of the Lords is sent back to the House of Commons. *Com. Journ.* 24 *July* 1660.

If any debate happens on the first reading of a bill, the Speaker puts the question, whether the same shall have a second reading? and sometimes upon motion appoints a day for it; for public bills, unless upon extraordinary occasions, are seldom read more than once a day, the members being allowed convenient time to consider of them: if nothing be said against a bill, the ordinary course is to proceed without a question; but if the bill be generally disliked, a question is sometimes put, whether the bill shall be rejected? If it be rejected, it cannot be proposed any more that session: when a bill hath been read a second time, any member may move to have the same amended; but no member of the House is admitted to speak more than once in a debate, except the bill be read more than once that day, or the whole House be turned into a committee, and after long time spent in debates, the Speaker collecting the sense of the House, reduces the same to a question, which he submits to the House, and it goes to the vote: and a question is to be put, after the bill is read a second time, whether it shall be committed? The chairman of the committee makes his report of a bill at the side bar of the House, reading all the alterations made, and then delivers the same to the clerk of the Parliament; who likewise reads all the amendments, and the Speaker puts the question, whether they shall be read a second time? And if that be agreed unto, he reads the amendments himself, and puts the question, whether the bill so amended shall be engrossed, and read a third time, some other day? In the House of Lords, if a bill be not committed, then it is to be read a third time, and the next question to be for its passing; and on the third reading of the bill, any member may speak against the whole bill to throw out the same, or for amendment of any clause. *Pratt. Solic. in Par.* 397, 398.

In cases of private bills, when the petition is read, and leave given to bring in the bill, the persons concerned and affected by it may be heard by themselves or counsel at the bar, or before the committee, to whom such bill is referred; and in case of a Peer, he shall be admitted to come within the bar of the House of Commons, and sit covered on a stool whilst the same is debating. And after counsel are heard on both sides, and the House is satisfied with the contents of the bill, it goes through the several forms.

The *Royal Assent* may be given two ways: 1. In person; when the King comes to the House of Peers, in his crown and royal robes, and sending for the Commons to the bar, the titles of all the bills that have passed both Houses are read; and the King's answer is declared by the clerk of the Parliament in *Norman-French*: a badge, it must be owned, (now the only one remaining,) of conquest; and which one could wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force. If the King consents to a public bill, the clerk usually declares, "*Le Roy le veut*—The King wills it so to be:" if to a private bill, "*Soit fait comme il est desiré*; Be it as it is desired." If the King refuses his assent, it is in the gentle language of "*Le Roy s'avisera*; The King will advise upon it." When a bill of Supply is passed, it is carried up and presented to the King, by the Speaker of the House of Commons; and the royal assent is thus expressed, "*Le Roy remercie ses loyal subjects, accepte leur benevolence, et aussi le veut*; The King thanks his loyal Subjects, accepts their benevolence, and wills it so to be." *Rot. Parl.* 9 *Hen.* 4. *in Pryn*: 4 *Inst.* 30, 31. In case of an act of grace, which originally proceeds from the Crown, and has the royal assent in the first stage of it, the Clerk of the Parliament thus pronounces the gratitude of the Subject; "*Les prelats, seigneurs, et commons, en ce present parliament assemblés, au nom de touts vous autres subjects, remercient tres humblement votre Majesté, et prient à Dieu vous donner en santé bonne vie et longue*; The Prelates, Lords, and Commons, in this present Parliament assembled, in the name of all your other Subjects, most humbly thank your Majesty, and pray to God to grant you in health and wealth long to live." *D'Ewes's Journ.* 35.

The words *Le Roi s'avisera* correspond to the phrase formerly used by Courts of justice, when they required time to consider of their judgment; viz. *Curia advisare vult*. And there can be little doubt but, originally, these words implied a serious intent in the King to take the subject

subject under consideration; and they only became in effect a negative, when the bill or petition was annulled by a dissolution, before the King communicated the result of his deliberation: for in the Rolls of Parliament, the King sometimes answers, that the petition is unreasonable, and cannot be granted; sometimes he answers, that he and his Council will consider of it; as in *Rot. Parl.* 37 *E.* 3. *No.* 33.

This prerogative of rejecting bills was exercised to such an extent, in ancient times, that *D'Ewes* informs us, that Queen *Elizabeth* at the close of one session gave her assent to twenty-four public, and nineteen private, bills; and at the same time rejected forty-eight, which had passed the two Houses of Parliament. *Journ.* 596. The last time it was exerted was in the year 1692, by King *William* III. who at first refused his assent to the bill for triennial Parliaments; but was prevailed upon to permit it to be enacted, two years afterwards. *De Lolme* 404.

By *stat.* 33 *Hen.* 8. *c.* 21, the King may give his assent by letters patent under his great seal, signed with his hand, and notified in his absence to both Houses assembled together in the Lords' House.

When the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of Parliament, and is placed among the records of the kingdom; there needing no formal promulgation to give it the force of a law, as was necessary by the civil law with regard to the Emperor's edicts: because every man in *England* is, in judgment of law, party to the making of an act of Parliament, being present thereat by his representatives. However, a copy thereof is usually printed at the King's press for the information of the whole land. And formerly, before the invention of printing, it was used to be published by the Sheriff of of every county; the King's writ being sent to him at the end of every session, together with a transcript of all the acts made at that session; commanding him, "*ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit, publicè proclamari, et firmiter teneri et observari faciat.*" And the usage was to proclaim them at his County-Court, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of *Henry* VII. 3 *Inst.* 41: 4 *Inst.* 26. See further, title *Statute.*

An act of Parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every Subject in the land, and the dominions thereunto belonging; nay, even the King himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of Parliament: for it is a maxim in law, that it requires the same strength to dissolve, as to create an obligation. It is true it was formerly held, that the King might in many cases dispense with penal statutes. *Finch. L.* 81, 234: *Bacon. Elem. c.* 19. But now, by *stat.* 1 *W.* & *M. st.* 2. *c.* 2, it is declared that the suspending or dispensing with laws by regal authority, without consent of Parliament, is illegal; as has already been repeatedly noticed. See this Dictionary, title *King.*

VIII. AN Adjournment is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each House separately every day; and sometimes for a fortnight or month together, as at *Christmas* or *Easter*, or upon other particular occasions. But the adjournment of one House is no adjournment of the other. 4 *Inst.* 28. It hath also been usual, when his Majesty hath signified his pleasure that both or either of the Houses should adjourn themselves to a certain day, to obey the King's pleasure so signified, and to adjourn accordingly. *Com. Journ. passim.* Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow; which would often be very inconvenient to both public and private business. For prorogation puts an end to the session: and then such bills as are only begun and not perfected, must be resumed *de novo* (if at all) in a subsequent session: whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

A Prorogation is the continuance of the Parliament from one session to another, as an adjournment is a continuation of the session from day to day. This is done by the royal authority, expressed either by the Lord Chancellor in his Majesty's presence, or by commission from the Crown, or frequently by proclamation.

At the beginning of a new Parliament, when it is not intended that the Parliament should meet, at the return of the writ of summons, for dispatch of business, the practice is to prorogue it, by a writ of prorogation; as the Parliament called in 1790 was prorogued twice by writ; and the first Parliament in the reign of *Geo.* III. was prorogued by four writs. On the day upon which the writ of summons is returnable, the members of the House of Commons who attend, do not enter their own House, or wait for a message from the Lords, but go immediately up to the House of Lords where the Chancellor reads the writ of prorogation, and when it is intended that they should meet upon the day to which the Parliament is prorogued for dispatch of business, notice is given by a proclamation. 1 *Comm. c.* 187, *in n.* See *post.*

Both Houses are necessarily prorogued at the same time, it not being a prorogation of the House of Lords, or Commons, but of the Parliament. The session is never understood to be at an end until a prorogation: though, unless some act be passed or some judgment given in Parliament, it is in truth no session at all. 4 *Inst.* 28: *Hale of Parl.* 38: *Hut.* 61. And formerly the usage was, for the King to give the royal assent to all such bills as he approved, at the end of every session, and then to prorogue the Parliament; though sometimes only for a day or two: after which all business then depending in the Houses was to be begun again. Which custom obtained so strongly, that it once became a question, whether giving the royal assent to a single bill did not, of course, put an end to the session. And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the *stat.* 1 *Car.* 1. *c.* 7, was passed to declare, that the King's assent to that and some other acts should not put an end to the session; and even so late as the reign of *Charles* II, we find a proviso frequently tacked to a bill, that his Majesty's assent thereto should not determine the session of Parliament. *Stat.* 12 *Car.* 2. *c.* 1: 22 & 23 *Car.* 2. *c.* 1. But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session.

All orders of Parliament determine by prorogation; and one taken by order of the Parliament, after their prorogation, may be discharged on an *habeas corpus*, as well

well as after a dissolution; but it was long since determined, that the dissolution of a Parliament did not alter the state of impeachments, brought up by the Commons in a preceding Parliament. *Raym.* 120: 1 *Lev.* 384. See title *Impeachment.* And it hath been resolved, that cases of appeals and writs of error, shall continue, and are to be proceeded in *statu quo*, &c. as they stood at the dissolution of the last Parliament. *Raym.* 381.

A prorogation of Parliament is always by the King, and in this case the sessions must begin *de novo*. An adjournment is by each House, and the sessions continues notwithstanding such adjournment. 1 *Mod.* 242. By a prorogation of Parliament, there is a session; and every several session of Parliament is in law a several Parliament: though if it be only an adjournment, there is no session; and when a Parliament is called and doth sit, but is dissolved without any act passed, or judgment given, it is no Session of Parliament, but a Convention. 4 *Inst.* 27. If a Parliament is assembled, and orders made, and writs of error brought in the House of Peers, and several bills agreed on, but none signed; this is but a Convention, and no Parliament, or Session of Parliament: but every session, in which the King signs a bill, is a Parliament: and so every Parliament is a session. 1 *Rol. Rep.* 29: *Hut.* 61.

The Parliament from the first day of sitting is called the first Session of Parliament, &c. *Raym.* 120. And the Courts of justice *ex officio* are to take notice of the beginning, prorogation, and ending of every Parliament; also of all general statutes. 1 *Lev.* 296: *Hob.* 111.

On prorogation, such bills as have passed, not having received the royal assent, must fall; for there can be no act of Parliament, without consent of the Lords and Commons, and the royal *fiat* of the King, giving his consent personally, or by commission.

It was heretofore provided by a clause in several militia acts, that if at the time of an actual rebellion or imminent danger of invasion, the Parliament should be separated, by adjournment or prorogation, the King might call them together, by proclamation, on fourteen days' notice of the time appointed for their re-assembling; but that provision is materially altered by *stat.* 26 *Geo.* 3. *c.* 107. It has been held, that after a prorogation, the King cannot summon a Parliament, except under the circumstances, and in the manner described in that statute, before the day to which it was last prorogued; and it is understood that when a Parliament is prorogued to a certain day, they do not meet on that day; unless it be particularly declared, by the proclamation that gives notice of the prorogation, that they shall meet *for the dispatch of business*; and when it has not been prorogued by such a proclamation, and it is intended that Parliament shall actually sit, it is the established practice to issue a proclamation, to give notice that it is for the dispatch of business; and this proclamation, unless upon some urgent occasion, bears date at least forty days before the meeting. 2 *Hats.* 239. But by § 95, of the said *stat.* 26 *Geo.* 3. *c.* 107, in all cases of actual invasion, or imminent danger of it, and in cases of rebellion or insurrection, the King having first communicated the occasion to Parliament, if sitting, and if no Parliament be sitting, having notified the occasion by proclamation, may order the militia to be called out and embodied. And wherever this is done, if the Parliament be adjourned or prorogued, he shall convene them within fourteen days. Pursuant to this statute the Parliament was called together, and met on the 13th of *December* 1792; the only doubt, and that entertained by very few persons, being at that time, whether the measure was justified by any actual insurrection. See this Dictionary, title *Militia.*

A Dissolution is the civil death of the Parliament; and this may be effected three ways: *First*, By the King's will, expressed either in person or by representation. For, as the King has the sole right of convening the Parliament, so also it is a branch of the royal Prerogative, that he may (whenever he pleases) prorogue the Parliament for a time, or put a final period to its existence. If nothing had a right to prorogue or dissolve a Parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to incroach upon the Executive Power: as was fatally experienced by the unfortunate King *Charles* the First; who, having unadvisedly passed an act to continue the Parliament then in being, till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power, which he himself had consented to give them. It is therefore extremely necessary that the Crown should be empowered to regulate the duration of these assemblies, under the limitations which the *English* constitution has prescribed: so that, on the one hand, they may frequently and regugularly come together, for the dispatch of business and redress of grievances; and may not, on the other, even with the consent of the Crown, be continued to an inconvenient or unconstitutional length.

A Parliament, it hath been said, ought not to be dissolved as long as any bill remains undiscussed; and proclamation must be made in the Parliament, that if any person have any petition, he shall come in and be heard, and if no answer be given, it is intended the Public are satisfied. *Lex Constitutionis* 157.

Secondly, A Parliament may be dissolved by the demise of the Crown. This dissolution formerly happened immediately upon the death of the reigning sovereign: for he being considered in law as the head of the Parliament, (*caput, principium, et finis,*) that failing, the whole body was held to be extinct. But, the calling a new Parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no Parliament in being, in case of a disputed succession, it was enacted by *stats.* 7 & 8 *W.* 3. *c.* 15: 6 *Ann. c.* 7, that the Parliament in being shall continue for six months after the death of any King or Queen, unless sooner prorogued or dissolved by the Successor: that, if the Parliament be, at the time of the King's death, separated by adjournment or prorogation, it shall notwithstanding assemble immediately: and that, if no Parliament is then in being, which has met and sat, the members of the last Parliament shall assemble, and be again a Parliament.

Lastly, a Parliament may be dissolved or expire by length of time. For if either the Legislative Body were perpetual; or might last for the life of the Prince who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy; but when different

bodies

bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A Legislative Assembly also, which is sure to be separated again, (whereby its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others,) will think themselves bound, in interest as well as duty, to make only such laws as are good. The utmost extent of time that the same Parliament was allowed to sit, by *stat.* 6 *W.* & *M. c.* 2, was three years; after the expiration of which, reckoning from the return of the first summons, the Parliament was to have no longer continuance. But by *stat.* 1 *Geo.* 1. *st.* 2. *c.* 38, (in order, professedly, to prevent the great and continued expences of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion,) this term was prolonged to *seven* years: and, what alone is an instance of the vast authority of Parliament, the very same *House*, that was chosen for three years, enacted its own continuance for seven. So that, as our Constitution now stands, the Parliament must expire, or die a natural death, at the end of every seventh year, if not sooner dissolved by the royal prerogative; as it generally is, in the course of every five or six years.

This Septennial Act has been thought by some to be an unconstitutional exertion of the authority of Parliament; and the reason given is, that those who had a power delegated to them for three years only, could have no right to extend that term to seven years. But this, says Mr. *Christian*, appears to be a fallacious mode of considering the subject. Before the Triennial Act, 6 *W.* & *M. c.* 2, the duration of Parliament was only limited by the pleasure or death of the King; and it never can be supposed that the next, or any succeeding, Parliament had not the power of repealing the Triennial Act; and if that had been done, then as before, they might have sat 17 or 70 years. It is certainly true, that the simple repeal of a former statute would have extended their continuance much beyond what was done by the Septennial Act. 1 *Comm. c.* 2. *ad fin. in n.* To this may be added an observation, which seems unaccountably to have been passed over in silence by the defenders (and therefore no wonder by the accusers) of the Septennial Act; namely, that it is not true in fact, as the argument is usually put, that a Parliament chosen for three years continued themselves for seven, since it was only one part of the Parliament, the *House of Commons*, which was chosen for any limited time; and the Septennial Act was the act of the *whole Legislature*. Will it be thought too great a presumption to remark, that it is not quite accurate in *Blackstone*, to say, that that *House* enacted its own continuance for seven years? as no *Enactment* on the subject could take place, till the sanction of the Lords, and finally that of the King, was obtained.

Parliamentum Diabolicum. A Parliament held at *Coventry*, 38 *H.* 6, wherein *Edward* Earl of *March*, (afterwards King *Edw.* IV,) and many of the chief nobility were attainted, was so called; but the acts then made were annulled by the succeeding Parliament. *Holingshed's Chron.*

Parliamentum Indoctorum, the *Lack-learning Parliament*, A Parliament held 6 *H.* 4, whereunto by special precept to the Sheriffs in their several counties, no lawyer, or person skilled in the law, was to come. See title *Parliament* VI. 2.

Parliamentum Insanum, A Parliament assembled at *Oxford*, *anno* 41 *H.* 3, so stiled, from the madness of their proceedings; and because the Lords came with armed men to it, and contentions grew very high between the King, Lords, and Commons, whereby many extraordinary things were done. 4 *Inst.*

Parliamentum Religiosorum. In most convents, they had a common room into which the brethren withdrew for conversation; and the conference there had was termed *Parliamentum. Mat. Paris.* The abbot of *Croyland* used to call a Parliament of his monks, to consult about the affairs of his monastery: and at this day, the Societies of the two Temples, or Inns of Court, call that assembly of the Benchers or Governors, a Parliament; wherein they confer upon the common affairs of their several Houses. *Crompt. Jurisd.* 1.

PAROL, Word of Mouth; See titles *Agreement*; *Fraud*; *Assumpsit*; *Will*; *Trust*.

As to what things may be done by Parol without deed, the following determinations may deserve notice.

An use will not pass by Parol without deed; but Ch. J. *Pemberton* said, it would be a good trust or Chancery use, if for money. 2 *Show.* 156. A Parol release is good to discharge a debt by simple contract. *Arg.* 2 *Show.* 417.

A promise merely executory on both parts; as if I promise *B.* 5*s.* if he goes to *Paul*'s, before *B.* goes, I may discharge him, and so shall discharge myself of payment of the 5*s.* for no debt was yet due, nor any thing executed on either side. 3 *Lev.* 238. An agreement in writing, since the statute of frauds and perjuries, may be discharged by Parol. *Vern.* 240. A rent assigned in lieu of dower may be by Parol without deed, though it be a freehold created *de novo*: and though a rent lies in grant; because this is not properly a grant, but an appointment. 12 *Mod.* 201. Lessee for years surrendered to the lessor by Parol reserving rent; adjudged this was a good reservation upon the contract, and that an action of debt would lie for the rent after the first day of payment incurred, though the reservation was by way of contract, and without any deed. 3 *Salk.* 312. *pl.* 7.

If one has a bill of exchange, he may authorise another to indorse his name upon it, by Parol; and when that is done, it is all one as if he had done it himself. 12 *Mod.* 564. See title *Bill of Exchange.*

An insurance was made from *Archangel* to the *Downs*, and from the *Downs* to *Leghorn*, but there was a Parol agreement at the same time, that the policy should not commence till the ship came to such a place, and it was held, that the Parol agreement should avoid (or defeat) the writing; cited *per Holt* Ch. J. as adjudged in *Pemberton*'s time. 2 *Salk.* 444, 445. See title *Insurance.*

If a thing is granted by a writing, which is grantable by Parol, it may be revoked by Parol. *Vide* 10 *Mod.* 74.

Deputation of an office is in its own nature grantable by Parol; and therefore though it should happen to be granted by writing, yet since it is in itself grantable by Parol, it may be revoked by Parol. 10 *Mod.* 74.

Parols, or Pleadings; Are the mutual altercations between the plaintiff and defendant; which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce*, in Court, and then minuted

down by the chief clerks, or prothonotaries; whence in our old law *French* the pleadings are frequently denominated the Parol. 3 *Comm.* 293. See title *Pleadings.*

It is sometimes joined with lease, as lease Parol, *i. e.* lease *per* Parol, a lease by word of mouth, to distinguish it from a lease in writing. *Cowell.*

Parol Arrest, Any Justice of Peace may, by word of mouth, authorise any one to arrest another who is guilty of a breach of the peace in his presence, *&c. Dalt.* 117. See title *Arrest.*

Parol Demurrer, Is a privilege allowed an infant, who is sued concerning lands which came to him by descent; and the Court thereupon will give judgment *quod loquela predicta remaneat, quousque* the infant comes to the age of twenty-one years. And where the age is granted on Parol Demurrer, (which may happen on the suggestion of either party, 3 *Comm.* 300,) the writ doth not abate, but the plea is put *sine die,* until the infant is of full age; and then there shall be a re-summons. 2 *Lill. Abr.* 283: 2 *Inst.* 258: *Rast Entr.* 363.

In Parol Demurrer, when it may be had, if two are vouched, and there is Parol Demurrer for the nonage of the one; it shall be for the other also. 45 *Ed.* 3. 23. But by the statutes *Westm.* 1; 3 *Ed.* 1. *c.* 46, and of *Gloucester,* 6 *Ed* 1. *c.* 2, in writs of entry *sur disseisin* in some particular cases, and in actions ancestrel brought by an infant, the Parol shall not demur; otherwise he might be deforced of his whole property, and even want a maintenance till he came of age. 6 *Rep.* 3, 5. So likewise in a writ of dower the heir shall not have his age; for it is necessary that the widow's claim be immediately determined, else she may want a present subsistence. 1 *Roll. Abr.* 137. Nor shall an infant patron have it in a *quare impedit,* since the law holds it necessary and expedient, that the church be immediately filled. 1 *Roll. Abr.* 138.

Parol Evidence; See *Evidence* II.

PARRICIDE, *Patricida.*] He who kills his father or mother. *Law Lat. Dict.* It is also used for the *crime* of killing.

By the *Roman* law, Parricide, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leather sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea. *Solon,* it is true, in his laws, made none against Parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity. And the *Persians,* according to *Herodotus,* entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason as this, must we account for the omission of an exemplary punishment for this crime in our *English* laws; which treat it no otherwise than as simple murder, unless the child was also the servant of his parent. 1 *Hal. P. C.* 380.

For though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder, denominates it a new offence; no less than a species of treason, called *parva proditio,* or petit treason; which, however, is nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason. And thus, in the ancient *Gothic* constitution, we find the breach both of natural and civil relations, ranked in the same class with crimes against the State and Sovereign. 4 *Comm.* 202, 3. See title *Treason.*

PARSON.

Persona Ecclesiæ.] One that hath full possession of all the rights of a parochial church. He is called Parson, *Persona,* because, by his person the Church, which is an invisible body, is represented; and he is in himself a body-corporate, in order to protect and defend the rights of the Church (which he personates) by a perpetual succession. 1 *Inst.* 300. It has been also said, that he is called *Parson,* as he is bound, by virtue of his office, *in propriâ personâ servire Deum. Fleta, l.* 9. *c.* 18. He is sometimes called the *Rector* or Governor of the Church; but the appellation of *Parson* is the most legal, as well as the most beneficial and honourable, title that a parish priest can enjoy; because such an one, (as *Coke* observes,) and he only, is said *vicem seu personam ecclesiæ gerere.* 1 *Comm. c.* 11. *p.* 384.

The word *Parson,* in a large sense, includes all clergymen having spiritual presentments. And there may be two Parsons in one church; one of the one moiety, and the other of the other; and a part of the church and town allotted to each: and there may be two, that make but one Parson in a church, presented by one patron. 1 *Inst.* 17, 18.

A Parson hath the entire fee of his church; and where it is said he hath not the right of fee-simple, that is understood as to bringing a temporal writ of right. *Cro. Car.* 582. And in the time of the Parson, the patron hath nothing to do with the church; but if the Parson wastes the inheritance thereof to his own private use, in cutting trees, *&c.* his patron may have a prohibition, so that, to some purposes, he hath an interest during the Parson's time. 11 *H.* 6. 4: 11 *Rep.* 49.

I. *The Distinction between a Parson (or Rector); and a Vicar.*

II. *The Method of becoming a Parson or Vicar; and of their Qualifications and Duties.*

III. *How one may cease to be a Parson or Vicar.*

I. Though a Parson has regularly during his life the freehold in himself of the parsonage house, the glebe, the tithes, and other dues: yet these are sometimes *appropriated;* that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman. See this Dictionary, title *Appropriation.*

The ancient appropriating Corporations, or Religious Houses, were wont to depute one of their own body to perform divine service, and administer the sacraments in those parishes, of which the Society thus became the Parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *Vicarius* or Vicar. His stipend was at the discretion of the Appropriator; who was however bound of common right to find somebody, *qui illi de temporalibus,*

poralibus, episcopo de spiritualibus, debeat respondere. Seld. Tith. c. 11. 1. But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the Appropriators, that the Legislature was forced to interpose: and, accordingly, it is enacted by *stat.* 15 *R.* 2. *c.* 6, that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be sufficiently endowed. It seems the parish were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and therefore, in this act, a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the Vicar. But he, being liable to be removed at the pleasure of the Appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend; and therefore, by *stat.* 4 *Hen.* 4. *c.* 12, it is ordained, that the Vicar shall be a secular person, not a member of any religious house; that he shall be Vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the Ordinary, for these three express purposes: to do divine service; to inform the people; and to keep hospitality.

From this statute we may date the origin of the present Vicarages; for, before this time, the Vicar was nothing more than a temporary curate; and when the church was appropiated to a monastery, he was generally one of their own body; that is one of the *regular* clergy; for the monks, who lived *secundum regulas* of their respective houses or societies, were denominated regular clergy, in contradiction to the parochial clergy, who performed their ministry in the world, *in seculo*; and who, from thence, were called *secular* clergy. All the tithes or dues of the church of common right belong to the Rector; or to the Appropriator or Impropriator, who have the same rights as the Rector; and the Vicar is entitled only to that portion which is expressed in his endowment; or what his predecessors have immemorially enjoyed by prescription, which is equivalent to a grant or endowment. These endowments frequently invest the Vicar with some part of the great tithes; therefore the words *rectorial* and *vicarial* tithes have no definite signification: But *great* and *small* tithes are technical terms; and which are, or ought to be, accurately defined and distinguished by the law. 1 *Comm. c.* 11, *in n.* See this Dict. title *Tithes.*

The endowments, in consequence of these statutes, have usually been by a portion of the glebe, or land, belonging to the Parsonage, and a particular share of the tithes, which the Appropriators found it most troublesome to collect, and which are therefore generally called privy or small tithes; the greater, or predial, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages Hence some are more liberally, and some more scantily, endowed: and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial, tithes. 1 *Comm. c.* 11.

The distinction therefore of a Parson and Vicar is this: The Parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a Vicar has generally an Appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary. Though in some places the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by *stat.* 29 *Car.* 2. *c.* 8, enacted in favour of poor Vicars and Curates; which rendered such temporary augmentations (when made by the appropriators) perpetual.

A Vicar indeed must *necessarily* have an Appropriator over him, or a sinecure Rector, who in some books is considered as, and called, an Appropriator Of benefices, some have never been appropriated; consequently, in those there can be no Vicar, and the incumbent is Rector, and entitled to all the dues of the church. Some were appropriated to secular ecclesiastical corporations, which appropriations still exist, except perhaps some few which may have been dissolved; others were appropriated to the Houses of the regular clergy; all which appropriations, at the dissolution of monasteries, were transferred to the Crown; and, in the hands of the King or his grantees, are now called Impropriations; but in some appropriated churches no perpetual Vicar has ever been endowed; in that case, the officiating minister is appointed by the Appropriator or Impropriator, and is called a perpetual Curate. 1 *Comm. c.* 11. *in n.* See further titles *Vicar*; *Vicarage.*

II. The method of becoming a Parson or Vicar is much the same. To both there are four requisites necessary: holy orders; presentation; institution; and induction. The method of conferring the holy orders of deacon and priest, according to the liturgy and canons, is foreign to the present purpose, any farther than as they are necessary requisites to make a complete Parson or Vicar. See 2 *Burn. Eccl. Law* 103. By Common Law, a Deacon, of any age, might be instituted and inducted to a parsonage or vicarage; but it was ordained by *stat.* 13 *Eliz. c.* 12, that no person under 23 years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained Priest within one year after his induction, he should be *ipso facto* deprived: and now, by *stat.* 13 & 14 *Car.* 2. *c.* 4, no person is capable to be admitted to any benefice, unless he hath been first ordained a priest; and then he is, in the language of the law, *A Clerk in orders.* But if he obtains orders, or a licence to preach, by money or corrupt practices, (which seems to be the true, though not the common, notion of simony,) the person giving such orders forfeits 40*l.* and the person receiving 10*l.* and is incapable of any ecclesiastical preferment for seven years afterwards. *Stat.* 31 *Eliz. c.* 6: and see further this Dictionary, title *Ordination.*

Any Clerk may be presented to a parsonage or vicarage; that is, the patron, to whom the advowson of the church belongs, may offer his Clerk to the Bishop of the diocese to be instituted. A layman also may be presented; but he must take Priest's orders before his admission. 1 *Burn. Eccl. Law* 103. As to Advowsons, or the right of presentation, which are a species of private property, see this Dictionary, title *Advowson.*

But when a clerk is presented, the Bishop may refuse him upon many accounts. As, if the patron is excommunicated, and remains in contempt forty days. 2 *Rol. Abr.* 355. Or if the clerk be unfit; *Glanv. l.* 13. *c.* 20; which

which unfitness is of several kinds. First, with regard to his person; as if he be a bastard; (though that incapacity seems now exploded, see *Bastard*;) an outlaw, an excommunicate, an alien, under age, or the like. 2 *Roll. Abr.* 356: 2 *Inst.* 632: *Stats.* 3 *Ric.* 2. *c.* 3: 7 *Ric.* 2. *c.* 12. Next, with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se*: but if the Bishop alleges only in generals, as that he is *schismaticus inveteratus*, or objects a fault that is *malum prohibitum*, merely as haunting taverns, playing at unlawful games, or the like; it is not good cause of refusal. 5 *Rep.* 58. Or, lastly, the clerk may be unfit to discharge the pastoral office, for want of learning. In any of which cases the Bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the Bishop must give notice to the patron of such his cause of refusal, who, being usually a layman, is not supposed to have knowledge of it; else he cannot present by lapse: but, if the cause be temporal, there he is not bound to give notice. 2 *Inst.* 632. See title *Advowson* II.

If an action at law be brought by the Patron against the Bishop for refusing his clerk, the Bishop must assign the cause. If the cause be of a temporal nature and the fact admitted, (as, for instance, outlawry,) the judges of the King's Courts must determine its validity, or whether it be sufficient cause of refusal; but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as, heresy, particularly alledged,) the fact, if denied, shall also be determined by a jury; and if the fact be admitted or found, the Court, upon consultation, and advice of learned divines, shall decide its sufficiency. 2 *Inst.* 632. If the cause be want of learning, the Bishop need not specify in what points the clerk is deficient, but only allege, that he is deficient; for the *stat.* 9 *Edw.* 2. *st.* 1. *c.* 13, is express, that the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. 5 *Rep.* 58: 3 *Lev.* 313. But because it would be nugatory in this case to demand the reason of refusal from the Ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore, if the Bishop returns the clerk to be *minus sufficiens in literaturâ*, the Court shall write to the Metropolitan, to re-examine him, and certify his qualifications; which certificate of the Archbishop is final. 2 *Inst.* 632.

If the Bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk. When a Vicar is instituted, he (besides the usual forms) takes, if required by the Bishop, an oath of perpetual residence; for the maxim of law is, that *vicarius non habet vicarium*: and, as the non-residence of the Appropriators was the cause of the perpetual establishment of vicarages, the law judges it very improper for them to defeat the end of their constitution, and by absence to create the very mischief which they were appointed to remedy; especially as, if any profits are to arise from putting in a curate and living at a distance from the parish, the Appropriator, who is the real Parson, has undoubtedly the elder title to them. And it appears that the Bishop cannot dispense with the Vicar's oath, which is, that he will be resident upon his vicarage, unless dispensed withal by his diocesan. 1 *Burn. Eccl. Law* 148.

When the Ordinary is also the patron, and confers the living, the presentation and institution are one and the same act, and are called a Collation to a benefice. See title *Advowson* I. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron; but the church is not full against the King, till induction: nay, even if a clerk is instituted upon the King's presentation, the Crown may revoke it before induction, and present another clerk. *Co. Litt.* 344. Upon institution also the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction. 1 *Comm. c.* 11. *p.* 391. See further this Dictionary, title *Institution*.

Induction is performed by a mandate from the Bishop to the Archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This therefore is the investiture of the temporal part of the benefice, as institution is of the spiritual. See further title *Induction*. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or Parson imparsonee. *Co. Litt.* 300.

The *Duties* of a Parson or Vicar, are principally of ecclesiastical cognizance; see this Dictionary, title *Preaching*; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy; they are to be gathered chiefly from such authors as have compiled treatises expressly upon this subject; though these, it is remarked by *Blackstone*, are not very much to be relied on. The article of *Residence* may here be slightly noticed; upon the supposition of which the law doth stile every parochial minister an incumbent. By *stat.* 21 *Hen.* 8. *c.* 13, persons wilfully absenting themselves from their benefices, for one month together, or two months in the whole, in the year, incur for every month a penalty of 5*l.* to the King, and 5*l.* to any person that will sue for the same; except chaplains to the King, or others therein mentioned, during their attendance in the household of such as retain them: (See title *Chaplain*:) and also except all Heads of Houses, magistrates, and professors in the Universities; (*viz.* the Chancellor, Vice-Chancellor, Commissary, Doctors of the Chair, and Readers of Lectures;) and all students under forty years of age residing there, *bona fide* for study. Legal residence is not only in the parish, but also in the parsonage house, if there be one: for it hath been resolved, that the statute intended residence, not only for serving the cure, and for hospitality; but also for maintaining the house, that the successor also may keep hospitality there. 6 *Rep.* 21. And if there be no parsonage house, it hath been holden that the incumbent is bound to hire one, in the same parish, to answer the purposes of residence.

See *Cowp.* 429: 5 *Burr.* 2722; and this Dictionary, title *Residence.*

For the more effectual promotion of this important duty of residence in the parochial clergy, a provision is made by the *stat.* 17 *Geo.* 3. *c.* 53, for raising money upon ecclesiastical benefices, and to be expended in rebuilding, or repairing, the houses belonging to such benefices. This statute enables the Incumbent, when there is no parsonage house, or where it is so ruinous as not to be repaired with one year's income of the living, to borrow, with the consent of the Patron and Ordinary, upon mortgage of the revenue of the living, a sum not exceeding two years' clear value, to be laid out in repairs, building, or the purchase of a house. The interest of which was, under this statute, to be repaid by the Incumbent yearly, and 5*l.* *per cent.* of the principal, or 10*l.* *per cent.* if he did not reside 20 weeks within a year. And where the income is 100*l.* a year, and the incumbent does not reside 20 weeks within a year, the patron and the Ordinary are empowered to undertake this without his consent. The Governors of Queen *Anne*'s bounty may lend money upon such mortgages at 4*l.* *per cent.* interest, and 100*l.* upon a living under 40*l.* a year, without any interest. Colleges and other Corporations may lend money for this purpose upon their own livings without interest. And the statute contains the forms and modes of proceeding to fulfil its various purposes.

Under this statute the money borrowed was directed to be discharged by paying 5*l.* *per cent.* yearly, upon the principal remaining due; the consequence was, that it would have been diminished by decreasing instalments; which would have produced an infinite series; so that the whole could never have been paid. And it required another statute, which was passed merely for the purpose, to correct this palpable blunder; by this latter statute the original sum must be paid, as stated, at the farthest, within 20 years. See *stat.* 21 *Geo.* 3. *c.* 66.

III. Although there is but one way, whereby one may become a Parson or Vicar; there are many circumstances, besides death, by which one may cease to be so.

By *Cession*, in taking another benefice. For by *stat.* 21 *Hen.* 8. *c.* 13, if any one having a benefice of 8*l.* *per annum*, or upward, (according to the present valuation in the King's books, *Cro. Car.* 456,) accepts any other, the first shall be adjudged void, unless he obtains a dispensation; which no one is entitled to have, but the chaplains of the King and others therein mentioned; the brethren and sons of Lords and Knights; (but not of baronets, as that dignity did not exist at the time of the *stat.* 21 *H.* 8;) and doctors and bachelors of divinity and law, admitted by the universities of this realm. See this Dictionary, titles *Chaplain*; *Plurality.* And a vacancy thus made, for want of a dispensation, is called Cession. See this Dictionary, title *Cession.*

By *Consecration*; for when a Clerk is promoted to a bishoprick, all his other preferments are void, the instant that he is consecrated. See this Dictionary, title *Bishops.* But there is a method, by the favour of the Crown, of holding such livings *in commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the Crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary for one, two, or three years; or perpetual; being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*. There is also a *commenda recipere*, which is to take a benefice *de novo*, in the Bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him as institution and induction are to another clerk. See further this Dictionary, title *Commendam.*

By *Resignation*. But this is of no avail, till accepted by the Ordinary; into whose hands the resignation must be made. *Cro. Jac.* 198. See further this Dictionary, title *Resignation.*

By *Deprivation*; either, first, by sentence declaratory in the Ecclesiastical Courts, for fit and sufficient causes allowed by the Common Law; such as attainder of treason or felony, *Dyer* 108: *Jenk.* 210; or conviction of other infamous crime in the King's Courts; for heresy, infidelity, (*Fitz. Ab.* tit. *Trial* 54,) gross immorality, and the like; or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some nonfeasance or neglect, or else some mal-feasance or crime. As, for Simony; by *stats.* 31 *Eliz.* *c.* 6: 12 *Ann* *st.* 2. *c.* 12; see title *Simony*:— for maintaining any doctrine in derogation of the King's supremacy, or of the thirty-nine articles, or of the Book of Common Prayer; by *stats.* 1 *Eliz.* *cc.* 1, 2: 13 *Eliz.* *c.* 12:—for neglecting, after institution, to read the liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath; *stats.* 13 *Eliz.* *c.* 12: 13 & 14 *C.* 2. *c.* 4: 1 *Geo.* 1. *st.* 2. *c.* 6:—for using any other form of prayer than the liturgy of the church of *England*; *stat.* 1 *Eliz.* *c.* 2:—or for absenting himself sixty days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the universities; *stat.* 1 *W.* & *M.* *st.* 1. *c.* 26; see title *Papist*: in all which and similar cases the benefice is *ipso facto* void, without any formal sentence of deprivation. 6 *Rep.* 29, 30: 1 *Comm.* *c.* 11.

For further matter relating to this subject, see this Dictionary, titles *Church*; *Clergy*; *Curate*; *Quare Impedit*; *Tithes*, &c.

PARSONAGE, *Personatus*, *Personagium.*] Is sometimes taken for a dignitary in a church, and sometimes for the benefice itself. *Cowell.*

Parsonage, or rectory, is a parish church, endowed with a house, glebe, tithes, &c.; or a certain portion of lands, tithes, and offerings, established by law, for the maintenance of the minister who hath the cure of souls: and though properly a Parsonage or rectory doth consist of glebe land and tithes; yet it may be a rectory, though it have no glebe, but the church and church-yard: also there may be neither glebe nor tithes, but annual payments in lieu thereof. *Pars. Counc.* 190. The rights to the Parsonage and church lands are of several natures; for the Parson hath a right to the possession; the Patron hath the right of presentation; and the Ordinary a right of investiture, &c. But the rights of the Patron and Ordinary are only collateral rights; neither of them being capable of possessing or retaining the church themselves; though no charge can be laid on the church or Parsonage, but by the consent and agreement of all of them. *Hughes's Pars. Law* 188. See titles *Parson*; *Appropriation.*

PARSON MORTAL. The rector of a church instituted and inducted, for his own life, was called *Persona mortalis:* and any collegiate or conventional body, to whom the church was for every appropriated, was termed *Persona immortalis*. *Cartular. Rading. MS. f.* 182. See titles *Parson*; *Appropriation*.

PARTES FINIS NIHIL HABUERUNT, &c. Is an exception taken against a fine levied. 3 *Rep.* 88. See title *Fine of Lands*.

PARTICIPATIO, Is the charity so called, by which the poor are made *participes* of other men's goods. We read it in several places in the *Monast.* 2 *tom. page* 321.

PARTIES, Are those who are named in a deed or fine, as parties to it; as those who levy the fine, and to whom the fine is levied: so they who make any deed, and they to whom it is made, are called *Parties to the deed*. *Cowell.* See titles *Deeds*; *Fine of Lands*.

PARTITION, *Partitio*] The dividing land descended by the Common Law, or custom, among co-heirs or parceners, where there are two at least. In *Kent*, where the land is of gavelkind nature, they call their Partition shifting, from the Saxon *shiftan*, to divide. In *Latin* it is called *dercissere*. Partition also may be made by joint-tenants, or tenants in common, by assent, deed, or writ. See titles *Joint-tenants*; *Parceners*; *Tenants in Common*.

PARTITIONE FACIENDA, mentioned in *stat.* 31 *H.* 8. *c.* 1.] A writ that lies for those who hold lands or tenements *pro indiviso*, and would sever to every one his part; against those who refuse to join in Partition, as coparceners, tenants in gavelkind, &c. *Old. Nat. Brev.* 142: *F. N. B.* 61. See title *Parceners*; *Joint-tenants*; *Tenants in Common*.

PARTNERS, Are where two or more persons agree to come into any trade or bargain in certain proportions agreed upon. If there are two partners in trade, and judgment is recovered against one of them, his moiety of the goods in partnership only, shall be taken in execution. *Show.* 174. See title *Bankrupt* IV. 7.

PART-OWNERS, Those who are concerned in ship matters, and have joint shares therein. And when there are Part-owners of a ship, the majority may fit her out, without consent of the rest; and if they do, such majority run all hazard, and are to partake of the profits. *Show.* 13, 30. Action lies as well against the part-owners of a ship, for the loss or spoiling of goods delivered to the master, as against the master; for as the master of a ship is chargeable in respect of his wages, so are Part-owners in respect of the freight: but the action against the Part-owners must be brought against all of them, or defendants may take advantage of it, by pleading in abatement, &c. *Show.* 30, 105: 3 *Lev.* 259. See title *Insurance*.

PARTY-WALLS; See titles *Fire*; *London*.

PARVISE, *Seldon* (in his Notes on *Fortescue*, *c.* 51.) defines it to be, an afternoon's exercise, or moot for the instruction of young students; bearing the same name originally with the *Parvisiæ* at *Oxford*. *Seld. Notes, page* 56. *Chaucer* mentions it in one of his prologues.

PASCHA CLAUSUM, The octaves of *Easter* or *Low Sunday*, which closes that solemnity: and *die (sali) post* Pascha Clausum, is a date in some of our old deeds. The first statute of *Westminster*, *anno* 3 *Ed.* 1, is said to be made the *Monday* after *Easter* week; *post de la cluse de Pasche*, &c.

PASCHA FLORIDUM, The *Sunday* before *Easter*, called *Palm Sunday*; when the proper hymn or gospel sung was *occurrunt turbæ cum* floribus & palmis, &c. *Cartular. Abbat. Glaston. MS.* 75.

PASCHAL RENTS, Rents or yearly tributes paid by the clergy to the Bishop or Archdeacon, at their *Easter* visitations.

PASCUA, A particular meadow or pasture ground, set apart to feed cattle. See *Lindwood. Prov. Ang. l.* 3. *c.* 18: and *post*, *Pastura*.

PASCUAGE, *pascuagium*, Fr. *pascage*.] The grasing or pasturing of cattle. *Mon. Angl.* ii. 23. The same with *pannage*.

PASNAGE, And *pathnage* in woods, &c. See title *Pannage*.

PASSAGE, *passagium*.] Is properly over water, as *way* is over land; it relates to the sea, and great rivers, and is a *French* word signifying *transitum*. In *stat.* 4 *Ed.* 3. *c.* 7, it is used for the hire a man pays for being transported over sea, or any river: and it is mentioned among customs and duties, as *theolonio*, Passagio, & *lastagio*. *Chart. Hen.* 1.

All persons shall have free passage on the river *Severn*; and if any be disturbed, he may have his remedy by action. *Stat. Antiq.* 9 *H.* 6. *c.* 5. There were also other statutes passed for regulating the passage of this river, and preventing disorders therein by the *Welch*, &c. 19 *Hen.* 7. *c.* 18: 26 *Hen.* 8. *c.* 5.

Passagio is also the name of a writ directed to the keepers of the ports to permit a man to pass over sea, who has the King's leave, *Reg. Orig.* 193. The prices of passage at *Dover*, &c. were limited by *stat.* 4 *Ed.* 3. *c.* 8. None to pass out of the realm without the King's licence, *Stat.* 5 *R.* 2. *st.* 1. *c.* 2. See titles *King*; *Ne exeat regno*. Passage from *Kent* to *Calais* restrained to *Dover*. *Stat. an. Ed.* 4. *c.* 10.

PASSAGIUM, Or *Passagium Regis*. A voyage or expedition to the Holy Land, when made by the Kings of *England* in person. *Cowell.*

PASSATOR, He who has the interest or command of the passage of a river, or the lord to whom a duty is paid for passage. *Cowell.*

PASSIAGIARIUS, A ferry-man. *Thorn's Chronicle, in an.* 1287.

PASS-PORT, A compound of two *French* words, *viz. passer*, *transire*, and *port*, *portus*, a haven. It signifies a licence, for the safe passage of any man from one place to another. See *stat.* 2 *E.* 6. *c.* 2; and titles *Alien* IV; *Safe conducts*.

PASTITIUM, A pasture field. *Domesday, per Gale* 761.

PASTORAL STAFF. The form of it was streight which signified *rectum regimen*. All the top part of it was crooked, and the other part sharp: the crooked signified, that the bishop presided over the people; and the sharp signified, to punish the stubborn. *Cowell.*

PASTURE, Is any place generally where cattle may feed; and feeding for cattle is called Pasture, wherefore feeding grounds are called common of Pasture: but

common

common of Pasture is properly a right of putting beasts to pasture in another man's soil; and in this there is an interest of the lord and of the tenant. *Wood's Inst.* 196, 197. For in those waste grounds, which are usually called *Commons*, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. And common of Pasture is either appendant, appurtenant, because of vicinage, or in gross. See title *Common.*

PASTUS, The procuration, or provision, which tenants were bound to make for their lords at certain times, or as often as they made a progress to their lands: This, in many places, was turned into money. *Hoc modo per ævum liberabo à* Pastu *Regis & Principum. Chart. Walgasi Regis Merciorum in Mon. Angl.* i. 123.

PATENTEE, One to whom the King grants his letters patent. 7 *Ed.* 6. *c.* 3.

PATENTS, The King's writings, sealed with the Great Seal, having their name from being *open*: and they differ from writs. *Crompt. Jurisd.* 126. The King is to advise with his Council touching grants and Patents made of his estate, &c. And in petitions for lands, annuities, or offices, the value is to be expressed; also a former Patent is to be mentioned where the petition is for a grant in reversion, or the Patents thereupon shall be void. *Stats.* 1 *Hen.* 4. *c.* 6: 6 *Hen.* 8. *c.* 15.—Patents, which bear not the date and day of delivery of the King's warrants into Chancery, are not good. *Stat.* 18 *Hen.* 6. *c.* 1.—Where the King's Patent creates a new estate, of which the law doth not take knowledge; the Patents are void. 8 *Rep.* 1: 5 *Rep.* 93. But Patents shall not be avoided by nice constructions: if a Patent may be taken to two intents, and is good as to one, and not as to the other, it is valid. *Jenk. Cent.* 138. When the King would pass a freehold, it is necessary that the Patent be under the Great Seal; and it ought to be granted *de advisamento* of the Chancellor of the Exchequer and Lord Treasurer in the usual manner. *Fitzgib.* 291. See titles *Grants of the King*; *Scire Facias.*

As to Patents for new inventions, see title *Monopoly.* For Patents of peerage, title *Peer.* For Patents of precedence, title *Barrister.*

PATRIA, The country; the men of a neighbourhood: Thus when it is said *inquiratur per patriam*, a jury of the neighbourhood is meant. In like manner, *Assisa vel recognitio per assisam, idem est quod recognitio* Patriæ. *Cowell.* See titles *Jury*; *Assise.*

PATRIMONY, An hereditary estate, or right descended from ancestors. The legal endowment of a Church, or Religious House, was called *ecclesiastical Patrimony*; and the lands and reversions, united to the See of *Rome*, are called *St. Peter's Patrimony. Cowell.*

PATRINUS, A godfather; as *Matrina* is a god-mother. *Ll. H.* 1.

PATRITIUS, An honour conferred on men of the first quality, in the time of the *English Saxon* Kings. *Mon Ang.* i. 13.

PATRON, He who hath the disposition of an ecclesiastical benefice. See titles *Advowson*; *Parson.*

The Patron's right is the most worthy and first act and part of a promotion to a benefice, and is granted and pleaded by the name of *libera dispositio ecclesiæ. Hob.* 152. But during the vacancy of a church, the freehold of the glebe is not in the Patron; for it is in abeyance. 8 *H.* 6. 24: *Litt.* 144. A Patron shall not have an action for trespass done when the Church is vacant: and if a man who hath a right to glebe lands, releaseth the same to the Patron, that is not good; because the Patron has not any estate in the land. 11 *H.* 6. 4. If the Patron grants a rent out of a church, it is void even against himself. 38 *Ed.* 3. 4. See further, this Dict. titles *Advowson*; *Parson*; *Vicar*, &c.

PAVAGE, *Pavagium.*] Money paid towards paving the streets or highways. *Rex concessit* Pavagium *villæ de Huntingdon per quinquennium. Pla. Parl.* 35 *Edw.* 1.

PAUPER, A poor man; according to which we have a term in law, to sue *in formâ pauperis.* See title *Costs* II.

Before a person is admitted to sue *in formâ pauperis*, he must have counsel's hand to his petition, certifying the judge to whom the petition is directed, that he conceives the petitioner hath good cause of action; he must also annex an affidavit to his petition, that he is not worth five pounds, all his debts paid, except wearing apparel, and his right to the matter in question. *Lil. Reg.* 633.

None ought to be admitted to sue *in formâ pauperis* in an action on the case, for words. *Lil. Reg.* 633.

A person admitted to sue *in formâ pauperis*, can only sue in that cause for which he is admitted, & *sic toties quoties. Lil. Reg.* 633.

It seems that, after the statutes which introduced costs, neither plaintiffs nor defendants could sue or defend *in formâ pauperis*; for that would be a means of depriving the other party of the costs given him by statute: and as *stat.* 11 *Hen.* 7. *c.* 12, enables persons only to sue as Paupers; and as the *stat.* 23 *Hen.* 8. *c.* 15, excepts only *plaintiffs* who are Paupers from paying costs; it seems, that one cannot be admitted in a civil action to *defend* as a Pauper. But it hath been adjudged, that a person may be admitted to defend an indictment *in formâ pauperis* for a misdemeanor, such as a conspiracy, keeping a disorderly house, &c. for in such proceedings there being no costs, the judges have a discretionary power of admitting or refusing them by the Common Law. *Pasch.* 9 *Geo.* 2. *The King* v. *Wright.* See *stat.* 2 *Geo.* 2. *c.* 28. § 8, by which, persons are allowed to defend *in formâ pauperis* on actions and informations relating to the Customs.

It is said, that Paupers ought not to be admitted to remove causes out of inferior Courts, but ought to satisfy themselves with the jurisdiction within which their actions properly lie. 1 *Mod.* 368.

By the orders of the Courts, if the party admitted to sue *in formâ pauperis* give any fee or reward to his counsel or attorney, or make any contract or agreement with them, he shall from thenceforth be dispaupered, and not be afterwards admitted again in that suit to prosecute *in formâ pauperis. Ord. Cur.* 94.

Also, if it shall be made appear to the Court, that any person prosecuting *in forma pauperis* hath sold or contracted for the benefit of the suit, or any part thereof, while the same depends, such cause shall be from thenceforth totally dismissed the Court. *Ord. Cur.* 95.

It is said, that if a pauper gives notice of trial, and does not proceed, he shall be dispaupered. 1 *Salk.* 506.

PAWN, *Pignus.*] A pledge or gage for payment of money lent: it is said (*risum teneatis?*) to be derived *à pugno, quia res quæ* pignori *dantur*, pugno *vel manu traduntur. Lit. Dict.* The party who pawns goods, hath a general

general property in them; they cannot be forfeited by the *Pawnee*, or party who hath them in Pawn, for any offence of his; nor be taken in execution for his debt; neither may they otherwise be put in execution, till the debt for which they are pawned is satisfied. *Litt. Rep.* 332. For the absolute property is in another: therefore they are not alienable, nor, by consequence, forfeitable; because they cannot be forfeited without loss and danger to the absolute owner; and all qualified possessors do take the property under the restriction to preserve the property of the right owner. *Bro.* title *Attachment in Assise* 20.

If a man pawns goods for money, and afterwards a judgment is had against the Pawner at the suit of one of the creditors; the goods in the hands of the Pawnee shall not be taken in execution, until the money is paid to the Pawnee: because he had a qualified property in them, and the judgment creditor only an interest. 3 *Bulst.* 17. And when a person hath jewels in Pawn for a certain sum, and he who pawned them is attainted, the King shall not have the jewels unless he pay the money. *Plowd.* 487. For the alteration of the general property doth not alter the special property in the Pawnee. 2 *H.* 7. 1: 1 *Bulst.* 29.

If a man pledge goods and then is outlawed, he cannot redeem them; because *then* the absolute property is in the King; but if the outlawry is reversed, then the person is re-instated in his property, as if there had been no outlawry; and therefore may redeem them. 1 *Bulst.* 29.

The Pawnee of goods hath a special property in them, to detain them for his security, &c. and he may assign the Pawn over to another, subject to the same conditions: and if the Pawnee die before redeemed, his executors shall have it upon the like terms as he had it.

If goods pawned are perishable, and no day being set for payment of the money, they lie in Pawn till spoiled, without any default in him who hath them in keeping; the party who pawned them shall bear the damage; for it shall be adjudged his fault that he did not redeem them sooner: and he, to whom pawned, may have action of debt for his money. Also, if the goods are taken from him, he may have action of trespass, &c. *Co. Litt.* 89, 208: *Yelv.* 179.

Where goods are pawned for money borrowed, without a day set for redemption, they are redeemable at any time during the life of the borrower. They may be redeemed after the death of him to whom pawned; but not after the death of him who pawned the goods. 2 *Cro.* 245: *Noy* 137: 1 *Bulst.* 9. But where a day is appointed, and the Pawner dieth before the day, his executors may redeem the Pawn at the day, and this shall be assets in their hands. 1 *Bulst.* 30, 31. If goods are redeemable at a day certain, it must be strictly observed; and the Pawnee, in case of failure of payment at the day, may sell them. 1 *Rol. Rep.* 181, 215. But still the right owner has his redemption in equity, as in case of a mortgage. 1 *Inst.* 205: *Shep.* 106.

He, who borrows money on a Pawn, is to have the pledge again, when he repays it; or he may have action for the detainer; and his tender of the money revests the special property. 2 *Cro.* 244. And it hath been held, that where a broker or Pawnee refuses (upon tender of the money) to redeliver the goods in Pawn, he may be indicted; because being secretly pawned, it may be impossible to prove a delivery for want of witnesses, if *trover* should be brought for them. 3 *Salk.* 268. Adjudged, that if goods are lost, after the tender of money, the Pawnee is liable to make them good to the owner; for, after tender, he is a wrongful detainer; and he who keeps goods wrongfully must answer for them at all events; his wrongful detainer being the occasion of the loss. *Cro. Jac.* 243: *Yelv.* 149: 1 *Bulst.* 29: *Bro. Bailment*, 7: 1 *Rol. Rep.* 129: 1 *Inst.* 89. But if they are lost before a tender, it is otherwise; the Pawnee is not liable, if his care of keeping them was exact; and the law requires nothing of him, but only that he should use an ordinary care in keeping the goods, that they may be restored on payment of the money for which they were deposited; and in such case if the goods are lost, the Pawnee hath still his remedy against the Pawner for the money lent. 2 *Salk.* 522: 3 *Salk.* 268.

If the Pawn is laid up, and the Pawnee robbed, he is not in general answerable; though if the Pawnee useth the thing, as a jewel, watch, &c. that will not be the worse for wearing, which he may do, it is at his peril; and if he is robbed, he is answerable to the owner, as the using occasioned the loss, &c. 2 *Salk.* 522: 3 *Salk.* 268: see *Co. Litt.* 89, *a*: 3 *Inst.* 108: 4 *Co.* 83: *Palm.* 551: *Ow.* 123: *Yelv.* 178: *Cro. Jac.* 244: 1 *Bulst.* 29, 30: 1 *Rol. Rep.* 181. If the Pawn is of such a nature, that the keeping is a charge to the Pawnee, as a cow, or a horse, &c. he may milk the one, or ride the other; and this shall go in recompence for his keeping. Things, which will grow the worse by usage, as apparel, &c. he may not use. *Owen* 124.

A person borrowed 100*l.* on the Pawn of jewels, and took a note from the lender, acknowledging them to be in his hands, for securing the money; afterwards, he borrowed several other sums of the same person, for which he gave his notes, without taking any notice of the jewels. As in this case it was natural to think the lender would not have advanced the sums on note only, but on the credit of the pledge in his hands before; it was decreed in equity, that if the borrower would have his jewels, he must pay all the money due on the notes. *Preced. Chanc.* 419, 421.

A factor cannot pawn the goods of his principal. *Strange* 1178. He to whom goods are delivered for safe custody cannot pawn them. *Strange* 1187. There can be no market-overt for Pawning. *Ibid.* Where money is lent on a pledge, the borrower is personally liable to the payment, unless there be an agreement to the contrary. *Strange* 919. See further, this Dictionary, title *Bailment*; and *post*, *Pawn-brokers*.

PAWNAGE, in woods and forests for swine; see *Pannage*.

PAWN-BROKERS. By *stat.* 25 *Geo.* 3. *c.* 48, Pawnbrokers are annually to take out a licence on a 10*l.* stamp, if within the bills of mortality; and 5*l.* in any other part of the kingdom, for each shop kept; under the penalty of 50*l.*

By *stat.* 29 *Geo.* 3. *c.* 57, confirmed by *stats.* 31 *G.* 3. *c.* 52; 33 *Geo.* 3. *c.* 53, the following rates of profit are allowed to Pawnbrokers for interest and warehouse-room:

For every pledge upon which there shall have been lent not exceeding 2*s.* 6*d.* one halfpenny, for any time during which the said pledge shall remain in pawn, not exceeding

exceeding one month; and the same for every month afterwards, including the current month in which such pledge shall be redeemed, although such month shall not be expired. For 5*s.* one penny; 7*s.* 6*d.* one penny halfpenny; 10*s.* two-pence; 12*s.* 6*d.* two-pence halfpenny; 15*s.* three-pence; 17*s.* 6*d.* three pence halfpenny; 1*l.* four-pence; and so on progressively and in proportion for any sum not exceeding 40*s.*

And for every sum exceeding 40*s.* and not exceeding 10*l.* at the rate of 3*d.* and no more, for the loan of every 20*s.* of such money lent by the month; and so in proportion for any fractional sum. § 1.

A party applying for the redemption of goods pawned, within seven days after the expiration of any month, may redeem them without paying any thing for the seven days, and applying after seven, and within fourteen days, pays the profit for one month and a half of another month; but after the expiration of the first fourteen days the Pawnbroker may take for the whole month. § 3.

Entries to be made and duplicates given. § 4.

Any person fraudulently pawning the goods of another, and convicted before a justice, shall forfeit 20*s.* and also the value of the goods pawned, *&c.* to be ascertained by the justice; and, on failure of payment, shall be committed to the House of Correction, for not more than three months, nor less than one month, and be publicly whipped; the forfeitures, when paid, to be applied towards making satisfaction to the party injured, and defraying the costs; the overplus, if any, to the poor of the parish. § 5.

Any person, counterfeiting or altering a duplicate, may be seized and taken before a Justice; who is to commit the party to the House of Correction, for not more than three months, nor less than one. § 6.

If any person shall offer to pawn any goods, refusing to give a satisfactory account of himself, and the goods; or if there shall be reason to suspect that such goods are stolen; or if any person, not entitled, shall attempt to redeem goods pawned; they may be taken before a Justice, who shall commit them for further examination: and if it appears that the goods were stolen, or illegally obtained, or that the person offering to redeem the same has no title or pretence to them; the Justice is to commit him to be dealt with according to law, where the nature of the offence shall authorize such committment by any other law; or otherwise, for not more than three months, nor less than one. § 7.

A Justice may grant a search warrant; in executing which, a peace officer may break open doors, and the goods, if found, shall be restored to the owner. § 8.

Pawnbrokers, refusing to deliver up goods pledged within one year, on tender of the money lent, and interest, on conviction, a Justice is empowered to commit the offender till the goods be delivered up, or reasonable satisfaction made. § 9.

Persons producing notes are not to be deemed owners, unless on notice to the contrary from the real owner. § 10.

Duplicates being lost, the owners, on oath before a Justice, shall be entitled to another from the Pawnbroker. § 11.

Goods to be sold by public auction after the expiration of one year; being exposed to public view, and catalogues thereof published, and two advertisements of sale by the Pawnbroker to be inserted in some news-paper two days at least before the first day's sale under penalty of 5*l.* to the owner. § 12.

Pawnbrokers, receiving notice from the owners of goods before the expiration of a year, shall not dispose of them, until after the expiration of three months from the end of the said year. § 13.

Pawnbrokers to enter an account of sales in their books of all goods pawned for upwards of ten shillings; and in case of any overplus by the sale, upon demand within three years, it shall be paid to the owner, the necessary costs, principal, and interest being deducted; persons possessing duplicates entitled to the inspecting of the book; and in case the goods shall have sold for more than the sum entered, or the further entries not made, or the overplus is refused to be paid, the offender shall forfeit treble the sum lent, to be levied by distress. § 14.

Pawnbrokers shall not purchase goods whilst in their custody, or suffer them to be redeemed for that purpose; nor lend money to any person appearing to be under twelve years of age, or intoxicated, or purchase duplicates of other Pawnbrokers, or buy any goods before eight in the forenoon, and after seven in the evening; nor receive any goods in pawn before eight in the forenoon or after nine at night, between *Michaelmas* and *Lady-day*, and before seven o'clock in the forenoon, and after ten at night, during the remainder of the year; except the evenings of *Saturday*, and that preceding *Good Friday* and *Christmas-day*; nor carry on the trade on any *Sunday*, *Good Friday*, or *Christmas day*. § 15.

Pawnbrokers are to place in their shops a table of rates allowed by this act. § 16.

Pawnbroker's christian and surname, and business, to be written over the door; under a penalty of 10*l.* half to the informer and half to the poor. § 17.

Pawnbrokers having sold goods illegally, or having embezzled or injured goods, Justices may award reasonable satisfaction to the owners, in case the same shall not amount to the principal and profit; or, if it does, the goods shall be delivered to the owner, without paying any thing under a penalty of 10*l.* § 18.

Pawnbrokers to produce their books before any Justice, if required, on a penalty of 10*l.* § 19.

Penalty on Pawnbrokers neglecting to make entry 10*l.* and for every offence against this act, where no penalty is provided, 5*l.* to be levied by distress; 2*l.* 10*s.* to the informer, the remainder to the poor. § 20.

Complaint shall, in all cases, be made within twelve months. § 21.

Churchwardens to prosecute for every offence, at the expence of the parish, on notice from a Justice. § 22.

This act does not extend to pledges for money above 10*l.* nor by § 53, to persons lending money upon goods at 5 *per cent.* interest.

This act to extend to the executors, *&c.* of Pawnbrokers and Pawners. § 25.

The form of conviction is settled by § 28; and an appeal given to the Quarter Sessions. § 29.

PAYMENT of money *before* the day appointed, is in law Payment *at* the day; for it cannot, in presumption of law, be any prejudice to him, to whom the payment is made, to have his money before the time; and it appears, by the party's receipt of it, that it is for his own

own advantage to receive it then, otherwise he would not do it. Yet it is said, that defendant must not plead, that the plaintiff accepted it in full satisfaction; but that he paid it in full satisfaction. 5 *Rep.* 117. Payment of a lesser sum, in satisfaction of a greater, cannot be a satisfaction for the whole; unless the payment be before the day: though the gift of an horse, or robe, *&c.* in satisfaction, may be good. *Ibid.* And where damages are uncertain, a less thing may be done in satisfaction of a greater. 4 *Mod.* 89.

Upon *solvit ad diem* pleaded, it is good evidence to *prove Payment* at any time after the day, and before action brought; and Payment, although after the day, may be pleaded to any action of debt, upon bill, bond, or judgment, or *scire facias* upon a judgment. 2 *Lil. Abr.* 287: *Stat.* 4 *&* 5 *Ann. c.* 16. But see 1 *Stra.* 652; where, on such a plea, proof was made of interest paid two years *after* the day, whereby the plea was *falsified*; which was made on *presumption* only; as the debt had not been demanded for thirty years. And though Payment after the day is good by way of discharge, it will not be so by way of satisfaction. 4 *Mod.* 250. Payment is no plea to debt on covenant, or an obligation, without acquittance; but if the obligation have a condition, it is otherwise. *Dyer* 25, 169. If a bond, *&c.* be for Payment of money; and no day is set, damages cannot be recovered till a demand is made. *Bridg.* 20. See title *Bond.*

For payment of rent, there are said to be four times: 1. A voluntary time, that is not satisfactory, and yet good to some purpose: as where a lessee pays his rent before the day, this gives seisin of the rent, and enables him to whom paid to bring his assize for it. 2. A time voluntary and satisfactory in some cases; when it is paid the morning of the last day, and the lessor dies before the end of the day, this is a good payment to bind the heir or executor, but not the King. 3. The legal, absolute, and satisfactory time, which is a convenient time before the last instant of the last day, and then it must be paid. The 4th is satisfactory, and not voluntary, but coercive, when forced and recovered by suit at law. *Co. Litt.* 200: 10 *Rep.* 127: *Plowd.* 172. See title *Rent.*

Payment of money shall be directed by him who pays it, and not by the receiver, *&c.* 5 *Rep.* 117: *Cro. Eliz.* 68. If the payer does not apply the Payment, the receiver may; but he must not apply it to an uncertain demand, as to a debt from a testator. *Strange* 1194. In the payment of a testator's debts by executors, they are to pay first judgments, mortgages, rent due by lease, *&c.* then bonds and bills, *&c.* 1 *Roll. Abr.* 927. See title *Executor* V. 6.

A bill drawn on *A.* to pay money for value received, is a good discharge of a debt, though the bill be not paid, unless the creditor return the bill in convenient time. *Show.* 155. *A.* gives *B.* a bill of exchange on *C.* in payment of a former debt; this is not allowable as evidence on *non assumpsit*, unless paid; for a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so. 1 *Salk.* 124. When a merchant draws a bill upon a correspondent, who accepts it, this is payment: for it makes him debtor to another person, who may bring his action. 10 *Mod.* 37. See title *Bill of Exchange.*

PAYMENT INTO COURT; See *Money into Court.*

PEACE, *Pax.*] In the general signification, is opposite to war or strife; but, particularly in law, it intends a quiet behaviour toward the King and his Subjects. And if any man is in danger from another, and makes oath of it before a Justice of Peace, he shall be secured by good bond, which is called binding to the Peace. *Lamb. Eiren. lib.* 2. *cap.* 2. 77: *Cromp. Just. of Peace*, 118, 129. And also frank-pledge and conservation of the Peace. Time of Peace is, when the Courts of justice are open; and Judges and ministers of the same may, by law, protect men from wrong, and administer justice to all. *Co. Litt.* 249.

All authority for keeping the Peace comes originally from the King, who is the Supreme Magistrate for preservation thereof; though it is said the King cannot take a recognizance of the Peace; because it is a rule in law that no one can take any recognizance, who is not either a justice of record, or by commission: also it is certain, that no duke, earl, or baron, as such, have any greater power to keep the Peace, than mere private persons. *Lamb. lib.* 1. *c.* 3: *Dalt. c.* 1. But the Lord Chancellor, or Lord Keeper of the Great Seal, the Lord High Steward, the Lord Marshal, and every Justice of the King's Bench, have, as incident to their offices, a general authority to keep the Peace throughout the realm, and to award process for surety of the Peace, and take recognizances for it. And every Court of Record hath power to keep the Peace within its own precincts: as have likewise Sheriffs, who are entrusted with the custody of the counties, consequently have by it an implied power of keeping the Peace, within the same; and coroners may bind persons to the Peace, who make an affray in their presence; but may not grant process of the Peace, *&c.* 2 *Hawk. P. C.*

Peace shall be kept, and justice and right duly administered to all persons. *Stat.* 1 *R.* 2. *c.* 2, &c.—Breakers of the Peace to be imprisoned, and to find sureties, *&c. Stats.* 2 *Ed.* 3. *c.* 6: 34 *Ed.* 3. *c.* 1. Recognizances for keeping the Peace to be certified to the quarter sessions. *Stat.* 3 *H.* 7. *c.* 1.—The Chancery and King's Bench restrained from granting process of the Peace or behaviour without motion and affidavit; and to give costs and damages to persons wrongfully vexed by such process, and restrained from granting *supersedeas*, unless the process is granted in the manner required by the statute. The said Courts to punish insufficient sureties. *Stat.* 21 *Jac.* 1. *c.* 8. Actions against Peace-officers made local. *Stat.* 21 *Jac.* 1. *c.* 12. And the general issue pleadable. *Stat.* 7 *Jac.* 1. *c.* 5: 21 *Jac.* 1. *c.* 12. See this Dictionary, titles *Justices of Peace*; *Surety of the Peace*; and *post, Peace of the King.*

PEACE OF GOD AND THE CHURCH, *Pax Dei & Ecclesiæ.*] Was anciently used for that cessation which the King's Subjects had from trouble and suit of law between the terms, and on *Sundays* and holidays. See *Vacation.*

PEACE OF THE KING, *Pax Regis*, mentioned in *stat.* 6 *R.* 2. *st.* 1. *c.* 13.] Is that Peace and security both for life and goods, which the King promiseth to all his Subjects, or others taken into his protection. And where an ou[illegible] reversed, a person is restored to the King's [illegible] this is termed *ad Pacem redire. Bract. lib.* 3. [illegible] point of policy seems to have been bor[illegible] from the *Feudists*, which, in the second book [illegible] *Feudi*, *cap.* 53, intitled, *de Pace tenenda*, &c.

Hotoman

Hotoman proveth. Of this *Hoveden* fetteth down many branches, *Annal. H. 2. fol.* 144, 330. As to the Peace of the Church, see title *Sanctuary*. The Peace of the King's highway is the immunity that the King's highway hath to be free from annoyance or moleftation. The Peace of the plough, whereby the plough and the plough cattle are fecured from diftreffes. *F. N. B.* 90. And fairs have been faid to have their Peace; becaufe no man might be troubled in them for any debt contracted elfewhere.

PECIA, A piece or fmall quantity of ground. *Paroch. Antiq.* 240.

PECTORALE, A word often met with in old writings. Moft authors agree that it is the fame with that garment called *rationale*, which the high prieft in the old law wore on his fhoulders, as a fign of perfection. It is worn alfo by the high prieft of the new law, as a fign of the greateft virtue. *Quæ gratia & ratione perficitur*; for which reafon it is called *rationale*. It is by fome taken to be that part of the pall which covers the breaft of the prieft, and from thence called *Pectorale*. But all agree that it is the richeft part of that garment, embroidered with gold, and adorned with precious ftones. *Cowell.*

PECTORAL, Armour for the breaft, a breaft-plate or petral, for a horfe; from the Lat. *pectus*; it is mentioned in *ftat.* 13 & 14 *Car.* 2. *c.* 3.

PECULIAR, Fr. *peculier*, i. e. private.] A particular parifh or church, that hath jurifdiction within itfelf, and power to grant adminiftration or probate of wills, &c. exempt from the Ordinary.

There are Royal Peculiars, and Archbifhops' Peculiars: the King's chapel is a Royal Peculiar, exempted from all fpiritual jurifdiction, and referved to the immediate government of the King: there are alfo fome peculiar ecclefiaftical jurifdictions belonging to the King, which formerly appertained to Monafteries and Religious Houfes. It is an ancient privilege of the See of *Canterbury*, that wherever any manors or advowfons belong to it, they forthwith become exempt from the Ordinary, and are reputed Peculiars of that fee; not becaufe they are under no Ordinary, but becaufe they are not under the Ordinary of the diocefe, &c. For the jurifdiction is annexed to the Court of Arches, and the judge thereof may originally cite to thefe Peculiars of the Archbifhop. *Wood's Inft.* 504.

The Court of Peculiars of the Archbifhop of *Canterbury*, hath a particular jurifdiction in the city of *London*, and in other diocefes, &c. within his province: in all, fifty-feven Peculiars. 4 *Inft.* 338: *Stat.* 22 & 23 *Car.* 2. *c.* 15. There are fome Peculiars which belong to Deans and Chapters, or a Prebendary, exempted from the Archdeacon only: they are derived from the Bifhop, of ancient compofition, and may be vifited by the Bifhop in his primary or triennial vifitation: in the mean time, an Official of the Dean and Chapter, or Prebendary, is the Judge; and from hence the appeal lies to the Bifhop of the diocefe. *Wood* 504. Appeal lieth from other Peculiar Courts to the King in Chancery, [illegible] 25 *H.* 8. *c.* 19. The Dean and Chapter of St. [illegible] a Peculiar jurifdiction; and the Dean and [illegible] *Salifbury* have a large Peculiar within that [illegible] have the Dean and Chapter of *Litchfield*, [illegible] *Abr.* 1240, 1241.

There is mention in our books of Peculiars of Archdeacons; but they are not properly Peculiars, only fubordinate jurifdictions; and a Peculiar is *primâ facie* to be underftood of him who hath a co-ordinate jurifdiction with the Bifhop. *Hob.* 185: *Mod. Ca.* 308. If an Archdeacon hath a peculiar authority by commiffion, this fhall not take away the authority of the Bifhop; but, if he hath authority and jurifdiction by prefcription, it is faid, it fhall. 2 *Roll. Rep.* 357. Where a man dies inteftate, leaving goods in feveral Peculiars, it has been held, that the Archbifhop is to grant adminiftration. *Sid.* 90: 5 *Mod.* 239. See 16 *Vin. Abr.* title *Peculiars*; and this Dictionary, title *Courts Ecclefiaftical* 4.

PECUNIA, Properly money, but anciently ufed for cattle, and fome times for other goods as well as money. So we find often in *Domefday*, *Paftura ibidem ad* Pecuniam *villæ*, that is, pafture-ground for the cattle of the village. *Cowell.*

PECUNIA SEPULCHRALIS, *LL. Canuti*, 102.] Money anciently paid to the prieft at the opening of the grave, for the good of the deceafed's foul. This the *Saxons* called *faulfceat*, *faulfcot*, and *animæ fymbolum*. *Spel. de Concil. t.* 1. *f.* 517. See *Mortuary*.

PECUNIARY. All punifhments of offences were anciently Pecuniary, by mulct, &c. See *Fine*.

PECUNIARY CAUSES, Cognifable in the *Ecclefiaftical Courts*; are fuch as arife either from the withholding ecclefiaftical dues, or the doing or neglecting fome act relating to the church, whereby damage accrues to the plaintiff; towards obtaining a fatisfaction for which he is permitted to inftitute a fuit in the Spiritual Court. For the principal of thefe caufes, fee 3 *Comm.* 88; and this Dictionary, titles *Courts Ecclefiaftical*; *Tithes*; *Spoliation*; *Dilapidation*.

PECUNIARY LEGACY; See titles *Executor*; *Legacy*.

PEDAGE, *pedagium*.] Money given for the paffing by foot or horfe through any country. *Caffan. de Conf. Burgun.* 118: *Spelm.* This word is likewife mentioned by *Mat. Paris*, *anno* 1256.

PEDALE, A foot cloth, or piece of tapeftry laid on the ground to tread on, for greater ftate and ceremony. *Ingulph. pag.* 41.

PEDIS ABSCISSIO, Cutting off the foot; a punifhment on criminals, anciently inflicted here, inftead of death; as appears by the laws of *William*, called *The Conqueror*, *cap.* 7: fo, in *Ingulphus*, *p.* 856: *Fleta*, *lib.* 1. *c.* 38: *Bracton*, *lib.* 3. *cap.* 32: *Monaft.* 1 *tom. pag.* 166.

PEDONES, Foot-foldiers. *Simeon of Durham*, *anno* 1085.

PEDLARS; See *Hawkers*.

PEERAGE. The dignity of the Lords or Peers of the realm. See *Peers of the Realm*.

PEERS, *Pares*.] Signify, in law, thofe who are impannelled in an inqueft upon a man, for convicting or clearing him of any offence; the reafon is, becaufe the cuftom of the realm is to try every man in fuch cafe by his Peers or *equals*. See *ftats. Weftm.* 1. 3 *E.* 1. *cap.* 6: *Mag. Car. c.* 29. And in this fenfe, it is in ufe with other [illegible]ons. *Cowell.*

[illegible] as every one of the Nobility, being a Lord of Par[illegible], is a Peer, or equal to all the other Lords, though [illegible]eral degrees; fo the Commons are Peers to one another,

another, although distinguished as Knights, Esquires, Gentlemen, &c. 2 *Inst.* 29: 3 *Inst.* 31. See *post*, title *Peers of the Realm*.

PEERS OF FEES. The word Peer denoted originally one of the same rank; afterwards, it was used for the vassals or tenants of the same Lord, who were obliged to serve and attend him in his Courts, being equal in function: these were termed Peers of Fees, because holding fees of the Lord; or because their business in Court was to sit and judge under their Lord, of disputes arising on fees; but if there were too many in one lordship, the Lord usually chose twelve, who had the title of Peers, by way of distinction; from whence, it is said, we derive our common juries, and other Peers. *Cowell.*

PEERS OF THE REALM.

PARES REGNI; PROCERES.] The Nobility of the Kingdom, and Lords of Parliament; who are divided into *Dukes*, *Marquesses*, *Earls*, *Viscounts*, and *Barons*. And the reason why they are called Peers is, that notwithstanding a distinction of dignities in our Nobility, yet in all public actions they are equal; as in their votes of Parliament, and trial of any nobleman. *S. P. C. lib.* 3. The appellation seems to have been borrowed from *France*, from those twelve Peers that *Charlemaine* instituted in that kingdom, called *Pares vel Patricii Franciæ*.

I. *Of the Titles and Origin of the several Degrees of Nobility.*

II. *The Manner in which they may be created, and limited; and how forfeited.*

III. *Of the Privileges of Peers.*

IV. *The Mode of their Trial in capital Cases.*

I. ALL degrees of nobility and honour are derived from the King as their fountain, and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity.

A Duke, though he be in *England*, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; this being the first title of dignity after the royal family. *Camden Britan.* title *Ordines*. Among the *Saxons* the *Latin* names of Dukes, *duces*, is very frequent; and signified, as among the *Romans*, the commanders or leaders of their armies, whom in their own language they called heretoga; and in the laws of *Henry* I. (as translated by *Lambard*), they are called *heretochii*. But after the *Norman* conquest, which changed the military p[illegible] of the nation, the Kings themselves continuing for many generations Dukes of *Normandy*, they would not honour any Subjects with the title of Duke, till the time of *Edward* III; who, claiming to be King of *France*, and thereby losing the ducal in the royal dignity, in the eleventh year of his reign created his son, *Edward* the Black Prince, Duke of *Cornwall*; and many, of the Royal Family especially, were afterwards raised to the like honour. This reason, however, does not seem very satisfactory, as in fact this order of Nobility was created about a year before *Edw.* III. assumed the title of King of *F*[illegible] *A. D.* 1337. *Henry's Hist. Eng.* viii. 135. (8vo.) [illegible] this Dictionary, titles *Duke*; *King* II.

In the reign of Queen *Elizabeth*, *A. D.* 1572, the whole order became utterly extinct; (*Camden Britan.* title *Ordines*: *Spelman. Gloss.* 191) but it was revived about fifty years afterwards by her Successor, who was remarkably prodigal of honours, in the person of *George Villiers*, Duke of *Buckingham*. 1 *Comm. c.* 12.

A Marquess, (*Marchio*,) is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom; which were called the marches, from the Teutonic word, *marche*, a limit: such as, in particular, were the marches of *Wales* and *Scotland*, while each continued to be an enemy's country. The persons who had command there, were called Lords-Marchers, or Marquesses; whose authority was abolished by *stat.* 27 *Hen.* 8. *c.* 27 (26?): though the title had long before been made a mere ensign of honour; *Robert Vere*, Earl of *Oxford*, being created Marquis of *Dublin*, by *Richard* II, in the eighth year of his reign. 2 *Inst.* 5. See this Dictionary, title *Marquess*.

An Earl is a title of nobility so ancient, that its original cannot be clearly traced out. Thus much seems tolerably certain: that among the *Saxons* they were called *ealdormen*, *quasi* elder men, signifying the same as senior or senator among the *Romans*; and also *schiremen*, because they had each of them the civil government of a several division or shire. On the irruption of the *Danes*, they changed the names to *Eorles*, which, according to *Camden*, signified the same in their language. *Britan.* title *Ordines*. In *Latin* they are called *Comites*, (a title first used in the Empire,) from being the King's attendants; *à societate nomen sumpserunt, Reges enim tales sibi associant. Bracton, lib.* 1. *c.* 8: *Flet. l.* 1. *c.* 5. After the *Norman* conquest, they were, for some time, called Counts or Countees, from the *French*; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of *Earls* or *Comites* is now become a mere title; they having nothing to do with the government of the county, which is now entirely devolved on the Sheriff, the Earl's deputy, or *vice-comes*. In writs, and commissions, and other formal instruments, the King, when he mentions any Peer of the degree of an Earl, usually stiles him "trusty and well beloved *cousin*:" an appellation as antient as the reign of *Henry* IV: who, being either by his wife, his mother, or his sisters, actually related or allied to every Earl then in the kingdom, artfully and constantly acknowledged that connection in all his letters and other public acts; from whence the usage has descended to his successors, though the reason has long ago failed. See title *Earl*.

The name of *Vice-comes*, or *Viscount*, was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it, by *Henry* VI; when, in the eighteenth year of his reign, he created *John Beaumont* a Peer, by the name of Viscount *Beaumont*; which was the first instance of the kind. 2 *Inst.* 5.

The title of *Baron* is the most general and universal [illegible]ility; for originally every one of the Peers of [illegible]k had also a barony annexed to his other [illegible] 5, 6. But it hath sometimes happened that, [illegible]ent baron hath been raised to a new degree [illegible]e, in the course of a few generations, the two titles

titles have descended differently; one perhaps to the male descendants, the other to the heirs-general; whereby the earldom, or other superior title, hath subsisted without a barony; and there are also modern instances, where Earls and Viscounts have been created without annexing a barony to their other honours: so that now the rule doth not hold universally, that all Peers are Barons. The original and antiquity of baronies have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of Court-baron (which is the Lord's Court, and incident to every manor) gives some countenance. It may be collected from King *John's Magna Carta*, *c.* 14, that originally all lords of manors, or Barons, that held of the King *in capite* had seats in the Great Council or Parliament: till, about the reign of that Prince, the conflux of them became so large and troublesome, that the King was obliged to divide them, and summon only the greater Barons in person, leaving the small ones to be summoned by the Sheriff; and (as it is said) to sit by representation in another House, which gave rise to the separation of the two Houses of Parliament. *Gilb. Hist. of Exch. c.* 3: *Seld. Title of Hon.* 2, 5, 21. See title *Parliament.* By degrees the title came to be confined to the greater Barons, or Lords of Parliament only; and there were no other Barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till *Richard* I. first made it a mere title of honour, by conferring it on divers persons by his letters patents. 1 *Inst* 9: *Seld. Jan. Angl.* 2. § 66.

Before the time of King *Ed.* III. there were but two titles of nobility, *viz.* Earls and Barons: the Barons were originally by tenure, afterwards created by writ, and after that by patent; but Earls were always created by letters patent. *Seld.* 536. See 1 *Comm. c.* 12. *p.* 398. *in n.* And *Hen.* VI. created *Edmund of Hadham* Earl of *Richmond*, by patent, and granted him precedency before all other Earls. *Mary* I. likewise granted to *Henry Ratcliff*, Earl of *Sussex*, a privilege by patent beyond any other nobleman, *viz.* that he might at any time be covered in her presence, like unto the grandees of *Spain*; and some few others of our Nobility have had this honour. *Dict.*

The *stat.* 31 *Hen.* 8. *c.* 10, settles the precedency of the Lords of Parliament, and great Officers of State; after whom, the Dukes, Marquesses, Earls, Viscounts, and Barons, take place according to their ancienty; but it is declared, that precedence is in the King's disposition. See this Dictionary, title *Precedence.*

A dignity of Earl, &c. is a title by the Common Law; and if a patentee be disturbed of his dignity, the regular course is to petition the King, who indorses it and sends it into Chancery. *Staundf. Prerog.* 72: 22 *Edw.* 3.

There are now no feudal baronies; but there are Barons by succession, and those are the Bishops; who, by virtue of ancient baronies held of the King, (into which the possessions of their bishopricks have been converted,) are called by writ to Parliament, and have place in [illegible] House of Peers as Lords Spiritual: the tempora[illegible] sessions of Bishops are held by their service to att[illegible] Parliament when called; and that is in the nature [illegible] barony. See *Post* II. III.

II. The right of Peerage seems to have been originally territorial, that is, annexed to lands, honors, castles, manors, and the like; the proprietors and possessors of which were (in right of those estates) allowed to be Peers of the Realm, and were summoned to Parliament to do suit and service to their Sovereign; and, when the land was alienated, the dignity passed with it as appendant. Thus the Bishops still sit in the House of Lords in right of successions to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands. *Glan. l.* 7. *c.* 1. And thus, in 11 *Hen.* 6, the possession of the castle of *Arundel* was adjudged to confer an earldom on its possessor. *Seld. Tit. of Hon. b.* 2. *c.* 9. § 5. But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled; and, instead of territorial, became personal. Actual proof of a tenure by barony became no longer necessary to constitute a Lord of Parliament; but the record of the writ of summons to him, or his ancestors, was admitted as a sufficient evidence of the tenure. 1 *Comm. c.* 12.

Peers are now created either by writ, or by patent; for those who claim by prescription must suppose either a writ or patent made to their ancestors; though, by length of time, it is lost. The creation by writ, or the King's letter, is a summons to attend the House of Peers, by the stile and title of that barony, which the King is pleased to confer; that by patent is a royal grant to a Subject of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually takes his seat in the House of Lords: and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct Parliaments, to evidence an hereditary barony. *Whitelocke of Parl. ch.* 114. The most usual way, therefore, because the surest, is to grant the dignity by patent; which enures to a man and his heirs according to the limitations thereof, though he never himself makes use of it. *Co. Litt.* 16. Yet it is frequent to call up the eldest son of a Peer to the House of Lords by writ of summons, in the name of his father's barony: because in that case there is no danger of his children's losing the nobility, in case he never takes his seat; for they will succeed to their grandfather. And where the father's barony is limited by patent to him, and the heirs-male of his body, and his eldest son is called up to the House of Lords by writ, with the title of this barony, the writ in this case will not create a fee or a general estate tail, so as to make a female capable of inheriting the title; but upon the death of the father the two titles unite, or become one and the same. *Ex parte Eliz. Perry, Bro. P. C.* Creation by writ has also one advantage over that by patent: for a person created by writ holds the dignity [in tail] to him and his heirs, without any words to that purport in the writ; but in letters patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life. *Co. Lit.* 9. 16. For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs: as where a peerage is limited to a man, and the heirs male of his body, by *Elizabeth* his present lady; and not to such heirs by any former or future wife. And it is to be observed, that, though the opinion of Lord *Coke* is to the contrary,

trary, it is now underſtood, that a creation by writ does not confer a fee-ſimple in the title, but only an eſtate-tail-general: for every claimant of the title muſt be deſcended from the perſon firſt ennobled. 1 *Woodd.* 37: 1 *Comm. c.* 12, *&* *n.*

In caſe of creation by patent, the perſon created muſt have the inheritance limited by apt words; as to him and his heirs, or the heirs male of his body, heirs of his body, *&c.* otherwiſe he ſhall have no inheritance. 2 *Inſt.* 48.

The King may create either man or woman noble for life only: and peerage may be gained for life, by act of law; as if a Duke take a wife, ſhe is a Dutcheſs in law by the intermarriage; ſo of a Marqueſs, Earl, *&c.* 1 *Inſt.* 16: 9 *Rep.* 97. Alſo the dignity of an Earl may deſcend to a daughter, if there be no ſon, who ſhall be a Counteſs; and if there are many daughters, it is ſaid, the King ſhall diſpoſe of the dignity to which daughter he pleaſes. 1 *Inſt.* 165: *Wood's Inſt.* 42. See titles *Peereſs*; *Deſcent* III. If a perſon is ſummoned as a Baron to Parliament by writ, and, ſitting, die, leaving two or more daughters, who all dying, one of them only leaves iſſue a ſon, ſuch iſſue has a right to demand a ſeat in the Houſe of Peers. *Skin.* 441.

Thomas de la Warre was ſummoned to Parliament by writ, *anno* 3 *Hen.* 8; and *William* his ſon, *anno* 3 *Ed.* 6, was diſabled by attainder to claim any dignity during his life, but was afterwards called to Parliament by Queen *Elizabeth*, and ſat there as Puiſne Lord, and died; then *Thomas*, the ſon of the ſaid *William*, petitioned the Queen in Parliament to be reſtored to the place of *Thomas* his grandfather; and all the Judges, to whom it was referred, were of opinion that he ſhould; becauſe his father's diſability was not abſolute by attainder, but only perſonal and temporary, during his life: and the acceptance of the new dignity by the petitioner ſhall not hurt him; ſo that when the old and new dignity are in one perſon, the old ſhall be preferred. 11 *Rep.* 1.

Where nobility is gained by writ, or patent, without deſcent, it is triable by record; but when it is gained by matter of fact, as by marriage, or where deſcents are pleaded, nobility is triable *per pais.* 22 *Aſſ.* 24: 3 *Salk.* 243. A perſon petitioned the Lords in Parliament to be tried by his Peers; the Lords diſallowed his peerage, and diſmiſſed the petition: and it was held in this caſe, that the defendant's right ſtood upon his letters-patent, which could not be cancelled but by *ſcire facias*: and that the Parliament could not give judgment in a thing which did not come in a judicial way before that Court. 2 *Salk.* 510, 511: 3 *Salk.* 243. Where peerage is claimed *ratione Baronii*, as by a Biſhop, he muſt plead that he is *unus parium Regni Angliæ*; but if the claim is *ratione nobilitatis*, he need not plead otherwiſe than purſuant to his creation. 4 *Inſt.* 15: 3 *Salk.* 243.

When a Lord is newly created, he is introduced into the Houſe of Peers, by two Lords of the ſame rank in their robes, Garter King at Arms going before, and his Lordſhip is to preſent his writ of ſummons, *&c.* to the Lord Chancellor; which being read, he is conducted to his place; and Lords by deſcent, where nobility comes down from the anceſtor, and is enjoyed by right of blood, are introduced with the ſame ceremony, the preſenting of the writ excepted. *Lex Conſtitutionis* 79.

A Nobleman, whether native or foreigner, who has his nobility from a foreign State, although the title of dignity be given him, (as the higheſt and loweſt degrees of nobility are univerſally acknowledged,) in all our legal proceedings no notice is taken of his nobility; for he is no Peer: and the laws of *England* prohibit all Subjects to receive any hereditary title of honour or dignity, from any foreign Prince, without conſent of the Sovereign. *Lex Conſtitutionis* 80, 81.

An Earldom conſiſts in office, for defence of the kingdom; and of rents and poſſeſſions, *&c.* and may be entailed as any other office may, and as it concerns land: but the dignity of peerage cannot be transferred by fine; becauſe it is a quality affixed to the blood, and ſo merely perſonal, that a fine cannot touch it. 2 *Salk.* 509. 3 *Salk.* 244.

A Peer cannot loſe his nobility, but by death or attainder; though there was an inſtance in the reign of *Edward* IV. of the degradation of *George Neville* Duke of *Bedford* by act of Parliament, on account of his poverty, which rendered him unable to ſupport his dignity. 4 *Inſt.* 355. But this is a ſingular inſtance: which ſerves at the ſame time, by having happened, to ſhew the power of Parliament: and, by having happened but once, to ſhew how tender the Parliament hath been, in exerting ſo high a power. It hath been ſaid indeed, that if a Baron waſtes his eſtate, ſo that he is not able to ſupport the degree, the King may degrade him; but it is expreſsly held by later authorities, that a Peer cannot be degraded but by act of Parliament. *Moor* 678: 12 *Rep.* 107: 12 *Mod.* 56.

George Neville Duke of *Bedford* was degraded by act of Parliament, 16 *June*, 17 *Ed.* 4. The preamble of the ſtatute, reciting, that the ſaid *George* hath not, nor may have, any livelihood to ſupport his name, eſtate, and dignity, or any name of eſtate; and that it is oftentimes ſeen when a lord is called to high eſtate, and hath not convenient livelihood to ſupport the dignity, it induceth great poverty, and often cauſeth great extortion, embracery, and maintenance, to the great trouble of all ſuch counties where ſuch eſtate ſhall happen to be: wherefore the King, by advice of his Lords and Commons, ordaineth, eſtabliſheth, and enacteth, That from henceforth the ſame creation and making of the ſaid Duke, and all the names of dignity given to the ſaid *George*, or to *John Neville* his father, be from henceforth void and of none effect, *&c.*

In which act theſe things are to be obſerved: Firſt, that although the Duke had not any poſſeſſions to ſupport his dignity; yet his dignity could not be taken from him without an act of Parliament. Secondly, The inconveniencies appear, where a great ſtate and dignity is, and no livelihood to maintain it. Thirdly, It is a good reaſon to take away ſuch dignity by act of Parliament; therefore the ſtatute *de abſentibus* made at a Parliament holden at *Dublin* in *Ireland*, the 10th of *May*, 28 *H.* 8, by reaſon of the long abſence of *George* Earl of *Shrewſbury* out of that realm, ſhall be expounded, according to [illegible] general words of the writ, to take away ſuch incon[illegible]. 12 *Rep.* 106, 107. Earl of *Shrewſbury*'s caſe.

[illegible]gh dignities of peerage are granted from the [illegible]n; yet they cannot be ſurrendered to the Crown, except it be, in order to new and greater honours; nor

are they transferable, unless they relate to an office: and notwithstanding there are instances of earldoms being transferred, and wherein one branch of a family sat in the House of Peers, by virtue of a grant from the other branch, particularly in the reigns of *Hen.* III. and *Ed.* II. these precedents have been disallowed. *Lex Constitutionis* 85, 86, 87.

A personal honour or dignity may be forfeited, on committing treason, *&c.* for it is implied by a condition in law, that the person dignified shall be loyal; and the office of an Earl, *&c.* is *ad consulendum Regem tempore pacis & defendendum tempore belli*, therefore he forfeits it when he takes counsel or arms against the King. 7 *Rep.* 33.

III. Of the Privileges of Peers as Members of the Upper House of Parliament, see this Dictionary, title *Parliament.*

All Peers of the realm are also looked upon as the King's hereditary counsellors, and may be called together by the King to impart their advice in all matters of importance to the realm, either in time of Parliament, or, which hath been their principal use, when there is no Parliament in being. *Co. Litt.* 110.

Instances of conventions of the Peers, to advise the King, have been in former times very frequent, though now fallen into disuse, by reason of the more regular meetings of Parliament. Many instances of this kind of meeting are to be found under our ancient Kings: though the former method of convoking them had been so long left off, that when *Charles* I. in 1640, issued out writs under the Great Seal to call a great council of all the Peers of *England*, to meet and attend his Majesty at *York*, previous to the meeting of the long Parliament, the Earl of *Clarendon* mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practised in some hundreds of years. But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet in cases of emergency, our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together; as was particularly the case with King *James* the Second, after the landing of the Prince of *Orange*, and with the Prince of *Orange* himself, before he called that convention-parliament, which afterwards called him to the throne. 1 *Comm.*

Besides this general meeting, it is usually looked upon to be the right of each particular Peer of the realm, to demand an audience of the King, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public. And therefore, in the reign of *Edward* II. it was made an article of impeachment in Parliament against the two *Hugh Spencers*, (father and son,) for which they were banished the kingdom, "that they by their evil covin would not suffer the great men of the realm, the King's good counsellors, to speak with the King, or to come near him; but only in the presence and hearing of the said *Hugh* the father, and *Hugh* the son, or one of them, and at their will, and according to such things as pleased them." 4 *Inst* 53. See 1 *Comm.* 227-9.

We are next to consider the general privileges which attach to the persons of Peers in their individual capacity.

Peers are created for two reasons; 1st, *ad consulendum*, 2d, *ad defendendum Regem*; for which reasons the law gives them certain great and high privileges, such as freedom from arrests, *&c.* even when no Parliament is sitting; because the law intends, that they are always assisting the King with their counsel for the commonwealth; or keeping the realm in safety by their prowess and valour. 1 *Comm.* 227.

In certain criminal cases, that is to say, on indictments for treason and felony, and misprision thereof, a nobleman shall be tried by his Peers; but in all misdemeanors, as libels, riots, perjuries, conspiracies, *&c.* he is to be tried, like a commoner by a jury. 3 *Inst.* 30: 2 *Hawk. P. C.* *c.* 44. § 13. So in case of an appeal of felony he shall be tried by a jury. 9 *Rep.* 30: 2 *Inst.* 49: 10 *E.* 4. 6. *b*: 3 *Inst.* 30. And the indictments of Peers for treason or felony, are to be formed by freeholders of the county: and then the Peers shall plead before the Lord High Steward, *&c.* 1 *Inst.* 156: 3 *Inst.* 28. See *post* IV.

The privilege of Peers extends only to the Peers of *Great Britain*; so that a Nobleman of any other country, or a Lord of *Ireland*, hath not any other privileges in this kingdom than a common person: also the son and heir apparent of a Nobleman is not entitled to the privilege of being tried by his Peers, which is confined to such person as is a *Lord of Parliament* at the time; but it seems that an infant Peer is privileged from arrests, his person being held sacred *Co. Litt.* 156: 2 *Inst.* 48; 3 *Inst.* 30. See titles *Arrest*; *Privilege*; *Process.*

The Peers of *Scotland* had no privilege in this kingdom before the Union; but by the 23d clause of the articles of Union, (*stat.* 5 *Ann. c.* 5,) the sixteen elected Peers have all the privileges of the Peers of Parliament of *Great Britain*; also all the rest of the Peers of *Scotland* have all the privileges of the peerage of *England*, excepting only that of sitting and voting in Parliament. 1 *P. Wms.* 583.

This right of trial by their Peers, it seems now generally admitted, does not extend to Bishops: though the reason given for this exception, *viz.* that they are not ennobled in blood, and consequently not Peers with the nobility, does not seem sufficiently satisfactory. And it has been suggested, that if any instances of trials of this sort by a jury had occurred in remote times, the Bishops could not have demanded a trial in Parliament, without admitting themselves subject to temporal jurisdiction; from which they then claimed exemption: and hence it may be conjectured the Bishops have lost their right to be tried in Parliament, though only two instances can be found of their being tried by Jury, *viz.* those of Archbishop *Cranmer* and Bishop *Fisher.* 2 *Hawk. P. C.* *c.* 44. § 12.

Some Bishops have been tried by Peers of the Realm; but it hath been when impeached by the House of Commons, as upon special occasions many others have been who have not been Peers. The Bishops may however claim all the privileges of the Lords Temporal; except that they cannot be tried by their Peers, and that they cannot, in capital cases, pass upon the trial of any other Peers, they being prohibited by canon to be judges of life and death, *&c.* They usually therefore withdraw voluntarily, but enter a protest, declaring their right to stay. See further, title *Bishops*, and 4 *Comm. c.* 19.

A Peer,

A Peer, or Peeress (either in her own right or by marriage), cannot be arrested in civil cases. *Finch, L.* 355: 1 *Ventr.* 298. They have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A Peer, sitting in judgment, gives not his verdict upon oath, like an ordinary juryman, but upon his honour. 2 *Inst.* 49. He answers also to bills in Chancery upon his honour, and not upon his oath; 1 *P. Wms.* 146; but, when he is examined as a witness either in civil or criminal cases, he must be sworn, (whether in inferior Courts, or in the High Court of Parliament); for the respect which the law shews to the honour of a Peer, does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis. Salk.* 512: *Cro. Car.* 64. The honour of Peers is however so highly tendered by the law, that it is much more penal to spread false reports of them and certain other great officers of the realm, than of other men: scandal against them being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishments by divers ancient statutes. *Stats. West.* 1. 3 *Edw.* 1. *c.* 34: 2 *Ric.* 2. *st.* 1. *c.* 5: 12 *Ric.* 2. *c.* 11. See titles *Scandalum Magnatum*; *Libel.*

As to the privileges of Peers in cases of actions against them, see this Dictionary, title *Parliament.*

With respect to the privileges of Peeresses, see *post*, title *Peeresses.*

As to the general privileges of Peers, something more at length, and in various instances, see further this Dictionary, title *Privilege.*

At Common Law, it was lawful for any Peer to retain as many chaplains as he would; but by *stat.* 21 *H.* 8. *c.* 13, their number is limited. See title *Chaplains.* In many cases, the protestation of honour shall be sufficient for a Peer; as in trial of Peers, they proceed upon their honour, not upon oath; and if a Peer is defendant in a Court of Equity, he shall put in his answer upon his honour, (though formerly it was to be on oath): and in action of debt upon account the plaintiff being a Peer, it shall suffice to examine his attorney, and not himself on oath; but where a Peer is to answer interrogatories, or make an affidavit, as well as where he is to be examined as a witness, he must be upon his oath. *Bract lib.* 5. *c.* 9: 9 *Rep.* 49: 3 *Inst.* 29: *W. Jones* 152: 2 *Salk.* 512.

In the pleas of Parliament, 18 *Ed.* 1, between the Earl of *Gloucester* and Earl of *Hereford*, on long debate whether *John de Hasting*, a baron, ought to be sworn, because he was a Peer of the Realm, it was resolved that he ought to lay his hand on the book. The like was resolved, 10 *Car.* in *B. R.* by the Court, where the Lord *Dorset*'s testimony was requisite. See *Dy.* 314. *b. marg. pl.* 98.

A bill was against a Peeress to discover deeds, she answers on her honour and confesses deeds. She shall produce them only upon her honour, and not on oath. *Ch. Prec.* 92.

A *subpœna* shall not be awarded against a Peer out of the Chancery, in a cause; but a letter from the Lord Chancellor, or Lord Keeper, in lieu thereof. See title *Chancery.* A Peer may not be impannelled upon any inquest, though the cause hath relation to two Peers; and if a Peer be returned on a Jury, a special writ shall issue for his discharge from service. The houses of Peers shall not be searched for conventicles, but by warrant under the sign manual, or in the presence of the Lord Lieutenant, or one Deputy Lieutenant, and two Justices of the peace. *Stat.* 22 *Car.* 2. *c.* 1: and it is expresly provided by *stat.* 13 & 14 *Car.* 2. *c.* 1, against non-conformists, that for every third offence, which is punishable by transportation, Lords of Parliament shall be tried by their Peers.

A Nobleman menacing another person, whereby such other person fears his life is in danger, no writ of *supplicavit* shall issue, but a *subpœna*; and when the Lord appears, instead of surety, he shall only promise to keep the peace. 35 *H.* 6. See title *Surety of the Peace.*

The privilege of a Peer is so great in respect of his person, that the King may not restrain him of his liberty, without order of the House of Lords, except it be in cases of treason, &c. A memorable case wherein was that of the Earl of *Arundel* imprisoned by the King in the reign of King *Charles* I.

Every Lord of Parliament is allowed his clergy in all cases, where others are excluded by the *stat.* 1 *Ed.* 6. *c.* 12, except wilful murder; and cannot be denied clergy for any other felony wherein it was grantable at Common Law, if it be not ousted by some statute made since the first of King *Ed.* 6. *S. P. C.* 130. Lord *Morley*, who was tried by his Peers for murder, and found guilty of manslaughter, was discharged without clergy. *Sid.* 277: 2 *Nels. Abr.* 1181. See title *Clergy, Benefit of.*

In ejectment a special verdict was found on a trial at bar, and judgment for defendant, and costs taxed; and after affidavit of the demand of costs, a motion was made for an attachment against the Duchess (the Duke being dead), she being one of the lessors, for non-payment of costs; and it was alleged, that if the Court did not grant it, the defendant would be remediless; for though in other cases a *distringas* issues against Peers, yet in this case no process can go but an attachment. The Court refused to grant an attachment against the person of the Duchess, but ordered her to shew cause why an attachment, as to her goods and chattels, should not be issued; which rule was afterwards made absolute. *Rep. of Pract. in C. B.* 7, 8. See title *Attachment.*

A Peer, or Lord of Parliament, cannot be an approver; for it is against *Magna Charta* for him to pray a coroner. 3 *Inst.* 129. *c.* 56: 2 *Hawk. Pl. C. c.* 24. §3.

If a bill in Chancery be exhibited against a Peer, the course is first for the Lord Keeper to write a letter to him; and if he doth not answer, then a *subpœna*; then an order to shew cause why a sequestration should not go; and if he still stands out, then a sequestration. And the reason is, because there can be no process of contempt against his person. 2 *Vent.* 342. See title *Chancery.*

Distringas is the first process against a Peer on an information for an intrusion on the King's lands, or for a conversion of the King's goods. 2 *Hawk. Pl. C. c.* 27. § 12. cites *Co. Ent.* 387.

If a Peer be impleaded by a Commoner, yet such cause shall not be tried by Peers, but by a Jury of the country; for though the Peers are the proper *pares* to a Lord of Parliament in capital matters, where the life and nobility of a Peer is concerned; yet in matter of property *the trial of fact is not by them*, but by the inhabitants of those counties where the facts arise; since such Peers living through the whole kingdom, could not be

generally

generally cognizant of facts arising in several counties, as the inhabitants themselves where they are done; but this want of having Noblemen for their Jury was compensated as much as possible, by reurning persons of the best quality; therefore it was formerly necessary, that a Knight should be summoned in any cause where a Peer was party. *G. Hist. C. B.* 78, 79. See title *Jury*.

IV. Blackstone says, that in the method and regulation of its proceedings, the trial by the House of Peers differs but little from the trial *per patriam*, or by Jury; except that no special verdict can be given in the trial of a Peer; because the Lords of Parliament, or the Lord High Steward, (if the trial be had in his Court,) are Judges sufficiently competent of the law that may arise from the fact. *Hatt.* 116. And except also, that the Peers need not all agree in their verdict, but the greater number, consisting of twelve at the least, will conclude and bind the minority. *Kelynge* 56: *Stat.* 7 *W.* 3. *c.* 3 § 10: *Foster* 247. During a trial before the House of Peers in Parliament, every Peer present on the trial is to judge both of the law and the fact. *Fost.* 142. In cases of the impeachment of a Peer for treason, a Lord High Steward is usually, though not necessarily appointed, rather in the nature of a Speaker to regulate the proceedings, than as a Judge. 4 *Comm.* 260: *Fost.* 145. But in the Court of the High Steward, which is held in the recess of Parliament, he alone is to judge in all points of law and practice, and the Peers-triers are merely judges of the fact. *Fost* 142.

All the Barons of Parliament shall be tried for treason, felony, misprision, or as accessary, at the suit of the King by their Peers. See *Magna Charta*, 9 *H.* 3. 29: 2 *Inst.* 49: 9 *Co.* 30. *b*: *Sta.* 152, 153. So all the nobility, who are Peers of Parliament, by the Common Law, which is now affirmed by the *stat.* 20 *H.* 6. *c.* 9. And a Peer cannot waive the trial by his Peers. *Kel.* 56, *in marg* 621. 1 *St. Tr.* 265: 2 *Rush.* 94.

It has been adjudged, that if a Peer on arraignment before the Lords, refuse to put himself on his Peers, he shall be dealt with as one who stands mute; for it is as much the law of the land, that a Peer be tried by his Peers, as a Commoner by Commoners; yet if one who has a title to peerage be indicted and arraigned as a Commoner, and plead not guilty, and put himself upon his country, it hath been adjudged, that he cannot afterwards suggest that he is a Peer, and pray trial by his Peers. 2 *Hawk. Pl. C. c.* 44. § 19.

By *stat.* 7 *W.* 3. *cap.* 3. § 10, it is enacted, That upon the trial of any Peers or Peeresses, for treason or misprision, all the Peers who have a right to sit and vote in Parliament, shall be duly summoned twenty days at least before the trial, and every Peer so summoned and appearing shall vote in the trial, first taking the oaths of allegiance and supremacy, and subscribing and repeating the test enjoined by 30 *Car.* 2. *st.* 2. *c.* 1.—Formerly Lords-triers were appointed by the Crown in the trial of Peers; but this was at length found such an inlet to oppression, as to be deservedly abolished by the above *stat.* 7 *W.* 3. See title *Treason*. And it seems, that this act extends to *every* proceeding in full Parliament, for the trial of a Peer in the ordinary course of justice. *Fost.* 247.

By *stat.* 6 *Ann. c.* 23. § 12, Peers shall be *indicted* in *Scotland* as in *England*.

The Peer being indicted for the treason or felony, before commissioners of oyer and terminer, (or in the King's Bench, if the treason, &c. be committed in the county of *Middlesex*,) then the King by commission under the Great Seal, constitutes some Peer (generally the Lord Chancellor) Lord High Steward, who is Judge in these cases; and the commission commands the Peers of the Realm to be attendant on him, also the Lieutenant of the *Tower*, with the prisoner, &c. A *certiorari* is awarded out of Chancery, to remove the indictment before the Lord High Steward: and another writ issues to the Lieutenant of the *Tower*, for bringing the prisoner; and the Lord High Steward makes his precepts for that purpose, assigning a day and place, as in *Westminster-Hall*, inclosed with scaffolds, &c. and for summoning the Peers, which are to be twelve and above, at least, present: at the day, the Lord High Steward takes place under a cloth of state; his commission is read by the clerk of the Crown, and he has a white rod delivered him by the usher; which being returned, proclamation is made, and command given for certifying of indictments, &c. and the Lieutenant of the *Tower* to return his writ, and bring the prisoner to the bar; after this, the serjeant at arms returns his precept with the names of the Peers summoned, and they are called over, and, answering to their names, are recorded, when they take their places: the ceremony thus adjusted, the High Steward declares to the prisoner at the bar, the cause of their assembly, assures him of justice, and encourages him to answer without fear; then the clerk of the Crown reads the indictment, and arraigns the prisoner, but is not to insist on his holding up his hand, and the High Steward gives his charge to the Peers; this being over, the King's counsel produce their evidence for the King; and if the prisoner hath any matter of law to plead, he shall be assigned counsel; after evidence given for the King, and the prisoner's answer heard, the prisoner is withdrawn from the bar, and the Lords go to some place to consider of their evidence: but the Lords can admit no evidence, but in the hearing of the prisoner; they cannot have conference with the Judges, or demand it, (who attend on the Lord High Steward, and are not to deliver their opinions beforehand,) but in the prisoner's hearing; nor can they send for the opinion of the Judges, or demand it, but in open Court: and the Lord Steward cannot collect the evidence, or confer with the Lords, but in the presence of the prisoner; who is at first to require justice of the Lords, and that no question or conference be had, but in his presence: Nothing is done in the absence of the prisoner, until the Lords come to agree on their verdict; and then they are to be together as Juries until they are agreed, when they come again into Court and take their places; and the Lord High Steward, publicly in open Court, demands of the Lords, beginning with the puisne Lord, whether the prisoner, calling him by his name, be guilty of the treason, &c. whereof he is arraigned; who all give in their verdict; and he being found guilty by a majority of votes, such majority being more than twelve; is brought to the bar again, and the Lord Steward acquainting the prisoner with the verdict of his Peers, passes sentence and judgment accordingly; after which, an *O Yes!* is made for dissolving the commission, and the white rod is broken by the Lord High Steward;

where-

whereupon this grand assembly breaks up, which is esteemed the most solemn and august Court of Justice upon earth. 2 *Hawk. P. C.* c. 44: and see 4 *Comm* c. 19.

The Lord High Steward gives no vote himself on a trial by commission; but only on a trial by the House of Peers, while the Parliament is sitting: where a Peer is tried by the House of Lords in full Parliament, the House may be adjourned as often as there is occasion, and the evidence taken by parcels; and it hath been adjudged, that where the trial is by commission, the Lord Steward, after a verdict given, may take time to advise upon it, and his office continues till he gives judgment. But the triers may not separate upon a trial by commission, after evidence given for the King; and it hath been resolved, that the Peers in such case must continue together, till they agree, to give a verdict. *State Trials* ii. 702: iii. 657: and see more fully, 2 *Hawk. P. C.* c. 44. § 1-8.

It is said, a writ of error lies in the King's Bench of an attainder of a Peer before the Lord High Steward. 2 *Hawk. P. C.* c. 50. § 16, cites 1 *Sid.* 208. If a Peer be attainted of treason or felony, he may be brought before the Court of *B. R.* and demanded, what he has to say why execution should not be awarded against him? And if he plead any matter to such demand, his plea shall be heard, and execution ordered by the Court, upon its being adjudged against him. 1 *H.* 7. 22. *pl.* 15: *Bro. Coro.* 129: *Fitz. Coro.* 49. Likewise the Court of King's Bench may allow a pardon pleaded by a Peer to an indictment in that Court; to save the trouble of summoning the Peers, merely for that purpose: But that Court cannot receive his plea of not guilty, &c. but only the Lord Steward on arraignment before the Lords. 2 *Inst.* 49.

The sentence against a Peer for treason, is the same as against a common Subject; though the King generally pardons all but beheading, which is a part of the judgment: for other capital crimes, beheading is also the general punishment of a Peer; but *an.* 33 *H.* 8, the Lord *Dacres* was attainted of murder, and had judgment to be hanged; and *anno* 3 & 4 *P. & M.* the Lord *Stourton*, being attainted of murder, had judgment against him to be hanged, which sentences were executed; and so in the case of Lord *Ferrers*, 10 *St. Tr.* 478. In this latter case it was determined by all the Judges, that a Peer, convicted of felony and murder, ought to receive judgment for the same, according to the provisions of *stat.* 25 *Geo.* 2. c. 37. See title *Homicide* III 3. *ad. fin.* And secondly, Supposing the day appointed by the judgment for execution should lapse before such execution done, that a new time may be appointed for the execution; either by the High Court of Parliament, before which such Peer shall have been attainted, although the office of High Steward be determined; or by the Court of K. B. the Parliament not then sitting; and the record of the attainder being properly removed into that Court. *Fost.* 139.

If execution be not done, the Lord Steward may by precept command it to be done according to the judgment. 3 *Inst.* 31.

Trial by Peers is very ancient: In the reign of *Will.* I. the Earl of *Hereford*, for conspiring to receive the *Danes* into *England*, and depose the conqueror, was tried by his Peers, and found guilty of treason, *per judicium parium suorum.* 2 *Inst.* 50. The Duke of *Suffolk*, *anno* 28 *H.* 6, being accused of high treason by the Commons, put himself upon the King's grace, and not upon his Peers, and the King alone adjudged him to banishment; but he sent for the Lord Chancellor, and the Lords who were in town, to his palace at *Westminster*, and also the Duke, and commanded him to quit the kingdom in their presence: The Lords nevertheless entered a protest to save the privilege of their peerage; and this was deemed no legal banishment, for the King's judging in that manner was no judgment; he was extrajudicially bid to absent himself out of the realm; and in doing it, he was taken on the sea and slain. The case of the Lord *Cromwell*, in the reign of King *Henry* VIII. was very extraordinary; this Lord was attainted in Parliament, and condemned and executed for high treason, without being allowed to make any defence. It need only be observed, that this attainder was by a Parliament under the power and influence of *Henry* VIII. See *Parliament. Hist.* 3 *V.* 163. And several great persons during this reign were brought to trial before Lords Commissioners. *Anno* 32 *Car.* 2, the Lord *Stafford* was tried for treason; and after evidence given for the King, and the prisoner had made his objections to the King's evidence, he insisted upon several points of law, *viz.* That no overt-act was alleged in his impeachment; that they were not competent witnesses who swore against him, but that they swore for money; and whether a man could be condemned for treason by one witness, there not being two witnesses to any one point, &c. But the points insisted upon being over-ruled, he was found guilty by a majority of twenty-four votes; fifty-five against thirty-one for him. 3 *St. Tr.* 311. He was executed; but in 1685 the attainder was reversed by an act of Parliament, reciting, that he was innocent of the treason laid to his charge, and that the testimony whereon he was found guilty was false.

PEERESS. As we have noblemen, so we have noblewomen, and these may be by creation, descent, or marriage. And first, *Hen.* VIII. made *Anne Bullen* Marchioness of *Pembroke*. *James* I created Lady *Compton*, wife to Sir *Thomas Compton*, Countess of *Buckingham* in the lifetime of her husband, without any addition of honour to him; and also made Lady *Finch* Viscountess of *Maidstone*, and afterwards Countess of *Winchelsea*, to her and the heirs of her body. *George* I. made Lady *Sculingburgh* Duchess of *Kendal*. If any *English* woman takes to husband a *French* nobleman, she shall not bear the title of dignity; and if a *German* woman, &c. marry a nobleman of *England*, unless she be made denizen, she cannot claim the title of her husband, no more than her dower, &c. *Lex Constitution.* 80.

There was no precedent for the trial of Peeresses, when accused of treason or felony, till after *Eleanor* Duchess of *Gloucester*, wife to the Lord Protector, was accused of treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of Cardinal *Beaufort*. This very extraordinary trial gave occasion to a special statute, 20 *Hen.* 6. c. 9, which declares the law to be, that Peeresses, either in their own right or by marriage, shall be tried before the same judicature as other Peers of the realm. *Moor* 769: 2 *Inst* 50: 6 *Rep.* 52: *Staundf. P. C.* 152. If a woman, noble in her own right, marries a Commoner, she still remains noble, and shall be tried by her Peers; but if she be only noble by marriage, then by a second marriage with a Commoner,

she loses her dignity; for as by marriage it is gained, by marriage it is also lost. *Dyer* 79: *Co. Litt.* 16. Yet if a Duchess Dowager marries a Baron, she continues a Duchess still; for all the nobility are *pares*, and therefore it is no degradation. 1 *Inst.* 16. *b*: 2 *Inst.* 50.

If a Queen Dowager takes a husband, noble or not noble, she by her subsequent marriage shall not lose her dignity. 2 *Inst.* 50. Yet if a woman, noble by descent, marries to an inferior degree of nobility, as if the daughter of a Duke marries a Baron, she shall have precedence only as a Baroness. *Ow.* 82.

A woman noble in her own right, or by a first marriage, marrying a Commoner, communicates no rank or title to her husband. 1 *Inst.* 326. *b.* There have been claims, and supported by authorities, by a husband after issue had, to assume the title of his wife's dignity, and after her death to retain the same as tenant by the curtesy, but it does not seem that such a claim would now be allowed. See 1 *Inst* 29 *b. in n.*

A woman noble by marriage, afterwards marrying a Commoner, is generally called and addressed by the style and title which she bore before her second marriage. but this is only by curtesy, as the daughters of Dukes, Marquisses, and Earls are usually addressed by the title of Lady; though in law they are Commoners. In a writ of partition brought by *Ralph Howard* and Lady *Anne Powes*, his wife, the Court held that it was a misnomer, and that it ought to have been by *Ralph Howard* and *Anne* his wife, late wife of Lord *Powes* deceased. *Dy* 79.

A Countess or Baroness may not be arrested for debt or trespass; for though, in respect of their sex, they cannot sit in Parliament, yet they are Peers of the Realm, and shall be tried by their Peers, &c. But a *capias* being awarded against the Countess of *Rutland*, it was held that she might be taken by the Sheriff; because he ought not to dispute the authority of the Court from whence the writ issued, but must execute it, for he is bound by oath so to do; and although by the writ itself it appeared, that the party was a Countess, against whom a *capias* would not generally lie, for that, in some cases it may lie, as for a contempt, &c. therefore the Sheriff ought not to examine the judicial acts of the Court. 6 *Rep.* 52.

It hath been agreed, that a Queen Consort, and Queen Dowager, whether she continue sole after the King's death, or take a second husband, and he be a Peer or Commoner; and also all Peeresses by birth, whether sole or married to Peers or Commoners; and all Marchionesses and Viscountesses are entitled to a trial by the Peers, though not expressly mentioned in the *stat.* 20 *H.* 6. *c.* 9: 2 *Inst.* 50: *Cromp. Jurisd.* 33: 2 *Hawk. P. C. c.* 44. § 10, 11.

PEINE FORT ET DURE; See *Mute*.

PELA, A peel, pile, or fort. The citadel or castle in the *Isle of Man* was granted to Sir *John Stanley* by this name. *Pat.* 7 *H.* 4. *m.* 18.

PELES, Issues arising from, or out of a thing. *Fitzb. Just.* 105.

PELF AND PELFRE, *Pelfra.*] In time of war, the Earl Marshal is to have of preys and booties, all the gelded beasts, except hogs, &c. which is called Pelfre. *Old MS.* It is used for the personal effects of a felon convict. *Plac. in Itin. apud Cestr.* 14 *Hen.* 7.

PELLAGE, The custom or duty paid for skins of leather. *Rot. Parl.* 11 *H.* 4.

PELLICIA, A pilch, *Tunica vel indumentum pelliceum*; *hinc super-pelliceum*, a fur pilch, or surplice. *Spelm.*

PELLIPARIUS, A leatherseller or skinner. *Pat.* 15 *Ed.* 3. *p.* 2. *m* 45.

PELLOTA, Fr. *Pelote.*] The ball of the foot. See 4 *Inst.* 308.

PELT-WOOL, The wool pulled off the skin or pelt of dead sheep. See *stat.* 8 *H.* 6. *c.* 22.

PEN, A word used by the *Britons* for a high mountain, and also by the ancient *Gauls*; from whence those high hills which divide *France* from *Italy* are called the *Appenines*; and more to the purpose is the name of *Penmaenmawr* in *Wales*. *Camd. Britan.*

PENAL LAWS, Are of three kinds, *viz. Pœna pecuniaria, pœna corporalis*, and *pœna exilii*. *Cro. Jac.* 415. And penal statutes are made on various occasions, to punish and deter offenders; and they ought to be construed strictly, and not extended by equity; but the words may be interpreted beneficially, according to the intent of the legislators. 1 *Inst.* 54, 168. See 1 *Comm. Introd.* § 3. *p.* 89. Where a thing is prohibited by statute under a penalty, if the penalty, or part of it, be not given to him who will sue for the same, it goes and belongs to the King. *Rast. Entr.* 433: 2 *Hawk. P. C. c.* 26. § 17. But the King cannot grant to any person any penalty or forfeiture, &c. due by any statute, before judgment thereupon had. *Stat.* 21 *Jac.* 1. *c.* 3. Though after plea pleaded, Justices of assise, &c. having power to hear and determine offences done against any penal statute, may compound the penalties with the defendant, by virtue of the King's warrant or Privy Seal.

The Courts at *Westminster* (particularly the Court of King's Bench) frequently give leave on motion, and an affidavit of circumstances, &c. to compound penal actions. Compounding without such leave, is punishable by indictment.

Where penalties are ordained by penal acts of Parliament to be recovered in any Court of Record, this is to be understood only of the Courts at *Westminster*; and not of the Courts of Record of inferior corporations. *Jenk Cent.* 228. The Spiritual Court may hold plea of a thing forbidden by statute upon a penalty; but they may not proceed on the penalty. 2 *Lev.* 222. See further, titles *Information*; *Statutes*, *Action*; and as to the sanction of Laws by penalties, 1 *Comm. Introd. p.* 56, 7.

PENALTY OF BONDS, &c.; See titles *Bonds*; *Mortgages*.

PENANCE, An ecclesiastical punishment, which affects the body of the penitent; by which he is obliged to give a public satisfaction to the church, for the scandal he hath given by his evil example. And in the primitive times, they were to give testimonies of their reformation, before they were re-admitted to partake of the mysteries of the church. In the case of incest, or incontinency, the sinner is usually injoined to do a public Penance in the cathedral or parish church, or public market, bare-legged and bare-headed in a white sheet, and to make an open confession of his crime in a prescribed form of words; which is augmented or moderated according to the quality of the fault, and the discretion of the Judge.

So,

So, in smaller faults, a public satisfaction or Penance, as the Judge shall decree, is to be made before the minister, churchwardens, or some of the parishioners, respect being had to the quality of the offence; as in the case of defamation, or laying violent hands on a minister, or the like. *God. Append.* 18: *Wood's Inst.* 507. Penance may be changed into a sum of money, to be applied to pious uses, and this is called commuting. 3 *Inst.* 150: 4 *Inst.* 336. See *Articuli Cleri*, 9 *E.* 2. *c.* 4: *F. N. B.* 53; and this Dictionary, title *Clergy*.

PENANCE, At Common Law, where a person stands mute. See title *Mute*.

PENERARIUS, An ensign bearer; as *John Parient* was Squire of the Body, and *Penerarius* to King *Rich.* II.

PENNY; See *Peny*.

PENNYWEIGHT. As every pound *Troy* contained twelve ounces, each ounce was formerly divided into twenty parts, called Pennyweights; and though the Pennyweight be altered, yet the denomination still continues. Every Pennyweight is subdivided into twenty-four grains. *Cowell.*

PENON, mentioned in an ancient statute, 11 *Ric.* 2. *cap.* 1.] A standard, banner, or ensign, carried in war. *Cowell.*

PENSA SALIS, *Casei*, &c. A wey of salt, or cheese containing 256 pounds. *Cowell.*

PENSAM, *Ad pensam*] The ancient way of paying into the Exchequer as much money for a pound sterling, as weighed twelve ounces *Troy*. Payment of a pound *de numero*, imported just twenty shillings; *ad scalam* twenty shillings and six-pence; and *ad pensam*, imported the full weight of twelve ounces. See *Lowndes's Essay on Coin*, *p.* 4 See *Scalam*.

PENSION, Fr *Pension*.] An allowance made to any one without an equivalent. *Johns.* See *Pensioner*. To receive Pension from a foreign Prince or State, without leave of our King, has been held to be criminal, because it may incline a man to prefer the interest of such foreign Prince to that of his own country. See title *Contempt*. Six-pence in the pound to be deducted out of all salaries. *Stat.* 7 *Geo.* *st.* 1. *c.* 27. § 19: 12 *Geo.* 1. *c.* 2. What pensions are chargeable with the land tax, and what exempt, See the *Land-Tax Acts*.

Persons having pensions from the Crown are declared incapable of being elected members of Parliament, &c. by *stat.* 1 *Geo.* 1. *st.* 2. *c.* 56. See title *Parliament*, VI. B. (2).

PENSION OF CHURCHES, Certain sums of money paid to clergymen in lieu of tithes. Some churches have settled on them annuities, Pensions, &c. payable by other churches; which Pensions are due by virtue of some decree made by an Ecclesiastical Judge on a controversy for tithes, by which the tithes have been decreed to be enjoyed by one, and a Pension instead thereof to be paid to another; or they have arisen by virtue of a deed made by consent of the Parson, Patron, and Ordinary; and if such Pension hath been usually paid for twenty years, then it may be claimed by prescription, and be recovered in the Spiritual Court, or a Parson may prosecute his suit for a Pension by prescription, either in that Court or at Common Law, by writ of annuity; but if he takes his remedy at law, he shall never afterwards sue in the Spiritual Court; if the prescription be denied, that must be tried by the Common Law. *F. N. B.* 51: *Hardr.* 230: *Ventr.* 120. A spiritual person may sue in the Spiritual Court, for a Pension originally granted and confirmed by the Ordinary; but where it is granted by a temporal person to a clerk, he cannot; as if one grant an annuity to a Parson, he must sue for it in the Temporal Courts. *Cro. Eliz.* 675. If a Parson or Vicar have a Pension out of another church, and it is not paid, they may bring a writ of annuity; because a Pension issuing out of a rectory is the same thing as a rent; for it may be demanded in a writ of entry, and a common recovery may be suffered of it. 2 *Nels. Abr.* 1243.

Upon a bill in the Exchequer for a Pension, issuing out of a vicarage, it has been held, that though there is no glebe nor tithes, but only offerings, &c. yet the Vicar is chargeable; and a suit may be brought in this Court as well as at Common Law, &c. for a Pension by prescription, *Hardr.* 230. A Pension out of an appropriation by prescription is suable in the Spiritual Court; and if the duty is traversed, it may be tried there. 1 *Salk.* 58. A libel was had in the Spiritual Court for a Pension, to which the plaintiff made a title by prescription: and a prohibition was prayed, for that the Court had no cognisance of prescriptions; but adjudged, that they having cognisance of the principal, it shall draw the accessary. 1 *Vent.* 3. The Curate of a chapel of ease libelled against the Vicar of the parish for the arrears of a Pension, which he claimed by prescription; though a prohibition was granted, because the Curate is removeable at the will of the Parson, therefore cannot prescribe; he must bring a *quantum meruit*. 2 *Salk.* 506. The statute 13 *Ed.* 1. *st.* 4, appoints a remedy for Pensions in the Ecclesiastical Court. And *stat.* 34 & 35 *H.* 8. *c.* 19, gives damages to the value and costs, &c. See titles *Corody*; *Courts-Ecclesiastical*.

PENSIONS OF THE INNS OF COURTS, Annual payments of each member to the Houses: And also that which in the two Temples is called a Parliament, and in *Lincoln's Inn* a Council, in *Gray's Inn* is termed a Pension; being usually an assembly of the members to consult of the affairs of the Society.

PENSIONER, from Pension; one who is supported by an allowance at the will of another; a dependant. It is usually applied (in a public sense) to those who receive pensions or annuities from Government; who are chiefly such as have retired from places of honour and emolument.

PENSIONERS, *Pensionarii*.] Are a band of gentlemen so called, who attend as a guard on the King's person: they were instituted *anno* 1539, and have an allowance of fifty pounds a-year, to maintain themselves and two horses for the King's service. See *Stow's Annals* 973.

PENSION-WRIT. When a Pension-writ is once issued, none sued thereby in any Inns of Court, shall be discharged or permitted to come into Commons, till all duties be paid. Order in *Gray's Inn*, wherein it seems to be a peremptory order against such of the society as are in arrear for Pensions and other duties. *Cowell.*

PENTECOSTALS, *Pentecostalia*] Pious oblations made at the Feast of *Pentecost*, by parishioners to their priest, and sometimes by inferior churches or parishes, to the principal mother-church. Which oblations were also called *Whitsun*-farthings, and were divided into four

parts

parts, one to the parish priest, a second to the poor, a third for repair of the church, and a fourth to the Bishop. *Stephens of Procurations and Pentecostals.* See *Kennet's Glossary in Pentecostalia.*

PENY, Sax. *Penig.*] An ancient current silver coin. 2 *Inst.* 575. The *Saxons* had no other sort of silver coin. It was equal in weight to our three-pence. Five made one shilling *Saxon*, and thirty made a mark, which they called *mancuse*, and weighed as much as three of our half-crowns. The *English* penny called sterling, is round, without clipping, and weighs 32 *grana frumenti in medio spicæ*; twenty pence make an ounce, and twelve ounces make a pound. See *stats.* 20 *E.* 1 : 27 *E.* 1. *st.* 3; 31 *E.* 1. It was made with a cross in the middle, and broke into half-pence and farthings. *Cowell. Mat. Paris* 1279. See *Denarius.*

PERAMBULATION, *Perambulatio.*] A travelling through, or over; as Perambulation of the forest is the surveying or walking about the forest, and the utmost limits of it; by Justices, or other Officers thereto assigned, to set down and preserve the metes and bounds thereof. *Stats.* 16 *Car.* 1. *c.* 16: 20 *Car.* 2. *c.* 3: 4 *Inst.* 30. See further, title *Forest.*

Perambulation of parishes is to be made by the minister, churchwardens, and parishioners, by going round the same once a year, in or about *Ascension* week: And the parishioners may well justify going over any man's land in their Perambulation, according to usage; and it is said, may abate all nusances in their way. *Cro Eliz.* 441.

There is also a Perambulation of manors; and a writ *de perambulatione faciendâ*, which lies where any encroachments have been made by a neighbouring Lord, &c. then, by the assent of the Lords, the Sheriff shall take with him the parties and neighbours, and make a Perambulation, and settle the bounds; also a commission may be granted to other persons to make Perambulation, and to certify the same in the Chancery, or the Common Pleas, &c. And this commission is issued to make Perambulation of towns, counties, &c. *New Nat. Br.* 206.

If tenant for life of a lordship, and one who is tenant in fee-simple of another lordship adjoining, sue forth this writ or commission, and by virtue thereof a Perambulation is made, the same shall not bind him in reversion; nor shall the Perambulation made with the assent of tenant in tail, bind his heir. And it is said this assent of the parties to the Perambulation ought to be acknowledged and made personally in Chancery, or by *dedimus potestatem*; and being certified, the writ or commission issues, &c. *New Nat. Br.* 206. The writ begins thus: *The King to the Sheriff*, &c. *We command you, that taking with you twelve discreet lawful men of your county, in your proper person you go to the land of* A. B. *of*, &c. *and the land of* C. D. *of*, &c. *and upon their oaths you cause to be made* Perambulation *betwixt the lands of the said* A. *in*, &c. *and of the said* C. *in*, &c.; *so that it be made by certain metes, or bounds and divisions*, &c. *And make known to our Justices at* Westminster, &c.

If Perambulation be refused to be made by a lord, the other lord who is grieved thereby shall have a writ against him called *de Rationabilibus Divisis.* See *F. N. B.* 128, 133: *Reg. Orig.* 157: and *Rationabilibus Divisis.*

Questions as to boundaries, limits, &c. are now, however, in general determined, by actions of trespass, ejectment, &c.

PERANGARIA; See *Angaria.*

PERCA, For *Pertica*, a perch of land. *Mon. Angl.* ii. 87.

PERCAPTURA, A place in a river made up with banks, &c. for the better preserving and taking fish. *Paroch. Antiq.* 120.

PERCH, A rod or pole of sixteen feet and a half in length, whereof forty in length and four in breadth make an acre of ground. *Cromp. Jurisd.* 222. But by the customs of several counties, there is a difference in this measure: in *Staffordshire* it is twenty-four feet; and in the forest of *Sherwood* twenty-five feet, the foot there being eighteen inches long: and in *Herefordshire*, a Perch of ditching is twenty-one feet; the Perch of walling sixteen feet and a half; and a pole of denshiered ground is twelve feet, &c. *Skene.*

PER CUI ET POST, Writs of entry so called. See titles *Entry*; *Writ of Entry.*

PERDINGS, The dregs of the people, *viz.* Men of no substance. *Leg. Hen.* 1. *c.* 29.

PERDONATIO UTLAGARIÆ, Is a pardon for a man who, for contempt in not yielding obedience to the process of the King's Court, is outlawed, and afterwards of his own accord surrenders. *Reg. Orig.* 28: *Leg. Ed. Confess. c.* 18, 19.

PEREMPTORY, *Peremptorius*, from the verb *perimere*, to cut off.] Joined with a substantive, as action or exception, signifies a final and determinate act, without hope of renewing or altering. So *Fitzherbert* calleth a peremptory action. *Nat. Brev.* 35, 38, 104, 108: and nonsuit peremptory, *Idem*, 5, 11. A peremptory exception. *Bracton, lib.* 4. *cap.* 20. *Smith de Rep. Anglor. l.* 2. *c.* 13, calleth that a peremptory exception, which makes the state and issue in a cause. *Cowell.*

If defendant in an action, tender an issue in abatement, and the plaintiff demurs, if on arguing the demurrer the issue is over-ruled as not good, the Court will give defendant a day over to answer peremptorily; *viz.* to plead to the merits of the cause; the former plea which was over-ruled, being only in abatement of the writ; but it is otherwise where such an issue and demurrer is in bar of the action; for there the merits of the cause are put on it. *Trin.* 24 *Car.* 1 *B. R.*: 2 *Lill. Abr.* 190. A peremptory day is when business by rule of Court is to be spoke to at a precise day but if it cannot be spoken to then, the Court, at the prayer of the party concerned, will give a farther day without prejudice to him. See titles *Motion in Court*; *Practice.*

PEREMPTORY CHALLENGE of Jurors; See title *Jury* II; IV. 1.

PEREMPTORY MANDAMUS; See *Mandamus.*

PEREMPTORY WRIT; See *Optional Writ*; *Original*

PERFECTION OF THE KING; See title *King.* V. 2.

PERINDE VALERE, A term in the Ecclesiastical Law, signifying a dispensation granted to a clerk, who being defective in capacity for a benefice, or other ecclesiastical function, is *de facto* admitted to it; and it hath the appellation from the words, which make the faculty as effectual to the party dispensed with, as if he had been

been actually capable of the thing, for which he is dispensed with at the time of his admission. In *stat.* 25 *H.* 8. *c.* 21, it is called a writ.

PERINDINARE, To stay, remain, or abide in a place. *Matt. West. an.* 1016: *Fortesc. c.* 36.

PERIPHRASIS, Circumlocution; use of many words to express the sense of one. *Johns.*

No Periphrasis, or circumlocution, will supply words of art, which the law hath appropriated for the description of offences in indictments. No Periphrasis, intendment, or conclusion shall make good an indictment, which doth not bring the fact within all the material words of a statute; unless the statute be recited, &c. *Cro. Eliz.* 535, 749. See title *Indictment.*

PERJURY, AND SUBORNATION THEREOF.

PERJURY; *Perjurium; mendacium cum juramento firmatum*] Is defined to be, a crime committed, when a lawful oath is administered, by any who hath authority, to a person, in any judicial proceeding, who swears wilfully, absolutely, and falsely, in a matter material to the issue, or cause in question, by their own act, or by the subornation of others. 3 *Inst.* 163, 4.

PERJURY by the Common Law is defined a wilful false oath by one who, being lawfully required to depose the truth, in any proceeding in a Court of justice, swears absolutely, in a matter of some consequence to the point in question, whether he be believed or not. 1 *Hawk. P. C. c.* 69. § 1.

SUBORNATION OF PERJURY, by the Common Law, is, an offence in procuring a man to take a false oath amounting to Perjury, who actually takes such oath; but if the person incited to take such oath do not actually take it, the person by whom he was so incited is not guilty of subornation; yet he is liable to be punished not only by fine, but also by infamous corporal punishment. 1 *Roll. Abr.* 41, 57: *Yelv.* 72: *Cro. Jac.* 158: 2 *Keb.* 399: 3 *Mod.* 122: 1 *Hawk. P. C. c.* 69. § 10.

I. *Of Perjury by the Common Law; and how restrained and punished.*

II. *Of the Punishment of Perjury by Statute.*

I. 1st, IT is necessary to constitute the offence of Perjury, that the false oath be taken wilfully, *viz.* with some degree of deliberation; and it must also be *corrupt*, (that is, committed *malo animo*;) it must be *wilful*, positive, and absolute; not merely owing to surprise or inadvertency, or a mistake of the true state of the question. 5 *Mod.* 350: 4 *Comm.* 137: 1 *Hawk. P. C. c.* 69. § 2.

2dly, The oath must be taken either in a judicial proceeding, or in some other public proceeding of the like nature, wherein the King's honour or interest is concerned; or before commissioners appointed by the King to inquire of the forfeitures of his tenants, or of defective titles wanting the supply of the King's patents; but it is not material whether the Court, in which a false oath is taken, be a Court of Record or not, or whether it be a Court of Common Law, or a Court of Equity or Civil Law, &c. or whether the oath be taken in face of the Court, or out of it, before persons authorised to examine a matter depending in it; as before the Sheriff on a writ of inquiry, &c. or whether it be in relation to the merits of a cause, or in a collateral matter; as where one, who offers himself to be bail for another, swears that his substance is greater than it is, &c. but neither a false oath in a mere private matter, as in making a bargain, &c. nor the breach of a promissory oath, whether public or private, are punishable as Perjury. 1 *Hawk. P. C. c.* 69. § 3.

The law takes no notice of any Perjury but such as is committed in some Court of Justice having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a suit, or a criminal prosecution; for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned, how far any magistrate is justifiable in taking a voluntary affidavit in any extrajudicial matter, as is now too frequent upon every petty occasion; since it is more than possible that by such idle oaths a man may frequently *in foro conscientiæ*, incur the guilt, and at the same time evade the temporal penalties of Perjury. 4 *Comm. c.* 10. *p.* 137. See the *stat.* 15 *Geo.* 3. *c.* 39, and *Burn's Justice*, title *Oath* I.

3dly, The oath ought to be taken before persons lawfully authorised to administer it; for if it be taken before persons acting merely in a private capacity, or before persons pretending to a legal authority of administering such oath, but having no such authority, it is not punishable as Perjury; yet a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the King, is Perjury; if taken before such time as the commissioners had notice of such demise; for it would be of the utmost ill consequence, in such case, to make their proceedings wholly void. 1 *Hawk. P. C. c.* 69. § 4.

It is remarkable, that the *House of Commons* have no power to administer an oath, except in a few particular instances where that power is granted to them by express statute. It is supposed that the reason they have never obtained the general authority of administering an oath, is owing to the jealousy of the Upper House; which, by securing this privilege to itself, prevents the Commons from participating in the judicature of Parliament. 4 *Comm. c.* 10, *in n.*

4thly, The oath ought to be taken by a person sworn to depose the truth; therefore a false verdict comes not under the notion of Perjury, because the jurors swear not to depose the truth, but only to judge truly of the depositions of others; but a man may be as well perjured by an oath in his own cause, (*e. g.* in an answer in Chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit, &c.) as by an oath taken by him as witness in another's cause. 1 *Hawk. P. C. c.* 69. § 5.

5thly, Is it not material, whether the thing sworn be true or false, where the person who swears it in truth knows nothing of it. 1 *Hawk. P. C. c.* 69 § 6.

6thly, The oath must be taken absolutely and directly; therefore if a man only swears as he thinks, remembers or believes, he cannot be guilty of Perjury. 1 *Hawk. P. C.*

P. C. c. 69. § 7. But a man may be indicted for Perjury in swearing that he believes a fact to be true, which he must know to be false. *Leach* 270.

7thly. The thing sworn ought to be some way material; for if it be wholly foreign from the purpose, or immaterial, and neither pertinent to the matter in question, or tending to aggravate or extenuate the damages, not likely to induce the Jury to give credit to the substantial part of the evidence, it cannot amount to Perjury; because it is wholly insignificant; as where a witness introduces his evidence, with an impertinent preamble of a story, concerning previous facts, no ways relating to what is material, and is guilty of a falsity as to such facts; but a witness may be guilty of Perjury in respect to a false oath, concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence; as if in trespass for spoiling the plaintiff's close, with defendant's sheep, a witness swears that he saw such a number of defendant's sheep in the close, and being asked how he knew them to be defendant's, swears that he knew them by such a mark, which he knew to be the defendant's; where in truth defendant never used any such mark. 1 *Hawk. P. C. c.* 69. § 8. And it is incumbent on the prosecutor to prove the *materiality* of the Perjury, *ibid. in n.*

8thly. It is not material whether the false oath was credited, or not; or whether the party, in whose prejudice it was taken, was in the event damaged by it; for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. 1 *Hawk. P. C. c.* 69. § 9. On the trial, the oath will be taken as true, until it be disproved: and therefore to convict a man of Perjury, one probable credible witness is not enough; for the evidence must be strong, clear, and more numerous on the part of the prosecution, than the evidence on the other side. Therefore the law will not permit a man to be convicted of Perjury, unless there are two witnesses at least. 10 *Mod.* 195. Nor shall the party prejudiced by the Perjury be admitted as a witness to prove it. *Lord Raym* 396.

The punishment of Perjury and subornation, at Common Law, has been various. It was anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony. 3 *Inst.* 163. The *stat.* 5 *Eliz. c.* 9. (see *post* II.) if the offender be prosecuted thereon, inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the *suborner*; and in default of payment, imprisonment for six months, and to stand in the pillory: (*with both ears nailed thereto. Qu?* see the statute). Perjury itself is, by that statute, punished with six months imprisonment, perpetual infamy, and a fine of 20*l.* or not paying the fine, to have both ears nailed to the pillory. See *post* II. The prosecution, however, is usually carried on for the offence at Common Law; (by indictment at the assises, or in the King's Bench); especially as, to the penalties before inflicted, the *stat.* 2 *Geo.* 2. *c.* 25, superadds a power of punishment, by committing the offender to the House of Correction, and transportation for seven years. 4 *Comm. c.* 10: see *post.* II.

It has sometimes been wished, that Perjury, at least upon capital accusations, whereby another's life has been, or *might have been*, destroyed, was rendered capital, upon a principle of retaliation: and certainly the odiousness of the crime seems to plead strongly in behalf of such a law. Where, indeed, the death of an innocent person has actually been the consequence of such wilful Perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment; which our antient laws, in fact, inflicted. *Brit. c.* 5. But *Coke* says, expresly, it is not holden for murder at this day. 3 *Inst.* 48: and see *Fost.* 131, 132. And the mere attempt to destroy life, by other means, not being capital, there is no reason that an attempt by Perjury should; much less that this crime should, in all judicial cases, be punished with death. See 4 *Comm. c.* 10. *p.* 38, 9; *c.* 14. *p.* 196.

II. By *stat.* 5 *Eliz. c.* 9, it is enacted, "That whoever shall unlawfully and corruptly procure any witness to commit any wilful and corrupt Perjury, or shall unlawfully or corruptly procure or suborn any witness, who shall be sworn to testify *in perpetuam rei memoriam*, shall, for such offence, being thereof lawfully convicted or attainted, forfeit the sum of 40*l.* And if such offender, so convicted or attainted, shall not have goods, &c. to the value of 40*l.* then such person shall suffer imprisonment by the space of one half year, without bail; and stand upon the pillory the space of one hour, in some market town next adjoining to the place where the offence was committed, in open market there; or in the market town itself where the offence was committed.

"That no person, so convicted or attainted, shall be received as a witness in any Court of Record, till such judgment shall be reversed; and that on such reversal the party grieved shall recover damages against the party who procured the judgment so reversed to be first given.

"That if any person shall, either by the subornation, unlawful procurement, sinister persuasion, or means, of any other, or by their own act, consent, or agreement, wilfully and corruptly *commit* wilful Perjury, that then every offender, being duly convicted, shall forfeit 20*l.* and have imprisonment by the space of six months, without bail; and the oath of such offender shall not from thenceforth be received in any Court of Record, until such judgment be reversed, &c.; on which reversal, the party grieved shall recover damages in the manner before mentioned.

"That if such offender shall not have goods or chattels to the value of 20*l.* then he shall be set on the pillory, where he shall have both ears nailed.

"One moiety of the forfeitures to the King; the other to the person grieved, who will sue for the same, &c. and that as well the Judge of every Court where any suit shall be, and whereon any such Perjury shall be committed, as also the Justices of assise and gaol delivery, and Justices of peace at their quarter sessions, may inquire of, hear, and determine offences against the act.

"The act shall no way extend to any Spiritual or Ecclesiastical Court; but every offender shall be punished by such usual laws as are used in the said Courts.

"The statute shall not restrain the authority of any Judge, having absolute power to punish Perjury before the making thereof; but every such Judge may proceed in the punishment of all offences, punishable before making the statute, as they might have done to all purposes; so that they set not on the offender *less* punishment than contained in the act."

In the construction of this statute, the following opinions have been holden:

That every indictment, or action, on this statute must exactly pursue the words of it; therefore, if it allege, that the defendant deposed such a matter *falsò & deceptivè*, or *falsò & corruptè*, or *falsò & voluntariè*, without saying, *voluntariè & corruptè*, it is not good; though it conclude, that *sic voluntarium & corruptum commisit perjurium contra formam statuti*, &c. Also it is necessary expressly to shew, that the defendant was sworn; and it is not sufficient to say, that *tacto per se sacro evangelio deposuit*. *Cro Eliz.* 147: *Hetl.* 12: *Savil.* 43: 2 *Leon.* 211: 1 *Show.* 198: *Cro. Eliz.* 105: 1 *Hawk. P. C. c.* 69. § 17.

But there is no need to shew, whether the party took the false oath, through the subornation of another, or of his own act, though the words of the statute are, "If persons by subornation, *&c.* or their own act, *&c.* shall commit wilful Perjury:" for there being no medium between the branches of this distinction, they express no more than the law would have implied; therefore operate nothing. 3 *Bulst.* 147: 1 *Hawk. P. C. c.* 69. § 18.

It hath been adjudged that a man cannot be guilty of Perjury within this statute, in any case wherein he may not possibly be guilty of subornation of Perjury within it; for it is reasonable to give the whole statute the same construction: neither can it be well intended, that the makers of the statute meant to extend its purview farther as to Perjury, which they seem to esteem the *lesser* crime, than to subornation of Perjury, which they seem to esteem the *greater*: therefore, since the clause concerning subornation of Perjury, mentioning only matters depending by writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, *&c.* extends not to Perjury on an indictment or criminal information; the clause concerning Perjury, though penned in more general words, hath been adjudged to come under the like restriction: also since the clause concerning subornation of Perjury relates only to Perjury *by witnesses*, that concerning Perjury shall extend only to the like Perjury; therefore, not to Perjury in an answer in Chancery; or in swearing the peace against a man; or in any presentment by homage in a Court-baron; or in wager of law; or in swearing before commissioners of inquiry of the King's title to lands: and by the opinions of some, a false affidavit against a man in a Court of justice is not within the statute; but if such affidavit be by a third person, and relate to a cause depending in suit before the Court, and either of the parties in variance be grieved, in respect of such cause, by reason of the Perjury, it may strongly be argued that it is within the purview of the statute: also a false oath before the Sheriff, on a writ of inquiry, is within the statute. 5 *Co.* 99: *Cro. Jac.* 120: 3 *Inst.* 164: 2 *Leon.* 201: *Yelv.* 120: *Cro. Eliz.* 148: 2 *Roll. Abr.* 77: 1 *Hawk. P. C. c.* 69. §§. 19, 21.—But it has been decided, that any Court may punish such an offence committed in the face of the Court, under this statute, 5 *Eliz.* c. 9.—Therefore, where one made an affidavit in the Court of Common Pleas, and confessed it was false, the Court recorded his confession, and sentenced him to the pillory: and the objections that the Court had no jurisdiction, and that the offender ought to have been brought before the Court by indictment, were over-ruled. 8 *Mod.* 179: 1 *Hawk. P. C. c.* 69. § 21, *in n.*

It hath been collected, from the clause which gives an action to the party grieved, that no false oath is within the statute, which doth not give some person a just cause of complaint; therefore, if the thing sworn be true, though it be not known by him who swears it to be so, the oath is not within the statute, because it gives no just cause of complaint to the other party, who would take advantage of another's want of evidence to prove the truth; from the same ground, no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it; therefore, in every prosecution on the statute, you must set forth the record wherein you suppose the Perjury to have been committed, and must prove at the trial that there is such a record, either by actually producing it, or an attested copy; also, in the pleadings, you must not only set forth the point wherein the false oath was taken, but must also shew how it conduced to the proof or disproof of the matter in question; and if an action on the statute be brought by more than one, you must shew how the Perjury was prejudicial to each of the plaintiffs: But it seems that a Perjury which tends only to aggravate or extenuate the damages, is as much within the statute, as a Perjury which goes directly to the point in issue; and a Perjury, in a cause wherein an erroneous judgment is given, is a good ground of prosecution upon the statute, till the judgment be reversed. 1 *Hawk. P. C. c.* 69. § 22.

If Perjury be committed, that is within this statute, but the indictment concludes not *contra formam statuti*, yet it is good at Common Law; but not to bring one within the corporal punishment of the statute. 2 *Hal.'s Hist. P. C.* 191-2.

By *stat.* 2 *Geo.* 2. *c.* 25. § 2, the more effectually to deter persons from committing wilful and corrupt Perjury, or subornation of Perjury, it is enacted, "That, besides the punishment to be inflicted by law for so great crimes, it shall be lawful for the Court or Judge before whom any person shall be convicted of wilful and corrupt Perjury, or subornation of Perjury, to order such person to be sent to some *house of correction*, for a time not exceeding seven years, there to be kept to hard labour during the time; otherwise, to be *transported* for a term not exceeding seven years, as the Court shall think proper; therefore judgment shall be given, that the person convicted shall be committed or transported accordingly, besides such punishment as shall be adjudged to be inflicted on such person agreeable to the laws in being; and if transportation be directed, the same shall be executed in such manner as is provided by law for transportation of felons: and if any person so committed or transported shall voluntarily escape or break prison, or *return from transportation*, before the expiration of the time, such person, being lawfully convicted, shall *suffer death* as a felon; and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended."

By *stat.* 8 *Geo.* 1. *c.* 6, it is enacted, "That a *false affirmation* made by Quakers shall be liable to the same punishment as wilful Perjury." See titles *Quakers*; *Oaths*.

By *stat.* 31 *Geo.* 2. *c.* 10. § 24. the taking, or procuring to be taken, a false oath to obtain probates or letters of administration to seamen, is made felony, without benefit of clergy.

"The Insolvent Acts impose a penalty of 500*l.* on the Sheriff, or other officer, perjuring himself; and that of felony, without clergy, on a prisoner guilty of the same crime, in order to take the benefit of the acts. See also *stat.* 23 *Geo.* 3. *c.* 31, as to Perjury of freeholders at elections for *Cricklade.*

By *stat.* 23 *Geo.* 2. *c.* 11, it is enacted, "That, in every information or indictment for Perjury, it shall be sufficient to set forth the substance of the offence charged, and by what Court, or before whom the oath was taken, (averring such Court or person to have authority to administer the same,) together with the proper averments to falsify the matter wherein the Perjury is assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding; and without setting forth the commission or authority of the Court or person before whom the Perjury was committed. § 1.

In every information or indictment for subornation of Perjury, it shall be sufficient to set forth the substance of the offence charged; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding; and without setting forth the commission or authority of the Court or person before whom the Perjury was committed, or agreed to be committed. § 2.

"It shall be lawful for any Justice, (sitting the Court, or within twenty-four hours after,) to direct any person examined as a witness before them to be prosecuted for Perjury, in case there appear a reasonable cause; and to assign the party injured, or other person undertaking such prosecution, counsel, who shall do their duty without fee. And every prosecution so directed shall be carried on without payment of any tax, and without payment of any fees in Court, or to any officer of the Court. And the Clerk of assise, or his associate or prothonotary, or other officer of the Court attending when such prosecution is directed, shall, without fee, give the party injured, or other person undertaking such prosecution, a certificate of the same being directed, with the names of the counsel assigned him; which certificate shall be deemed sufficient proof of such prosecution having been directed. Provided, that no such direction or certificate shall be given in evidence upon any trial against any person upon a prosecution so directed. § 3."

In general, the Court will oblige the defendant to plead or demur even to a defective indictment for this offence. 2 *Hawk. P. C. c.* 25. § 146. They are also very cautious in granting a *certiorari* to remove it. 2 *Hawk. P. C. c.* 27. § 28. And permission has been refused in Chancery to amend an answer, where an indictment for Perjury had only been threatened; even where the party, having no interest, could not he supposed to make the false oath intentionally. 1 *Bro. P. C.* 419. For it is the province of the Grand Jury to judge of the intention; and what the Grand Jury may find, the Court will never expunge. *Hardw.* 203.

PERMISSIVE WASTE; See *Waste.*

PERMIT, from *permitto.*] A licence or warrant for persons to pass with and sell goods, on having paid the duties of customs or excise for the same. See *Customs.*

PERMUTATIONE *archidiaconatûs et ecclesiæ eidem annexæ cum ecclesiâ et præbendâ.* A writ to an Ordinary, commanding him to admit a clerk to a benefice, upon exchange made with another. *Reg. Orig.* 307.

PER MY ET PER TOUT; See title *Joint-tenants.*

PERNANCY, from the Fr. *prendre.*] A taking or receiving; as tithes in Pernancy, are tithes taken, or that may be taken, in kind. So, *Pernancy* of the profits means the taking the profits. See the next title.

PERNOR OF PROFITS, He who receives the profits of lands, *&c.* and is all one with *cestui que use,* 1 *Rep.* 123. The King has the *pernancy* of the profits of the lands of an outlaw, in personal actions; and by seizure shall hold against the alienation of such outlaw, *&c, Raym.* 17: See *Co. Litt.* 589. *b*: and 12 *R.* 2. *c.* 15.

PERPARS, A part of the inheritance. *Fleta, lib.* 2. *c.* 54. *par.* 19.

PERPETUATING THE TESTIMONY OF WITNESSES. If Witnesses to a disputable fact are old and infirm, it is usual to file a bill in Chancery, to perpetuate the Testimony of those Witnesses, although no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to commence his suit. 3 *Comm.* 450. See titles *Chancery*; *Evidence.*

PERPETUITY. A *Perpetuity* is, where, though all who have interest should join in a conveyance, yet they could not bar or pass the estate. But if, by concurrence of all having interest, the estate-tail may be barred, it is no perpetuity. *Ch. Cas.* 213. and see 3 *Ch. Ca.* 35.

Perpetuities are absolute or qualified. And estates-tail from the time of the statute *De donis,* till common recoveries were found out, were looked upon as Perpetuities. 12 *Mod.* 282.

Various have been the attempts to establish Perpetuities, by controlling the exercise of that right of alienation, which is inseparable from the estate of a tenant in tail. The chief of them are brought together in *Taylor* d. *Atkins* v. *Horde,* 1 *Burr.* 84; where it is observed, that the power to suffer a common recovery is a privilege inseparably incident to an estate-tail. It is a *potestas alienandi,* which is not restrained by the statute *De donis*; and has been so considered ever since *Taltarum's case,* 12 *E.* 4, 14. *b. p.* 16: and this power to suffer a common recovery cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. *Treat. Eq.* ii. *c.* 3. § 5, *in n.* See this Dictionary, titles *Limitation of Estates*; *Tail and Fee-tail*; *Conveyance,* &c.

A Perpetuity is a thing odious in law, and destructive to the commonwealth; it would put a stop to the commerce, and prevent the circulation of the property of the kingdom. *Vern.* 164.

Every executory devise is a Perpetuity, as far as it goes, *i. e.* an estate unalienable, though all mankind join in the conveyance. 1 *Salk.* 229. See title *Executory Devise.*

A. seized in fee, gives his lands, after his death without issue male, to *B.* in tail male, until he or they effectually go about to do any acts to alter or discontinue this estate-tail; and then to *D.* and the heirs male of his body, with several remainders over; the devisor dies without issue; *B.* enters; *D.* dies leaving issue *E.*; *B.* levies a fine; *E.* enters; and the question was, if the entry was good? Resolved, That this was a Perpetuity, and not allowable, being repugnant to law; for by such a limitation an estate-tail cannot be determined and given to another; for by the fine the remainder is discontinued and devested, so as *E.* cannot enter: for it is no limitation to enter but after the effectual going about to do any acts, *&c.* and it is

is not effectual till the act done; and when it is done, the remainder is discontinued, and then he cannot enter. *Cro. Jac.* 606. See *Vern.* 161.

It is absolutely against the constant course of Chancery to decree a Perpetuity, or give any relief in that case. 1 *Chan. Rep.* 144.

Trustees of a term limited over in tail, remainder in tail, were decreed in Chancery to convey the estate over; for otherwise there would be a Perpetuity. *Sid.* 37.

The father settles land on his son in tail male, and takes bond from him, that he will not dock the entail; decreed the bond good. Had not the son agreed to give the bond, the father might have made him only tenant for life; and though the alienation is not made by the son, but by his issue, the bill was dismissed with costs. 2 *Vern.* 233.

An attempt to make a perpetual succession of estates for life is vain and not practicable. 2 *Vern.* 738.

PERPETUITY OF THE KING; See title *King*, V. 2.

PER QUÆ SERVITIA, A judicial writ issuing from the note of a fine; and lieth for cognisee of a manor, seigniory, chief rent, or other services, to compel him who is tenant of the land at the time of the note of the fine levied to attorn unto him. *West. Symbol. part* 2. title *Fines, sect.* 126. *Old Nat. Brev.* 155. See 16 *Vin. Abr.* title *Per quæ servitia*.

PERQUISITES, *Perquisitum.*] Any thing gotten by industry, or purchased with money, different from that which descends from a father or ancestor; and so *Bracton* uses it, when he says, *Perquisitum facere, lib.* 2. *cap.* 30. *num.* 3. and *lib.* 4. *c.* 22. See *Purchase*.

PERQUISITES OF COURTS, Are commonly those profits which arise to lords of manors, from their court baron, above the yearly revenue of the land; as fines of copyholds, heriots, amerciaments, &c. *Perk.* 20, 21.

PERQUISITES OF OFFICES; See *Fees*.

PER QUOD, Words made use of by a plaintiff in his declaration, in the averring of particular damage to have happened, without which his action would not have been maintainable. As in slander, to say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can shew some special loss by it: in which case he may bring his action against me, for saying he was a bastard, by which (*per quod*) he lost the presentation to such a living. 4 *Rep.* 17. 1 *Leo.* 248: 3 *Comm.* 124. So in a declaration in trespass, for an injury to a wife or servant; the plaintiff states *per quod*, by which, he lost *consortium* of the one, or *servitium* of the other.

PERSON, A man or woman; also the state or condition whereby one man differs from another.

PERSON, Injuries to, are such as relate to life, limb, body, health, or reputation. See 3 *Comm.* and this Dictionary, title *Liberty*, &c.

PERSONABLE, *personabilis.*] Enabled to maintain plea in court: *e. g.* the defendant was judged *personable* to maintain this action, *Old Nat. Brev.* 142. The tenant pleaded that the wife was an *alien*, born in *Portugal*, and judgment was demanded whether she should be answered: the plaintiff saith, she was made personable by parliament, *i. e.* as the civilians would speak it, *habere personam standi in judicio*. *Kitch.* 214. Personable also signifies to be of capacity to take any thing granted or given. *Plowd.* 27.

PERSONAL, *personalis.*] Being joined with the substantives, things, goods, or chattels, as things personal, goods personal, chattels personal, signifies *any moveable thing*, quick or dead, *West. Symbol. part* 2. *sect.* 58. Thus theft is an unlawful felonious taking away of the moveable personal goods of another. See titles *Larceny*, *Felony*.

PERSONAL ACTION; See *Action, Personal*.

PERSONAL TITHES, Are tithes paid of such profits as come by the labour of a man's person; as by buying and selling, gains of merchandise, and handicrafts, &c. See title *Tithes*.

PERSONALTY, *Personalitas.*] An abstract of personal; the action is in the Personalty, *i. e.* it is brought against the right person, or the person against whom *in law* it lies. *Old Nat. Brev.* 92. Or it is to distinguish actions and things personal, from those that are real.

PERSONATE, To represent by a fictitious or assumed character, so as to pass for the person represented. *Johns.*

If one of *my name* levies a fine of *my land* in *my name*, I may well confess and avoid this fine, by shewing the *special matter*. But if a stranger, who is not of my name, levies a fine of my land *in my name*, I shall not be received to aver that I did not levy the fine, but another in my name, for that is merely contrary to the record; and so it is of a recognizance, and other matters of record. But when the fraud appears to the Court, they may enter a vacat on the roll, and so make it no fine, altho' the party cannot avoid it by averment, during the time it remains a record. *Cro. Eliz.* 531. See title *Fine*.

B. was taken in execution upon a recognizance of bail, and he made it appear to the Court, that *he never acknowledged the recognizance, but was personated by another*; and thereupon it was moved, that the bail might be vacated, and he discharged, as was done in *Cotton*'s case. 2 *Cro.* 256. But the Court said, since the *stat.* 21 *Jac. cap.* 26. (see title *Bail*), by which this offence was made *felony without clergy*; it is not convenient to vacate it until the offender is convicted; and so it was done in *Spicer*'s case; wherefore it was ordered, that *B.* should bring the money into Court, and be at large to prosecute the offender. *Twisden* said it must be tried in *Middlesex*, though the bail was taken at a Judge's chambers in *London*, because filed here, and the entry is *venit coram Domino Rege*, &c. so it differs from a recognizance acknowledged before Lord *Hobart*, upon *stat.* 23 *H.* 8. *c.* 6. at his chambers, and recorded in *Middlesex*; there the *scire facias* may be either in *London* or *Middlesex*. *Hob.* 195, 196: *Vent.* 301: *Mod.* 46. *Cockerel*, who personated *Beesley*, was hanged at *Tyburn*, but the rope was immediately cut; and afterwards *Beesley* on motion had restitution of his goods in the hands of the Sheriff. 2 *Jo.* 64.

A commission of rebellion was awarded against *A.* whereupon *B.* came before the commissioners and affirmed himself to be the person. The commissioners apprehended him by virtue of their commission; but *per Hale* Ch. B. the commissioners have no warrant to take him by their commission; *his affirming himself to be the person will not excuse them in false imprisonment*, as has been held on executing a *capias*. *Hard.* 323.—See further, titles *Bail*; *Fine of Lands*; *Forgery*; *Fraud*, &c.

PERSONS, Are divided by law into either *natural Persons*, or *artificial*. Natural Persons are such as the God of Nature formed us; artificial are such as are created

created and devised by human laws for the purposes of society and government, which are called Corporations, or Bodies Politic. 1 *Comm* 123; 467.

As to the *rights of Persons*, see this Dictionary, title *Liberty*.

PERTICATA TERRÆ, The fourth part of an acre. See *Perch*.

PERVISE, According to *Somner*, the Palace-yard at *Westminster*. *Somn. Gloss.* See his *Gloss. in* 10 *scriptores*, verbo *Triforium*: and see *Wood's Hist. of Oxford*, 2 *par. fol.* 6: and this Dictionary, title *Parvise*.

PESA, *Pensa*, *Pisa*.] A *wey* or *weigh*, or certain weight and measure of cheese and wool, &c. containing two hundred and fifty-six pounds. *Cowell*.

PESAGE, *Pesagium*.] A custom or duty paid for weighing merchandise, or other goods. *Seld. tit. Hon.*

PESARIUS, A weigher. *Cowell*.

PESSONA, Mast of oaks, &c. or money taken for mast, or feeding hogs. *Mon. Ang.* ii. 213. See *Mast*.

PESSURABLE, PESTARBLE, or PESTARABLE WARES, Seem to be such wares or merchandise as pester, and take up much room in a ship. See the old *stat.* 32 *H* 8. *c.* 14.

PETER-CORN, Is mentioned in some of the ancient registers of our bishops, particularly in that of St. *Leonard de Ebor.* which contains a grant thereof by King *Athelstane*, &c. *Collect. Dodsw. MS.*

PETER-PENCE, *Denarii Sancti Petri*.] Otherwise called in the *Saxon* tongue *Romefeoh*, the fee of *Rome*, or due to *Rome*; also *Romescot* and *Rome-pennyng*; was a tribute given by *Ina*, King of the *West Saxons*, being in pilgrimage at *Rome*, in the year of our Lord 720, which was a *penny for every house*. *Lamb. Explication of Saxon Words*, verbo *Nummus*. And the like given by *Offa*, King of the *Mercians*, through his dominions, in *anno* 794, not as a tribute to the Pope, but in sustentation of the *English* school or college there; and it was called *Peter-pence*, because collected on the day of St. *Peter ad Vincula*. *Spelm de Concil. tom.* i. *fol.* 2, 3. And see *St. Edward's Laws*, *num.* 10: King *Edgar's Laws*, 78. *c.* 4: *Stow's Annals*, *p.* 67. It amounted to 300 marks and a noble yearly. *Leg. Hen.* 1. *c.* 1.

It was first prohibited by *Edw.* III. and abrogated by *stat.* 25 *H.* 8. *c.* 21. But it was revived by *stat.* 1 & 2 *Ph.* & *Mar. c.* 8. and at length wholly abrogated by *stat.* 1 *Eliz. c.* 1.

PETER AD VINCULA; See *Gule of August*.

PETITION, *Petitio*.] A supplication made by an inferior to a superior, and especially to one having jurisdiction. *S. P. C. c.* 15. It is used for that remedy, which the Subject hath to help a wrong done by the King, who hath a prerogative not to be sued by writ: in which sense it is either general, that the King do him right, whereupon follows a general indorsement upon the same, *Let right be done the party*; or it is special, when the conclusion and indorsement are special, for this or that to be done, &c. *Standf. Prærog. c.* 22. See title *Monstrans de droit*.

By statute 13 *C.* 2. *stat.* 1. *c.* 5, the soliciting, labouring, or procuring the putting the hands or consent of above twenty persons to any Petition, to the King or either House of Parliament, for alterations in Church or State; unless by assent of three or more justices of peace of the county, or *a majority* of the Grand Jury, at the assises or sessions, &c. and repairing to the King or Parliament to deliver such Petition, with above the number of *ten* persons, is subject to a fine of 100*l.* and three months imprisonment; being proved by two witnesses, within six months, in the court of *B. R.* or at the assises. See title *Liberty*.

Care must also be taken that Petitions to the King contain nothing which may be interpreted to reflect on the Administration; for if they do, it may come under the denomination of a libel: and it is remarkable, that the Petition of the City of *London*, for the sitting of a Parliament was deemed libellous; because it suggested that the King's dissolving a late Parliament was an obstruction of justice. *Read. stat.* iv. 353. To subscribe a Petition to the King, *to frighten him into a change of his measures, intimating that, if it be denied, many thousands of his Subjects will be discontented*, &c. is included among the contempts against the King's person and government, tending to weaken the same, and punishable by fine and imprisonment. 1 *Hawk. P. C. c.* 23. § 3.

PETITION IN CHANCERY, A request in writing, directed to the Lord Chancellor or Master of the Rolls, shewing some matter whereupon the petitioner prays somewhat to be granted him. *Pr. C.* 269.

Most things, which may be moved for of course, may be petitioned for.

Sometimes it is upon a collateral matter only, as it has relation to some precedent suit, or to an officer of the court; as to have a clerk or solicitor's bill taxed, or to oblige him to deliver up papers. *Pr. C.* 270.

The Master of the Rolls is not to be petitioned for rehearings, but the Chancellor; also the Chancellor only is to be petitioned touching pleas, demurrers, or exceptions, or touching decrees or special orders made before the Chancellor. In most cases of Petition, the Master of the Rolls may be applied to. *Pr. C.* 270. See 16 *Vin. Abr.* 337, 338: and this Dictionary, title *Chancery*.

PETITION OF RIGHT. The *stat.* 3 *Car.* 1. *c.* 1, is thus called; by which it was provided, that none should be compelled to make or yield any gift, loan, benevolence, tax, and such like charge, without consent by act of Parliament; nor, upon refusal so to do, be called to make answer, take any oath not warranted by law, give attendance, or be confined, or otherwise molested concerning the same, &c. And that the Subject should not be burdened by the quartering of soldiers or mariners; and all commissions for proceeding by martial law, to be annulled, and none of like nature to be issued, lest the Subject (by colour thereof) be destroyed or put to death, contrary to the laws of the land, &c. See title *Liberty*.

PETIT CAPE; See *Cape*.

PETIT LARCENY; see *Larceny*.

PETIT SERJEANTY, *Parva serjeantia*.] To hold by *Petit Serjeanty* is, to hold lands or tenements of the King, yielding him a knife, a buckler, an arrow, a bow without a string, or other like service, *at the will of the first feoffor*: and there belongs not to it ward, marriage, or relief. None can hold by Grand or Petit Serjeanty, but of the King. But see *stat.* 12 *Car.* 2. *c.* 24, for the abolition of tenures; and this Dictionary, title *Tenures*.

PETIT SESSION. In both corporations and counties at large, there is sometimes kept a Special or Petty Sessions, by a few Justices, for dispatching smaller business in the neighbourhood between the times of the General Sessions; as, for licensing alehouses, passing the accounts of parish officers, and the like. See *Justices of the Peace*; *Sessions*.

PETIT TREASON, *Parva Proditio.*] See *Treason.* Treason of a lesser kind; for as High Treason is an offence against the security of the commonwealth, so is Petit Treason, though not so expresly: Petit Treason is, if a servant kills his master, a wife her husband, a secular or religious man his prelate. *Stat.* 25 *Ed.* 3. *stat.* 5. *c.* 2. See titles *Treason*; *Homicide* III. 4.

PETRA, A *stone* weight: See *Stone. Cowell.*

PETRARIA, Is sometimes taken for a quarry of stones, and in other places for a great gun called *Petrard*: it is often mentioned in old records and historians in both senses. *Cowell.*

PEWS, In a church, are somewhat in the nature of an heir-loom; and may descend by immemorial custom, without any ecclesiastical concurrence, from the ancestor to the heir. 3 *Inst.* 202: 12 *Rep.* 105: 2 *Comm.* 429.

The right to sit in a particular Pew in the church arises either from prescription as appurtenant to a messuage, or from a faculty or grant from the Ordinary; for he has the disposition of all Pews which are not claimed by prescription. *Gibs. Cod.* 221.

In an action upon the case for a disturbance of the enjoyment of a Pew; if the plaintiff claims it by prescription, he must state it in the declaration as appurtenant to a messuage in the parish. This prescription may be supported by an enjoyment for 36 years; and perhaps for any time above 20 years. 1 *Term Rep.* 428. In such an action against the Ordinary, the plaintiff must allege and prove repairs of the Pew. 1 *Wils.* 326.

PHAROS, from *Pharus*, a small island in the mouth of the *Nile*, wherein stood a high watch-tower.] A watch-tower or sea-mark: No man can erect a *Pharos*, light-house, beacon, &c. without lawful warrant and authority. 3 *Inst.* 204. See title *Beacon*.

PHILOSOPHER'S STONE. *Henry* VI. granted letters patent to certain persons, who undertook to find out the Philosopher's Stone, and to change other metals into gold, &c. to be free from the penalty of the *stat.* 5 *Hen.* 4. *c.* 4; made against the attempts of *Chemists* of this nature. *Pat.* 34 *Hen.* 6: 3 *Inst.* 74. See *Multiplication of Gold and Silver.*

PHYSICIANS. No person within *London*, or seven miles thereof, shall practise as a Physician or surgeon, without licence from the Bishop of *London*, or Dean of *St. Paul's*; who are to call to their assistance four doctors of physic, on examination of the persons, before granted: and in the country, without licence from the Bishop of the diocese, on pain of forfeiting 5*l.* a month. *Stat.* 3 *Hen.* 8. *c.* 11.

The charter for incorporating the College of Physicians is confirmed; they have power to choose a president, and have perpetual succession, a common seal, ability to purchase lands, &c. Eight of the chiefs of the College are to be called Elects, who from among themselves shall choose a President yearly: and if any practise physic in the said city, or within seven miles of it, without licence of the College *under their seal*, he shall forfeit 5*l.* Also persons practising physic in other parts of *England*, are to have letters testimonial from the President and three Elects, unless they be graduate Physicians of *Oxford* or *Cambridge*, &c. *Stat.* 14 & 15 *H.* 8. *c.* 5. Confirmed and enlarged by *stat.* 1 *Mary*, *stat.* 2. *c.* 9.

The *stat.* 32 *H.* 8. *c.* 40. ordains that four Physicians (called Censors) shall be yearly chosen by the College, to search apothecaries' wares, and have an oath given them for that purpose by the president; apothecaries denying them entrance into their houses, &c. incur a forfeiture of 5*l.* And Physicians refusing to make the search are liable to a penalty of 40*s.* And every member of the College of Physicians is authorised to practise surgery.—By *stat.* 3 *Jac.* 1. *c.* 5, Popish recusants are disabled to practise physic, or to use the trade of an apothecary, &c. under penalties; See title *Papist*.

In the case of Dr. *Bonham*, 7 *Jac.* 1, is shewn the power of the College of Physicians, in punishing persons for practising physic without licence; they imprisoned the Doctor for practising without licence; but it was adjudged that they could not lawfully do it, for in such case they had no power by the statute to commit, but they ought to sue for the penalty of 5*l.* *per* month, *qui tam*, &c. But in case of mal-practice, the Censors have power to commit, for they may in such case fine and imprison by their charter, and they are judges of record, and not liable to an action for what they do by virtue of their judicial power. 8 *Rep.* 107: *Carth.* 494.

It hath been solemnly resolved, that *mala praxis* in a Physician, surgeon, or apothecary, is a great misdemeanor and offence at Common Law; whether it be for curiosity or experiment, or by neglect: because it breaks the trust which the party had placed in his Physician, and tends to the patient's destruction. *Ld. Raym.* 214.

Apothecaries taking upon them to administer physic, without advice of a doctor, has been adjudged practising physic within the statutes; the proper business of an apothecary being *to prepare the prescriptions of the doctor*: the practice of physic was said to consist in judging of the disease and constitution of the patient; and of the proper remedy for the distemper; and in directing the application of the remedy. And so it was resolved, though no fee was given the apothecary. 2 *Salk.* 451. But this judgment was afterwards reversed in the House of Lords. *Mod. Cas.* 44. See *Bro. P. C.* title *Physicians*.

It has been holden, that if a person, not duly authorised to be a Physician or surgeon, undertakes a cure, and the patient dies under his hands, he is guilty of felony; but it is said not to be excluded the benefit of clergy. 1 *Hawk. P. C. c.* 31. § 62.

If a Physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance; *Mirr. c.* 4. § 16: but it hath been holden that if it be not a *regular* Physician or surgeon who administers the medicine, or performs the operation, it is manslaughter at the least. *Britt. c.* 5: 4 *Inst.* 251. Yet Sir Matthew Hale very justly questions the law of this determination. 1 *Hal. P. C.* 430. See 4 *Comm. c.* 14. *p.* 197: and this Dictionary, title *Homicide*.

One who has taken his degree of Doctor of physic in either of the Universities, may not practise in *London*, and within seven miles of the same, without licence from the College of Physicians; by reason of the charter of incorporation, confirmed by *stat.* 14 & 15 *Hen.* 8. *c.* 5, penned in *very* strong and *negative* words. As to the testimonials granted by the Universities on a person's taking the Doctor's degree, these may have the nature of a recommendation,

mendation, and give a man a fair reputation, but confer no right; consequently those statutes which have confirmed the privileges of the Universities would revive or confirm nothing but the reputation that this testimonial might give such graduates. And as to the last clause of this statute, that "none shall practise in the country without licence from the President and three Elects, unless he be a graduate of one of the Universities;" all the inference from that would be, that possibly two licences may be necessary where a person is not a graduate. In the case of Dr. *Levet*, Lord Ch. J. *Holt* did not think this question worth being found specially. The College of Physicians, without doubt, are more competent judges of the qualifications of a Physician than the Universities; and there may be many reasons for taking particular care of those who practise physic in *London*. 10 *Mod*. 353, 354.

See further, 16 *Vin. Abr*. title *Physicians*.

PICARDS, A sort of boats, of fifteen tons or upwards, used on the river *Severn*, mentioned in an ancient *stat*. 34 & 35 *H*. 8 *c*. 3. Also a fisher-boat, mentioned in *stat*. 13 *Eliz*. *c*. 11.

PICCAGE, *piccagium*, from the Fr. *piquer*, i. e. *effodere*.] A consideration, paid for the breaking up ground to set up booths, stalls, or standings, in fairs; payable to the Lord of the soil.

PICLE, *pictellum*.] A small parcel of land inclosed with a hedge; a little close: this word seems to come from the *Italian picciola*, i. e. *parvus*; and in some parts of *England* it is called *Pightel*.

PIE-POWDER COURT; *Curia pedis pulverizati*, from the French *pied*, *pes*, and *poudreux*, *pulverulentus*.] A Court held (*de hora in horam*) in fairs, to administer justice to buyers and sellers, and for redress of disorders committed in them. See Court of *Pie-powders*; and 7 *Vin*.

Skene, *de verbor*. *signif*., verbo *Pes-pulverosus*, says, the word signifies a vagabond; especially a pedlar, who hath no dwelling, therefore must have justice summarily administered to him, *viz*. within three ebbings and three flowings of the sea. *Bracton*, *lib*. 5. *tract* 1. *c*. 6. *num*. 6, calleth it *Justitiam pepoudrous*. Of this Court, read the *stat*. 17 *Ed*. 4. *c*. 2: 4 *Inst*. 272: and *Cromp*. *Jur*. 221. This, among our old *Saxons*, was called *ceapung gemot*, i. e. a court of merchandise, or handling matters of buying and selling. It is mentioned in *Doctor and Student*, *c*. 5. which says, it is a court incident to fairs and markets, to be held *only* during the time that the fairs are kept. *Cowell*.

The fair of *St. Giles*, held on the hill of that name, near the city of *Winchester*, by virtue of letters patent of K. *Edw*. IV. hath a court of *Pie-powder* of a *transcendent jurisdiction*; the Judges whereof are called *Justices of the Pavilion*, and have their power from the Bishop of *Winchester*. See title *Justices of the Pavilion*.

PIER, Fr. *Pierre*, saxum; from the materials of which it is composed.] A fortress made against the force of the sea or great rivers, for the better security of ships that lie at harbour in any haven. See title *Harbours*. Pierage is the duty for maintaining such Piers and harbours.

PIES, *Freres pies*, Were a sort of monks; so called because they wore *black* and *white* garments, like *magpies*. They are mentioned by *Walsingham*, *p*. 124.

PIETANTIA; } See *Pittance*.
PIETANTIARIUS; }

PIG OF LEAD; See *Fother*.

PIGEONS. Every person who shall shoot at, *kill*, or *destroy* a Pigeon, may be committed to the common gaol for three months, by two or more justices of the peace, or he shall pay 20*s*. to the poor of the parish. *Stat*. 1 *Jac*. 1. *c*. 27. By *stat*. 2 *Geo*. 3. *c*. 29, any person who shall wilfully shoot at, or destroy any house-doves or Pigeons belonging to other persons, shall forfeit on conviction 20*s*. to the prosecutor; and if not forthwith paid, the offender may be committed and kept to hard labour for any time not exceeding three months, nor less than one month, unless the forfeiture be sooner paid: the owners of dove-cotes or other places built for the preservation or breeding of Pigeons, and those appointed by them, excepted. Offender is liable only to one conviction for same offence; and prosecutions are to be commenced and carried on with effect, within two months after the offence; and where persons suffer imprisonment, they are not liable afterwards to pay the penalty.—To steal wild Pigeons in a Pigeon-house, shut up so that the owner may take them, is *felony*. 1 *Hawk*. *P*. *C*. *c*. 33. § 26.

PIGEON-HOUSE, A place for safe keeping Pigeons. A lord of a manor may build a Pigeon-house or Dove-cote upon his land, parcel of the manor; but a tenant of the manor cannot, without the lord's licence. 3 *Salk*. 248. Formerly none but the lord of the manor, or the parson, might erect a Pigeon-house; though it has been since held, that any *freeholder* may build a Pigeon-house on his own ground. 5 *Rep*. 104: *Cro Eliz*. 548: *Cro*. *Jac*. 382, 440: A person may have a Pigeon-house, or Dove-cote, by prescription. See title *Nusance* I.

PILA, That side of *money* which was called *pile*, because it was the side on which there was an impression of a church built on *piles*.—He who brings an appeal of robbery against another, must shew the certain quantity, quality, price, weight, &c. *valorem* & pilum, where *pilum* signifies *figuram monetæ*. *Fleta*, *lib* 1. *c* 39

PILETTUS, Anciently used for an arrow, which had a round knob, a little above the head, to hinder it from going far into a mark; from the Lat *pila*, which signifies generally any round thing like a ball.——*Et quod forestarii non portabunt sagittas barbatas*, *sed* piletos. *Chart*. 31 *H*. 3. Persons might shoot without the bounds of a *forest* with sharp or pointed arrows; but within the forest, for the preservation of the deer, they were to shoot only with blunts, bolts, or piles; and *sagitta pileta* was opposed to *sagitta barbata*; as *blunts* to *sharps*, in rapiers. *Mat*. *Paris*.

PILEUS SUPPORTATIONIS, A cap of maintenance. Pope *Julius* sent such a cap, with a sword, to *Hen*. VIII. *anno* 1514. *Holling*. 827. Mention of such a cap is made by *Hoveden*, *p*. 656, at the coronation of *Richard* the First. *Cowell*.

PILLORY, *collistrigium*, *collum stringens*; *pilloria* from the Fr. *pilleur*, i. e. *depeculator*; or *pilori* derived from the Greek πύλη, *janua*, a door, because one standing on the pillory, puts his head, as it were, through a door, and ὁράω, *video*.] An engine made of wood, to punish offenders, by exposing them to public view, and rendering them infamous. By the *statute of the Pillory*, 51 *H*. 3 *stat*. 6, it is appointed for bakers, forestallers, and those who use false weights, perjury, forgery, &c. 3 *Inst*. 219. Lords of leets are to have a Pillory and tumbrel, or it will be cause of forfeiture of the leet; and a vill may be bound by prescription to provide a Pillory, &c. 2 *Hawk*. *P*. *C*. *c*. 11. § 5.

PILOT, He who hath the government of a ship, under the master. By *stat.* 3 *Geo.* 1. *c.* 13, Pilots of ships, taking on them to conduct any ship from *Dover*, &c. to any place up the river *Thames*, are first to be examined and approved by the master and wardens of the society of *Trinity House*, &c. or shall forfeit 10*l.* for the first offence, 20*l.* for the second, and 40*l.* for every other offence; one moiety to the informer, the other to the master and wardens: but any master or mate of a ship may pilot his own vessel up the river; and if any ship be lost through the negligence of any Pilot, he shall be for ever after disabled to act as a Pilot. As to the construction of this statute, see *Stra.* 249. The *Lord Warden of the Cinque Ports* may make rules for government of Pilots, and order a sufficient number to ply at sea to conduct ships up the *Thames*: *stat.* 7 *Geo.* 1. *stat.* 1. *c.* 21.—No person shall act as a *Pilot* on the *Thames*, &c. (except in collier ships), without licence from the master and wardens of *Trinity House* at *Deptford*, on pain of forfeiting 20*l.* And *Pilots* are to be subject to the government of that corporation; and pay ancient dues, not exceeding 1*s.* in the pound out of their wages, for the use of the poor thereof. *Stat.* 5 *Geo.* 2. *c.* 20.

By the ancient laws of *France*, no person was to be received as a *Pilot*, till he had made several voyages, and passed a strict examination; and after that, on his return from long voyages, he was to lodge a copy of his journal in the *Admiralty*; and if a *Pilot* occasioned the loss of a ship, he was to pay 100 livres fine, and be for ever deprived of the exercise of *pilotage*; and if he did it designedly, be punished with death. *Lex Mercat.* 70, 71.

The *laws of Oleron* ordain, That if any Pilot designedly misguide a ship, that it may be cast away, he shall be put to a rigorous death, and hung in chains: And if the lord of the place where a ship be thus lost, abet such villains, in order to have a share in the wreck, he shall be apprehended, and all his goods forfeited for the satisfaction of the persons suffering; and his person shall be fastened to a stake in the midst of his own mansion, which being fired on the four corners, shall be burnt to the ground, and he with it. *Leg. Ol. c.* 15. It hath been said if the fault of a Pilot be so notorious, that the ship's crew see an apparent wreck, they may lead him to the hatches and strike off his head; but the Common Law denies this hasty execution: An ignorant Pilot is sentenced to pass thrice under the ship's keel, by the laws of *Denmark*. *Lex Mercat.* 70.

Masters of ships shall not oblige Pilots to pass through dangerous places, or to steer courses against their wills; but if there be a difference in opinions, the master may in such case be governed by the advice of the most expert mariners. *Ibid.* Before the ship arrives at her place or bed, while she is under the charge of the Pilot, if she or her goods perish, or be spoiled, the Pilot shall make good the same; but after the ship is brought to the harbour, then the *Master* is to take charge of her, and answer all damages, except that of the act of God, &c. *Leg. Ol. cap.* 23.

In charter-parties of affreightment, the master generally covenants to find a Pilot, and the merchant to pay him: And in case the ship shall miscarry through the insufficiency of the Pilot, the merchant may charge either the master or the Pilot; and if he charges the master, such master must have his remedy against the Pilot. *Lex Mercat.* 70: See *Lodemanage*: 3 *Geo.* 1. *c.* 13.

PIMP-TENURE——Willielmus Hoppeshor *tenet dimidiam virgatam terræ in* Rockhampton *de Domino Rege, per servitium custodiendi sex demisellas, scil. meretrices ad usum Domini Regis.* 12 Ed. 1. *viz.* by *Pimp-Tenure.* Blount's Ten. 39.

PINENDEN; See *Sharnburn.*

PINNAS BIBERE, or, *Ad pinnas bibere.* The old custom of drinking brought in by the *Danes*, was to fix a pin in the side of the wassal bowl, and to drink exactly to the pin; as now is practised in a sealed glass, &c. This kind of drunkenness was forbid the clergy, in the council at *London, anno* 1102. *Cowell.*

PIPE, *Pipa.*] A roll in the Exchequer, otherwise called *The Great Roll*, anno 37 *E.* 3. *c.* 4. See *Clerk of the Pipe.* A Pipe of wine is a measure, containing two hogsheads, or half a ton, that is one hundred and twenty-six gallons; mentioned in *stat.* 1 *R.* 3. *c.* 13.

PIQUANT, A *French* word for sharp, made use of to express malice or rancour against any one. *Law Fr. Dict.*

PIRATES, *Piratæ.*] Common sea rovers, without any fixed place of residence, who acknowledge no sovereign and no law, and support themselves by pillage and depredations at sea: but there are instances wherein the word *pirata* has been formerly taken for a sea captain. *Spelm.*

The offence of PIRACY, by Common Law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed on land, would have amounted to felony there. 1 *Hawk. P. C. c.* 37. § 10.

But by statute, some other offences are made Piracy also. Thus the *stat.* 11 & 12 *W.* 3. *c.* 7, (made perpetual by *stat.* 6 *Geo.* 1. *c.* 19,) enacts, That all Piracies, committed on the sea, or in any haven, &c. where the Admiral hath jurisdiction, may be tried at sea, or on the land, in any of his Majesty's islands, &c. abroad, appointed for that purpose, by commission under the Great Seal, or seal of the Admiralty, directed to such commissioners as the King shall think fit; who may commit the offenders, and call a Court of Admiralty, consisting of *seven persons at least*, or, for want of seven, any three of the commissioners may call others; and the persons so assembled may proceed *according to the course of the Admiralty*, pass sentence of death, and order execution, &c. And commissions for trial of offences within the *Cinque Ports*, shall be directed to the Warden of the *Cinque Ports*, and the trial to be by the inhabitants of the ports. And if any natural born Subjects, or denizens, shall commit Piracy against any of his Majesty's Subjects at sea, under colour of any commission from any foreign prince, they shall be adjudged Pirates: if any master of a ship, or seamen give up the ship to Pirates, or combine to yield up, or run away with any ship; or any seaman lay violent hands on his commander, or endeavour a revolt in the ship, he shall be adjudged a Pirate, and suffer accordingly; also, if any person discover a combination for running away with a ship, he shall be entitled to a reward of 10*l.* for every vessel of 100 tons, and 15*l.* if above: and all persons who set forth any Pirate, or be assisting to those committing Piracy, or that conceal such Pirates, or receive any vessel or goods piratically taken, shall be deemed accessary to the Piracy, and suffer as principals. And the *stat.* 4 *Geo.* 1. *c.* 11, expressly excludes the principal from the benefit of clergy; and provides, that offenders under *stat.* 11 & 12 *W.* 3, may be tried and judged according to the form of *stat.* 28 *H.* 8.

By

By *stat.* 8 *Geo.* 1. *c.* 24, (made perpetual by *stat.* 2 *Geo.* 2. *c.* 28,) the trading with known Pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in anywise consulting, combining, confederating, or corresponding with them, or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing overboard any of the goods, shall be deemed Piracy; triable according to the *stats.* 28 *H.* 8. *c.* 15: 11 & 12 *W.* 3. *c.* 7. and such accessaries to Piracy as are described by the *stat.* 11 & 12 *W.* 3, are declared to be principal Pirates; and all Pirates, convicted by virtue of this act, are made felons without benefit of clergy.—Ships fitted out with a design to trade with Pirates, and the goods therein, shall be forfeited.—By several statutes (and see *stat.* 22 & 23 *C.* 2. *c.* 11, and this Dict. tit. *Seamen,*) to encourage the defence of merchant vessels against Pirates, the commanders and seamen wounded, and the widows of such seamen as are slain in any piratical engagment, shall be entitled to a bounty, to be divided among them, not exceeding two *per cent.* or one fiftieth part of the value of the cargo on board; and such wounded seamen shall be entitled to the pension of *Greenwich* Hospital, which no other seamen are, except such as have served in a ship of war. And if the commander, officers, or mariners shall behave cowardly, by not defending the ship, if she carries guns or arms; or shall discourage the other officers or mariners from fighting, so that the ship falls into the hands of Pirates; such commander, officer, or mariner shall forfeit all his wages, and suffer six months' imprisonment.

By *stat.* 18 *Geo.* 2. *c.* 30, any natural-born Subject or denizen, who, during any war, shall commit hostilities on the sea against any of his Majesty's Subjects, by colour of any commission from the enemy, or adhere, or give aid to the enemy upon the sea, may be tried as a Pirate, in the Court of *Admiralty*, on ship-board or on land, and being convicted shall suffer death, &c. as other Pirates, &c. But persons, convicted on this act, shall not be tried for the same crime as for High Treason; but, if not tried on this act, may be tried for High Treason on the *stat.* 28 *H.* 8. *c.* 15.—The adherence to the King's enemies was thought to make the offence High Treason; this statute was made therefore to remove the doubt. Vide *Staundf. P. C.* 10: 3 *Inst.* 112: 2 *Hale's Hist. P. C.* 369, 370: 1 *Hawk. P. C. c.* 37. § 21.

The crime of PIRACY, or robbery and depredation upon the HIGH SEAS, is an offence against the universal law of society; a Pirate being, according to *Coke, hostis humani generis,* 3 *Inst.* 113. As therefore he hath renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do for any invasion of his person or personal property. 4 *Comm.* 71.

Pirates are enemies to all: they are denied succour by the law of nations; and by the Civil Law, a ransom promised to a Pirate, if not complied with, creates no wrong; for the law of arms is not communicated to such; neither are they capable of enjoying that privilege, which lawful enemies are entitled to in the caption of another. *Lex Mercat.* 183. If a Pirate enters a port or haven, and assaults and robs a merchant ship at anchor there; this is not Piracy, because it is not done upon the *High Sea*; but *it is a robbery at the Common Law*, the act being *infra corpus comitatûs*: and if the crime be committed either *super altum mare*, or in great rivers within the realm, which are looked upon as common highways, *there* it is Piracy. *Moor* 756.

It has been held, that Piracy, being an offence by the Civil Law only, shall not be included in a statute speaking generally of felonies, as to benefit of clergy, &c. which shall be construed only of those felonies which are such by our law; as those Piracies are which are committed in a port or creek, within the body of a county. 2 *Hawk P. C. c.* 33. § 41. See title *Clergy, Benefit of.*

If a ship be riding at anchor *at sea*, and the mariners part in their ship-boat, and the rest on shore, so that none are left in the ship; and a Pirate attack her, and commits a robbery, it is Piracy. 14 *Ed.* 3. And where a Pirate assaults a ship, and only takes away some of the men, in order to sell them for slaves; this is Piracy: And if a Pirate make an attack on a ship, and the master, for the redemption, is compelled to give his oath to pay a certain sum of money, though there be no taking, the same is Piracy by the Marine Law; but, by the Common Law, there must be *an actual taking*, as in case of robbery on the highway. *Lex Mercat.* 185. But the taking by a ship at sea, in great necessity, of victuals, cables, ropes, &c. out of another ship, is no Piracy; *if that other ship can spare them*, and paying or giving security therefore. *Ibid.* 183.

A Pirate takes goods upon the sea, and sells them, the property is not altered, no more than if a thief on land had stolen and sold them. See *stat.* 27 *Ed.* 3. *st.* 2. *cap.* 13: *Godb.* 193. Yet, by the laws of *England*, if a man commit Piracy upon the Subjects of any other Prince, (at enmity with *England*,) and brings the goods into *England* and sells them in a *market-overt*, the same shall be binding, and the owners be concluded. *Hob.* 79.

When goods are taken by a pirate, and afterwards the Pirate, making an attack upon another ship, is conquered and taken by the other, by the Law Marine the Admiral may make restitution of the goods to the owners, if they are Fellow-subjects of the captors, or belong to any State in amity with his Sovereign, on paying the costs and charges, and making the captor an equitable consideration for his service. *Lex Mercat.* 184. If a Pirate at sea assault a ship, and in the engagement kills a person in the other ship, by the Common Law, all the persons on board the pirate ship are principals in the murder, although none enter the other ship; but, by the Marine Law, they who give the wound only shall be principals, and the rest accessaries, if the parties can be known. *Yelv.* 135. It has been holden, that there cannot be an accessary in Piracy; but if it happens, that there is an accessary upon the sea, such accessary may be punished by the Civil Law before the Lord Admiral: And it was made a doubt, whether an accessary at land to a felony at sea, was triable by the Admiral, within the purview of *stat.* 28 *H.* 8. *c.* 15. Though this is settled by *stat.* 11 & 12 *W.* 3. *c.* 7; which provides that accessaries to Piracy, before or after, shall be inquired of, tried, and adjudged according to the said statute. 2 *Hawk. P. C. c.* 25. § 46. See *post.*

In case the Subjects of a Prince, in *enmity* with the crown of *England*, enter themselves sailors on board an *English* Pirate, and a robbery is committed by them, who are afterwards taken; it is felony in the *English*, but not in the strangers; but in ancient times it was petit treason in the *English*, and felony in the strangers: And if any *Englishman* commits Piracy upon the Subjects of any Prince or State in *amity* with *England*, they are within the statute 28 *H.* 8. *c.* 15. If the Subjects of any nation or kingdom, in *amity* with *England*, shall commit a Piracy on the ships or goods of the *English*, the same is felony, and punishable by this statute: and Piracy committed by the Subjects of *France*, or any other country in *friendship* with us, upon the *British* Seas, is properly punishable by the Crown of *England* only. *Lex Mercat.* 186, 187: 1 *Hawk. P. C. c.* 37. § 1 in *n.*

A Piracy is attempted on the ocean, if the Pirates are over-come, the takers may immediately inflict a punishment by hanging them up at the main-yard end; though this is understood *where no legal judgment may be obtained*; hence if a ship, on a voyage to any part of *America*, or the Plantations there, on a discovery of those parts, is attacked by a Pirate, but in the attempt the Pirate is overcome; the Pirates may be forthwith executed, without any solemnity of condemnation, by the Marine Law. *Lex Mercat.* 184.

By the ancient Common Law, Piracy, if committed by a Subject, was held to be a species of treason, being contrary to his natural allegiance; and, by an alien, to be felony only: but now, since the statute of treasons, 25 *Ed.* 3. *c.* 2, it is held to be only felony in a Subject. 3 *Inst.* 113. See *ante.*

Formerly this crime was only cognizable by the Admiralty Courts, which proceed by the rules of the Civil Law. But, it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his Peers, or the Common Law of the land, the statute 28 *Hen.* 8. *c.* 15, established a new jurisdiction for this purpose; which proceeds according to the course of the Common Law. 4 *Comm.* 71.

By this *stat.* 28 *Hen.* 8. *c.* 15, all felonies, robberies, and murders committed by Pirates, shall be inquired of, heard and determined in any county of *England*, by the King's *commission* of *oyer and terminer, as if the offences had been committed on land*; and such commission shall be directed to the Lord Admiral, and other persons, as shall be named by the Lord Chancellor, *who shall determine such offences, after the common course of the laws of the kingdom, used for felonies and robberies, &c.* and award judgment and execution as against felons for any felony done on the land; and the offenders shall suffer death, loss of lands and goods, as if they had been attainted of such offence committed on land, &c.

The Commissioners under the above act are the Admiral or his Deputy, and three or four more, among whom two Common-Law Judges are usually appointed: the indictment being first found by a grand jury of 12 men, and afterwards tried by a petty jury: the Judge of the Admiralty presiding. See 4 *Comm. c.* 19. *p.* 268. and title *Homicide* III. 3.

No attainder for this offence corrupts the blood, the statute mentioning only that the offender shall suffer death, loss of lands, &c. as if he were attainted of a felony at Common Law; but says not, that the blood shall be corrupted. 3 *Inst.* 112. And the offender is to be tried on the statute, to forfeit his lands, &c. which are not forfeited by the Civil Law. 1 *Lil. Abr.*

In the construction of this *stat.* 28 *H.* 8. *c.* 15, the following opinions have also been holden:

That it does not alter the nature of the offence, so as to make that, which was before a felony only by the Civil Law, now become a felony by the Common Law; for *the offence must still be alleged as* DONE UPON THE SEA, and is no way cognizable by the Common Law, but *only by virtue of this statute*; which, by ordaining that in some respects it shall have the like trial and punishment as are used for felony at Common Law, shall not be carried so far as to make it also agree with it in other particulars which are not mentioned; from hence it follows that this offence remains, *as before*, of a special nature, and that it shall not be included in a general pardon of all felonies. 3 *Inst.* 112: 2 *Hale's Hist. P. C.* 270: *Moor*, 756: *Co. Litt.* 391: 1 *Hawk. P. C. c.* 37. § 6.

From the same ground it follows, that no person, in respect of this statute, be construed to be, or punished as accessaries to Piracy before or after, as they might have been, if it had been made felony by the statute; whereby all those would incidentally have been accessaries in the like cases in which they would have been accessaries to a felony at Common Law; therefore accessaries to Piracy, being neither expresly named in the statute, nor by construction included, remain as they were before, and were triable by the Civil Law, if their offences were committed on the sea; but on the land, by no law, until *stat.* 11 & 12 *W.* 3. *c.* 7; for *stat.* 2 & 3 *Ed.* 6. *c.* 24, which provides against accessaries in one county to a felony in another, extends not to accessaries to an offence committed in no county, but on the sea; but by *stat.* 11 & 12 *W.* 3. *c.* 7, they are triable in like manner as the principals are by *stat.* 28 *Hen.* 8. *c.* 15: 3 *Inst.* 112: 1 *Hawk. P. C. c.* 37. § 7. [But now, as has been already stated, accessaries to Piracy are made principals, by *stat.* 8 *Geo.* 1. *c.* 24.]

It has been resolved, that an offender standing mute on an arraignment, by force of this statute, shall have judgment as in other cases; for the words of the statute are, that a commission shall be directed, &c. to hear and determine such offences after the common course of the laws of the land. 3 *Inst.* 114: *Dyer* 241. *pl.* 49, 308. *pl.* 73.

It hath been holden, that the indictment for this offence must allege the fact to be done *at sea*, and must have the words *felonicè* and *piraticè*; and that no offence is punishable by virtue of this act as Piracy, which would not have been felony if done on the land; consequently, taking an enemy's ship, by an enemy, is not within the statute. 3 *Inst.* 112: 1 *Roll. Rep.* 175: 1 *Hawk. P. C. c.* 37.

It is agreed, that this statute extends not to offences done in creeks or ports within the body of a county, because they are, and always were, cognizable by the Common Law. *Moor* 756: 1 *Roll. Rep.* 175: 1 *Hawk. P. C. c.* 37.

Piracies on the sea are always excepted out of general pardons.

For the more speedy bringing offenders to justice, a statute was passed, appointing that a session of *oyer and*

terminer

terminer and gaol-delivery for the trial of offences committed on the high seas, within the jurisdiction of the Admiralty, shall be held twice in every year.

PIRATES GOODS. In the patent to the Admiral, he has granted him *bona pirator'*: the proper *Goods of Pirates* only pass by this grant; and not piratical goods. So it is of a grant *de bonis felonum*; the grantee shall not have goods stolen, but the true and rightful owner. But the King shall have piratical goods, it the owner be not known. 10 *Rep.* 109: *Dyer* 269: *Jenk. Cent.* 325.

PISCARY, *Piscaria*, vel *privilegium piscandi*.] A right or liberty of *fishing* in the waters of another person. See title *Fishing, Right of.*

PISCENARIUS, is used in records for a Fishmonger. *Pat.* 1 *E.* 3. *part* 3. *m.* 13.

PIT, a hole wherein the *Scots* used to drown women thieves; and to say condemned to the pit, is as when we say condemned to the gallows. *Skene.*

PIT and GALLOWS; See *Furca et Fossa.*

PITCHING-PENCE, Money (commonly a *penny*) paid for pitching, or setting down every bag of corn, or pack of goods, in a fair or market.

PITTANCE; *Pictancia, modicum.*] A little repast, or refection of fish or flesh, more than the common allowance; and *The Pittancer* was the officer who distributed this at certain appointed festivals. *Rot. Chart. ad Hospital. S. Salvator. Sancti Edmundi, &c. An.* 1 *Reg. Johan. p.* 2: *Lib. stat. Eccl. Sti. Pauli Lond. A. D.* 1298.

PLACARD, Fr. *plaquart*, Dutch *placcaert.*] Hath several significations: in *France*, it formerly signified a table, wherein laws, orders, &c. were written and hung up: in *Holland*, an edict or proclamation: also it signifies a writing of safe conduct; with us it is little used, but is mentioned as a licence to use certain games, &c. in the *stat.* 2 & 3 *P. & M. c.* 9; and see *stat.* 33 *H.* 8. *c.* 6.

PLACE, *Locus.*] Where a fact was committed, is to be alleged in appeals of death, indictments, &c. And *Place* is considerable in pleadings, in some cases: where the law requires a thing to be set down in a *certain Place*, the party must, in his pleadings, say, it was done there. *Co. Lit.* 282. When one thing comes in the *Place* of another, it shall be said to be of the *same nature*; as in case of an exchange, &c. *Shep. Epit.* 700. See *Local*; *Pleading.*

PLACITA, Pleas, pleadings, or debates and trials at law. *Placita* is a word often mentioned in our histories, and law books; at first, it signified the public assemblies of all degrees of men where the King presided, and they usually consulted upon the great affairs of the kingdom; and these were called *generalia Placita*; because *generalitas universorum majorum tam clericorum quam laicorum ibidem conveniebat*: this was the custom in *France*, as well as here, as we are told by *Bertinian*, in his *Annals of France*, in the year 767. Some of our historians, as *Simeon of Durham*, and others, who wrote above 300 years afterwards, tell us, that those assemblies were held in the *open fields*: and that the *Placita generalia*, and *Curia Regis*, were what we now call a Parliament: it is true, the lords' courts were so called, *viz. Placita generalia*, but oftener *Curiæ generales*; because all their tenants and vassals were bound to appear there. See *Parliament.*

We also meet with *Placitum nominatum*; *i. e.* the day appointed for a criminal to appear and plead, and make his defence. *Leg H.* 1. *cc.* 29. 46. 50.—*Placitum fractum*; *i. e.* when the day is past. *Leg H.* 1. *c.* 59. Lord *Coke* says, that the word is derived from *placendo, quia bene placitare super omnia placet*: this seems to be a very fanciful derivation of the word; which appears rather to be derived from the German *plats*, or from the Latin *plateis*, *i. e.* fields or streets, where these assemblies or courts were first held. But this word *Placita* did sometimes signify penalties, fines, mulcts, or emendations, according to *Gervase of Tilbury*, or the *Black Book* in the Exchequer, *lib.* 2. *tit.* 13. Placita *autem dicimus pœnas pecuniarias in quas incidunt delinquentes.* So, in the laws of *Hen.* 1. *cap.* 12, 13.—Hence the old rule or custom, *Comes habet tertium denarium Placitorum*, is to be thus understood; the Earl of the county shall have the third part of the money due upon mulcts, fines, and amerciaments imposed in the assises and county courts. *Cowell.*

Placita is the stile of the Court at the beginning of the Record of *Nisi Prius. Tidd K. B. c.* 37. In this sense, pleas, *Placita*, are divided, into *Pleas of the Crown*, and *Common Pleas*; *Pleas of the Crown* are all suits in the King's name, for offences committed against his crown and dignity, and also against the peace: *Common Pleas* are those that are agitated between common persons, in civil cases. *S. P. C. cap.* 1: 4 *Inst.* 10.

PLACITARE, i.e. *Litigare & causas agere.*] To plead: And the manner of pleading before the *Conquest* was, *Coram aldermanno & proceribus & coram hundredariis, &c. M.S. in Bibl. Cotton.*

PLACITATOR, A pleader: *Ralf Flambard* is recorded to be *totius regni Placitator. Temp. W.* 2: See *supra*; under title *Placita.*

PLAGUE, See *Quarantine.*

PLAINT, Fr. *plainte*; Lat. *querela.*] The exhibiting any action, in writing; and the party making his *Plaint* is called the *Plaintiff. Kitch.* 231. A *Plaint* in an inferior court is the entry of an action, after this manner: A. B. *complains of* C. D. *of a plea of trespass, &c. and there are pledges of prosecuting, that is to say,* John Doe *and* Richard Roe.

The first process in an inferior court is a *Plaint*, which is *in the nature of an original writ*, because therein is briefly set forth the plaintiff's cause of action; and the Judge is bound, of common right, to administer justice therein without any special mandate from the King. 3 *Comm. c.* 18. *p.* 273: And on this *plaint* there may issue a *pone*, till the return of a *nihil*, upon which a *capias* will lie against the body of the defendant. 2 *Lill. Abr.* 294.

Where a *Plaint* is levied in an inferior court, the defendant must be first distrained for non appearance, by something of *small* value; then, if he doth not appear, a farther distress is to be taken to a greater value, and so on; if all his goods are distrained on the first distress, attachment may be issued out of *B. R.* against the officers, &c. 2 *Lill. Abr.* A plaintiff in an *assise* may abridge his *Plaint* of any part whereupon a bar is pleaded. 21 *Hen.* 8. *c.* 3. See further title *County Court.*

Plaint, in a *superior court*, is said to be the cause for which the plaintiff complains against the defendant; and for which he obtains the King's *writ*: For as the King denies his writ to none, if there be cause to grant it; so he grants not his writ to any, without there be cause alleged for it. 2 *Lill.* 294. See title *Original.*

PLAISTERERS, Not to exercise the art of a painter in *London*. *Stat*. 1 *Jac*. 1. *c*. 20. See title *Painters*.

PLANCHIA, A plank of wood. *Cowell*.

PLANTATION, *Plantatio*, *Colonia*.] A place where people are sent to dwell; or a company of people transplanted from one place to another, with an allowance of land for their tillage. *Lit. Dict*.

Perhaps it may, more fully, if not accurately, be defined, A District, Settlement, or Colony; frequently a whole island in some foreign part, dependent on a mother country, with whose inhabitants it was originally peopled, or by whom it was conquered or acquired.

In glancing over the settlements on the coast of *Africa*, the settlements of the *East India* Company in *India*, the *China* trade, *Nootka Sound*, and many other places, we see lands and territories under very different circumstances, and dependent upon political considerations of infinite variety; respecting some of which it must be extremely difficult to determine whether they are within the statute 7 & 8 *Will*. 3. *c*. 22, (for regulating the Plantation trade), as *Colonies* or *Plantations*; or indeed, which is a further doubt, whether they are within any part of the Act of Navigation, as lands, islands, or territories to his Majesty *belonging*, or *in his possession*. These are questions of great importance to the Navigation system, and deserve a serious attention.

As to the terms *Colony* or *Plantation*, whatever distinction may, at one time, have been made between them, there seems now to be none at all. The word *Plantation* first came into use. The Plantations of *Ulster*, *Virginia*, *Maryland*, and other places, all implied the same idea of introducing, instituting, and establishing, where every thing was desert before. *Colony* did not come much into use till the reign of *Charles* II. and it seems to have denoted the sort of political relation in which such Plantations stood to this kingdom. Thus the different parts of *New England* were, in a great measure, voluntary societies planted without the direction or participation of the *English* government; so that, in the time of *Charles* II. there were not wanting persons who pretended to doubt of their constitutional dependance upon the crown of *England*: and it was recommended, in order to put an end to such doubts, that the King should appoint governors, and *so make them Colonies*. A Colony therefore might be considered as a Plantation, when it had a governor and civil establishment, subordinate to the mother country. All the Plantations in *America*, except those of *New England*, had such an establishment; and they were, upon that idea, Colonies as well as Plantations. Those terms seem accordingly to be used without distinction in the *stat*. 7 & 8 *Will*. 3; and in those made afterwards. *Reeves's Law of Shipping*, *&c*. *p*. 136-138.—*p*. 123. *et seq*. and *p*. 521:—and see title *Navigation Acts* in this Dictionary.

Plantations or Colonies, in distant countries, (says *Blackstone*,) are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of Colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by *English* Subjects, all the *English* laws then in being, which are the birth-right of every Subject, are immediately there in force. *Salk*. 411. 666: 3 *Mod*. 159: 4 *Mod*. 225, 6: 2 *P. Wms*. 75. But this must be understood with very many, and very great, restrictions. Such Colonists carry with them only so much of the *English* law as is applicable to their own situation and the condition of an infant Colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are inforced by penalties,) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the King in Council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother country. But in conquered or ceded countries, that have already laws of their own, the King may indeed alter and change those laws: but, till he does actually change them, the ancient laws of the country remain in force; unless such as are against the law of God, as in the case of an infidel country. 7 *Rep*. 17; *Calvin's Case*: *Show. Parl. C*. 31. See also, in the case of *Campbell* v. *Hall*, an elaborate argument of Lord *Mansfield*, to prove the King's legislative authority, by his prerogative alone, over a ceded or conquered country. *Cowp*. 204. Our *American* Plantations are principally of this latter sort, being obtained in the last century, either by right of conquest and driving out the natives, or by treaties. And therefore the Common Law of *England*, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions. They are subject however to the control of the Parliament; though (like the Isle of *Man*, and the rest) not bound by any acts of Parliament, unless particularly named. 1 *Comm. Introd*. § 4. *p*. 108, 9.

With respect to their interior polity, our Colonies are stated by *Blackstone* to be properly of three sorts: 1. Provincial Establishments; the constitutions of which depend on the respective commissions issued by the Crown to the governors, and the instructions which usually accompany those commissions; under the authority of which, provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of *England*. 2. Proprietary Governments; granted out by the Crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties-palatine: yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother country. 3. Charter Governments; in the nature of civil corporations, with the power of making bye-laws for their own interior regulation, not contrary to the laws of *England*; and with such rights and authorities as are specially given them in their several charters of incorporation.

ration. The form of government in most of them is borrowed from that of *England*. They have a governor named by the King, (or in some proprietary colonies by the proprietor,) who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the King and Council here in *England*. Their general assemblies, which are their House of Commons, together with their Council of State, being their Upper House, with the concurrence of the King or his Representative, the Governor, make laws suited to their own emergencies. But it is particularly declared by *stat.* 7 & 8 *W.* 3. *c.* 22, that all laws, bye-laws, usages, and customs, which shall be in practice in any of the Plantations, repugnant to any law, made or to be made in this kingdom relative to the said Plantations, shall be utterly void and of none effect. And because several of the Colonies had claimed the sole and exclusive right of imposing taxes upon themselves, the statute 6 *Geo.* 3. *c.* 12. was passed, expresly declaring, that all his Majesty's Colonies and Plantations in *America* have been, are, and of right ought to be, subordinate to and dependent upon the Imperial Crown and Parliament of *Great Britain*; who have full power and authority to make laws and statutes of sufficient validity to bind the Colonies and people of *America*, Subjects of the crown of *Great Britain*, in all cases whatsoever. This authority was afterwards enforced, by [illegible] *Geo.* 3. *c.* 59, for suspending the legislation of *New-*[illegible]; and by several subsequent statutes: but in the year 1782, by *stat* 22 *Geo.* 3. *c.* 46, his Majesty was empowered to conclude a truce or peace with the Colonies of *New Hampshire, Massachusett's-Bay, Rhode-Island, Connecticut, New-York, New Jersey, Pennsylvania, the Three Lower Counties on Delaware, Maryland, Virginia, North Carolina, South Carolina,* and *Georgia* in *North-America*; and for that purpose, to repeal, or to suspend, the operation of any acts of Parliament so far as they related to the said Colonies. A peace was soon after concluded, and the independence, which the abovementioned colonies had before declared, was allowed to them, under the title of the *United States of America* and the *stat.* 23 *Geo.* 3. *c.* 39, gives his Majesty certain powers for the better carrying on trade and commerce between *England* and the *United States*. See this Dict. tit. *Navigation Acts*. See also *Stat.* 5 *Geo.* 2. *c.* 7, as to suits in the Courts of Law and Equity in the Plantations; and the making houses, lands, negroes, and real estates, assets to pay debts—*Stat.* 13 *Geo.* 3. *c.* 14, as to mortgages of estates in the *West India* Colonies, and the mode of proceeding to enforce the same.—*Stat.* 22 *Geo* 3 *c.* 75, by which offices in Plantations can only be granted by patent, during the residence of the grantee and *quamdiu se bene gesserit*; and on absence or misbehaviour, the officer is removable by the Governor and Council, who may also give leave of absence.

As to the limits and government of the Province of *Quebec*, see *stats.* 14 *Geo.* 3. *c.* 83: 31 *Geo.* 3. *c.* 31.

Courts of Civil Jurisdiction in *Newfoundland* are established and regulated by *stats.* 31 *Geo.* 3. *c.* 29: 32 *Geo.* 3. *c.* 46: 33 *Geo.* 3. *c.* 76: 34 *Geo.* 3. *c.* 44: 35 *Geo.* 3. *c.* 25.

A Court of Criminal Jurisdiction in *Norfolk Island*, on the Eastern Coast of *New South Wales*, whither felons are now transported, is established and regulated by *stats.* 27 *Geo.* 3. *c.* 2: 34 *Geo.* 3. *c.* 45: 35 *Geo.* 3. *c.* 18. See this Dict. title *Transportation*.

PLANTS, destroying. See title *Mischief, Malicious*; as to stealing plants, see *Larceny* I. 1.

PLATE, Vessels and utensils of gold and silver. By *stat.* 29 *Geo.* 2. *c.* 14, a tax was laid on all persons possessed of Plate; but that statute was repealed by *stat.* 17 *Geo.* 3. *c.* 39.

By *stat.* 7 & 8 *W.* 3. *c.* 19. *s.* 3. Public houses were prohibited from using Plate. After this part of the act had lain dormant many years, a set of informers suddenly arose, and brought a number of actions for the penalties, forfeited by virtue of the act; whereupon many publicans raised a sum of money to pay the expence of a bill to repeal this clause, which they obtained by *stat.* 9 *Geo.* 3. *c.* 11. See title *Goldsmiths*.

PLAYHOUSE. *Playhouses* were originally instituted with a design of recommending virtue and exposing vice and folly; therefore are not in their own nature nusances: but it hath been holden, that a common *Playhouse* may be a nusance, if it draw together great numbers of coaches, &c. as to prove generally inconvenient to the places adjacent. 5 *Mod.* 142. See title *Nusance*.

If any persons in *Plays*, &c. jestingly or profanely use the name of God, they forfeit 10*l.* *Stat.* 3 *Jac* 1. *c.* 21. And *Players* speaking any thing in derogation of the Book of Common Prayer, are liable to forfeitures and imprisonment. *Stat.* 1 *Eliz.* *c.* 2. §. 9. Also acting *Plays* or interludes on a *Sunday* is subject to penalties, by *stat.* 1 *Car.* 1. *c.* 1. See title *Sunday*.

By *stat.* 10 *Geo.* 2. *c.* 28, No person shall act any new *Play* or addition to an old one, &c. unless a true copy thereof, signed by the master of the *Playhouse*, be sent to the Lord Chamberlain *fourteen days before acted*; who may prohibit the representing any stage *Play*; and persons acting contrary to such prohibition, forfeit 50*l.* and their licences, &c. And no licence is to be given to act *Plays*, but in the city and liberties of *Westminster*, or places of his Majesty's residence: But by *stat* 28 *Geo.* 3. *c.* 30, the General or Quarter Sessions may licence Theatres in country towns and places, for 60 days at a time, under certain restrictions; and, by special Acts of Parliament, *Playhouses* are permitted to be erected in various places.

By the above *stat.* 10 *Geo.* 2. *c.* 28, Every actor for hire, (if he shall have no legal settlement where he acts,) without authority from the King or the Lord Chamberlain, shall be deemed a rogue and a vagabond, and be punished as such, or forfeit 50*l.*; and *Plays* acted in any place where liquors are sold, shall be deemed to be acted for hire.

Tumbling is not an entertainment of the stage within the meaning of this statute. 6 *Term Rep.* 286.

PLAYS and GAMES, See this Dict. titles *Gaming*; *Nusance*.

PLEA, *Placitum*.] That which either party alleges for himself in court, in a cause there depending to be tried.

Pleading, in a large sense, contains all the proceedings from the declaration, till issue is joined; but is, in its immediate sense, taken for the defendant's answer to the declaration.

PLEADING.

Pleadings are the mutual altercations between the Plaintiff and Defendant in a suit: which at present are set down and delivered into the proper office in writing; though formerly they were usually put in by their Counsel *ore tenus* or *vivâ voce* in open Court, and then minuted down by the chief clerks or prothonotaries; whence, in the old Law French, the Pleadings are frequently denominated *the parol*. 3 *Comm.* c. 20.

I. *The general Principles of Pleading, in Civil Cases, in the Common Law Courts.*

1. *As to the Declaration, and other Proceedings, previous to the Plea.*
2. *Of the Plea, and other Proceedings, previous to the Issue.*
3. *Of the Issue and Record; of the Language of Pleadings; and of Repleader, &c.*
4. *The Practice of the Courts as to the Time and Manner of entering Pleas.*

II. *Of Pleadings in Criminal Cases; and see this Dict. titles Judgment (Criminal); Execution and Reprieve.*

[*For the general principles of* Pleadings in Equity, *see this Dictionary, titles* Chancery; Equity.]

I. 1. In the Declaration, *Narratio*, or Count, antiently called the *tale*, the Plaintiff sets forth his cause of complaint at length; being indeed only an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place when and where the injury was committed.

It is generally usual in actions upon the case to set forth several cases, by different *counts*, in the same declaration; so that if the plaintiff fails in the proof of one, he may succeed in another. As, in an action on the case, upon an *assumpsit* for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant; as that they bargained for twenty pounds: and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant*; that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth; and then avers that they were worth other twenty pounds: and so on in three or four different shapes; and at last concludes with declaring, that the defendant had refused to fulfil any of these agreements, whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fails in the rest, he shall recover proportionable damages. This declaration always concludes with these words, "and thereupon he brings *suit*," &c. "*inde producit sectam*," &c. By which words, *suit* or *secta* (*à sequendo*), were antiently understood the witnesses or followers of the plaintiff. *Seld. on Fortesc.* c. 21. For in former times the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out at least a probable case. *Bract.* 400: *Flet. l.* 2. c. 6. But the actual production of the *suit*, the *secta*, or *followers*, is now antiquated; and hath been totally disused, at least ever since the reign of *Edw.* III. though the form of it still continues. 3 *Comm.* c. 20.

At the end of the declaration are added also the plaintiff's common pledges of prosecution, *John Doe* and *Richard Roe*, which are now mere names of form; though formerly they were of use to answer to the King for the amercement of the plaintiff, in case he were nonsuited, barred of his action, or had a verdict or judgment against him. 3 *Bulstr.* 275: 4 *Inst.* 189. But now he is punished by payment of the Costs. See this Dict. titles *Costs*; *Discontinuance of Process*; *Nonsuit*; *Pledges*.

When the Plaintiff hath stated his case in the declaration, it is incumbent on the Defendant within a reasonable time to make his *defence*, and to put in a *Plea*; else the plaintiff will at once recover judgment by *default* or *nihil dicit* of the defendant. See title *Judgment*.

As to the true meaning of this word *Defence*, and the nature of it in various actions, see this Dict. title *Defence*.

Before any defence made, however, if at all, *cognizance* of the suit must be *claimed* or demanded; when any person or body corporate hath the franchise, not only of *holding Pleas* within a particular limited jurisdiction, but also of the *cognizance of Pleas*: and that, either *without* any words exclusive of other courts, which entitles the lord of the franchise, whenever any suit that belongs to his jurisdiction is commenced in the courts at *Westminster*, to demand the cognizance thereof; or *with* such exclusive words, which also entitle the defendant to plead to the jurisdiction of the court. 2 *Lord Raym.* 836: 10 *Mod.* 126. Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to pursue his [illegible] in the special jurisdiction. It must be demanded before full defence is made, or imparlance prayed; for these are a submission to the jurisdiction of the superior court, and the delay is a *laches* in the lord of the franchise: and it will not be allowed, if it occasions a failure of justice, or if an action be brought against the person himself, who claims the franchise, unless he hath also a power in such case of making another judge. See *Rast. Ent.* 128: 2 *Ventr.* 363: *Hob.* 87; and this Dict. titles *Cognizance*; *Courts of the Universities*; and *Post.* 4.

After defence made, the defendant must put in his Plea. But, before he defends, he is in certain cases entitled to demand one *imparlance*, or *licentia loquendi*; and may, before he pleads, have more granted, by consent of the court; to see if he can end the matter amicably without farther suit, by *talking* with the plaintiff: See this Dict. title *Imparlance*, and *post*. 4. There are also many other previous steps which may be taken by a defendant before he puts in his Plea. He may, in real actions, demand a *view* of the thing in question, in order to ascertain its identity and other circumstances. See title *View*. He may crave *oyer* of the writ, or of the bond, or other specialty upon which the action is brought; that is, to *hear* it read to him. See title *Oyer*. In real actions also the tenant may pray in *aid*, or call for assistance of another, to help him to plead, because of the feebleness or imbecillity of his own estate. Thus a tenant for life may pray in aid of him that hath the inheritance in remainder or reversion; and an incumbent may pray in aid of the Patron and Ordinary: that is, that they shall be joined in the action and help to defend the title. See title *Aid Prayer*. *Voucher* also is the calling in of some person to answer the action, that hath warranted the title to the tenant or defendant. This is still used in the form of common recoveries which are grounded on a writ of entry; a species of action that relies chiefly on the weakness

neſs of the tenant's title, who therefore vouches another perſon to warrant it: See title *Recovery*. In aſſiſes indeed, where the principal queſtion is, whether the demandant or his anceſtors were or were not in poſſeſſion till the ouſter happened? and the title of the tenant is little (if at all) diſcuſſed, there no voucher is allowed; but the tenant may bring a writ of *warrantia chartæ* againſt the warrantor, to compel him to aſſiſt him with a good Plea or defence, or elſe to render damages and the value of the land, if recovered againſt the tenant, *F. N. B.* 135: See title *Warrantia Chartæ*. In many real actions alſo, brought by or againſt an infant under the age of twenty-one years, and alſo in actions of debt brought againſt him, as heir to any deceaſed anceſtor, either party may ſuggeſt the nonage of the infant, and pray that the proceedings may be deferred till his full age; or (in the legal phraſe) that the infant may have his age, and that the *parol may demur*; that is, that the pleadings may be ſtaid; and then they ſhall not proceed till his full age, unleſs it be apparent that he cannot be prejudiced thereby. *Dy.* 137: *Finch* 1. 360. But, by the *ſtat Weſtm.* 1. 3 *Edw.* 1. *c.* 46; *ſtat. Gloc.* 6 *Edw.* 1. *c.* 2, in writs of entry *ſur diſſeiſin* in ſome particular caſes, and in actions aunceſtrel brought by an infant, the parol ſhall not demur: otherwiſe he might be deforced of his whole property, and even want a maintenance, till he came of age. So likewiſe in a writ of dower the heir ſhall not have his age; for it is neceſſary that the widow's claim be immediately determined, elſe ſhe may want a preſent ſubſiſtence. 1 *Roll. Abr.* 137. Nor ſhall an infant patron have it in a *quare impedit*, ſince the law holding it neceſſary and expedient that the church be immediately filled. 1 *Roll. Abr.* 138.

2. When the proceedings above particulariſed are over, the defendant muſt then put in his excuſe or Plea. Pleas are of two ſorts; *dilatory* Pleas, and Pleas *to the action*. Dilatory Pleas are ſuch as tend merely to delay or put off the ſuit, by queſtioning the propriety of the remedy, rather than by denying the injury: Pleas to the action are ſuch as diſpute the very cauſe of ſuit. The former cannot be pleaded after a general imparlance, which is an acknowledgment of the propriety of the action. See title *Imparlance*.

Pleas in *bar* may come after a continuance, or general imparlance; but if ſuch Plea be firſt pleaded, the defendant ſhall not be admitted afterwards to plead in abatement of the writ, which is allowed to be good by pleading in bar to the action; yet *matter of record may be ſhewn in arreſt of judgment*, and thereby the writ be abated. *Hob.* 280, 281.

In good order of pleading, a perſon ought to plead,

1ſt, *To the Juriſdiction of the Court.*

2dly, *To the Perſon of the Plaintiff; and next of the Defendant.*

3dly, *To the Writ.*

4thly, *To the Action of the Writ.*

5thly, *To the Count or Declaration.*

6thly, *To the Action itſelf, in bar thereof.*

A *Plea* to the *juriſdiction* is called a *foreign Plea*, becauſe it alleges that the matter ought to be tried in another court, &c.

The *Plea* to the *writ*, &c. is for variance between the writ and record, death of parties, miſnomer, joint-tenancy, &c. and may be to the writ and bill, or count together.

Pleas to the *count* or *declaration* are variance between the writ and count; ſpecialty or record; incertainty, &c. and all theſe are properly *Pleas* in abatement. See this Dict. title *Abatement*.

Plea to the *action of the writ* is, where one pleadeth ſuch matter which ſheweth the plaintiff had no cauſe to have *the writ* brought. And a Plea in bar to the *action* itſelf is, when defendant pleadeth a *Plea*, which is ſufficient to overthrow *the action*. *Kitch.* 95: *Lit.* 196. *Pleas* in bar, ſuch as a releaſe, the ſtatute of limitations, agreement with ſatisfaction, &c. deſtroy the plaintiff's action for ever: but *Pleas* in abatement *are temporary and dilatory*, and do not deſtroy the action, *only ſtop the cauſe for a while*, till the defect is removed. 2 *Lutw.* 1174.

Dilatory Pleas therefore are; To the *juriſdiction* of the court: alleging, that it ought not to hold Plea of this injury, it ariſing in *Wales* or beyond ſea; or becauſe the land in queſtion is of antient demeſne, and ought only to be demanded in the lord's court, &c. To the *diſability* of the plaintiff, by reaſon whereof he is incapable to commence or continue the ſuit; as, that he is an alien enemy, outlawed, excommunicated, attainted of treaſon or felony, under a *præmunire*, not *in rerum naturâ* (being only a fictitious perſon), an infant, a feme-covert, or (formerly) a monk profeſſed. In *abatement*: which abatement is either of the writ, or the count, for ſome defect in one of them; as by miſnomer of the defendant, giving him a wrong addition, or other want of form in any material reſpect. Indeed all dilatory Pleas are called Pleas in *abatement*, in contradiſtinction to Pleas in *bar*. Or, it may be, that the plaintiff is dead; for the death of either party is generally an abatement of the ſuit, in perſonal actions. See this Dict. title *Action*: and further, title *Abatement* I. 6. *c.* Alſo he may plead in abatement another action depending *of the ſame nature*, for the ſame thing, &c. and if a perſon miſtaking his firſt action, bring another action without diſcontinuing the firſt, this *Plea* may be pleaded. 1 *Salk.* 392. See title *Abatement*.

Theſe Pleas in abatement were formerly very often uſed as mere dilatory Pleas, without any foundation of truth, and calculated only for delay; but now by *ſtat.* 4 & 5 *Ann.* *c.* 16, no dilatory Plea is to be admitted, without affidavit made of the truth thereof, or ſome probable matter ſhewn to the court to induce them to believe it true. And with reſpect to the Pleas themſelves, it is a rule, that no exception ſhall be admitted againſt a declaration or writ, unleſs the defendant will in the ſame Plea give the plaintiff a better; that is, ſhew him how it might be amended; that there may not be two objections upon the ſame account. *Brownl.* 139. Neither, by *ſtat.* 8 & 9 *W.* 3. *c.* 31, ſhall any Plea in abatement be admitted in any ſuit for partition of lands; nor ſhall the ſame be abated by reaſon of the death of any tenant.

All Pleas to the juriſdiction conclude to the cognizance of the court; praying "judgment, whether the court will have further cognizance of the ſuit:" Pleas to the diſability conclude to the perſon; by praying "judgment, if the ſaid *A.* (the plaintiff) ought to be anſwered:" and Pleas in abatement begin "That the defendant ought not to anſwer," &c. and (when the ſuit is by original)

ginal) conclude to the writ or declaration; by praying "judgment of the writ, or declaration, and that the same may be quashed," *cassetur*, made void, or abated: but, if the action be by bill, the Plea must pray "judgment of the bill," and not of the declaration; the bill being here the original, and the declaration only a copy of the bill. See title *Original.*

It has been resolved, That where a *Plea* is in abatement, if it be of necessity that the defendant must disclose matter of bar, he shall have his election to take it either by way of bar, or abatement. 2 *Mod.* 65.

When these dilatory Pleas are allowed, the cause is either dismissed from that jurisdiction; or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the Court; or to amend and new-frame his declaration. But when, on the other hand, they are over-ruled as frivolous, the defendant has judgment of *respondeat ouster*, or to *answer over* in some better manner.

It is then incumbent on him to plead *a Plea to the action*; that is, to answer to the merits of the complaint. This is done by confessing or denying it.

A confession of the whole complaint is not very usual, for then the defendant would probably end the matter sooner; or not plead at all, but suffer judgment to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowlege the debt, and plead the tender; adding that he has always been ready, *tout temps prist*, and still is ready, *uncore prist*, to discharge it. See title *Tender.* But frequently the defendant confesses one *part* of the complaint, (by a *cognovit actionem* in respect thereof,) and traverses or denies the rest: in order to avoid the expense of carrying that part to a formal trial, which he has no ground to litigate. A species of this sort of confession is the *payment of money into court*; which is for the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff; by paying into the hands of the proper officer of the court as much as the defendant acknowleges to be due, together with the costs hitherto incurred, in order to prevent the expense of any farther proceedings. See title *Money into Court*. To this head may also be referred the practice of what is called a *Set-off*, whereby the defendant acknowleges the justice of the plaintiff's demand on the one hand; but, on the other, sets up a demand of his own, to counterbalance that of the plaintiff either in the whole or in part. See title *Set-off.*

Pleas, that totally deny the cause of complaint, are either the *general* issue, or a *special* Plea, in bar.

The General Issue or general Plea is, what traverses, thwarts, and denies at once the whole declaration; without offering any special matter whereby to evade it. As, in trespass either *vi et armis*, or on the case, *Not guilty* in debt upon contract, *nihil (nil) debet*, "he owes nothing;" in debt on bond, *non est factum*, "it is not his deed;" on an *assumpsit*, *non assumpsit*, "he made no such promise." Or in real actions, *nul tort*, "no wrong done;" *nul disseisin*, "no disseisin;" and in a writ of right, the mise or issue is, that the tenant has more right to hold than the demandant has to demand. These Pleas are called the general issue; because, by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue; by which is meant a fact affirmed on one side and denied on the other. See further this Dict. title *Issue.*

Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special* Plea; which was originally intended to apprize the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. And it is an invariable rule, that every defence, which cannot be thus specially pleaded, may be given in evidence, upon the general issue at the trial. But, special pleading having been frequently perverted to the purposes of chicane and delay, the Courts have in some instances, and the Legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case; and have allowed special matter to be given in evidence at the trial. And, though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness antiently observed, yet experience has shewn it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprized by the other.

Special Pleas in bar of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, in real actions, a general release or a fine, both of which may destroy and bar the plaintiff's title: or, in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action. A *justification* is likewise a special Plea in bar; as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; in trespass that the defendant did the thing complained of in right of some office which warranted him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was. See title *Justification.*

The statutes of *limitation* may also be pleaded in bar; that is, the time limited by certain acts of parliament, beyond which no plaintiff can lay his cause of action; as to which see this Dict. title *Limitation of Actions.*

An *Estoppel* is likewise a special Plea in bar: which happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary. As if tenant for years (who hath no freehold) levies a fine to another person. Though this is void as to strangers, yet it shall work as an estoppel to the cognizor; for, if he afterwards brings an action to recover these lands, and his fine is pleaded against him, he shall thereby be estopped from saying that he had no freehold at the time, and therefore was incapable of levying it. See title *Estoppel.*

The conditions and qualities of a Plea (which, as well as the doctrine of estoppels, will also hold equally, *mutatis mutandis*, with regard to other parts of pleading) are, 1. That it be single and containing only one matter; for duplicity begets confusion. But by *stat.* 4 & 5 *Ann.* c. 16, a man with leave of Court may plead two or more distinct matters or single Pleas; as in an action of assault and battery, these three; not guilty, *son assault demesne*, and the statute of limitations. 2. That it be direct and positive, and not argumentative. 3. That it have convenient

certainty

certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial.

Special Pleas are usually in the affirmative, sometimes in the negative, but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true, in the common form:—" and this he is ready to verify."—This is not necessary in Pleas of the general issue; those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

Each Plea is to have its proper conclusion; and, regularly, all Pleas that are affirmative conclude, " And this he is ready to verify," &c. In a *Plea* in bar, the defendant in the beginning says, " That the plaintiff ought not to have or maintain his action against him;" and concludes to the action, *viz.* " He prays judgment if the plaintiff ought to have or maintain his action against him," &c. A *Plea* of a record ought to conclude, " And this he is ready to verify by the record," &c.

It is said, that the conclusion makes the Plea; for if it begins in bar, and concludes in abatement, it is a Plea in abatement. *Ld. Raym.* 337.

It is a rule in pleading, that no man be allowed to plead specially such a Plea as amounts only to the general issue, or a total denial of the charge; but in such case he shall be driven to plead the general issue, in terms; whereby the whole question is referred to a jury. But if the defendant, in an assize or action of trespass, be desirous to refer the validity of his title to the Court rather than the Jury, he may state his title specially, and at the same time *give colour* to the plaintiff, or suppose him to have an appearance or colour of title, bad indeed in point of law, but of which the jury are not competent judges. See this Dict. title *Colour*.

When the Plea of the defendant is thus put in, if it does not amount to an issue or total contradiction of the declaration, but only evades it, the plaintiff may plead again, and *reply* to the defendant's Plea: either traversing it, that is, totally denying it: as if on an action of debt upon bond the defendant pleads *solvit ad diem*, " that he paid the money when due," here the plaintiff in his *Replication* may totally traverse this Plea, by denying that the defendant paid it: Or he may allege new matter in contradiction to the defendant's Plea; as when the defendant pleads *no award made*, the plaintiff may reply, and set forth an actual award, and assign a breach: Or the replication may *confess and avoid* the Plea, by some new matter or distinction, consistent with the plaintiff's former declaration; as, in an action for trespassing upon land whereof the plaintiff is seised, if the defendant shews a title to the land by descent, and that therefore he had a right to enter, and gives colour to the plaintiff, the plaintiff may either traverse and totally deny the fact of the descent; or he may confess and avoid it, by replying, that true it is that such descent happened, but that, since the descent, the defendant himself demised the lands to the plaintiff for term of life. See titles *Replication*; *Traverse*. To the replication the defendant may *rejoin*, or put in an answer called a *Rejoinder*. The plaintiff may answer the Rejoinder by a *Sur-rejoinder*; upon which the defendant may *rebut*; and the plaintiff answer him by a *Sur-rebutter*. See for further information those titles in this Dict.

The whole of this process is denominated the *Pleading*; in the several stages of which it must be carefully observed, not to depart or vary from the title or defence, which the party has once insisted on. For this (which is called a *Departure*, in Pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the Plea, without departing out of it. See title *Departure*.

Yet in many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive Plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a *New* or *Novel Assignment*. As, if the plaintiff in trespass declares on a breach of his close in *D.*; and the defendant pleads that the place, where the injury is said to have happened, is a certain close of pasture in *D.* which descended to him from *B.* his father, and so is his own freehold; the plaintiff may reply and assign another close in *D.* specifying the abuttals and boundaries, as the real place of the injury. *Bro. Abr.* title *Trespass*, 205, 284.

It hath already been observed that *duplicity* in Pleading must be avoided. Every Plea must be simple, entire, connected, and confined to one single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the Court itself, and at all events would greatly enhance the expense of the parties. Yet it frequently is expedient to plead in such a manner, as to avoid any implied admission of a fact, which cannot with propriety or safety be positively affirmed or denied. And this may be done by what is called a *Protestation*; whereby the party interposes an oblique allegation or denial of some fact, protesting (*protestando*), that such a matter does, or does not, exist; and at the same time avoiding a direct affirmation or denial. See title *Protestation*.

In any stage of the Pleadings, when either side advances or affirms any new matter, he usually (as has been said) avers it to be true; " and this he is ready to verify." On the other hand, when either side traverses or denies the facts pleaded by his antagonist, he usually *tenders an Issue*, as it is termed; the language of which is different, according to the party by whom the issue is tendered; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, " and of this he puts himself upon the country;" thereby submitting himself to the judgment of his Peers: but if the traverse lies upon the plaintiff, he tenders the issue or prays the judgment of the Peers against the defendant in another form; thus, " and this he prays may be inquired of by the country."

But if either side (as, for instance, the defendant) pleads a special negative Plea, not traversing or denying any thing that was before alleged, but disclosing some new negative matter; as where the suit is on a bond, conditioned to perform an award, and the defendant pleads, negatively, that no award was made, he tenders no issue upon this Plea: because it does not yet appear whether the fact will be disputed, the plaintiff not having yet asserted

ſerted the exiſtence of any award: but when the plaintiff replies, and ſets forth an actual ſpecific award, if then the defendant traverſes the replication, and denies the making of any ſuch award, he then, and not before, tenders an iſſue to the plaintiff. For when in the courſe of pleading they come to a point, which is affirmed on one ſide, and denied on the other, they are then ſaid to be at iſſue; all their debates being at laſt contracted into a ſingle point, which muſt then be determined either in favour of the plaintiff or of the defendant. *Raym.* 199.

Beſides the rules and circumſtances already particulariſed, there are ſeveral general rules laid down in the Books with reſpect to Pleading; of which the following are the moſt obſervable:

All Pleas are to be ſuccinct, without unneceſſary repetitions, and be direct and pertinent to the caſe, not by way of argument or rehearſal; and the Plea of every man ſhall be taken moſt ſtrongly againſt himſelf. 2 *Lill.* 304. The Plea muſt *directly* anſwer the charge in the declaration, or it will not be good. 1 *Danv. Abr.* 235. If it doth not anſwer all the matter contained in the declaration, the plaintiff ſhall have judgment, as for want of a Plea (*i.e.* as to the part not anſwered). 1 *Lev.* 16. But when judgment in ejectment is ſigned for want of a Plea, if poſſeſſion be not delivered, a Judge before the aſſiſes, may compel the plaintiff to accept a plea. 2 *Salk.* 516.

Every affirmative in pleading ought to be anſwered with an expreſs negative; and if a perſon be named to be dwelling at *A* it is no Plea to ſay, that he is an inhabitant at ſome other place; unleſs it conclude in the negative, and not at *A.* *Co. Lit.* 126: 19 *H.* 6. 1.

When a man pleads ſpecial matter, and concludes generally, he thereby waives the ſpecial matter. 7 *Mod.* 53. Pleas that are too general are not good. 1 *Lutw.* 239: 2 *Salk.* 521. Every Plea ought to be ſingle and certain; and not double, or contain a multitude of diſtinct matters to one and the ſame thing, whereto ſeveral anſwers are required, which will not be allowed: nor may the defendant plead two matters, each being a ſufficient bar to the action, unleſs one depends on the other; or defendant cannot come at the one, without ſhewing the other; when it is good. 11 *Rep.* 52: 1 *Vent.* 48, 272: 2 *Nelſ. Abr.* 1254.

Good matter muſt be pleaded in right form, apt time, and due order; but that which is only inducement or conveyance to the ſubſtance, need not be ſo certainly alleged, as that which is the git of the Plea. *Co. Lit.* 303: *Plow.* 65, 81: *Cro. Jac.* 362.

What is apparent, and appears from a neceſſary implication in the record, need not be averred. *Co. Litt.* 300: 7 *Co.* 40.

Every man's Plea ſhall be taken moſt ſtrongly againſt himſelf, as every body is preſumed to make the moſt of his own caſe. *Dyer* 16: *Co. Litt.* 303: *Hob.* 234: *Latch.* 186.

What the parties have agreed in Pleading ſhall be admitted, tho' the jury find otherwiſe. 2 *Mod.* 5.

When a man will recover a thing from another, it is not enough for him to deſtroy ſuch perſon's title, but he muſt prove his own a better. *Vaugh.* 58, 60.

Every man ſhall plead ſuch Pleas as are proper, according to the quality of his caſe, eſtate, or intereſt. *Co. Lit.* 285, 303.

The law requires, in every Plea, that it be, in matter, ſufficient, and that it be deduced and expreſſed *according to the forms of law*; and if either be wanting, it is cauſe of demurrer. *Hob.* 164. But it is ſaid, a man is not bound to one form of pleading, ſo he plead the ſubſtance of the matter. *Plowd.* 435.

Every Plea in bar, being a confeſſion and avoidance of the plaintiff's action, *muſt be ſubſtantive and certain*, with an avoidance of plaintiff's demand, which he may traverſe, and thereon go to iſſue; becauſe the declaration ſtands confeſſed, as far as it is not avoided by the defendant. *Dyer* 66: *Godb.* 253: 2 *Leon.* 78.

If a count, avowry, (which is in nature of a count,) replication, &c. want *form*, or omit *circumſtance* of time, place, &c. they may be made good by the replication, and the replication by the rejoinder, &c. 7 *Co.* 25. *a*: 8 *Co.* 120 *b*: *Co. Lit.* 303: but not if it be inſufficient in matter. 2 *Vent.* 222.

All Pleas muſt be alleged directly, and not by way of rehearſal; nor is it ſufficient, that what ought to be expreſsly pleaded, may be deduced by argument from what is pleaded. *Co. Lit.* 303.

In matters triable by law, all things iſſuable ought to be ſpecially alleged, in order to have a convenient trial; but in matters ſpiritual, the law is otherwiſe, becauſe there is no peril in the trial; therefore, if certain enough to ground a certificate, it is ſufficient. 3 *Leon.* 300.

Where one is authorized to do a thing by Common Law, ſtatute, cuſtom, grant, or commiſſion, he ought to ſhew, that he hath purſued the ſubſtance of it accordingly. *Co. Lit.* 303.

General eſtates in fee-ſimple may be generally alleged; as that *J. S.* was ſeiſed in fee; but the commencement of particular eſtates muſt be ſhewn; becauſe they could not originally commence without a conveyance, which muſt be ſhewn, unleſs they be alleged by way of inducement only. *Co. Lit.* 121. *a*; 303.

Eſtates in tail, and particular eſtates, muſt be ſhewn. A Plea of conveyance of lands, &c. *inter alia*, where the conveyance contains more than relates to the matter of the Plea, is good. 1 *Roll. Rep.* 72.

If a party pleading derives an eſtate to another, under which he doth not claim any thing, there, general Pleading is ſufficient; becauſe he hath no means to know *another man's title*; but it is otherwiſe where he himſelf claims under it. *Carth.* 209.

If one comes in by act of law, the *general allegation will ſuffice*; and things ſpiritual, or where the Plea conſiſts of matter infinite, may be generally pleaded. All neceſſary circumſtances *implied by law* need not be expreſſed in the *Plea*; but when any ſpecial or ſubſtantial matter is alleged, it ſhall be ſpecially anſwered; ſo, matters of record, where they are the foundation of the ſuit, or ſubſtance of the *Plea*. 10 *Rep.* 94: *Cro. Car.* 749: *Plowd.* 65.

If a thing is ſhewn in Pleading, and it is not afterwards traverſed, or averred *ſpecially* to the contrary, it will be taken to be *confeſſed*. Though the confeſſion of one defendant in his *Plea*, ſhall not prejudice another. *Plowd.* 48: *Hob.* 64. A releaſe pleaded to an action of treſpaſs without ſhewing *when* it was made, ſhall be taken to be *before* the treſpaſs done: And a Plea of diſcharge or giving notice, &c. muſt ſhew how it was given. 10 *Rep.* 40: *Plowd.* 128: *Dyer* 41.

Bonds and deeds are to be pleaded with a *profert hic in curiâ*, &c. See titles *Oyer*; *Profert*.

That

That which is alleged by way of *inducement* to the substance of the matter, need not be as certainly alleged, as the substance itself. *Plowd.* 81. He who pleads in the *negative*, is not bound to plead so *exactly* as he who pleads in the *affirmative*. And that which a man cannot have certain knowledge of, he is not bound certainly to plead. *Plowd.* 33, 80, 126, 129.

Where the matter is indifferent to be well or ill, and the party pleads over, the Court will intend it well. *Mod. Cas.* 136. If there be a repugnancy in Pleading, it is error. 2 *And.* 182: *Jenk. Cent.* 21. And a man shall not take advantage of his own wrong, by pleading, &c. *Cro. Jac.* 588. A man cannot plead any thing afterwards which he might have pleaded at first. *Ibid.* 318. Surplusage shall never make the *Plea* vicious, but where it is contrary to the matter before. *Raym.* 8.

Every man must plead such Plea as is proper; but that need not be pleaded on one side, which will come properly on the other. *Hob.* 3, 78, 162.

Where it is doubtful between the parties, whether a *Plea* be good or not, it cannot be determined by the Court on motion, but there ought to be a demurrer to the *Plea*; and on arguing thereof, the Court will judge of the *Plea*, whether good or bad: And no advantage can be had of double Pleading, without *special* demurrer. But though the Court is to judge of Pleading, *they will not direct any person how to plead*, notwithstanding the matter be difficult; for *the parties must plead at their peril*, and Counsel are to advise, &c. *Lutw.* 422.

A Plea may be *amended*, if it be but *in paper*, and not entered, *paying costs*: If after the defendant hath pleaded, the plaintiff alters his declaration, the defendant may alter his Plea. See title *Amendment*. Falshood in a Plea, if not hurtful to plaintiff, nor beneficial to defendant, doth no injury; as it doth where detrimental to plaintiff, &c. 2 *Lill.* 297. Though if an attorney pleads a false Plea by deceit, it is against his oath, and he may be fined. 1 *Salk.* 515.

3. An Issue upon Matter of Law is called a *Demurrer*; as to which see this Dictionary under that title.

An Issue of fact is, where the fact only, and not the law, is disputed. And when he that denies or traverses the fact, pleaded by his antagonist, has tendered the issue, thus, "and this he prays may be inquired of by the country;" or, "and of this he puts himself upon the country;" it may immediately be subjoined by the other party, "and the said *A. B.* doth the like." Which done, the issue is said to be joined; both parties having agreed to rest the fate of the cause upon the truth of the fact in question. And this issue of fact must, generally speaking, be determined, not by the Judges of the Court, but by some other method; the principal of which methods is that by the Country, *per pais*, (in Latin, *per patriam*,) that is, by Jury. See titles *Trial*; *Jury*.

During the whole of the proceedings, from the time of the defendant's appearance in obedience to the King's writ, it is necessary that both the parties be kept or *continued* in Court from day to day, till the final determination of the suit. For the Court can determine nothing, unless in the presence of both the parties, in person or by their attornies, or upon default of one of them, after his original appearance, and a time prefixed for his appearance in Court again. Therefore, in the course of Pleading, if either party neglects to put in his declaration, Plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the Court, the plaintiff, if the omission be his, is said to be *nonsuit*, or not to follow and pursue his complaint, and shall lose the benefit of his writ: or, if the negligence be on the side of the defendant, judgment may be had against him, for such his default. And, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the *Continuance*, because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted, the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day, for this turn: for by his appearance in Court he has obeyed the command of the King's writ; and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons; but he must be warned afresh, and the whole must begin *de novo*. See title *Discontinuance of Process*.

Now it may sometimes happen, that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; as, that the plaintiff, being a feme-sole, is since married, or that she has given the defendant a release, and the like: here, if the defendant takes advantage of this new matter, as early as he possibly can, *viz.* at the day given for his next appearance, he is permitted to plead it in what is called a Plea, *puis darrein continuance*, or "since the last adjournment." For it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former. But it is dangerous to rely on such a Plea, without due consideration; for it confesses the matter which was before in dispute between the parties. *Cro. Eliz.* 49. And it is not allowed to be put in, if any continuance has intervened between the arising of this fresh matter and the pleading of it: for then the defendant is guilty of neglect, and is supposed to rely on the merits of his former Plea. Also it is not allowed after a demurrer is determined, or verdict given; because then relief may be had in another way, namely, by writ of *audita querela*. *Cro. Jac.* 646. And these Pleas, *puis darrein continuance*, when brought to a demurrer in law, or issue of fact, shall be determined in like manner as other Pleas.

Demurrers, or questions concerning the *sufficiency* of the matters alleged in the Pleadings, are to be determined by the Judges of the Court, upon solemn argument; and to that end a demurrer book is made up, containing all the proceedings at length, which are afterwards entered on *record*; and copies thereof, called *Paper-books*, are delivered to the Judges to peruse. The *Record* is a history of the most material proceedings in the cause, entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the Pleadings, the declaration, view or *oyer* prayed, the imparlances, Plea, replication, rejoinder, continuances, and whatever farther proceedings have been had; all entered *verbatim* on the roll, and also the issue or demurrer, and joinder therein.

 These

These were formerly all written, as indeed all public proceedings were, in *Norman* or Law *French*, and even the arguments of the Counsel, and decisions of the Court, were in the same barbarous dialect. An evident and shameful badge, it must be owned, (says *Blackstone*,) of tyranny and foreign servitude; being introduced under the auspices of *William* the *Norman*, and his sons. This continued till the reign of *Edward* III.; who, having employed his arms successfully in subduing the *Crown* of *France*, thought it unbeseeming the dignity of the victors to use any longer the *language* of a vanquished country. By the *stat.* 36 *E.* 3. *c.* 15, it was therefore enacted, that, for the future, all Pleas should be pleaded, shewn, defended, answered, debated, and judged in the *English* tongue, but be entered and enrolled in *Latin*. The practisers, however, being used to the *Norman* language, and therefore imagining they could express their thoughts more aptly and more concisely in that than in any other, still continued to take their notes in Law *French*: and of course when those notes came to be published, under the denomination of Reports, they were printed in that dialect. 3 *Comm. c.* 21.

The learned Commentator then proceeds to shew the necessity, and in some measure the propriety, of these ancient law languages; and afterwards thus proceeds, in the history of the change of that used in Pleadings and Records:

This technical *Latin* continued in use from the time of its first introduction, till the subversion of our ancient Constitution under *Cromwell*; when, among many other innovations in the Law, some for the better and some for the worse, the language of our records was altered and turned into *English*. But, at the Restoration of K. *Charles* II., this novelty was no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the *Latin*. And thus it continued, without any sensible inconvenience, till about the year 1730, when it was again thought proper that the proceedings at Law should be *done into English*; and it was accordingly so ordered by *stat.* 4 *Geo.* 2. *c.* 26. This provision was made, according to the preamble of the statute, that the common people might have knowlege and understanding of what was alleged or done for and against them in the process and Pleadings, the judgment and entries in a cause. Which purpose has, it is to be feared, not been very completely answered. On the other hand, these inconveniences have already arisen from the alteration; that now many clerks and attornies are hardly able to read, much less to understand, a record even of so modern a date as the reign of *George* I. And it has much enhanced the expense of all legal proceedings: for since the practisers are confined (for the sake of the stamp duties, which are thereby considerably increased) to write only a stated number of words in a sheet; and as the *English* language, through the multitude of it's particles, is much more verbose than the *Latin*; it follows that the number of sheets must be very much augmented by the change. The translation also of technical phrases, and the names of writs and other process, were found to be so very ridiculous, (a writ of *nisi prius*, *quare impedit*, *fieri facias*, *habeas corpus*, and the rest, not being capable of an *English* dress with any degree of seriousness,) that in two years time it was found necessary to make a new act, *stat.* 6 *Geo.* 2. *c.* 14; which allows all technical words to continue in the usual language, and has thereby almost defeated every beneficial purpose of the former statute.

What is said of the alteration of language by *stat.* 4 *Geo.* 2. *c.* 26, will hold equally strong with respect to the prohibition of using the antient immutable *court-hand*, in writing the records or other legal proceedings; whereby the reading of any record that is fifty years old is now become the object of science, and calls for the help of an antiquarian. But that branch of it, which forbids the use of abbreviations, seems to be of more solid advantage, in delivering such proceedings from obscurity.

When the substance of the Record is completed, and copies are delivered to the Judges, the matter of law upon which the Demurrer is grounded is upon solemn argument determined by the Court, and judgment is thereupon accordingly given by them. See title *Demurrer*.

An issue of Fact takes up more form and preparation to settle it; for here the truth of the matters alleged must be solemnly examined and established by proper evidence in the channel prescribed by law. To which examination of Facts, the name of *Trial* is usually confined. As to which, see this Dict. titles *Trial*; *Jury*, &c.

If, by the misconduct or inadvertence of the Pleaders, the issue be joined on a fact totally immaterial, or insufficient to determine the right; so that the Court, upon the finding, cannot know for whom judgment ought to be given; the Court will award a *Repleader*; *quod partes replacitent*. As if, in an action on the case in *assumpsit* against an executor, he pleads that he himself (instead of the testator) made no such promise. 2 *Ventr.* 196. So if, in an action of debt on bond, conditioned to pay money *on* or *before* a certain day, the defendant pleads payment *on* the day; which issue, if found for the plaintiff, would be inconclusive, as the money might have been paid *before*. *Stra.* 994. Unless it appears, from the whole record, that nothing material can possibly be pleaded in any shape whatsoever, and then a Repleader would be fruitless. 4 *Burr.* 301, 2. And, whenever a Repleader is granted, the Pleadings must begin *de novo* at that stage of them, whether it be the Plea, replication, or rejoinder, &c. wherein there appears to have been the first defect, or deviation from the regular course. *Raym.* 458: *Salk.* 579: See further title *Repleader*.

4. It hath been already noticed, (see ante 1,) that after the plaintiff has declared, and the defendant appeared, he may be allowed a certain time by *Imparlance* to prepare for his defence. *The practical effect of such Imparlance*, and the time in all cases allowed for the defendant to plead, is here to be noticed; as laid down in *Tidd's Pract.* K. B. where a vast number of authorities on the subject are collated and digested, in the following short and perspicuous manner:

After a *general* Imparlance, the defendant can only plead in *bar* of the action; and cannot regularly plead to the *jurisdiction* of the Court, in *abatement*, or a *tender* and *touts temps prist*. It is then also too late, as has already been hinted, to claim *cognisance*, or demand *oyer* of a deed, &c. After a *special* Imparlance, the defendant may plead in abatement, though not to the jurisdiction of

of the Court. And where the defendant pleaded a misnomer in abatement, after an Imparlance, which was entered thus, "And *A. B.* who was arrested by the name of *A. C.* comes," &c.; the Court held this to be tantamount to a special imparlance. After a *general-special* Imparlance, the defendant may not only plead in abatement of the writ, bill, or count, but also *privilege*, which is a Plea to the *person* of the defendant, affecting the *jurisdiction* of the Court. But he cannot plead a *tender* and *touts temps prist*, after any kind of Imparlance; for, by craving time, he admits he is *not ready*, and so falsifies his Plea. A *tender* must therefore be pleaded before Imparlance, of the same term with the declaration; unless the declaration be delivered or filed so late, that the defendant is not obliged to plead to it that term: and then it may be pleaded, of *course*, within the first four days inclusive of the next term, or even afterwards, upon *motion*, as of the preceding term. See *Tender*.

If the defendant plead in abatement after a *general* Imparlance, to the jurisdiction of the Court after a *special* Imparlance, or a *tender* after any kind of Imparlance, the plaintiff may *demur*, or allege the Imparlance in his replication, by way of *estoppel*; but if the plaintiff, instead of demurring, or alleging the estoppel, reply to the special matter of the Plea, the fault is cured.

Formerly, the defendant had always an Imparlance, to the term next after the return of the process, unless the proceedings were by *original*, upon a *habeas corpus*, for or against *attornies* or other privileged persons, or against *prisoners* in custody of the marshal. On proceedings by *original*, if the action were laid in *London* or *Middlesex*, and the defendant appeared before the *last* return of the term; or if the action were laid in any other county, and the defendant appeared the *first* return of *Hilary* or *Trinity* term, or before the *third* return of *Michaelmas* or *Easter* term; no Imparlance was allowed, without consent or special rule. So upon a *habeas corpus*, returnable in *Michaelmas* or *Easter* term, if the declaration were delivered before the *third* return, the defendant was not entitled to an Imparlance. And where the proceedings were for or against *attornies* or other privileged persons, or against *prisoners* in custody of the Marshal, the defendant was bound to plead, without any Imparlance, the same term the declaration was delivered, if delivered *four* days exclusive before the end of the term. Afterwards, when the clause of *ac-etiam* had been introduced into the bill of *Middlesex*, and other process in trespass, it became a rule, that where the cause of action was specially expressed in the process, the defendant should not have liberty of imparling, without leave of the Court; but should plead within the time allowed, by the course of the Court, to defendants sued by original writ. *Rule, Hil.* 2 *Geo.* 2. And at length it was determined, that even upon a special *capias* by original, the defendant should not be obliged to plead, sooner than upon a common *latitat*. The former distinctions upon this subject being thus gradually abolished, it is now settled, that where the defendant has appeared, or filed bail, upon any kind of process, returnable the *first* or *second* return of any term, if the plaintiff declare in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the declaration should be delivered or filed *absolutely*, with notice to plead within *four* days; or in case the plaintiff declare in any other county, or the defendant live above twenty miles from *London*, within *eight* days *exclusive*, after the delivery or filing thereof; and the defendant must plead accordingly, without any Imparlance: or in default thereof, the plaintiff may sign judgment. *Rule, Trin.* 5 & 6 *Geo.* 2. (*a*).

Where the defendant has not appeared, or filed bail, the rule is, that "upon all process returnable before the *last* return of any term, *where no affidavit is made* and filed of the cause of action, the plaintiff may file or deliver the declaration *de bene esse*, at the return of such process, with notice to plead in *eight* days *exclusive*, after the filing or delivery thereof;" *Rule, Trin.* 22 *Geo.* 3: (and see *Rule, Mich.* 10 *Geo.* 2:) being the same time as is allowed for the defendant to appear and file common bail: and "if the defendant do not file common bail, and plead within the said eight days, the plaintiff, having filed common bail for him, may sign judgment for want of a Plea." *Rule, Trin.* 22 *Geo.* 3. But if the declaration be not filed, until *after* the return of the process, the defendant has *eight* days to plead, from the time of filing it, whenever it may be. And "upon all such process, *where an affidavit is made* and filed of the cause of action, the declaration may be filed or delivered *de bene esse*, at the return of such process, with notice to plead, in *four* days after the filing or delivery, if the action be laid in *London* or *Middlesex*, and the defendant live within twenty miles of *London*; and in *eight* days, if the action be laid in any other county, or the defendant live above twenty miles from *London*;" *Rule, Trin.* 22 *Geo.* 3: being the same time as is allowed for pleading, where the declaration is delivered or filed *absolutely*. And, "if the defendant put in bail, and do not plead within such times as are respectively before-mentioned, judgment may be signed." *Same Rule.* But in all the foregoing cases, the declaration should be delivered, or filed, and notice thereof given, *four* days *exclusive* before the end of the term; a rule to plead duly entered; and a Plea demanded, when necessary. *Rules, Trin.* 5 & 6 *Geo.* 2, *b*: *Mich.* 10 *Geo.* 2. *Reg.* 2: *Trin.* 22 *Geo.* 3.

Where the process is returnable the *last* return of the term, or where it is returnable before, but the declaration is not delivered, or filed, and notice thereof given, *four* days *exclusive* before the end of the term, the defendant is entitled to an Imparlance; and must plead within the first *four* days of the next term, provided the declaration be delivered, or filed, and notice thereof given, before the essoin-day of that term: otherwise, the defendant will be allowed to imparl to the subsequent term. *Rule, Trin.* 5 & 6 *Geo.* 2.

If four terms have elapsed, since the delivery or filing of the declaration, the defendant shall have a whole term's notice to plead, before judgment can be entered against him. *Rule, Trin.* 5 & 6 *Geo.* 2. *b.* Unless the cause have been stayed by *injunction* or privilege; and the notice in such case must be given before the essoin-day of the term: but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment signed, in the vacation.

It remains to be observed, within what time the defendant must plead, after changing the *venue*, demanding *oyer*, or *amending* the declaration. After changing the *venue*, the defendant must plead to the new action, as he should have done in the other, without delay. *Rule, Mich.* 1654. § 5. After the delivery of *oyer*, the defendant

fendant shall have the same time to plead, as he had when he demanded it. See title *Oyer*. And if the plaintiff *amend* his declaration, the defendant shall have *two* days, exclusive of the day of amendment, to alter his first Plea, or plead *de novo*. *Rule, Tr.* 5 & 6 *Geo.* 2.

If the defendant be not ready to plead, by the expiration of the time allowed him for that purpose, his attorney or agent should take out a *summons*, and serve it upon the plaintiff's attorney or agent, requiring him to attend a judge, and shew cause why the defendant should not have further time to plead. When the summons is taken out, and made returnable before the expiration of the time for pleading, it is a stay of proceedings, pending the application: but it is otherwise, when taken out, or made returnable, after the expiration of the time for pleading; nor will it operate as a stay of proceedings, where the object of it is collateral to the time for pleading; as, to discharge the defendant out of custody upon common bail, &c.

The plaintiff's attorney or agent, on being served with the summons, either indorses his consent to an order being made upon it, attends the Judge, or makes default. In the latter case, the defendant's attorney or agent, after waiting an hour, should take out a *second* summons, and after that a *third* (if necessary), which should be respectively served and attended as the first. And if default be made upon three summonses, the Judge, on affidavit thereof, will make an order *ex parte*. But if any one of the summonses be attended, the Judge will make an order upon, or discharge it, as he sees cause; and if he make an order for a month's time to plead, it is understood to mean a *lunar*, and not a *calendar*, month.

The order of a Judge, for time to plead, must be served in like manner as the summons. And it is either upon, or without, terms. The usual terms are, pleading *issuably*, rejoining *gratis*, and taking *short* notice of trial or inquiry. And where the defendant is an *executor* or *administrator*, he must undertake not to plead any judgment obtained against him, since his time for pleading was out; for otherwise he might confess judgments in the mean time, and plead them in bar to the plaintiff's demand.

An *issuable* Plea is a Plea *in chief* to the merits, upon which the plaintiff may take issue, and go to trial. Therefore, a Plea in abatement is not an issuable Plea; nor a false Plea of judgment recovered, or other Plea which does not go to the merits. But a Plea of tender has been deemed an issuable Plea, and also a Plea of the statute of limitations, or that a bail-bond was taken for ease and favour. As to *demurrers*, there is a distinction between a real and fair demurrer, and a demurrer without good cause: The former is an issuable Plea, within the meaning of a Judge's order; the latter is not, but only an evasion of it. By rejoining *gratis* is meant, rejoining without the common four-day rule to rejoin. *Short* notice of trial, in *country* causes, must be given at least *four* days before the commission-day; one day exclusive, and the other inclusive. *Rule, East.* 30 *Geo.* 3. In *town* causes, *two* days notice seems to be sufficient: But it is usual to give as much more as the time will admit of. The defendant, however, is not precluded, by these terms, from demurring to the replication, if there be good cause. *Rule, Trin.* 5 & 6 *Geo.* 2. *b.*

Where the defendant is under a Judge's order to plead issuably, and pleads a Plea which is not issuable, the plaintiff may consider it as a mere nullity, and sign judgment: and where several Pleas are pleaded, one of which is not issuable, it will vitiate all the others. But where it is doubtful whether the Plea be issuable, the better way, in term-time, is to move the Court to set it aside.

Of the Rule to plead, and Demand of a Plea.

If a defendant be bound by rule of Court, or order of a Judge, to plead by a time therein limited, it is incumbent on him to do so; although the plaintiff do not enter any rule to plead, or call for a Plea. *Rule, Trin.* 5 & 6 *Geo.* 2. With this exception, the plaintiff must in all cases enter a rule to plead, whether the defendant have appeared or not; and where the defendant has appeared, he must also demand a Plea, before he can sign judgment.

The Rule to plead is the order of the Court; and may be entered, at any time after the delivery, or filing and notice of the declaration, in term, or within four days after; and *Sunday* is a day within this rule, unless it be the first or last. Anciently, there were two rules given, of *four* days each; the first, *ad respondendum*; the second, *ad respondendum peremptorie*. These were afterwards converted into one *eight*-day rule; but now, "*four* days only shall be allowed the defendant, from the time of giving any rule to plead:" *Rule, Trin.* 1 *Geo.* 2: which four days expire before, with, or after the time for pleading. If they expire before, the plaintiff must wait till the expiration of the time for pleading, before he can sign judgment for want of a Plea: But if they expire with or after that time, "the plaintiff is at liberty to sign his judgment, the day after the rule for pleading is out; the declaration having been regularly delivered or filed, and the defendant or his agent being called upon for a Plea." *Rule, Hil.* 2 *Geo.* 2. *Reg.* 3.

When a rule to plead has been once entered, and the cause stands over to another term, without any further proceeding, a new rule to plead should regularly be entered in that term, to entitle the plaintiff to sign judgment; for all judgments must be entered the same term in which rules are given. Where the declaration is amended, if a rule to plead be entered the same term the amendment is made, though before such amendment, it is sufficient; otherwise a new rule to plead must be entered. And where the plaintiff, after giving a rule to plead, has been delayed by injunction, he may sign judgment after the injunction is dissolved, without a new rule.

The Demand of Plea is a notice in writing from the plaintiff's attorney; and, except where the defendant is in custody of the sheriff, &c. must be made in every case where the defendant has appeared. But before the defendant has appeared, or after the plaintiff has entered an appearance, or filed common bail for him, according to the statute, or where the defendant is in custody of the sheriff, &c. the demand of a Plea is unnecessary. It is usually made *pending* the time for pleading; and the plaintiff cannot sign judgment, till the expiration of twenty-four hours from the time of making it. But if the time for pleading be out, judgment may be signed at any time after the twenty-four hours are expired; and therefore if the Plea be demanded in the morning, the plaintiff

plaintiff is not obliged to wait until the opening of the office, in the afternoon of the following day.

II. When a Criminal is indicted of felony, *&c.* he ought not to be allowed to plead to the indictment till he holds up his hand at the bar, which is in nature of an appearance. See title *Trial.*

The Plea of a prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute, may be either a Plea to the Jurisdiction; a *Demurrer*; a Plea in *Abatement*; a *special Plea* in Bar; or the *General Issue.* See 4 *Comm. c.* 26.

Formerly there was another Plea, that of *Sanctuary,* now abrogated; and as to which, see this Dict. title *Sanctuary.*

The *Benefit of Clergy* used also formerly to be pleaded before trial or conviction, and was called a *Declinatory Plea*; which was the name also given to that of Sanctuary. 2 *Hal. P. C.* 236. But as the prisoner upon a trial has a chance to be acquitted and totally discharged; and, if convicted of a clergyable felony, is entitled equally to his clergy after, as before conviction, this course is extremely disadvantageous, and therefore the Benefit of Clergy is now very rarely pleaded; but if found requisite, is prayed by the Convict before judgment is passed upon him. See titles *Judgment (Criminal)*; *Clergy, Benefit of.*

A Plea to the Jurisdiction is, where an Indictment is taken before a Court that hath no cognizance of the offence; as if a man be indicted for a rape at the Sheriff's tourn; or for treason at the Quarter-sessions: in these or similar cases, he may except to the Jurisdiction of the Court, without answering at all to the crime alleged. 2 *Hal. P. C.* 256.

A Demurrer is incident to criminal cases as well as to civil, see this Dict. title *Demurrer to Indictments.*

A Plea in Abatement is principally for a *misnomer*, a wrong name, or a false addition to the prisoner. As if *James Allen, Gentleman*, is indicted by the name of *John Allen, Esquire*; he may plead that he has the name of *James* and not of *John*, and that he is a *Gentleman* and not an *Esquire*; and if either fact is found by a Jury, then the indictment shall be abated, as writs or declarations may be in civil actions. See *ante*, I. 2. and this Dict. titles *Abatement*; *Misnomer.*

But, in the end, there is little advantage accruing to the prisoner by means of these dilatory Pleas; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his Plea avers to be his true name and addition. For it is a rule, upon all Pleas in Abatement, that he, who takes advantage of a flaw, must at the same time shew how it may be amended.

Special Pleas in Bar go to the merits of the indictment; and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: *A former Acquittal*; *A former Conviction*; *A former Attainder*, or *A Pardon.* There are many other Pleas, which may be pleaded in bar of an appeal; but these are applicable as well to appeals as indictments. See title *Appeal* I.

First, the Plea of *auterfoits acquit*, or *a former acquittal*, is grounded on this universal maxim of the common law of *England*; that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once *fairly* found not guilty upon any indictment, or other prosecution, before any Court, having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal, on an appeal, is a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the Common Law: and therefore, in favour of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were past; by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience, the statute 3 *Hen.* 7. *c.* 1, enacts, that indictments shall be proceeded on, immediately, at the king's suit, for the death of a man, without waiting for bringing an appeal; and that the Plea of *auterfoits acquit*, on an indictment, shall be no bar to the prosecuting of any Appeal. See title *Appeal* I, and, at large, 2 *Hawk P. C. c.* 35.

Secondly, the Plea of *auterfoits convict*, or *a former conviction*, for the same identical crime, though no judgment was ever given, or perhaps will be, (being suspended by the Benefit of Clergy or other causes,) is a good Plea in bar to an indictment. And this depends upon the same principle as the former; that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment is a bar even in another appeal, and much more in an indictment, of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. See 2 *Hawk. P. C. c.* 36. § 10, *&c.*

It is to be observed, that the Pleas of *auterfoits acquit* and *auterfoits convict*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime.

But the case is otherwise, in the Plea of *auterfoits attaint*, or *a former attainder*; which is a good Plea in bar, whether it be for the same or any other felony. For whenever a man is attainted of felony, by judgment of death, either upon a verdict or confession, by outlawry, or, heretofore, by abjuration; and whether upon an appeal or an indictment; he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony. 2 *Hawk. P. C. c.* 36. § 1. And this, because, generally, such proceeding on a second prosecution cannot be to any purpose: for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: so that it is absurd and superfluous to endeavour to attaint him a second time. But to this general rule however, as to all others, there are some exceptions; wherein, *cessante ratione, cessat et ipsa lex.* As, where the former attainder is reversed for error, for then it is the same as if it had never been. And the same reason holds, where the attainder is reversed by Parliament, or the judgment vacated by the King's pardon, with regard to felonies committed afterwards.—Where the attainder was upon indictment, such attainder is no bar to an appeal: for the prior sentence is pardonable by the King; and if that might be pleaded in bar of the appeal, the King might in the end defeat the suit of the Subject, by suffering the prior sentence to stop the prosecution of a second; and then, when the time of appealing is elapsed, granting the delinquent

delinquent a pardon.—An attainder in felony is no bar to an indictment of treason: because not only the judgment and manner of death are different, but the forfeiture is more extensive, and the land goes to different persons.—Where a person, attainted of one felony, is afterwards indicted as principal in another, to which there are also accessaries, prosecuted at the same time; in this case it is held, that the Plea of *auterfoits attaint* is no bar, but he shall be compelled to take his trial, for the sake of public justice: because the accessaries to such second felony cannot be convicted till after the conviction of the principal. *Poph.* 107. But see title *Accessary*. And from these instances it may be collected, that the Plea of *auterfoits attaint* is never good, but when a second trial would be quite superfluous. *See 2 Hawk. P. C. c.* 36. § 1—10.

Lastly, a *Pardon* may be pleaded in bar; as at once destroying the end and purpose of the indictment, by remitting that punishment, which the prosecution is calculated to inflict. See this Dict. title *Pardon*.

Though in civil actions, when a man has his election what Plea in bar to make, he is concluded by that Plea, and cannot resort to another if that be determined against him: (as if, on an action of debt the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet*, as he might at first; for he has made his election what Plea to abide by, and it was his own folly to chuse a rotten defence:) yet in criminal prosecutions, *in favorem vitæ*, as well upon appeal as indictment, when a prisoner's Plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the Court; still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may *plead over* to the felony the general issue, not guilty. 2 *Hal. P. C.* 239. For the law allows many Pleas, by which a prisoner may escape death; but only one Plea, in consequence whereof it can be inflicted; viz. on *the general issue*, after an impartial examination and decision of the facts, by the unanimous verdict of a jury.

The general issue, or Plea of *Not-Guilty*, then, is the only Plea upon which the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of Plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, Not guilty, and give this special matter in evidence. For (besides that these Pleas do in effect amount to the general issue, since, if true, the prisoner is most clearly not guilty,) as the facts in Treason are laid to be done *proditoriè et contra ligeantiæ suæ debitum*; and, in felony, that the killing was done *felonicè*; these charges, of a traiterous or felonious intent, are the points and very gist of the indictment, and must be answered directly, by the general negative, *Not Guilty*; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous Plea for the prisoner. 2 *Hal. P. C.* 258. Thus also, in an indictment for an assault, if the prosecutor struck first, the defendant, is not, as in civil suits, to plead *son assault demesne*, but the general issue, *Not-Guilty*, and give the special matter in evidence.

When the prisoner hath thus pleaded *not guilty*, *non culpabilis*, or *nient culpable*; which was formerly used to be abbreviated upon the minutes, thus, "*non* (or *nient*) *cul.*" the clerk of the assise, or clerk of the arraigns, on behalf of the Crown, replies, that the prisoner is guilty, and that he is *ready* to prove him so. This is done by two monosyllables "*cul. prit.*" which signifies first, that the prisoner is guilty, (*cul. culpable*, or *culpabilis*,) and then that the King is ready to prove him so; *prit præsto sum*, or *paratus verificare*. By this replication, the King and the prisoner are therefore at issue. 4 *Comm.* 339.

Mr. *Christian*, in his note on the passage in the Commentaries, from whence the foregoing is abridged, remarks, that the explanation of *prit* from *præsto sum*, or *paratus verificare*, however ingenious, is inconsistent both with the principles and practice of Special Pleading. After the *general issue*, or the Plea of *Not guilty*, there could be no replication; the words *paratus verificare* could not therefore possibly have been used. This Plea in Latin was entered thus upon the record. *Non inde est culpabilis, et pro bono et malo ponit se super patriam.* After this the Attorney-General, the King's Coroner, or Clerk of Assize, could only join issue by *facit similiter*, i. e. he doth the like. See the *Appendix* § 1. p. iii. at the end of 4 *Comm.*

Mr. *Christian* suggests that *prit* was an easy corruption of *pnt*, written for *ponit (se super patriam)* by the clerk; as a minute that issue was joined; or *pnt se* might be converted into *prist* or *prest*, as it is sometimes written.

In confirmation of the conjecture that *prist* is a corruption of *pnt*, it is observable that the Clerk of the Arraigns, immediately after the Arraignment, writes upon the indictment, over the name of the prisoner, *puts*.

But however it may have arisen, the joining of issue, (which, though now usually entered on the record, is no otherwise joined in any part of the proceedings,) seems to be clearly the meaning of this obscure expression; which has puzzled our most ingenious etymologists, and is commonly understood as if the Clerk of the Arraigns, immediately on Plea pleaded, had fixed an opprobrious name on the prisoner, by asking him, "*Culprit!* how wilt thou be tried?" for immediately upon issue joined, it is inquired of the prisoner, by what trial he will make his innocence appear. This form has at present reference to appeals and approvements only, wherein the appellee has his choice, either to try the accusation by battel or by jury. But upon indictments, since the abolition of ordeal, there can be no other trial but by jury, *per pais*, or by the country: and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and the Country, if a Commoner; and, if a Peer, by God and his Peers; (*Kel.* 57: *St. Tr. passim*;) the indictment, if in treason, is taken *pro confesso*: and the prisoner, in cases of felony, is adjudged to stand mute, and, if he perseveres in his obstinacy, shall be convicted of the felony. See title *Mute*.

When the prisoner has thus put himself upon his trial, the clerk answers, in the humane language of the Law, which always hopes that the party's innocence, rather than his guilt, may appear, "God send thee a good deliverance." And then they proceed, as soon as conveniently may be, to the trial; as to which, see titles *Jury*; *Trial*; and the references there.

PLEAS OF THE SWORD, *Placita ad gladium.*] *Ranulph*, the third Earl of *Chester*, in the second year of King *Henry* III. granted to his Barons of *Cheshire* an ample charter of liberties; *Exceptis placitis ad gladium meum pertinentibus. Rot. Pat. in Archivis Regis infra castellum Cestriæ.* 3 *E.* 4. *m.* 9.—The reason was, because *William* the Conqueror gave the Earldom of *Chester* to his kinsman *Hugh*, commonly called *Lupus*, ancestor to this Earl *Ranulph*, *tenere ita liberè per gladium, sicut ipse Rex* Willielmus *tenuit Angliam per coronam.* And consonant thereto in all indictments for felony, murder, &c. in that county palatine, the form was anciently, *Contra pacem Domini comitis, gladium, & dignitates suas*, or *Contra dignitatem gladii Cestriæ.* These were the Pleas of the dignity of the Earl of *Chester.* Sir *Peter Leicester's Hist. Antiq.* 164. *Cowell.*

PLEBANIA, *Plebanalis ecclesia.*] A mother church, which has one or more subordinate chapels. *Cowell.*

PLEBANUS, A Rural Dean; because the deaneries were commonly affixed to the *Plebaniæ*, or chief mother church within such a district, at first commonly of ten parishes: but it is inferred from divers authorities, that *Plebanus* was not the usual title of every rural dean; but only of such a parish priest in a large mother church, exempt from the jurisdiction of the Ordinary, who had the authority of a rural dean committed to him by the Archbishop, to whom the church was immediately subject. *Whartoni Ang. Sacr. Pa.* 1. 569: *Reg. Eccl. Christ. Cantuar. MS.* See title *Dean.*

PLEDGE, *plegius*, may be derived from the Fr. *pleige, fidejussor.*] As *pleiger aucun*, i. e. *fide jubere pro aliquo*, to be surety for a person; in the same signification is *plegius* used by *Glanvil, lib.* 10. *c.* 5, and *plegiatio* for the act of suretiship, in the interpreter of the *Grand Customary* of *Normandy, c.* 60, 89, 90: *Charta de Foresta.* This word *plegius* is used also for frankpledge sometimes, as in the end of *William* the Conqueror's laws, set out by *Lambard* in his *Archaionom.* 125, and these are called capital pledges. *Kitch.* 10. See 4 *Inst.* 180.

When writs were delivered to the Sheriff to be by him returned into *C. B.* he was obliged, before the return, to take Pledges of prosecution, which, when the fines and amercements were considerable, were real and responsible persons, and answerable for those amercements. But they being now so inconsiderable, there are only formal Pledges entered, *viz. John Doe* and *Richard Roe.* But there is a difference in debt and in trespass; for in trespass the attachment of the goods is the first process, and because the defendant is thereby hurt, therefore the writ commands the Sheriff to take Pledges, before he executes the process. But in debt, they begin with a summons, and so the defendant is not hurt in the first instance, therefore there is no command in the writ to the Sheriff to take Pledges, but unless he does, there is not a sufficient authority from the return to warrant further Process, unless Pledges are put in above, as in *B. R.* they always do on the bill. The reason why Pledges were not taken in Chancery, but committed to the Sheriff, was, that he, living in the county, was supposed to know who were sufficient security, and being to levy the amerciament afterward, they were to take ample security for them. *Gilb. Hist. of C. B.* 6, 7. See tit. *Process.*

The plaintiff's Pledges, that he shall prosecute his suit, may be entered at any time pending the action; and the putting in of Pledges is now a mere form. See the *stats.* 16 & 17 *C.* 2. *c.* 8; 4 & 5 *Ann. c.* 16; 5 *Geo.* 1. *c.* 13; under title *Amendment* in this Dictionary.

PLEDGES OF GOODS for money, &c. See titles *Pawn*; *Bailment.* There is also a Pledge in law; where the law, without any special agreement between parties, doth enable a man to keep goods in nature of a distress. &c. 2 *Comm.* 452. See title *Distress.*

PLEDGERY or PLEGGERY, Fr. *plegerie*, Lat. *plegiagium.*] Suretiship, an undertaking or answering for. "Also the appellant shall require the constable and mareschal to deliver his pledges, and to discharge them of their *Pledgery*; and the constable and mareschal shall ask leave of the King to acquit his pledges, after the appellant is come into his lists," &c. *Cowell.*

PLEDGING; See *Pawn*; *Bailment.*

PLEGIIS ACQUIETANDIS, A writ that anciently lay for a Surety, against him for whom he was surety, if he payed not the money at the day. *F. N. B.* 137. If the party who becomes surety be compelled to pay the money, &c. he shall have his writ against the person who ought to have paid the same. And if a man be surety for another, to pay a sum of money, so long as the principal debtor hath any thing, and is sufficient, his sureties shall not be distrained, by the statute of *Magna Charta*: if they are distrained, they shall have a special writ on the statute to discharge them. *Magna Charta* 9 *H.* 3. *c.* 8. But if the plaintiff sue the sureties in *C. B.* where the principal is sufficient to pay the debt, whether the sureties may plead that, and aver that the principal debtor is sufficient to pay it; or whether they shall have a writ to the Sheriff not to distrain in such a case, hath been made a question. *New Nat. Br.* 306. It was adjudged, (*Pasch.* 43 *Ed.* 3,) that the writ *de Plegiis acquietandis* lieth without any specialty shewed thereof; as it has been held, that a man shall have an action of debt against him who becometh pledge for another, upon his promise to pay the money, without any writing made of it. *New Nat. Br.* 270, 304. But notwithstanding these old Authorities, there seems now little doubt, that a man may maintain his action against the surety, as soon as the cause of action accrues, without any regard to the circumstances of the principal. And it hath been determined, that if a surety in a bond pays the debt of the principal, he may recover it back from the principal, in an action of assumpsit for so much money paid and advanced to his use. 2 *Term Rep.* 105.

PLENA FORISFACTURA, A forfeiture of all that one hath, &c. See *Forfeiture.*

PLENARTY, The abstract of the adjective *plenus*; and is used in Common Law in matters of benefices, where a church is *full* of an incumbent; *Plenarty* and vacation, or avoidance, being direct contraries. *Staundf. Prærog. c.* 8. *f.* 32: *Stat. Westm.* 2. *c.* 5. A clerk inducted may plead his patron's title; and, being instituted by the space of six months, his patron may plead *Plenarty* against all common persons. *Plowd.* 501. Institution by six months, before a writ of *quare impedit* brought, is a good *Plenarty* against a common person; but *Plenarty* is no plea against the King, till six months after induction. *Co. Litt.* 119, 344. *Plenarty* for six months is not generally pleadable against the King, because he may bring *quare impedit* at any time, and *nullum tempus occurrit regi*: though, if a title devolves to the

King by lapse, and the patron presents his clerk by usurpation, who is instituted and inducted, and enjoys the benefice for six months, this is such a *Plenarty* as deprives the King of his presentation. 2 *Inst.* 361. And *Plenarty* by six months after institution is a good plea against the Queen Consort; although she claims the benefice, of the King's endowment. *Wood's Inst.* 160. Upon collation of a Bishop by lapse, *Plenarty* is not pleadable; for the collation doth not make a *Plenarty*, by reason the Bishop would be judge in his own cause: the bishop must certify whether the church is full, or not; and his collation is interpreted to be no more than to supply the cure till the patron doth present; and it is for this cause a *Plenarty* by collation cannot be pleaded against the right patron: but, by collation, *Plenarty* may be a bar to any lapse of the Archbishop, and to the King, though it is no bar to the right patron. 6 *Rep.* 50: *Co. Litt.* 344: *Cro. Jac.* 207. *Plenarty* or not shall be tried by the Bishop's certificate, being acquired by institution, which is a spiritual act; but in a *quare impedit*, the *Plenarty* must be tried by a jury. 6 *Rep.* 49.

By the Common Law, where a person is presented, instituted, and inducted to a church, the church is full, though the person presented be a layman; and shall not be void, but from the time of the deprivation of the incumbent for his incapacity. *Count. Pars. Compan.* 99. See titles *Advowson*; *Parson*; *Quare Impedit*.

PLENE ADMINISTRAVIT. A plea pleaded by an executor or administrator, where they have administered the deceased's estate faithfully and justly before the action brought against them. See title *Executor* VI. 1. 2.

On *Plene Administravit* pleaded by an executor, if it be proved that he hath goods in his hands which were the testator's, he may give in evidence that he hath paid to the value of his own money, and need not plead it specially; for when an executor, before the action, hath paid the money for a debt in equal degree with that demanded by plaintiff, he may plead *fully administered* generally, and give the special matter in evidence. 2 *Lil. Abr.* 330. And where a testator, or intestate, was indebted to the executor or administrator, upon bond, they may plead *Plene Administravit*, and give their own bonds in evidence against any other bond; so likewise upon an *indebitatus*; having the privilege of paying themselves first. *Ibid.* *Plene Administravit* is no plea, where an executor, &c. is sued in the *debet* and *detinet*; because he is charged for his own occupation 1 *Mod.* 185. And if *Plene Administravit* be pleaded, omitting the words, *And that he hath not goods or chattels of the testator, nor had on the day of exhibiting the bill aforesaid, or at any time after,* &c. it is bad, on a demurrer, and not helped by verdict. *Cro. Jac.* 132: 3 *Lev.* 28. Where the executor, &c is to shew specially, how he hath administered the goods; vide *Aleyn* 48.

PLIGHT, An old *English* word, signifying sometimes the estate, with the habit and quality of the land; and extends to rent-charge, and to a possibility of dower. *Co. Litt.* 221, *b*.

PLONKETS, A kind of coarse woollen cloth. See *stat.* 1 *R.* 3. *c.* 8.

PLOW-ALMS, *Eleemosyna aratrales.*] Anciently 1*d.* paid to the church for every plow-land. *Mon. Angl.* 1. 256.

PLOW-BOTE, A right of tenants to take wood to repair ploughs, carts, and harrows; and for making rakes, forks, &c. See 2 *Comm.* 35.

PLOW-LAND, Is the same with a hide of land; and a hide or Plow-land, it is said, do not contain any certain quantity of acres: but a Plough-land, in respect of repairing the highway was settled at 50*l.* a year, by the statute 7 & 8 *W* 3. *c.* 29.

PLOW-SILVER, In former times, was money paid by some tenants, in lieu of service to plough the lord's lands. *W. Jones* 280. See titles *Socage*; *Tenure*.

PLURALITY, *Pluralitas*] Signifies the plural number; mostly applied to such clergymen who have more benefices than one: and *Selden* mentions trialities and quadralities, where one person hath three or four livings. *Seld. Tit. Hon.* 687.

Plurality of livings is, where the same person claims two or more spiritual preferments, with cure of souls; in which case the first is void *ipso facto*, and the patron may present to it, if the clerk be not qualified by dispensation, &c.; for the law enjoins residence, and it is impossible that the same person can reside in two places at the same time. *Count. Pars. Compan.* 94.

By the Canon Law, no ecclesiastical person can hold two benefices with cure *simul & semel*; but that upon taking the second benefice, the first is void: but the *Pope*, by usurpation, did dispense with that law; and, at first, every Bishop had power to grant dispensations for Pluralities, till it was abrogated by a general Council, held *anno* 1273, and this constitution was received till the statute 21 *H.* 8. *c.* 13. *Moor* 119.

The *stat.* 21 *H.* 8. *c.* 13, ordains, that if any parson having one benefice with cure, of the yearly value of 8*l.* or above, in the King's books, accepts of another's benefice with cure, and is instituted and inducted, then the first shall be void: so that there may be a plurality within the statute; and a Plurality by the Canon Law. 2 *Lutw.* 1306.

The power of granting dispensations to hold two benefices with cure, &c. is vested in the King by the aforesaid statute: and it has been adjudged, that a dispensation is not necessary for a Plurality, where the King presents his chaplain to a second benefice; for such a presentment imports a dispensation, which the King hath power to grant, as supreme Ordinary; but if such a chaplain be presented to a second benefice by a Subject, he must have a dispensation, before he is instituted to it. 1 *Salk.* 161.

The Archbishop's dispensation and King's confirmation regularly are necessary to hold Pluralities: and the statute 21 *H.* 8. *c.* 13, ought to be construed strictly, because it introduces non-residence, and Plurality of benefices, against the Common Law. *Jenk. Cent.* 272.

A man, by dispensation, may hold as many benefices, without cure, as he can get; and likewise so many, with cure, as he can get, all of them, or all but the last, being under the value of 8*l.* *per annum* in the King's books; if the person to be dispensed withal, be not incapable thereof. Yet if a dispensation is made to hold three benefices with cure, whereof the first is of the yearly value of 8*l.* the dispensation is void, unless it be in case of the King's chaplains, &c. who may hold three benefices with cure, above the value of 8*l.* a year, where one of them is in the King's gift. *Hob.* 148.

If there be two parsons of one church, and each parson hath the intire cure of the parish, and their benefices be severally of the value of 8*l.* *per annum*, if one dies and the other succeeds, this is a Plurality within the statute. *Cro. Car.* 456. And though the act mentions instituted and inducted, when one is instituted into the second church, the dispensation to hold two benefices comes too late; though he be afterwards inducted; for, by institution, the church is full of the incumbent. 4 *Rep.* 79.

By the statute, if the first benefice be of the value of 8*l.* a year, or more, by the acceptance of a second, it is actually void, to all intents: but benefices under that value, being not within the statute, are only avoidable by accepting a second, and not void on such Plurality, without a declaratory sentence, &c. *Mallor. Q. Imped.* 104. In these cases it hath been held, that the value of livings, to make Pluralities, shall be determined by the King's books in the first-fruits office: though the Court hath been divided, whether the value should be taken as it was in the King's books, or according to the true value of the living. 2 *Lutw.* 1301.

No deanery shall be taken, by our law, to be a benefice with cure, to need dispensation on having another benefice, &c. 1 *Leon.* 316. And a parsonage and vicarage make not a Plurality, but are only one cure; the vicarage being endowed out of the parsonage. *Cro. Jac.* 691. See further this Dictionary, titles *Parson*; *Chaplain*; *Advowson*.

PLURIES, A writ that issues in the third place, after two former writs have been disobeyed. See title *Capias*.

POCKET SHERIFF, A person appointed by the King himself to be Sheriff who is not one of the three nominated in the Exchequer. See title *Sheriff*.

POCKET OF WOOL. A quantity of wool, containing half a sack. 3 *Inst.* 96.

POISON. The killing a person by poisoning was, heretofore, held more criminal than any other murder, because of its secrecy, which prevents all defence against it; whereas most open murders give the party killed some opportunity of resistance. For this reason offenders, guilty of poisoning any person, were anciently judged to a severer punishment than other offenders. See 3 *Nels. Abr.* 363.

Richard Cole was attainted of High Treason, for putting Poison into a pot of pottage boiling in the Bishop of *Rochester*'s kitchen, by which two persons were poisoned; and there was a particular statute made for his punishment, *viz.* by the statute 22 *H.* 8. *c.* 9, it was enacted, That *he* should be boiled to death. *Anno* 22 *H.* 8. *Richard Cole*'s case. *Dict.* see title *Homicide* III. 3.

If a man persuade another to drink a poisonous liquor, under the notion of a medicine, who afterwards drinks it in his absence; or if *A.* intending to poison *B.* put Poison into a thing, and deliver it to *D.* who knows nothing of the matter, to be by him delivered to *B.* and *D.* innocently delivers it accordingly, in the absence of *A.*; in this case the procurer of the felony is as much a principal, as if he had been present when it was done. And so likewise all those seem to be, who are present when the Poison was infused, and privy and consenting to the design; but persons, who only abet their crime by command, counsel, &c. and are absent when the Poison was infused, are accessaries only. 2 *Hawk. P. C* *c.* 29. § 11. See titles *Accessary*; *Homicide*.

POLE; see *Perch*.

POLEIN, Was a shoe, sharp or picked, and turned up at the toe; it first came in use in the reign of *William Rufus*, and by degrees became of that length, that in *Richard* the Second's time they were tied up to the knees with gold or silver chains: they were restrained *Anno* 4 *Ed.* 4, but not wholly laid aside till the reign of *Hen.* VIII. See *Malms. in Vit. Wil.* 2.

POLICE, not improbably from Πόλις, a city.] The term public Police and Œconomy is applied by *Blackstone* to signify the due regulation and domestic order of the kingdom: but is more generally applied to the internal regulations of large cities and towns, particularly of the Metropolis; whereby the individuals of the State, generally speaking, or of any town or city within itself, like members of a well governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective situations. See 4 *Comm. c.* 13. *p.* 162.

The Police of the Metropolis (says an Author who has written on this subject with great accuracy and after much research) is a system highly interesting to be understood: but a vast proportion of those who reside in the capital, as well as the multitude of strangers who resort to it, have no accurate idea of the principles of organisation, which move so complicated a machine: establishing those conveniences and accommodations, and preserving that regularity which prevails, in the particular branches of Police, which may be denominated *Municipal Regulations*. These relate to *paving*, *watching*, *lighting*, *cleansing*, and *removing nusances*; *furnishing water*; the mode of *building houses*; the system established for *extinguishing fires*; and for regulating *coaches*, *carts*, and *carriages*; with a variety of other useful improvements tending to the comfort and convenience of the inhabitants. See *A Treatise on the Police of the Metropolis*, 8vo. 1796.

To administer that branch of the Police which is connected with the prevention and suppression of *crimes* twenty-six Magistrates, namely, the Lord Mayor and Aldermen, sit in rotation every forenoon, and take cognizance of all complaints within the ancient jurisdiction of the city of *London*. See this Dictionary, title *London*.

For every other part of the Metropolis, twenty-four stipendiary Magistrates are appointed; *three* at *Bow-street*, under a jurisdiction long established; and *twenty-one*, by *stat.* 32 *Geo.* 3. *c.* 53. (generally called the *Police-Act*). These twenty-one have seven different offices or Courts of Justice assigned them, at convenient distances, in *Westminster*, *Middlesex*, and *Surry*; where they sit every day, (*Sundays* excepted,) both in the morning and evening, for the purpose of executing those multifarious duties connected with the office of a Justice of Peace, which occur in large societies. This institution was suggested to the Legislature in consequence of the pressure felt by the public from the want of some regular tribunals, where the system should be uniform, and where the purity of Magistrates, and their regular attendance, might insure to the lower orders of the People, the adjustment of their differences, at the least possible expence; and the assistance of gratuitous advice in every difficulty, as well as official aid, in all cases within the sphere of the Magistrate.

The duty of these stipendiary Magistrates (in conjunction with the county Magistrates) extends also to several judicial proceedings, where, in various instances, they are empowered and required to hear and determine offences in a summary way; particularly in cases relating to the *customs* and *excise*; *game-laws*; *pawnbrokers*; *labourers*; and *apprentices*, &c. They act ministerially in licensing and regulating *public-houses*; punishing *vagrants*; removing the *poor*, &c. &c. And examine into complaints in criminal cases, capital and others, for the purpose of sending them to superior tribunals for trial.

These extensive duties, and others, which it is to be wished these Magistrates could perform towards the *prevention* of crimes, the Author of the above Treatise thinks would be much facilitated, by the establishment of a fund, from whence to bestow rewards on constables and others for detecting, and on accomplices for discovering, offenders.

The following abstract of the *Civil Municipal Regulations* of the Police of the Metropolis above alluded to, and the various statutes by which they are regulated, is extracted, and corrected from the same Author:

The Metropolis having by degrees been extended so far beyond its ancient limits, every parish, hamlet, liberty, or precinct, now contiguous to the cities of *London* and *Westminster*, may be considered as a separate municipality; where the inhabitants regulate the Police of their respective districts, raise money for paving the streets, and assess the householders for the interest thereof, as well as for the annual expence of watching, cleansing, and removing nusances and annoyances. These funds, as well as the execution of the powers of the different statutes creating them, (excepting where the interference of Magistrates is necessary,) are placed in the hands of trustees; of whom, in many instances, the Churchwardens or parish officers, for the time being, are members *ex officio*; and, by these different bodies, all matters relating to the immediate safety, comfort, and convenience of the Inhabitants, are managed and regulated; under the provisions of statutes made in the last and present reign, as well public as private, applicable to the Metropolis in general, and to the various parishes, hamlets, and liberties in particular; former statutes for these purposes having been found inadequate.

The *stat.* 10 *Geo.* 2. *c.* 22, established a system for paving, lighting, cleansing, and watching the city of *London*; but the statute which removed signs and sign-posts, balconies, spouts, gutters, and those other encroachments and annoyances which were felt as grievances by the Inhabitants, did not pass till the year 1771. The *stat.* 11 *Geo.* 3. *c.* 29, contains a complete and masterly system of that branch of the Police which is connected with Municipal Regulations; and may be considered as a model for every large city in the Empire. This statute extends to every obstruction by carts and carriages, and provides a remedy for all nusances which can prove, in any respect, offensive to the inhabitants; and special Commissioners, called Commissioners of Sewers, are appointed to ensure a regular execution. This statute is improved by *stat.* 33 *Geo.* 3. *c.* 75; by which the power of the Commissioners is increased, and some nusances, arising from butchers, dustmen, &c. further provided against.

In the city and liberty of *Westminster* also many new and useful Municipal Regulations have been made within the present century. The *stats.* 27 *Eliz.* and 16 *Car.* 1, (private acts,) divided the city and liberties into twelve wards, and appointed twelve burgesses to regulate the Police of each ward; who, with the Dean or High Steward of *Westminster*, were authorized to govern this district of the Metropolis.

The *stat.* 29 *Geo.* 2. *c.* 25, enabled the Dean or his High Steward to choose eighty constables in a court-leet; and the same act authorized the appointment of an Annoyance-Jury of forty-eight Inhabitants, to examine weights and measures, and to make presentments of every public nusance either in the city or liberty. The *stat.* 31 *Geo.* 2. *cc.* 17, 25, improved the former statute, and allowed a free market to be held in *Westminster*. The *stat.* 2 *Geo.* 3. *c.* 21, amended by *stat* 3 *Geo* 3. *c.* 23, extended and improved the System for paving, cleansing, lighting, and watching the city and liberty, by including six other adjoining parishes and liberties in *Middlesex*. The *stats.* 5 *Geo.* 3 *cc.* 13, 50; 11 *Geo.* 3. *c.* 22; and particularly 14 *Geo.* 3. *c.* 90, for regulating the nightly watch and constables, made further improvements in the general System; by which those branches of Police in *Westminster* are at present regulated.

In the Borough of *Southwark* also, the same System has been pursued: the *stats.* 23 *Geo.* 2. *c.* 9; 6 *Geo* 3. *c.* 24, having established a System of Regulation applicable to this district of the Metropolis; relative to markets, hackney coach stands, paving, cleansing, lighting, watching, marking streets, and numbering houses; and placing the whole under the management of Commissioners.

In contemplating the great leading features of Municipal Regulation, nothing places *England* in a situation so superior to most others, with regard to cleanliness, as the System of the *Sewers*; under the management of special Commissioners in different parts of the kingdom; introduced so early as by *stat.* 6 *H.* 6. *c.* 5, and organized by *stats.* 6 *H.* 8. *c.* 10: 23 *H.* 8 *c.* 5: 25 *H.* 8. *c.* 10; afterwards improved by *stats.* 3 & 4 *E.* 6. *c.* 8: 1 *Mary st.* 3. *c.* 11: 13 *Eliz.* *c.* 9: 3 *Jac.* 1. *c.* 14: 7 *Ann.* *c.* 10. See this Dictionary, title *Sewers*.

Sewers being early introduced into the Metropolis, as well as other cities and towns, in consequence of the general System, every offensive nusance was removed through this medium; and the Inhabitants early accustomed to the advantages and comforts of cleanliness.

Another feature, strongly marking the wisdom and attention of our ancestors, was the introduction of *water*, for the supply of the Metropolis, in the reign of King *James* I. in 1604. The improvements which have been since made, in extending the supplies, by means of the *New River*, and also by the accession of the *Thames* water, through the medium of the *London*-bridge, *Chelsea*, *York*-Buildings, *Shadwell*, and other water-works, it is not necessary to detail.

The *stat.* 9 *Ann.* *c.* 23, first established the regulations with regard to *hackney-coaches* and chairs, which have been improved and extended by several subsequent statutes; see title *Coach*: and *stat.* 33 *Geo.* 3. *c.* 75. § 15—19, which enlarges the power of the Magistrates of the

the city of *London*, to compel the appearance of hackney coachmen residing out of their immediate jurisdiction.

Carts and other carriages have also been regulated by different statutes, *viz. stats.* 1 *Geo.* 1. *st.* 2. *c.* 57: 18 *Geo.* 1. *c.* 33: 24 *Geo.* 1. *c.* 43: 30 *Geo.* 2. *c.* 22: 7 *Geo.* 3. *c.* 44: 24 *Geo.* 3. *st.* 2. *c.* 27; which contain a very complete System relative to this branch of Police: by virtue of which, all complaints arising from offences under these acts are cognizable by the Magistrates in a summary way.

The *stat.* 34 *Geo.* 3. *c.* 65, established an improved System with regard to *watermen* plying on the river *Thames*. The Lord Mayor and Aldermen are empowered to make rules and orders for their government; and, with the Recorder of the city, and Justices of the Peace of the respective counties and places next adjoining to the *Thames*, between *Gravesend* and *Windsor*, have power, within those districts, to put in execution not only the *laws*, but also the rules and orders, relative to such watermen: such rules and orders to be from time to time sent to the public office in the Metropolis, and to the clerks of the peace of the counties joining the *Thames*, within thirty days after they are made or altered. The Magistrates have power given them to fine watermen for extortion and misbehaviour; and persons refusing to pay the legal fares may be compelled so to do with all charges, or be imprisoned for a month; and persons giving watermen a fictitious name or place of abode shall forfeit 5*l*.

Offences relative to the driving of *cattle* improperly, usually termed Bullock-hunting, are also determinable by the Magistrates in the same summary way, under the authority of *stat.* 21 *Geo.* 3. *c.* 67; by which every person is authorized to seize delinquents guilty of this very dangerous offence.

The last great feature of useful Police to be here mentioned, consists in the excellent Regulations relative to *buildings*, projections, and *fires*: first adopted after the fire of *London* in 1666; and extended and improved by several statutes from that time down to the *stat.* 14 *Geo.* 3. *c.* 78. This statute repeals all former acts, and besides regulating the mode of building houses in future, so as to render them ornamental, commodious, and secure against the accidents of fire, established other useful rules for the prevention of this dreadful calamity; by rendering it incumbent on the churchwardens to provide engines and ladders; to fix fire plugs at convenient distances on all the main pipes in the parish; to fix a mark in the street where they are to be found, and where there is a key ready to open the plugs: rewards are also payable to persons bringing the engines to a fire. See this Dictionary, title *Fire*.

These outlines will explain, in some measure, by what means the System of the Police, in most of its great features, is conducted in the Metropolis: to which it may be necessary to add, that the *Beadles* of each parish are the proper persons to convey informations, in case of any inconvenience or nusance, by which a stranger may have it removed. The City and Police Magistrates, in their respective Courts, if not immediately authorized to remedy the wrong complained of, will point out how it may be effected.

It is however earnestly to be wished, that one general act, comprehending the whole of the Regulations made for the city of *London*, so far as they will apply, could be extended to every part of the Metropolis and its suburbs; that a perfect uniformity might prevail in the penalties and punishments for the several offences, against the comfort and convenience of the Inhabitants.

POLICY OF ASSURANCE, or Insurance, from the *Ital. Poliza*, i. e. *schedulo & assecuratio.*] An instrument entered into by insurers of ships and merchandise, *&c.* to merchants, obligatory, for the payment of the sum insured, in case of loss. *Merch. Dict.* See title *Insurance.*

POLLARDS, or Pollengers. Such trees as have been usually cropped, therefore distinguished from timber-trees. *Plowd.* 469.

POLL. A deed poll is distinguished from one indented, the latter being polled or shaved quite even. See *Deed*.

POLLS. Where one or more jurors are excepted against, it is called a challenge to the Polls. *Co. Lit.* 156. See title *Jury*.

POLYGAMY, *Polygamia*.] The having a plurality of wives or husbands at once. See title *Bigamy*; To which is here to be added, that by *stat.* 35 *Geo.* 3. *c.* 67, persons convicted of Bigamy, are made subject to the penalty inflicted on *Larceny*, i. e. transportation, *&c.*

PONDUS, Poundage; which duty, with that of tonnage, was anciently paid to the King according to the weight and measure of merchants goods. *Cowell.*

PONDUS REGIS, The standard weight appointed by our ancient Kings. And what we now call *Troy Weight*, was this *Pondus Regis*, or *Le Roy Weight*, with the scales in *equilibrio*: whereas the *aver du pois* was the fuller weight, with a declining scale. *Cowell.* See titles *Troy Weight*; *Weights*.

PONE, A writ whereby a cause depending in the county, or other inferior Court, is removed into the Common Pleas; and sometimes into the King's Bench: as when a replevin is sued by writ out of Chancery, *&c.* then if the plaintiff or defendant will remove that plea out of the county-court into *C. B.* or *K. B.* it is done by *Pone*. *F. N. B.* 4, 69: 2 *Inst.* 339 The writ *Pone* lies to remove actions of debt, and of detinue, writ of right, of nusance, *&c.* *New Nat. B. R.*

A *Pone* to remove causes is of this form: Put *at the petition of* A. B. *before our Justices at* Westminster, *the day* &c. *the plea which is in your Court by our writ, between the said* A. B. *and* C. D. *of*, &c. *and summon the said* C. *that he be then there to answer the said* A. *&c.* This form is only applicable to the Common Pleas; but if the writ of *Pone* be to remove a cause into *K. B.* it should be worded thus: Put at the petition of, *&c. before us, wheresoever*, &c. *the plea*, &c.

Pone is also a writ willing the Sheriff to summon the defendant to appear and answer the plaintiff's suit on his putting in sureties to prosecute: it is so called from the words of the writ, *Pone per vadium & salvos plegios*; "Put, by gage and safe pledges, *A. B.* the defendant." This is a writ not issuing out of Chancery, but out of the Court of Common Pleas, being grounded on the non-appearance of the defendant, at the return of the original writ: and thereby the Sheriff is commanded to attach him, by taking gage, that is, certain of his goods, which he shall forfeit if he doth not appear; or by making him find safe pledges or sureties, who shall be amerced

amerced in case of his non-appearance. *Finch*, *L.* 345: *Ld Raym.* 278: *Dalt. Sher. c.* 32. See title *Process*.

This is also the *first* and immediate process, without any previous summons, upon actions of trespass *vi et armis*, or for other injuries which, though not forcible, are yet trespasses against the peace, as *deceit* and *conspiracy*; where the violence of the wrong requires a more speedy remedy; and therefore the original writ commands the defendant to be at once attached without any precedent warning. 3 *Comm. c.* 19. *p.* 280, cites *Finch. L.* 305, 351. See title *Original*.

PONENDIS IN ASSISIS, A writ granted by the statute of *Westm.* 2. 13 *E.* 1. *st.* 1. *c.* 38; which statute shews what persons sheriffs ought to impanel upon assises and juries. *Reg. Orig.* 175: *F. N. B.* 165. See title *Jury*.

PONENDUM IN BALLIUM, A writ commanding that a prisoner be bailed in cases bailable. *Reg. Orig.* 133.

PONENDUM SIGILLUM AD EXCEPTIONEM, A writ by which justices are required to put their seals to exceptions, exhibited by defendant against the plaintiff's evidence, verdict, or other proceedings before them, according to the statute *Westm.* 2. 13 *E.* 1. *st.* 1. *c.* 31. See title *Bill of Exceptions*.

PONE PER VADIUM; See *Pone*.

PONTAGE, *Pontagium*] A contribution towards the maintenance, or re-edifying bridges. *Stat. Westm.* 2. *c.* 25. It may also signify toll taken to this purpose of those who pass over bridges. *Stats.* 1 *Hen.* 8. *c.* 9: 22 *Hen.* 8. *c.* 5: 39 *Eliz. c.* 25. See *Trinoda Necessitas*.

PONTIBUS REPARANDIS. A writ directed to the Sheriff, &c. requiring him to charge one or more, to repair a bridge, to whom it belongeth. *Reg. Orig.* 153. See *Pontage*.

POOR.

PAUPER] A poor person, who is a burden and charge upon a parish.

The Poor our Law takes notice of are, 1st, Poor by *impotency* and defect; as the aged or decrepid fatherless or motherless; Poor under sickness; and persons who are Idiots, Lunaticks, lame, blind, &c. these the Overseers of the Poor are to provide for.

2dly, Poor by casualty; such as House-keepers, decayed or ruined by unavoidable misfortunes: poor persons overcharged with children; labourers disabled; and these, having ability, are to be set to work; but if not able to work, they are to be relieved with money.

3dly, Poor by prodigality and debauchery, also called thriftless Poor; as idle slothful persons, pilferers, vagabonds, strumpets, &c. who are to be sent to the House of Correction, and be put to hard labour, to maintain themselves; or work is to be provided for them, that they do not perish for want; and if they become impotent by sickness, or if their work will not maintain them, there must be an allowance by the Overseers of the Poor for their support. *Dalt. c.* 73. *s.* 35.

The Law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient to all the necessities of life, from the more opulent part of the community, by means of the several statutes enacted for relief of the Poor. 1 *Comm.* 131.

The Poor of *England*, till the time of *Henry*-VIII. subsisted entirely upon private benevolence and the charity of well-disposed Christians: and the Poor in *Ireland* have, to this day, no relief except from private charity.—By an ancient statute, 23 *E.* 3. *c.* 7, it was enacted, that none should give alms to a beggar able to work.—It appears by the *Mirror*, that at the Common Law the Poor were to be "sustained by parsons, rectors of the church, and the parishioners; so that none of them die for default of sustenance." *Mirr. c.* 1 § 3.—And by *stats.* 15 *R.* 2. *c.* 6: 4 *H.* 4. *c.* 12, impropriators were obliged to distribute a yearly sum to the poor parishioners: and to keep hospitality. (See titles *Parson*; *Appropriators.*)—By *stats.* 12 *R.* 2. *c.* 7: 19 *H.* 7. *c.* 12, the Poor were directed to abide in the cities and towns wherein they were born, or such wherein they had dwelt for three years: which seems to be the first rudiment of parish settlements.

No compulsory method, however, was marked out for the relief of the Poor, till the *stat* 27 *H.* 8. *c.* 25; under which, provision was ordered to be made for the impotent Poor.—Before that time, the Monasteries were their principal resource; and among other bad effects, which attended these institutions, it was not perhaps one of the least, (though frequently esteemed quite otherwise,) that they supported and fed a very numerous and very idle Poor; whose sustenance depended upon what was daily distributed in alms at the gates of the Religious Houses. But, upon the total dissolution of these, the inconvenience of thus encouraging the Poor in habits of indolence and beggary, was quickly felt throughout the kingdom; and abundance of statutes were made in the reign of King *Henry* VIII. and his children, for providing for the Poor and impotent; which, the preambles to some of them recite, had of late years greatly increased. These Poor were principally of two sorts; sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing to exercise any honest employment. To provide, in some measure, for both of these, in and about the Metropolis, *Edward* VI. founded three Royal Hospitals; *Christ*'s and *St. Thomas*'s, for relief of the impotent, through infancy or sickness; and *Bridewell*, for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the Poor throughout the Kingdom at large: and therefore, after many other fruitless experiments, by *stat.* 43 *Eliz. c.* 2, *Overseers of the Poor* were appointed in every parish: whose office and duty are principally these: *first*, to raise competent sums for the necessary relief of the Poor, impotent, old, blind, and such other being poor, and not *able* to work, and them only; and, *secondly*, to provide work for such as are able and cannot otherwise get employment: but this latter part of their duty, which, according to the wise regulations of that salutary statute, should go hand in hand with the other, is now most shamefully neglected. 1 *Comm. c.* 9. *pp.* 359, 360.

The Learned Commentator then proceeds to state the evils arising from what, he considers as, a deviation from the original purpose of the Poor Laws, by accumulating all the Poor in one Workhouse; a practice which he condemns

condemns as destructive of the industry and domestic happiness of the Poor. He also reprobates the sub-division of parishes; the plan of confining the Poor to their respective districts; and the laws passed since the Restoration, as having given birth to the intricacy of our Poor Laws, by multiplying and rendering more easy the methods of gaining settlements: and, in consequence, creating an infinity of expensive Law-suits between contending neighbourhoods, concerning those settlements and removals. He then proceeds to state the general heads of the Law relative to the settlement of the Poor; which, he truly observes, by the resolutions of the Courts of Justice thereon, within a century past, are branched into a great variety. "And yet, he concludes, notwithstanding the pains that have been taken about these Laws, they still remain very imperfect, and inadequate to the purposes they are designed for: a fate that has generally attended most of our statute Laws, where they have not the foundation of the Common Law to build upon. When the Shires, the Hundreds, and the Tithings were kept in the same admirable order in which they were disposed by the great *Alfred*, there were no persons idle, consequently, none but the impotent that needed relief: and the *stat* 43 *Eliz. c.* 2, seems entirely founded on the same principle. But when this excellent scheme was neglected and departed from, we cannot but observe, with concern, what miserable shifts and lame expedients have from time to time been adopted, in order to patch up the flaws occasioned by this neglect. There is not a more necessary or certain maxim, in the frame and constitution of Society, than that every individual must contribute his share, in order to the well being of the Community: and surely they must be very deficient in sound policy, who suffer one half of a parish to continue idle, dissolute, and unemployed; and, at length, are amazed to find that the industry of the other half is not able to maintain the whole." 1 *Comm. c.* 9 *ad finem.*

After reading the foregoing observations, it may seem a hopeless, and almost an useless, task, to enter into any detail of the Poor Laws. This has, however, been here attempted: the source from which the following Abridgment has been chiefly drawn, is Mr. *Const*'s enlarged and valuable edition of *Bott's Poor Laws*; to which, and *Burn's Justice*, title *Poor*, the studious Inquirer into particulars should refer. Since the publication of those works, two statutes have been passed, which, in some measure, obviate several objections of the Learned Commentator, and of other writers, to the policy of some parts of this Law.—These are introduced under the proper divisions of the Subject; which seems most conveniently to arrange itself in the following manner:

I. *Of* OVERSEERS OF THE POOR.
- 1. *Their Appointment.*
- 2. *Their Accounts.*
- 3. *Their Indemnity and Punishment.*

II. *Of* POOR-RATES.
- 1. *What Persons and Property are liable to.*
- 2. *The Manner and Purpose of raising them.*
- 3. *Of Appeals against them.*
- 4. *How to be levied; and of rating in Aid.*

III. 1. *Of relieving and maintaining the Poor.*
- 2. *Of Relations maintaining each other.*

IV. *Of the* SETTLEMENTS *of Poor People.*
- 1. *By Birth.*
- 2. *By Parentage.*
- 3. *By Marriage.*
- 4. *By Residence, in particular Cases.*
- 5. *By renting a Tenement.*
- 6. *By Payment of public Taxes.*
- 7. *By serving an Office.*
- 8. *By Hiring and Service.*
- 9. *By Apprenticeship.*
- 10. *By Estate.*

V. *Of Certificates.*

VI. *Of the Removal of Poor Persons.*

I. 1. THE CHURCHWARDENS of every parish, and *four, three,* or *two* substantial householders there, shall be nominated yearly in *Easter-Week*, or within a month after *Easter*, under the hands and seals of two Justices of the County, to be *Overseers* of the Poor of that parish. *Stat.* 43 *Eliz c.* 2 § 1.

In the counties of *Lancashire*, and others specified, and many (any) other counties, where, by reason of the largeness of the parishes, they (the parishes) cannot reap the benefit of the said *stat* 43 *Eliz. c.* 2, *two*, or *more* Overseers shall be yearly chosen and appointed, according to the directions of the said *stat.* 43 *Eliz.* within every *township* or *village* within such county. *Stat.* 13 & 14 *Car.* 2. *c* 12. § 21.—This statute extends to towns and villages, in extra parochial places, as well as within parishes; and, by an equitable construction, to all counties, though not named in the statute.

If any Overseer so appointed shall die, or remove from the place, or become insolvent before the expiration of his office, two Justices, on oath made thereof, may appoint another in his stead, until new Overseers are appointed. *Stat.* 17 *Geo.* 2. *c.* 38. § 3.

The Mayor and Magistrates of every city, being Justices of the Peace, shall have the same authority, within their respective jurisdictions, as is given to two or more Justices of the Peace. *Stat.* 43 *Eliz. c.* 2. § 8.—If any parish happen to extend into more counties than one, or part to lie within a city, and part without, the Magistrates of the city and Justices of the County shall only intermeddle in so much of the parish as lies within their several jurisdictions respectively; but the Churchwardens and Overseers of such parish shall nevertheless duly execute their office, without dividing themselves, in all places within the said parish. § 9.—If, in any place, there be no nomination of Overseers, every Magistrate in the division, and every Mayor, Alderman, and head officer of the Corporation, where the default shall happen, shall forfeit 5*l.* § 10.

In stating the determinations which have been made by the Courts, in explanation of the above statutes, and the several others hereafter referred to, it would be too minute a labour to quote every authority. Mr. *Const*, as well as Mr. Justice *Burn*, and his Continuators, having so carefully and accurately gone over the whole subject,

an abridgment of the decisions related by them must, in the first instance, be considered as sufficient. When it is necessary to examine more minutely, recourse must be had to those Authors; and to the cases which they have given so much at length, as generally to preclude the necessity of consulting any other Reports.

The Appointment must expressly state, that the persons named in it are appointed "Overseers of the Poor." It must also state, that they are "substantial householders there," that is, within the parish; and the county in which the parish lies must be named. An appointment to a *precinct* is not good; but an appointment to a *hamlet* is: the appointment need not state the Justices to be of the division; or that one of the Justices is of the Quorum. *Stat.* 26 *Geo.* 2. *c.* 27.

All persons, of whatever age or sex, are *primâ facie* liable to serve, unless they can shew some legal exemption to except them out of it. Thus it is said, that all Peers of the Realm, by reason of their dignity; Clergymen, by reason of their order; Members of Parliament, by reason of the privileges of Parliament; and Attornies, by reason of the necessity of their attendance at *Westminster-Hall*; are exempted from being chosen Overseers, even where there is a special custom in the parish for every inhabitant to serve: it is admitted that practising Barristers also have the same privilege, for the like reason. It has also been held, that an Alderman of *London* ought to be discharged from serving parish offices, on account of his necessary attendance on the duties of the Corporation. Persons also of particular professions and descriptions are exempted, by divers statutes, from serving the office of Overseer. The President and Members of the Colleges of Physicians, in *London*. *Stat.* 32 *H.* 8. *c.* 40. Surgeons, being freemen of the Corporation of Surgeons, in *London*, for so long a time as they shall practise. *Stat.* 18 *Geo.* 2. *c.* 15. And it is said, that Surgeons in general are exempted, by special custom, at Common Law. Apothecaries, free of the Apothecaries' Company, and every person using and exercising the said art, who has served *as an apprentice* to it for seven years, while they practise. *Stat.* 6 & 7 *W.* 3. *c.* 4. Dissenting Ministers, who shall conform to the directions of the Toleration Act, *stat.* 1 *W.* & *M.* *c.* 18; and Dissenters in general, are allowed to serve the office by deputy. See title *Dissenter*. Prosecutors of felons, to conviction, who shall apprehend and take any person guilty of burglary, or privately stealing from the shop. *Stat.* 10 & 11 *W.* 3. *c.* 23. See title *Reward*. Soldiers, serving in the militia during the time of service. *Stat.* 26 *Geo.* 3. *c.* 107. § 103.—And, perhaps, it may be considered, that those who are exempted from serving the office of *Churchwarden*, are also exempted from serving the office of *Overseer*: See this Dictionary, title *Churchwarden*. It has also been said, that persons, who are only occasional residents in a parish, ought not to be appointed; and it seems clear, that absentees, or persons who do not reside, but only hold land, in the parish, cannot be chosen. But it is settled that a Woman, or a Justice of the Peace, or an Officer upon half-pay, may be appointed, if there are no other more substantial or proper persons in the parish, who are eligible to the office. But, unless there is a positive exemption, the Justices have a discretionary power, to appoint such persons in the parish, as they think most proper, to execute the office.

The appointment of Overseers must be under the hands and seals of two Justices, pursuant to the direction of the *stat.* 43 *Eliz.* *c.* 2; and, therefore, it cannot be made by the Sessions, nor by the Mayor of a Corporation, conjointly with the Justice of a County; but, if there should happen to be only one Justice in a county, perhaps he alone may appoint. It is, however, completely determined, that the two Justices must sign and seal the appointment in the presence of each other, for it is not merely a ministerial, but a judicial, act, wherein the Justices are to exercise their discretion.

The appointment, though made on a *Sunday*, is good, provided it be within *Easter week*, or within a month after; but if the *Sunday* be *Easter Sunday*, the Court will take it to be *primâ facie* clandestine and bad, but it will be good unless the collusion be made to appear; although *Sunday* is considered as an improper day for making an appointment of Overseers: an order also, appointing Overseers, in obedience to a *mandamus*, is good, although made above a month after *Easter*; so also an appointment of an Overseer *for the year next ensuing* will be understood to be for the Overseer's year.

The Justices cannot appoint more than four Overseers for any parish, unless the parish be divided into two or more divisions or townships, each separately maintaining its own Poor; but the Court will not quash an order appointing one Overseer; especially if it do not appear that other Overseers were not appointed by other orders.

It seems to be settled, that no Overseers can be appointed for any place that is not, in contemplation of Law, a Vill; and, therefore, if a place that is extra-parochial come within the notion of a vill, Overseers may be appointed for the purpose of obliging the Inhabitants to provide for their own Poor. But it is a subject that has been much litigated what kind of place shall be so considered. *Coke* describes a vill thus: "*Villa est ex pluribus mansionibus vicinata*;" and it seems to be taken generally, that wherever there is a constable, the place over which he presides shall be considered a township. It has been determined, that a place consisting of two houses, or of a castle and an alehouse, or of a capital mansion house, and three keepers' lodges in the parish adjoining, though the lodges were converted into farms, were not vills. The number of houses, however, or the size of the place is not the only distinguishing feature of a vill; for where a place, consisted of a capital mansion house, and a large farm-house thereto belonging, of the yearly value of 200*l.* and also of three other large farm houses, with three other farms; the Court refused to grant a *mandamus* to appoint Overseers, because it did not appear that the place had ever had a constable, or even been reputed to be a vill. So also it has been determined, that the scites of ancient Cathedrals, Colleges, and Inns of Courts, are extra-parochial; and not being vills, either legally or by reputation, cannot have Overseers appointed to them. But if an extra-parochial place be a vill by reputation, it may have Overseers appointed, although it consist only of a mansion-house and a farm-house, occupied by different persons, and the property of one: and where the Sessions, on an appeal from an appointment of Overseers, adjudge the place to be a vill, this is conclusive; for then it is perfectly immaterial of what number of houses or persons it consists: but if the Sessions set forth the facts upon which

which their judgment is founded, the Court of King's Bench will consider whether they have rightly concluded the place to be a vill.

The Justices ought not to appoint separate Overseers for distinct parts of a parish, under *stat.* 13 & 14 *Car.* 2. *c.* 12, unless such separate appointments are necessary; and this necessity can only be evinced by the inability of a parish, to reap the benefit of the *stat.* 43 *Eliz. c.* 2; of which inability, the circumstances of a township having, for sixty or seventy years, had separate Overseers, and maintained its own Poor, independently of the parish at large, is pregnant evidence; and, therefore, where a parish consists of several *townships*, some of which have immemorially maintained their own Poor, the Court will grant a *mandamus* for the appointment of separate Overseers for the remaining townships. And when a parish is thus divided into separate townships, each township is to be considered as a distinct parish. But it is decided, that a parish shall not be thus divided, unless the Sessions *find it as a fact* that the parish could not reap the benefit of the *stat.* 43 *Eliz. c.* 2: and this in a case where the parish had immemorially been divided into two separate *districts*, making separate rates which were afterwards blended together, and divided in certain proportions; and there had been more than four Overseers; and a Constable for the hamlet part of the parish.

Persons aggrieved by any thing done or omitted by the Churchwardens or Overseers, or the two Justices, may, on giving *reasonable notice* to the Churchwardens, &c. appeal to the next General or Quarter Sessions; and if it shall appear to the Sessions that reasonable notice were not given, they shall adjourn it to the next Quarter Sessions, and then and there finally determine the same, giving reasonable costs, &c. *Stat.* 17 *Geo.* 2. *c.* 38. § 4. See title *Sessions*.

The appointment cannot be removed into the Court of K. B. before the time for appealing is expired, for it would deprive the party of this right of appeal. This appeal may be made as well by the parishioners as by the persons who are appointed Overseers.

2. It is provided, that Overseers shall, within *four* days after the end of their year, and after other Overseers nominated, make and yield up to *two Justices*, true and perfect accounts of all monies by them received, or rated and assessed, and not received; and also such stock as shall be in their hands, or in the hands of the Poor to work, and of all other things concerning their office; and pay over the balance to the succeeding Overseers. *Stat.* 43 *Eliz. c.* 2. § 2.—The succeeding Overseers may, by distress, levy the sums of money or stock which shall be behind, upon any account so made; in defect of distress, the offender may be committed to the common gaol until payment of the arrears: *two* Justices may commit Overseers, who shall *refuse* to account, until they make a true account, and pay over the balance in their hands. § 4.

The Overseers shall not bring into their account any money, given to the relief of a poor person, not registered in the parish books, as a person entitled to receive collections, on pain of 5*l*. *Stat.* 19 *Geo.* 1. *c.* 7. § 2.

The Overseers shall, within *fourteen* days after other Overseers are appointed, deliver in, *to such succeeding Overseers*, a true and just account, in writing, fairly entered in a book or books to be kept for that purpose, and signed by the Overseers; such account to be verified on oath before one Justice, who shall sign and attest the caption of the same at the foot of the account; and the Overseers shall deliver over all the stock, and pay the balance, remaining in their hands, to their successors; these books of account to be carefully preserved in some public place; and to be open at all seasonable times to the inspection of any person assessed, and copies thereof delivered, if required. *Stat.* 17 *Geo.* 2. *c.* 38. § 1. If any Overseer shall refuse or neglect to account and pay the balance, as aforesaid, *two* Justices may commit such Overseer until he complies. § 2.—If an Overseer shall remove, he shall previously deliver accounts and papers, and pay the balance aforesaid to the Churchwarden or other Overseer; and if any Overseer shall die, his executors or administrators shall, within forty days after his decease, deliver all things, concerning his office, to the Churchwarden or other Overseer, and pay the balance out of assets, before any of the other debts are paid and satisfied. § 3.—The succeeding Overseers may levy arrears of rates due to their predecessors; and, out of the money, reimburse, to their predecessors, sums expended for the use of the Poor, and which are allowed to be due to them upon their accounts. § 11.

The authority given by the *stat.* 43 *Eliz. c.* 2, to commit, upon the non-delivery of the account within the time limited, extends only to Overseers, and not to Churchwardens; and if the latter are committed for a default, as Overseers, they must be so named. The power of stating and allowing the accounts at the end of the year, must be executed by the Justices themselves; for they cannot delegate any other person to perform this office. The account delivered must be a particular account, and not merely what the Overseer has received and paid in gross; but the Justices cannot commit if an account be actually delivered, though it is objectionable; they must go into it, hear the objections, strike out what is amiss, and balance the account; and if, after the accounts are passed, they appear to be fraudulent, the remedy is to indict the Overseers. After the Justices have examined, they are to allow the account; and if they refuse to administer the oath prescribed by *stat.* 17 *Geo.* 2. *c.* 38, in verification of the account, the Overseer may have a *Mandamus* to compel them. A *Mandamus* will also lie, on behalf of the new Overseers, to compel the old Overseers to deliver over the book of Poor's-rates, and all other public books and papers in their custody relating to the office. Overseers must account *yearly*, although they may be appointed for several years successively.

If any person shall find themselves aggrieved by any act done by the Churchwardens and Overseers, or by the two Justices, they may, by *stat.* 43 *Eliz. c.* 2. § 4. appeal to the General Quarter Sessions. And also by *stat.* 17 *Geo.* 2. *c.* 38. § 4. (See *ante* I. 1.) If any person shall have any material objection to such account or any part thereof, such person giving *reasonable notice* to the Churchwardens, &c. may appeal to the next General or Quarter Sessions, and the Justices there assembled shall receive such appeal, and finally determine the same.

The Sessions, upon an appeal against the allowance of Overseers' accounts, may, if they see reason, disallow of the accounts, and order the Overseers to pay over such balances as they shall adjudge to be due to the parish; but if they refuse so to do, the Sessions cannot commit, but must levy the arrears pursuant to the direction

section of the *stat.* 43 *Eliz. c.* 2. § 4. So also the Sessions may, upon an appeal, set aside the allowed account, and order a re-examination of the account by two Justices; but the accounts must be previously allowed by two Justices, or the Sessions cannot receive an appeal, and this allowance must appear on the face of the order; but objections may be made to the accounts before the appeal, for the inhabitants are aggrieved as soon as the money is assessed. Great doubts have been entertained as to the time when the appeal is to be brought; and it has been said, that if the accounts are passed before one Justice, under 17 *Geo.* 2. *c.* 38, that the appeal must be to the next Sessions; but that if they are passed before two Justices, under the 43 *Eliz. c.* 2, the appeal may be at any distance of time; but with respect to a Poor's-rate, it has been determined, that the latter statute repeals the former, and therefore the appeal must be in all such cases to the next Sessions, after the publication of the rate.

It seems that if Overseers have laid out their money upon the maintenance of the Poor, they may, previously to their going out of office, make a rate for the relief of [illegible] and reimburse themselves out of it; but they cannot be reimbursed after they are out of office; for even the Sessions cannot order the succeeding Overseers to pay any sums omitted to be charged in the ac[illegible] although such sums are found to be due to the [illegible], and consented to be paid by a vestry of the [illegible]; but they may order one Overseer to reimburse [illegible] of money already raised.

The balance must be paid over to the succeeding Overseers, notwithstanding a vestry may be willing to let the old Overseers retain it, in order to discharge the expences of a law suit, or a surgeon's bill incurred on account of the Poor; nor can they take credit in their accounts for money paid, as a salary to an assistant Overseer, although such assistant Overseer be appointed with such salary at a vestry meeting.

As Overseers are not compellable, under *stat.* 17 *G.* 2. *c.* 38, to give in their accounts until fourteen days after *Easter*, the sums of money they may receive in their official capacity, are not due until that time is expired; and therefore, if an Overseer become bankrupt, such money cannot be proved against his estate before his accounts are delivered in.

If any action of trespass or other suit shall be brought against any person taking a distress, making of any sale, or any other thing done by authority of the act, they may plead that it was done by virtue of the act; and if a verdict be for the defendant, or the plaintiff be nonsuit, [illegible] appearance, the defendant shall recover [illegible] costs. *Stat.* 43 *Eliz. c.* 2. § 19.

If any action upon the case, trespass, battery, or false imprisonment, shall be brought against any Overseer, or any in aid of him, for any thing touching and concerning his office, the action shall be laid in the county where the fact was done; and he may plead generally; and, on a verdict in his favour, or if the plaintiff be nonsuit, or suffer any discontinuance, or the fact is not proved to be committed within the county, the defendant shall have double costs. *Stats.* 7 *Jac.* 1. *c.* 5: 21 *Jac.* 1. *c.* 12.

When any distress shall be made for a Poor's-rate, the distress itself shall not be deemed unlawful, nor the parties making it deemed trespassers, on account of any defect or want of form in the warrant for the appointment of such Overseers; or in the rate of assessment; or in the warrant of distress thereon; nor shall the party distraining be deemed a trespasser *ab initio*, on account of any subsequent irregularity; but the parties injured may have their action of *trespass*, or on the *case*, at their election; and, if the plaintiffs recover, they shall have full costs; provided no such plaintiffs shall have any action for such irregularity, if tender of amends hath been made before action brought. *Stat.* 17 *Geo.* 2. *c.* 38. § 8.

No action shall be brought against any constable or other officer, (and it has been decided that Overseers are officers within this statute,) or person acting under his authority, for any thing done under a warrant, under the hand and seal of any Justice, until demand made, and left at the usual place of his abode, signed by the party demanding, of a perusal and copy of the warrant, and the same has been refused for six days: and after complying with such demand, if any action be brought, without making the Justice who signed it defendant, on producing and proving the warrant at the trial, the Jury shall find for the defendant, notwithstanding any defect of jurisdiction: and if the action be brought *jointly* against the Justice and the officer, then, on proof of such warrant, the Jury shall find for such officer, notwithstanding such defect of jurisdiction: and if a verdict shall be given against the Justice, the plaintiff shall recover against him the costs which he is liable to pay to the officer acquitted. *Stat.* 24 *Geo.* 2. *c.* 44. § 6.—And where in such case the plaintiff shall obtain a verdict against a Justice, and the Judge shall certify, that the injury complained of was wilfully and maliciously committed, he shall have *double costs.* § 7.—But no such action shall be brought, unless commenced within six calendar months after the act committed. § 8.

It has been decided that the *stats.* 7 *Jac.* 1. *c.* 5: 21 *Jac.* 1. *c.* 12, giving double costs, do not extend to ecclesiastical matters; as, if a Churchwarden present a man upon a pretended crime of incontinency; or a constable present a person as an inhabitant of a parish, when he is only an occupier of lands therein, for non-payment of charges towards the repair of the church: and to entitle an Overseer to the double costs, it must be certified, by the Judge who tries the cause, that the Overseer was acting in the execution of his office: if, however, there is a special verdict in a case where an Overseer is defendant; and it appears by the facts found in such verdict, that the act for which the action is brought, was done by virtue or reason of his office, the master must tax double costs, though there is no certificate or allowance by the Judge who tries the cause.

As the law hath provided these protections to Overseers, acting properly in their office, so also it has inflicted punishments on them for misbehaviour; besides those already noticed on their failing to deliver their accounts, and hereafter as to the removal of the Poor.

The Churchwardens and Overseers shall meet together at least once a month in the church, upon a *Sunday* in the afternoon, after divine service, to consider of business respecting the Poor; upon pain of forfeiting *twenty shillings* for every neglect. *Stat.* 43 *Eliz. c.* 2. § 2.

The Justice, before whom any idle and disorderly person shall be convicted, may order the Overseer to pay 5*s.* to the person who apprehended the offender; and, if he

he shall refuse or neglect so to do, it may be levied by distress. *Stat.* 17 *Geo* 2. *c.* 5. § 1.

If any Overseer (or other officer of any parish) shall neglect, or refuse to obey and perform the several orders and directions in the statute particularized, or any of them, if no penalty is specifically provided, he shall forfeit, not exceeding 5*l.* nor less than 20*s.* *Stat.* 17 *Geo.* 2. *c.* 38. § 14.

If any Overseer, intrusted to make payments for the use of the Poor, shall make such payments in base or counterfeit coin, the offence may be heard in a summary way; and, on conviction, he shall forfeit from 10*s.* to 20*s.* for each offence *Stat.* 9 *Geo.* 3. *c.* 37. § 7.

Overseers also may be indicted for refusing to accept of and undertake the office, or for refusing to make a rate to reimburse constables for the apprehending of vagrants, under *stat.* 17 *Geo.* 2. *c.* 1. § 1; or for refusing to account, within the time limited, for the monies they have received for the relief of the Poor; or for not relieving the Poor, or for relieving them unnecessarily; or for disobeying a legal order of Justices; or for not receiving a pauper when sent to their parish under an order of removal; or for cruelty in the removal of poor women with child: so also the Court will grant an information against an Overseer, for fraudulently contriving to remove a poor person in order to prevent him from becoming chargeable to the Parish; or for contriving to marry a pauper, or for giving a man money to marry a woman who was with child, in order to prevent the child from being a burden to the parish; but the Court will not grant an information against an Overseer, for making an alteration in a Poor's-rate, after it had been allowed by two Justices, if the alteration appear to have been made with the approbation of the Justices. Nor can an Overseer be adjudged guilty of absenting himself from the monthly meetings appointed by *stat.* 43 *Eliz.* *c.* 2, until he has had personal notice of his appointment; and if he be appointed, under *stat.* 13 & 14 *Car.* 2. *c.* 12, an Overseer in an extra-parochial place, he is not liable to this penalty.

An information, in nature of a *Quo Warranto*, will not lie against Overseers; nor can the Justices in Sessions award an *Attachment* against those officers.

II. 1. The Churchwardens and Overseers, or the greater part of them, shall take order, from time to time, with the consent of two Justices, *to raise*, weekly or otherwise, (by taxation of every inhabitant, parson, vicar, and every other occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwood in the parish, in such competent sums as they shall think fit): 1. A sufficient stock of materials to set the Poor on work. 2. Competent sums of money to relieve the lame, impotent, old, blind, and indigent. 3. To put out poor children apprentices. And, 4. For doing and executing all other things concerning the premises, as to the Overseers shall seem convenient. *Stat.* 43 *Eliz.* *c.* 2. § 1.—The Mayors, or other Head Officers of Corporations, shall have the same authority within their respective jurisdictions, both in and out of Sessions, as is given to county Justices; and every Alderman of *London*, within his ward. § 8.

As this latter clause restrains the Magistrates and Justices, to the limits of their respective jurisdictions, the Justices for a county cannot allow a rate made by the Overseer of a borough. 2 *Const* 62.

The Justices of the counties, in which separate Overseers shall be appointed for particular *townships* and *villages*, shall have the like authority to raise and levy monies, and to do and execute every thing in such townships and villages, as is given them in any parish where the Overseers are appointed, under *stat.* 43 *Eliz.* *c.* 2. *Stat.* 13 & 14 *C.* 2. *c.* 12. § 22.

The Justices and parish officers of a distinct jurisdiction, as of the precinct of the cathedral church at *Norwich*, may, therefore, be compelled, by a *Mandamus*, to make a rate for the relief of the Poor. 1 *Const* 61.

Public notice in the church shall be given, by the Overseers, of every Poor's-rate allowed by the Justices, the next *Sunday* after such allowance; and no rate shall be valid, to collect and raise the same, unless such notice shall have been given. *Stat.* 17 *Geo.* 2. *c.* 3. § 1.

In trespass, on a distress for non-payment of a Poor's-rate, the publication of the rate must be proved; and the Court of K. B. will not grant a *Mandamus* to compel Justices to sign a warrant of distress under a Poor's-rate, if it has not been duly published. But a special case, respecting the legality of a rate, is good, though it does not appear therein that that rate was duly published.

The Overseers shall permit the inhabitants of the parish, &c. to inspect every such rate at all seasonable times, paying 1*s.*; and shall give copies at the rate of 6*d.* for every twenty-four names; or, on refusal or neglect, forfeit 20*l.* *Stat.* 17 *Geo.* 2. *c.* 3. § 2, 3.

True copies of all Poor's-rates shall be entered in a book, within fourteen days after the determination of all appeals; to be attested by the Overseers, and kept for public perusal, under penalty of from 5*l.* to 20*s.* where no other penalty is provided. *Stat.* 17 *Geo.* 2. *c.* 38. § 13, 14. Overseers, where there are no Churchwardens, may do, perform, and execute, and shall be liable as to all matters relating to the Poor. § 15.

The rate which the Churchwardens and Overseers are, by these statutes, authorised to make, must be assessed only on the visible property, both real and personal, which the occupier or owner may have within the parish; and not according to the amount of the property which a person, rated as an inhabitant, may have out of the parish.

The general rule seems to be, that every species of property, lying within the parish, which has an occupier, and from which an annual profit arises, is rateable to the Poor.

Land; is to be rated according to its value, of which the improved rents may be taken as evidence. Therefore, if a person rent a quantity of land, together with a mineral spring thereout arising, at a gross yearly rent, it is rateable to the Poor in respect of the whole of such rent; for the value of the land is improved by the profits of the spring. But, as the improved rent is supposed to be in proportion to the quantity of stock it keeps or furnishes, the value of the stock ought not to be assessed; unless, indeed, a farmer, under colour of keeping stock for the purposes of husbandry, or as the produce of his farm, do buy and sell articles, such as hay, corn, straw, horses, in the way of trade. So also lands, though given to an hospital, are still rateable to the Poor; for a man cannot, by appropriating his land to charitable

these purposes, exempt them from taxes to which they were before liable. See *post*.

Tithes; are, in contemplation of law, a tenement, and are holden by the parson as an occupier; and, therefore, the parson is rateable for the amount of his tithes to the Poor; but the assessment must be made personally on him, although he has leased them to one or more of the parishioners. So (*b*), if a sum of money be paid annually in lieu of tithes, it is rateable to the Poor; although the amount of such money be settled under a composition between the parson and the parish, and confirmed by act of Parliament. But if an act of Parliament say, that the inhabitants of such a place shall pay tithes to the vicar, and give an option to the parishioners, either to pay such tithes personally, or to raise such a sum as will pay it to the vicar, "clear [illegible] deduction or charges, whether parochial or parliamentary, in lieu of his tithes," this payment is not liable to the Poor's-rate. Tithes which are payable by custom only, as on fish, are liable to be rated to the Poor.

Rents; Quit-rents, it has been said, are rateable to the Poor; but this opinion may be doubted; for it is positively laid down in one case, that the quit-rents and casual profits of a manor are not rateable to the Poor's tax; for the property, though permanent, does not produce a regular annual profit, but is merely accidental: but Ground-rents are certainly liable.

Waste lands; By *stat.* 17 *Geo.* 2. c. 37, waste and barren lands, when improved, and adjudged assessable by the Sessions, shall be assessed to the Poor's rate of the nearest parish: and the Justices, in General Quarter Sessions, may hear and determine disputes concerning the same. And it has been adjudged, that if a waste be inclosed in the parish of *A.* on which the landholders of the parish of *B.* have right of common appurtenant, the allotment given in lieu of that right, shall be assessed to the Poor of the parish of *A.*

Tolls; which a corporation is entitled to, and which yield a certain annual profit, are rateable to the Poor. So also, it has been determined, that the grantee of the right of navigation of the river *Ouse*, between *Erith* and *Bedford*, is rateable to the Poor in each of those parishes, in which a sluice is erected; and for the passing of which certain tolls are established, although the grantee live, and tolls are collected in a different parish. So also, where, by a navigation-act, the proprietor was entitled to a toll of [illegible] per ton, for goods carried up the river *Kennet*, from *Reading* to *Newbury*, or down the river from *Newbury* to *Reading*, and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection; it was held, that the tolls for goods, carried the whole voyage from *Reading* to *Newbury*, were rateable in *Newbury*, though in fact they were collected at [illegible] lock, in the parish of *Padworth*, about midway between *Newbury* and *Reading*, by the agent of the proprietor. So also, where a person is entitled to a dish or measure, by way of toll, of all the gotten in certain lands, he is rateable to the Poor in respect of the profits produced by his right of toll. So also, it has been determined, that the barge-way in the hamlet of *Hampton Wick*, purchased by the city of *London*, for the more effectually completing the navigation of the *Thames*, is rateable to the Poor in respect of the tolls and duties [illegible]

thereon collected. But where the right of using a certain path or way is a mere easement; or if *A.* has an exclusive right of using a way-leave over lands which he holds in common with *B.* paying *B.* certain sums yearly, and has the privilege of using another way-leave, occupied by *C.* paying to *C.* so much a ton for the goods carried over it; *A.* is not liable to be rated to the Poor in respect of either of such way leaves: nor are the tolls collected at a light-house, of all ships passing or coming into the harbour, rateable, unless it be found as a fact, that the person rated is the occupier of the house.

Conventicles; a house converted into a conventicle, if not used for any other purpose than that of public worship, is not rateable to the Poor; nor is the preacher of the sect, unless he be permitted by his congregation to dwell therein, rateable as the occupier thereof: but if a private building used, and, by covenant, always to be used, as a Chapel, for religious purposes, be let out so as to produce an annual profit, either by the rent of the pews, or by any other means, such a building is then rateable to the Poor.

An alms-house; wholly occupied by objects of the charity, and from which no profits arise, is not rateable to the Poor; and if lands be given to a charitable purpose, as for building a school or alms-house, by a private act of Parliament, in which it is expressed, that such lands shall be free from "all public taxes," they are not liable to be rated to the Poor. But the master of a free school, appointed by the minister and inhabitants, under a charitable trust, whereby a house, garden, &c. were assigned for his habitation, for the teaching of ten poor boys, is rateable for his occupation of the same. 6 *Term Rep.* 332.

Market and fair; the lessee of a stall in a market town, to which the lessee resorts every market-day weekly, to sell his wares, is not liable to be rated to the Poor in respect thereof; nor is a person liable to be assessed for the profits of a fair.

Palaces; A Bishop is liable to be rated to the Poor in respect of his palace; for there can be no prescription against this rate. So also, where the scite of a royal palace is demised to a Subject, for a certain permanent interest, the grantees that occupy it are rateable for such property to the Poor. So also, though Royal palaces, in the hands of the Crown, are not rateable; yet, if they, or the respective apartments in them, are separately occupied, the occupiers are liable to be rated, whether they pay for such occupation by rent or services.

Army; stables rented by a Colonel of a regiment, by order of the Crown, for the use of the regiment, are not liable to be rated to the Poor. So also, the battery-house, at *Seaford*, which is the property of the Crown, is not liable to be rated, although the master-gunner live in the house; for, being removable at pleasure, he has no permanent occupation; but if the Session find the fact positively, that he is the occupier, and rate him, such rate is good. But the owner of stables in the parish of *Marylebone*, rented by a Colonel of a troop of horse, by the authority of the King, for the use of the troop, is liable to be assessed for them, to the rates collected in that parish, under *stat.* 10 *Geo.* 3. c. 23.

Parks; the Ranger of a Royal park is rateable, as such, to the Poor, for all the inclosed lands therein, in the parish.

parish, yielding certain profits: and so also is the herbage and pannage of a park, if it yields a certain profit; but if they yield no profit, they are not rateable.

Chambers; in the Inns of Court and Chancery, are not liable to be rated to the Poor.

Hospitals; the officers belonging to and lodging in *Chelsea Hospital* are rateable to the Poor; but neither the trustees nor the servants attending *St. Luke's Hospital*; nor the Governors of *St. Bartholomew's Hospital*, are liable to be rated.

Mines; the lessees of lead-mines, who pay no rent, but only a certain part of the ore raised, are not rateable to the Poor: but the lessee of lead-mines, though held of the Crown, is rateable for the profits arising from lot and cope; which are duties paid him by the adventurer, without any risk on his part.

Corporation; a corporation is liable to be rated to the Poor, for profits arising from tolls; see *ante*: but a corporation established for the purposes of a public charity, such as the Governors of *St. Bartholomew's Hospital*, are not rateable with respect to the hospital; for they cannot be considered as occupiers. A Corporation, however, seised of lands in fee for its own profit, are inhabitants and occupiers, within the meaning of the *stat.* 43 *Eliz. c.* 2; and are, in respect thereof, liable to be rated, in their corporate capacity, to the relief of the Poor. So also, lands purchased by a Company, not incorporated, and converted into a dock under an act of Parliament, declaring that the shares of the proprietors shall be considered as personal property, are rateable to the Poor in proportion to the annual profits.

Woods; consisting of timber trees, where the underwood is left for standards, are not rateable to the Poor.

Offices; an officer of the salt office is not liable to be rated to the Poor in respect of his salary.

Machines; the profits of a weighing machine, on a turnpike road, are liable to be rated to the Poor. So, a building called, "The engine-house," in which is a carding machine for manufacturing cotton, is rateable to the Poor, on its increased value by the working of the machine; although this engine is not fixed to the premises, but capable of being moved at pleasure; but the profits of a light-house are not rateable. See *ante*; *Tolls*.

Prisons; the Warden of the Fleet prison is liable to the Poor's-rates in respect of those profits which he derives from letting lodgings to prisoners, in the prison and the Rules thereof.

Stock in trade; the general question, how far personal property is rateable to the Poor, is not fully determined; and therefore whether stock in trade be liable, must depend, in a great measure, upon the particular circumstances of each case; for although there are not wanting authorities, of a recent as well as more early date, to shew that stock in trade, in general, is rateable to the Poor; yet there is no clear and express authority, either of more ancient or modern times, in the instance of any one trade, adjudging the stock of that particular trade to be liable, except in those places in which an usage to assess such stock has been proved; though, in many boroughs, the stock in all trades has, immemorially, and even from the very date of the *stat.* 43 *Eliz. c.* 2, been, in point of fact, rated. It seems, on the whole, to be decided, that stock in trade, if it be the property of the person in possession, and productive, is rateable: the circumstance of its having been rated once, is *prima facie* evidence, that it is productive the next year, and, if not contradicted by other evidence, is sufficient to warrant the Justices to decide, that it should be then rated. See 6 *Term Rep.* 468.

A farmer shall be taxed for his stock in hand, in case it is more than necessary for the carrying on his farm and paying his rent; for then it is like a stock in trade; but, for stock necessary for his farming, he shall not be taxed. *Vin. Abr.* title *Poor*, xvi. *p.* 426. See *ante*; *Lands*.

2. The Poor's rate must be made by the Overseers, and allowed by the Justices; for the Sessions have no original power to order an assessment to be made. The Overseers, with the concurrence of the Justices, may make the rate without the consent of the Churchwardens; and when made, the Justices must allow it; for this is merely a ministerial act; and if either the Overseers neglect to make, or the Justices to allow, a rate, they may be compelled by *Mandamus*.

The time for which a Poor's-rate ought to be made, seems to be left to the discretion of the Overseers. The statute of the 43 *Eliz. c.* 2, says, "Weekly or otherwise." In one case, it is said, that it ought to be monthly, because the possessors are to pay, and possessions frequently change; this rule is confirmed by *Burrow*, but denied by *Bott*, who states a *dictum* of Lord *Mansfield*, that a Poor's-rate might as well be made for three months as for one month; and *Holt*, Chief Justice, assigned as a reason against making Poor's-rates quarterly, that by this means a man cannot move in the middle of the quarter, but he must be twice charged. The Legislature, however, has provided against this by *stat.* 17 *Geo.* 2. *c.* 38. § 12, which enacts, "That when any person shall come into, or occupy any premises, from which any person assessed shall be removed, or which, at the time of making the rate, were empty, every person, so removing or coming in, shall pay the rate, in proportion to their respective occupations."

The purposes also for which a Poor's-rate is made, must be conformable to the direction of the *stat.* 43 *Eliz. c.* 2; and therefore a rate cannot be made to reimburse former Overseers, for monies expended to the use of the Poor, or to defray law charges; for an Overseer is not bound to lay out the money until he has it: nor can a rate be made to repay money borrowed to build a workhouse: but if the monies, on any rate made by preceding Overseers, be not raised at the expiration of their offices, the successors may, by *stat.* 17 *Geo.* 2. *c.* 38. § 11, raise it and reimburse them; and Overseers, before their office expires, may make a rate to reimburse themselves monies laid out in proceedings at law, provided such expence be not incurred wantonly and unnecessarily. And by *stat.* 13 & 14 *Car.* 2. *c.* 12. § 18, a rate may be made for reimbursing *Constables* such monies as they shall have expended in relieving the Poor, in conveying them with passes; and in carrying rogues, vagabonds, and sturdy beggars to Houses of Correction.

The rate also must be made in equal proportion, on all the persons assessed, according to their respective properties; and therefore, a pound rate on the rent of lands and houses, and the amount of the interest of personal property, is said to be the most fair and reasonable assessment: but this is denied to be the rule; for the circumstances of a man of landed property may differ in proportion

portion as his family is large or ſmall, and perſonal property is in a continual ſtate of fluctuation; and therefore, neither rent nor land tax ought to be conſidered in the making of a rate; but the Overſeers, taking their former aſſeſſments as their beſt guide, are to proportion rates according to their beſt diſcretion; and if they make it unequal, the Seſſions, on appeal, will correct it; for the Seſſions are the ultimate Judges of the proportion and equality of the rate. A Poor's-rate made upon three-fourths of the yearly value of land, and upon one moiety of the yearly value of houſes, is not diſproportionate or unequal. A rate made on one half of the full yearly value or net rent of farms, and taking one-twentieth part of all ſtock, perſonal eſtate, and money out at intereſt, valuing the intereſt of ſuch twentieth part at 4 *per cent.* and then rating one moiety of ſuch twentieth part, varying the proportion as circumſtances require, (for the Overſeers cannot make a ſtanding rate,) is a good and equal rate. A rate on lands and houſes, at one penny in the pound, without making any diſtinction between farm dwelling houſes and cottages, although they had been before rated in different proportions, is not an unequal rate; for whether houſes are to be rated to the Poor, in a different proportion from land, muſt depend on local circumſtances. But of thoſe equalities and proportions, the Seſſions are ultimately to judge; and therefore, the Court of King's Bench, preſuming *primâ facie* that the inferior juriſdiction will not violate its duty, will not grant a *Mandamus* to make an equal rate, or quaſh a rate, unleſs it evidently appear unequal on the face of it.

3. The appeal to the Seſſions may, by 43 *Eliz. c.* 2. § 4, be to any General Quarter Seſſions; but by 17 *G.* 2. *c.* 38. § 4, it muſt be on reaſonable notice given to the next Seſſions, General or Quarter: ſee *ante* I. 1, 2: for it is by making the rate that the party is aggrieved, and the publication ſhall be taken from the time it is allowed; and if an appeal be lodged and diſmiſſed for informality, the party cannot have a ſecond appeal; but if it appears, that reaſonable notice has not been given, they may adjourn the appeal to the next Quarter Seſſions, and there finally determine the ſame, and award the party, in whoſe favour it is determined, coſts.

In all Corporations which have not four Juſtices, perſons grieved may appeal againſt a Poor's-rate to the next Seſſions for the county or diviſion. *Stat.* 17 *Geo* 2. *c.* 38. § 5.—The Overſeer's book, in which all appeals from Poor's-rate are directed to be entered, ſhall be produced at the Seſſions when any appeal is heard. § 13.

Upon all appeals from rates, the Seſſions may, by *ſtat.* 17 G. 2. c. 38, amend the rate, *without altering it with reſpect to other perſons.* Upon an appeal from the whole rate, *if it ſhall be found neceſſary,* the Seſſions may, in their diſcretion, quaſh the rate, and direct the Overſeers to make a new equal rate. The Seſſions cannot ſtrike out the name of a perſon from the Poor's-rate; ſo if the name of any perſon be omitted, the Seſſion muſt quaſh the rate, and cannot amend it by inſerting his name. But it ſeems agreed, that where a perſon is overcharged in a Poor's-rate, the Seſſions may relieve him, on appeal, by leſſening the ſum aſſeſſed on him. A pariſhioner, who is liable to be rated, but who in fact is not rated, is a competent witneſs to prove that the perſon, whoſe name is omitted, is liable to be rated.

The Juſtices in Seſſions ſhall cauſe *defects of form* in appeals to be amended without coſts; and determine the appeal on the merits of the caſe, *Stat.* 5 *Geo.* 2. *c.* 19. § 1.

4. The preſent, as well as the ſubſequent Overſeers may, by warrant from two Juſtices, levy the ſums of money aſſeſſed for the Poors' rates, and all arrears thereof, of every one that ſhall refuſe to contribute according as they ſhall be aſſeſſed, by diſtreſs and ſale of the offender's goods, rendering the party the overplus; and in defect of ſuch diſtreſs, two Juſtices may commit the defaulter till payment. *Stat.* 43 *Eliz. c.* 2. § 4.

The goods of any perſon aſſeſſed, and refuſing to pay, may be diſtrained, not only in the place for which the aſſeſſment is made, but in any other place within the ſame county or precinct; and if ſufficient diſtreſs cannot be found there, on oath before a Juſtice of any other county or precinct, goods in ſuch other county or precinct may be diſtrained. *Stat.* 17 *Geo.* 2. *c.* 38. § 7.—In caſe any perſon refuſe to pay the preſent Overſeers, the ſucceeding Overſeers may levy arrears, and reimburſe their predeceſſors. § 11.—But perſons ſucceeding tenants rated, or coming into houſes empty, at the time of the rate, ſhall only pay in proportion to the time they have occupied the premiſes; which proportion ſhall be ſettled by two Juſtices. § 12.

Juſtices granting diſtreſs-warrants ſhall therein order the goods diſtrained to be ſold within a certain time limited in the ſaid warrant, not leſs than four nor more than eight days; unleſs the penalty and charges of diſtreſs be ſooner paid. *Stat.* 27 *Geo.* 2. *c.* 20. § 1.—The officer making ſuch diſtreſs may deduct his reaſonable charges out of the money ariſing by the ſame, and alſo the penalty or ſum diſtrained for; and ſhall, if required, ſhow the warrant of diſtreſs, and ſuffer a copy thereof to be taken by the perſon whoſe goods are diſtrained. § 2.

Juſtices acting for adjoining counties, and perſonally reſident in one of them, may grant diſtreſs-warrants: and the acts of any conſtable or other officer, in obedience thereto, ſhall be as valid as if they had been granted by Juſtices acting for the proper county only; but ſuch warrants muſt be directed and given, in the firſt inſtance, to the conſtable or other officer of the county, to which the ſame particularly relate; and the conſtable may take perſons apprehended before Juſtices of the adjoining county. *Stat.* 28 *Geo.* 3. *c.* 49. See this Dictionary, title *Juſtices.*

Juſtices may act *in all matters relating to the Poor Laws,* notwithſtanding they are rated to or chargeable with taxes or rates, within the pariſh or place affected by the acts of ſuch Juſtices. *Stat.* 16 *Geo.* 2. *c.* 18. § 1.

A Poor's-rate, after it is demanded, and the party ſummoned, may be diſtrained for, before the time for which the rate is made is expired; but if the landlord of the premiſes tender the rate, the Overſeers are bound to receive it, although the tenant is not rated; and if they make an exceſſive diſtreſs, they are liable to a ſpecial action on the caſe.

Pariſhes alſo may be rated in aid; for, by the ſaid *ſtat.* 43 *Eliz. c.* 2, if the Juſtices perceive that the inhabitants of any pariſh are not able to levy, among themſelves, ſufficient ſums of money for the purpoſes of the act, the ſaid two Juſtices may rate any other (inhabitants) of other pariſhes, or out of any pariſh within the hundred,

dred, where the said parish is, to pay such sum or sums of money to the Churchwardens and Overseers of the poor parish as the said Justices shall think fit: and if such parish, so rated, is not able to pay the sum assessed, then the Sessions may rate any other (inhabitants) of other parishes, in or out of any parish within the county, for the purposes aforesaid. § 3.

The two Justices, or the Sessions, as the case may happen to be, are under this clause of the act, to order the *quantum* of money, which they think ought to be raised, in aid of the poor parish; but the Overseer must make the rate on those who are to pay it. They may make the order either on particular persons, or on the whole parish, for the relief of a year; but the order must state that it was made by the Justices, if the parish charged be within the hundred, and by the Sessions, if the parish be within the county: but both these jurisdictions are original, and independent of each other; and therefore it is not necessary, that the Justices should adjudge the parish within the hundred incapable, before the Sessions can rate a parish out of the hundred in aid. An extra-parochial place may be taxed in aid of a poor parish, and one vill may be ordered to contribute to the relief of another vill in the same parish, or any division of a county that is equivalent to the name of hundred. It is also said, that the next able parish to the poor parish should be first rated; but one parish in a city cannot be made contributory to another parish in the same city, if not locally situated within a hundred or a county.

III. 1. The Overseers are to set to work all such children whose parents shall not be thought able to maintain them; and all such persons, married or unmarried, who have no means to maintain themselves, and use no ordinary and daily trade to get their living by; to relieve (as has been already noticed) the lame, impotent, old, blind, and such other among them, being poor and not able to work; and to put out poor children apprentices. *Stat.* 43 *Eliz. c.* 2. § 1.—The Overseers shall meet once a month in the church on *Sunday* afternoon, after divine service, to take some good course in the premises, on pain of 20*s.* § 2. [This clause does not extend to Overseers of extra-parochial places. 8 *Mod* 40.]—The Justices, or any one of them, may send to the House of Correction, or common gaol, such poor persons as shall not employ themselves according to the direction of the Overseers. § 4.—The majority of the Churchwardens and Overseers, by leave of the Lord of the Manor, whereof any waste or common within the parish shall be parcel, and by order of Sessions may build on such waste or common, at the charge of the parish, convenient houses for the impotent Poor. § 5.

The Overseers, with the consent of two Justices, may set up any trade or manufactory for the employment and relief of the Poor. *Stat.* 3 *Car.* 1. *c.* 4. § 22.

The Sessions may set poor *Prisoners* on work, and expend the profit arising from their labour, towards their relief; but no parish shall be rated above 6*d.* a week on this account. *Stat.* 19 *Car.* 2. *c.* 4. Other provisions are also made by the same statute, for the relief and removal of sick prisoners.

There shall be kept in every parish, at the charge of the parish, a book or books wherein the name of all such persons who do or may receive collection, shall be registered, with the day and year when they were first admitted to have relief, and the occasion which brought them under that necessity. Yearly, in *Easter week*, or as often as it shall be thought convenient, the parishioners of every parish shall meet in vestry, before whom the said book shall be produced; and all persons receiving collections shall be called over, and the reasons of their taking relief examined, and a new list made and entered as shall be thought fit, to receive collection: and no other person shall be allowed to have or receive parish collection, but by authority under the hand of a Justice residing in the parish, or if none be there dwelling, in the parts near or next adjoining, or by order of *Quarter* Sessions, except in cases of pestilential diseases, and then only such families as are infected. *Stat.* 3 *& 4 W. & M. c.* 11. § 11.

Every person who shall be upon the collection-books, and receive relief, and the wife and children of such person cohabiting in the same house, shall wear *a badge*, as described in the act, on pain of losing the usual allowance; and if any parish officer shall relieve any person, not having such badge, he shall forfeit 20*s.* *Stat.* 8 *& 9 W.* 3. *c* 30. § 2.

No Justice shall order relief to any poor person, until oath be made before him of some matter which he shall judge a reasonable cause or ground for having such relief, and that the same person had applied to the parish for relief, and was refused: and until such Justice has summoned two of the Overseers to show cause why such relief should not be given *Stat.* 9 *Geo* 1. *c.* 7. § 1—The person, whom the Justice shall order to be relieved, shall be entered in the books, as a person entitled to receive collections, as long as the cause of such relief continues, and no longer. § 2.

For the greater ease of parishes in the relief of the Poor, the Churchwardens and Overseers, [or the major part of them,] with the consent of the major part of the parishioners, may purchase houses, or contract with persons for the maintenance of the Poor; and such persons shall have the benefit of their work and labour: and when any parish shall be too small to purchase or hire such *workhouse*, two or more such parishes, with the consent of the majority of their respective parishioners, may unite in purchasing or hiring such workhouse: and the Churchwardens and Overseers of a parish, where a workhouse is situated, may contract with the Churchwardens and Overseers of any other Parish, for the maintenance of any of the Poor of such other Parish. But no poor person so removed from one parish to the other, shall gain a settlement thereby. *Stat.* 9 *Geo.* 1. *c.* 7. § 4.

The above section of this act is repealed, with respect to any parish, township, or place, which shall adopt the provisions continued in *stat.* 22 *Geo.* 3. *c.* 83, (explained by *stat.* 33 *Geo.* 3. *c.* 35,) for the establishment of *Houses of Industry*, and *Incorporated Societies*, for the maintenance of the Poor. That act lays down many excellent regulations for the furthering the wholesome purpose of protecting and relieving the Poor; by appointing *Guardians of the Poor*, and *Governors* and *Visitors* of the *Poor-houses*; under restrictions which, if adopted, would probably remedy many evils now attendant on the Poor Laws. But, it is believed, the act is not enforced or attended to, except in a very few parishes, which

[illegible] which have reaped the most important benefits from pursuing the plan suggested by the Legislature in that act. The act itself is too long to be here particularized, [illegible] may be carried into effect at any time, in any parish, by the consent of two thirds of those rated to the Poor; who must then consult the act, to profit by its directions.

The said *stat.* 9 *Geo.* 1. *c.* 7. § 4. also contained a clause, enacting, that poor persons who refused to be maintained and lodged *in such Workhouses*, should be struck out of the book, and not entitled to any relief from the [illegible]. But by the *stat.* 36 *Geo.* 3. *c.* 23, after reciting [illegible], and that it had been found to be inconvenient and oppressive, "inasmuch as it often prevents an industrious poor person from receiving such occasional relief, as is best suited to their peculiar case; and, in certain [illegible], holds out conditions of relief injurious to the domestic comfort and happiness of the Poor;" it is enacted, that Overseers may, with the approbation of the parishioners in vestry assembled, or of any Justice of the district, relieve any industrious poor person *at their own home*, under circumstances of temporary illness or distress, and, in certain other discretionary cases; although such poor person shall refuse to be lodged and maintained in the Poor-house. § 1.—And a Justice of the district may, at his discretion, make an order for the relief of such poor persons at their own houses; which the Overseers must obey. But the special cause of such relief must be assigned on the face of the Justice's order; which order is only to remain in force for one month, but is then renewable from month to month; and an oath of the necessity of such relief is to be administered to the poor person applying, and the Overseer is to be summoned to show cause, if any there be, against it. § 2. This act does not extend to any places where Houses of Industry are provided, under the *stat.* 22 *Geo.* 3. *c.* 83, [illegible] mentioned, or under any special act.

[illegible] of Peace, and Physicians, Apothecaries, or [illegible] authorized by them, may visit Parish Workhouses, and two Justices may make order for relieving [illegible] therein. *Stat.* 30 *Geo.* 3. *c.* [illegible]

[illegible] as well as the single Justices, may make [illegible] for the relief of the Poor; for in this [illegible] they have a concurrent jurisdiction. The order must be for the relief of the person in whose favour it is [illegible]; and therefore no order can be made to pay a surgeon's bill, or to pay a bill for the [illegible] for attending a pauper, or to pay [illegible] a pauper sick in gaol; nor unless the oath required by *stat.* [illegible] be first made. The order of [illegible] must state, that the party is poor and impotent. [illegible] materials are required to set the Poor on work, [illegible] cannot be made for that purpose, under *stat.* [illegible] and *stat.* 19 *Car.* 2. *c.* 4; for as they are [illegible] there must be distinct and several [illegible], to pay a person so much [illegible] and every week [illegible] and the money is due at the beginning of every week. It was also settled [illegible] that when an order [illegible] person only, and not any [illegible] to go into the Workhouse [illegible] child is born in a parish, and the [illegible] for its sustenance, the parish [illegible] there is no order [illegible] purpose.

Militia men and their substitutes are relieved according to the provisions of the several Militia Acts, and other acts of Parliament, *viz.* *stats.* 19 *Geo.* 3. *c.* 72: 33 *Geo.* 3. *c.* 8. § 34. 34 *Geo.* 3. *c.* 47: and particularly *stat.* 35 *Geo.* 3. *c.* 81.

2. The father and grandfather, and the mother and grandmother, and the children, of every poor old, blind, lame, and impotent person, or other person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person, at the rate the Justices in Sessions shall assess, on pain of 20*s.* a month. *Stat.* 43 *Eliz.* *c.* 2. § 7.—The penalties levied, for disobeying such order of maintenance, shall go to the relief of the Poor. § 11.

The Justices of the county or place in which the rich relation, and not where the poor relation, dwells, have alone authority to make this order, and to assess the rate of maintenance. The order must be made at a Quarter, and not at a General, Session; in which it must be alleged, that the person to be relieved is Poor, unable to work, and liable to become chargeable to the parish; and the person to relieve is of sufficient ability, and within the jurisdiction of the Session. The Session have, in this case, an original jurisdiction; but they make it as well upon the complaint of the Overseers, as upon the complaint of the poor relation; but they must order a sum of money to be paid; for they cannot order generally the rich person to relieve his poor relation.

This statute extends only to natural relations, and not to relations in law; and it seems that, in default of one relation, another may be compelled to relieve the pauper; as in the case of grandfather, father, and child; the father being incapable of maintaining the child, the grandfather may be compelled, if of sufficient ability; and therefore, a man is not obliged to maintain his son's wife, nor his wife's son, nor his wife's mother, nor his wife's daughter. And it seems to be now settled, that it makes no difference whether the wife be alive or dead at the time her poor relations require relief, contrary to some former determinations on this subject. It is said also, that a wife cannot be ordered to maintain her grandchild, nor the husband of a grandmother to maintain her grandchild; but if an order of maintenance be made on a grandmother, and she afterwards marries, the husband shall be liable (during her life) to the maintenance. It is also clear, that the reputed grandfather of a poor orphan cannot be ordered to maintain it, for no order can, in this respect, be made for the maintenance of a bastard. See title *Bastard.*—But where this species of order is well and properly made, the party may be indicted for disobeying it; and the money ordered to be paid becomes due the at *beginning* of each week.

By *stat.* 11 & 12 *W.* 3. *c.* 4, the Protestant children of Popish parents may obtain relief by application to the Court of Chancery; and by *stat.* 1 *Ann.* *c.* 30, the same is enacted with respect to the Protestant children of Jews.

As to relieving *Deserted Families*—Persons running away from their families, and leaving them on the parish, are declared to be *incorrigible rogues*; and if either man or woman shall *threaten* to run away, and leave their families on the parish, the same being proved by two

two witnesses, on oath before two Justices, they shall be sent to the House of Correction, unless they give security to the parish. *Stat.* 7 *Jac.* 1. *c.* 4. § 8.

The Churchwardens and Overseers, where any wife, child, or children, shall be so left, on application to, and by warrant of, or order from, two Justices, shall seise so much of the goods and chattels, and receive so much of the rents and profits of the lands and tenements of the husband, father, or mother, as the two Justices shall direct, for and towards the discharge of the parish, and relief of the family; and, on the order being confirmed at Sessions, the goods may be disposed of, and the rents received, as the Court shall direct. *Stat.* 5 *Geo.* 1. *c.* 8.

All persons, who *threaten* to run away and leave their wives or children to the parish, are declared *idle and disorderly persons*; by *stat.* 17 *Geo.* 2. *c.* 5. § 1.—And all persons, who *run away* and leave their wives or children so chargeable, are declared *rogues and vagabonds*. § 2.

See further, title *Vagrants*; and the Militia and Mutiny Acts.

IV. The state of the Poor, in ancient times, has been slightly mentioned at the beginning of this long Article: at present, there are *ten* modes whereby persons may gain *A Settlement*: which entitles them to claim and receive relief from the parish in which they are settled, whenever such relief is necessary; and if this happens while the pauper resides in a parish, where he or she is not settled, they are to be removed to their place of settlement; under the regulations noticed in this and the two subsequent divisions.

1. The place of *Birth* is the place of settlement of all illegitimate children; for a bastard, not having any legal parents, cannot be referred to their settlements, as a legitimate child may be: but this general rule is subject to the following exceptions: 1st. Where the mother is conveyed collusively and by fraud into the parish where the bastard is born.—2dly. Where a bastard is born in a house of industry, hospital, county gaol, or house of correction. See *stats.* 13 *Geo.* 3. *c.* 82: 20 *Geo.* 3. *c.* 36: and see *stat.* 13 *Geo.* 2. *c.* 29, as to the *Foundling Hospital*.—3dly. Where born while the mother is under an illegal order of removal.—4thly. Where born pending an appeal against an order of removal, which is afterwards reversed.—5thly. Where born, *in transitu*, while the mother is passing under an order of removal; or remaining under the suspension of such order. See *post* VI. But a bastard, born on the road, while the mother is endeavouring to reach her own parish, without fraud, is settled where born.—6thly. Where born after an order of removal is made out, but before actual removal.—7thly. Where the mother returns to the place from which she was removed.—8thly. Where born in the streets while the mother is wandering in a state of vagrancy. *Stat.* 17 *Geo.* 2. *c.* 5. § 25.—In all other cases the birth decides the settlement.

This rule also, that a bastard is settled where born, extends to the illegitimate offspring of persons certificated; see *post* V; although the certificate is in force at the time of the birth, and undertakes to provide for the mother and her child; but not if it expressly undertake to provide for the child she is then pregnant with; for then the child, though born a bastard, shall be settled in the certifying parish: and where a child is born a bastard, and its parents afterwards intermarry, and the father procures a certificate for himself, his wife, and *his* child, such bastard shall have his father's settlement. Under *stat.* 8 & 9 *W.* 3. *c.* 30, (see *post* V.) the *legitimate* children of certificated persons shall not gain a settlement by birth in the certificated parish.

The parish where born is also *primâ facie* the settlement of all legitimate children; but this, though the primary place of settlement, is only so until the settlement, to which such child is entitled by parentage, can be discovered. So also, the place, where a legitimate child is first *found*, is the place of its legal settlement, until the place of its birth, or its derivative settlement, can be known.

2. All legitimate children are settled in the parish, in which their father is last settled, wherever else he may have resided, or they may have been born; or if the father have no settlement, or if that cannot be traced, then in the place in which their mother is settled; until they are emancipated, or gain a new and distinct settlement for themselves. Foreigners, who have gained no settlement in *England*, cannot, of course, communicate this species of settlement to their children; and if the children are not born here, they cannot resort to that primary settlement which is gained by birth; but they (and their parents, if necessary) must be maintained where found. The father's settlement is communicated to his legitimate child, though born after his death, or though it is an idiot; and this right, which children have to the father's settlement, is not taken away after his death, by their mother gaining a new settlement, in her own right, by marriage; nor can she, during the life of her husband, gain a different settlement, for her children, than that which they inherit from their father: but if a child, above the age of nineteen, who possesses a derivative settlement from its father, go, after his death, with its mother into a different parish, and live there with her upon her own estate, they, both of them, gain a new settlement by their residence. See *post* 10.

But children, after the age of seven years, (or perhaps before,) may become emancipated, and gain settlement for themselves. Thus, where a child, on the removal of his father into another parish, was left behind, and continued distinct from his father's family, maintaining himself by his own industry, he was held to be emancipated. So also, where a son, nineteen years of age, left his father's family, and went into another parish, where he married and had children. So also, where a son, after he was one-and-twenty years of age, married and lived with his wife and family separately, and distinct from his father's family, though in the same parish, he was held to be emancipated: but a child cannot be emancipated from its parents, either by marriage or living apart in a distinct habitation, unless such child has gained a settlement in its own right. A son, therefore, who, at fifteen years of age, bound himself apprentice, served out part of his time, and worked about the country in the way of his business; but went to his father's house, whenever it was convenient, was held not to be emancipated. So also, where a son resided nine or ten years, by his father's direction, at the house of a friend, by whom he was supported, this was held not an emancipation. So also, where a boy was hired out for seven years successively, but his father received

ceived the wages, and maintained him. So, where a child was separated from its family by being maintained several years in a Workhouse; or where a child leaves its father's family when only five years old, and lives with different relations, till ten; or where a son, sixteen years of age, was bound apprentice for five years, and afterwards returned to his father's family, the indentures being void for want of a stamp; or where the son of a certificated person, at nineteen years of age, leaves his father's family, and serves a year under a hiring in an extra-parochial place, and then returns unmarried, and under age, to his father's family: for in all these cases the child, not being of age, nor having married, nor gained a settlement in his own right, nor contracted any relationship inconsistent with the idea of being part of his father's family, cannot be considered as emancipated, so as to lose the benefit of any settlement which his father may gain. It has, however, been held, that if a son enlist himself as a soldier, he thereby emancipates himself from his father's family; and cannot, therefore, change his original derivative settlement, by parentage, for a new settlement gained by his father.

3. SETTLEMENT by *Marriage* is acquired by construction of Law, independently of any statute; and, therefore, the moment a legal settlement takes place, the settlement of the husband is *ipso facto* transferred to the wife. It must, however, be a legal marriage, conformable to the direction of the Marriage-Act, *stat.* 26 *Geo.* 2. *c.* 33; and therefore, where a woman under age was married without the consent of parents, it was held, that the children born under such a connection, were illegitimate, and, as such, could not gain a derivative settlement from their parents. So also, where a marriage was celebrated in a chapel, in which banns had not been usually published, according to the direction of the Marriage-Act, it was held, previous to the *stat.* 21 *Geo.* 3. *c.* 53, (see title *Marriage*,) that the wife gained no settlement by virtue of this union; and it is necessary that the marriage should be with all the legal forms, though both the parties are illegitimate: (see title *Marriage*:) but a marriage in *Scotland* is a legal marriage, for the purposes of gaining a settlement. So also, is a marriage, though procured by a third person by fraud; and a cohabitation, as man and wife, for 30 years, is such a presumptive proof of marriage as will entitle the children of the parties to the settlement of their parents; nor is the validity of marriage, as to the purposes of settlement, affected by the entry, in the parish register, not being signed by the minister, or some other person in his presence, as directed by *stat.* 26 *Geo.* 2. *c.* 33. Indeed, the Law, favouring settlements as much as possible, has, in many instances, precluded the fact of marriage from being controverted: thus, after an order of removal, stating the parties to be husband and wife, the fact of marriage can only be controverted upon appeal to the Sessions. So also, if a man and woman be certificated as husband and wife, the legality of their marriage cannot be controverted by the certifying parish: and it is not necessary for this purpose to prove a marriage in fact; evidence of cohabitation, reputation, and other circumstantial proof, is sufficient.

But although the husband's settlement is, if known, communicated to the wife, and retained after the husband's death, till she gain a new one, notwithstanding she never lived with him at the place in which he is settled; yet her own settlement, in certain cases, is not extinguished, but only suspended, during the coverture; and if her husband have no settlement, her own remains even during the coverture; or if he have a settlement, but it cannot be discovered, her settlement returns. The removal of a wife, therefore, imports, that it is to her husband's settlement; for it is incumbent on the parish, to which she is removed, to prove a different settlement, even though she be not removed as a wife.

4. To prevent improper persons from gaining a settlement by *Residence*, it was enacted, by *stat.* 13 & 14 *Car.* 2. *c.* 12. § 1, "That it shall be lawful, upon complaint made by the Churchwardens and Overseers of the Poor of any parish, to any Justice of the Peace, *within 40 days* after any poor person shall come to settle in any tenement, under the yearly value of 10*l.* for any two Justices of the Peace, of the division where any person likely to be chargeable to the parish shall come to inhabit, by their warrant to remove and convey such person to such parish, where he or she were last legally settled, either as a native, householder, sojourner, apprentice, or servant, for the space of 40 days at the least, unless he or she give sufficient security for the discharge of the said parish, to be allowed by the said Justices."

By *stat.* 1 *Jac.* 2. *c.* 17. § 3, "the 40 days' continuance, intended by *stat.* 13 & 14 *Car.* 2. *c.* 12, to make a settlement, was to be accounted from the time of his or her delivery of notice, in writing, of the house of his or her abode, and the number of his or her family, to one of the Churchwardens or Overseers of the Poor of the parish to which they shall so remove."

By *stat.* 3 & 4 *W.* & *M.* *c.* 11, "the 40 days were to be accounted from the publication of the notice, in writing; which the Churchwardens or Overseers were required to cause to be read publicly, immediately after divine service, in the church or chapel of the said parish or town, on the next Lord's Day, when there should be divine service in the same; which notice was to be registered and kept in the book of the Poor's accounts; and, if they neglected to read or register such notice, they were to forfeit 40*s.* No soldier, seaman, shipwright, &c. were to gain any settlement in any parish, by delivery and publication of such notice, unless after the dismission of such person from the service. § 4.

By the same statute it is provided, that if any person shall execute an annual office, or, being properly rated, shall pay the public taxes; or shall be lawfully hired as a servant, and serve for a year; or shall be bound an apprentice in any parish; they shall respectively gain settlements thereby: though no such notice, in writing, was delivered or published, as the statutes, above recited, require. §§ 6, 7, 8.

It is apparent, from these statutes, that the Legislature was anxious to prevent a settlement being gained by constructive notices; it was therefore settled, by various determinations of the Courts, that nothing could be equivalent to notice, except those acts for which the statutes provide: and now, by *stat.* 35 *Geo.* 3. *c.* 101. § 3, it is expressly provided, "that no person shall, in future, be enabled to gain any settlement in any parish, township, or place into which they shall come, by delivery and publication of any notice in writing."

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The 40 days' residence, which is required to gain this species of settlement, need not be in the tenement which the party occupies; and therefore, when a person took a windmill of above 10*l.* a year, but resided in a distant cottage under 10*l.* a year, within the same parish, he thereby gained a settlement; nor need the residence be for 40 days successively: but if, during his occupation of the tenement, he resided at different times any where within the parish for more than 40 days, it is sufficient; and if he occupy two tenements, in different parishes, and reside alternately in each parish above 40 days in the whole, his settlement shall be in that parish in which he lodged the last night of the first 40 days; but the occupation must be legal; for if he has obtained possession of the tenement by fraud, a residence will not gain a settlement; and it is a general rule, seemingly without a single exception, that no person can be removed from residing upon his own estate, whatever likelihood there may be of his, or any part of his family, becoming chargeable. See *post* 10. It is also expresly enacted, by *stat.* 13 *Geo.* 3. *c.* 84, that gatekeepers, on turnpike roads, shall not be removed from their respective toll-houses: and, by other statutes, that officers, mariners, soldiers, marines, (and militia-men, being married,) shall not be removed from those parishes, in which they set up and exercise any trade, until they become actually chargeable. See *post* VI.

5. By the construction of *stat.* 13 & 14 *Car.* 2. *c.* 12. § 1, noticed in the preceding division, it is *implied*, that whoever shall *rent* a tenement above the yearly value of 10*l.* in the parish, in which he shall come to inhabit, for the space of 40 days, shall thereby gain a settlement.

But by *stat.* 9 & 10 *W.* 3. *c.* 30. § 11, it is moved, that no certificate person (see *post* V,) shall be adjudged to gain a settlement by residence, unless he shall really and *bonâ fide* take a lease of a tenement, of the value of 10*l.*

In the construction of this part of the statute, 9 & 10 *W.* 3. *c.* 30, it has been held, that where a certificate-man agreed with the lessee of a mill, that he would occupy the mill; and, in pursuance of the agreement, occupied it for two years, this was a sufficient *taking*, to avoid the certificate, though there was no under-lease or assignment; for the rent being reserved for a year, it is an absolute demise for a year: and if not, it is a lease at will, which is sufficient. And where it was stated, that a certificate-man took a lease for seven years, the Court said, they would intend that it was by deed, for otherwise it would be no lease at all.—And it is not material, though the greatest part of the premises lies in a different parish, if the tenant reside on that part which is in the certificated parish.—And renting a tenement of 10*l.* a year, with a residence of 40 days, will avoid a certificate, although the certificate be granted, *after* the taking, and before the expiration of the 40 days.

As to the *kind* of Tenement; it has been held, that the renting of a water mill, a coney warren, a piece of pasture ground, a house within the rules of the Fleet-prison, a windmill, a dairy of cows with privilege of pasture for them, a potatoe ground, a first and second floor unfurnished, a shop occupied separately from the house to which it belongs, a furnished room hired for a particular purpose though the landlord is to find fire and have the use of it at other times, a land-sale colliery, a cattlegate, the fishery of a pond with the spear-sedge flags and rushes in and about the same, the hay grass and aftermeath of meadow land, a rabbit warren though the party has no interest in the soil, except that of entering on the soil to kill the rabbits, the fogs and after-grass of meadow land, the hiring of twenty cows at 3*l.* 10*s* *per annum* each with privilege to feed them in particular fields for a certain part of the year during which time no other cattle were to depasture there; are all of them *Tenements* within the meaning of the statutes: and will, if above the value of 10*l.* a year gain the party, who resides on them for 40 days, a settlement in the parish in which each respectively lies. But no gatekeeper, or person renting the tolls of turnpikes, and residing in any toll-house, belonging to the trustees, shall thereby gain a settlement. *Stat.* 13 *Geo.* 3. *c.* 84. § 56.

The tenement must be *entire*; but it is not necessary to this purpose that the tenement should be taken all of the same landlord, or that it should lie entirely in the same parish. Therefore a house rented at 5*l.* a year of one landlord, and a piece of land of 6*l.* a year of another landlord; or a house of 6*l.* a year rented of one man, and stables of 50*s.* a quarter of another; are tenements sufficiently entire to give a settlement. So also, an entire tenement of house and lands of the value of 12*l.* a year, lying in different parishes, although in neither parish the value amounts to 10*l.* a year, will gain a settlement; and so, though the taking be at different times, and the tenement is afterwards underlet in part, or in the whole, to, and occupied jointly with, another person; and, in these cases, the settlement will be in that parish in which the tenant lodges the last 40 days.

The tenement also must be of the *value* of 10*l.* a year; and the value does not depend upon the rent, but on the real worth it may be of at any one time during the occupation of the tenant; for though no rent be reserved, yet if it be worth 10*l.* a year, it will gain a settlement. The rent, however, is good *primâ facie* evidence of its value, and shall be conclusive, if no other evidence of value appear. It hath accordingly been adjudged, that a house of the value only of 6*l.* 10*s.* a year, taken at the rent of 10*l.* a year, under a covenant that the landlord shall make new buildings, is not of sufficient value, if those new buildings are never made. So, a sole tenancy in a house of 8*l.* a year, and a joint-tenancy in land of 3*l.* 15*s.* a year, hath been adjudged not of sufficient value. So also, a house of 16*l.* a year, occupied jointly by two persons, or a farm of 14*l.* a year, rented by two persons, jointly, although the rent be paid, the stock stinted, and the profits taken separately by each, is not of sufficient value to gain either of them a settlement; but a farm of 52*l.* a year rented, occupied, and managed jointly by two tenants, is a tenement of sufficient value to each of them. A tenement of 10*l.* a year, taken without fraud, will gain a settlement, although the tenant live only in one part of it, and underlet the remainder to different tenants; and therefore, where a man took a tenement, consisting of a cottage and an acre of land of the value of 7*l* a year, and let the whole of it at the same rent to another person, and afterwards took another tenement of 3*l.* a year, these two takings

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were held sufficient to gain a settlement; for he continued tenant of the cottage and the land, though they were underlet. A cottage of 6*l.* 17*s.* a year, held for the remainder of 99 years, on a lease determinable on the life of the tenant, is a tenement of the value of 10*l.* a year. So also, where a person was appointed to be Herd to several persons, who had a right of common upon a large extensive common or waste, and resided in a house situated on the common, and was allowed, as a reward for his fidelity and service, the exclusive enjoyment of the house and parcel of meadow adjoining thereto, of the value of 20*l.* a year; this was held to be a sufficient renting, and of sufficient value to gain a settlement: but if the renting be fraudulent, as taking a farm without being able to stock it, it will not gain a settlement, although its value is more than 10*l.* a year.

As to the *time* of renting; the tenement need not be taken for a whole year, and therefore a taking and occupying from the first of *June* to the *Lady Day* following, has been held sufficient to gain a settlement.

To complete this species of settlement, there must be a *Residence* of 40 days; either on the tenement, or in the parish where it lies; for a residence in one parish, and occupying a tenement in another, is not sufficient.

6. IF any person shall come into any town or parish to inhabit, and shall, for himself, and on his own account, be charged with, and pay, his share towards the *public Taxes*, or levies, of the said town or parish, he shall be adjudged and deemed to have a legal settlement in the same. *Stat.* 3 & 4 *W.* & *M.* c. 11. § 6.—But no person shall gain such settlement by paying taxes for any tenement of less than 10*l.* yearly value. *Stat.* 35 *Geo.* 3. c. 101. § 4.

As to the *kind* of taxes; the Land-tax and the Poor's-tax are public taxes within the meaning of this statute; but a tax, assessed for the repair of a county bridge; or towards the repairs of the highways; or for the scavenger, *stat* 9 *Geo.* 1. c. 7. § 6; or the duties on houses and windows, *stat.* 21 *Geo.* 2. c. 10. § 13; or the stoppage raised on the persons belonging to *Sheerness* yard, for the relief of the poor; are neither public taxes, or levies, within the meaning of the Legislature; and therefore, the paying them will not entitle the person to a settlement under this statute.

The party must be both assessed to and pay the tax to gain a settlement; and payment of an assessment, which, as to other purposes, is illegal and void, will gain a settlement: so also, if it be made upon the house, and not upon the person, or on the occupier of such a house, or the farmer of such lands; and if the assessment continue in the rate book in the name of a former tenant deceased, payment by the occupier is sufficient; for it is not necessary that the tenant should be rated by *name*; if he is *virtually* rated and paid, it is sufficient. If the tenant be assessed, and he pay, he will thereby gain a settlement, although it is repaid to him by his landlord, or allowed in his rent; but if the landlord be assessed, payment by the tenant is not sufficient, although the tax is demanded of him by the officer who made the rate. So also, where a father occupied a house, and was rated to the Poor, but gave up the occupation to his son with whom he continued to live merely as an inmate; a payment by the son, under this rating, will not gain him a settlement; but if the father had continued in the occupation, and the son being the visible manager of his concerns, had been rated instead of his father, and had paid, he would have gained a settlement.

The rate books are generally divided into different columns, and distinguished,—"Landlords rated,"—"Names of occupiers;"—and therefore, if different persons be named in each, payment by the one will not gain a settlement; because in the one case he is not rated, and in the other has not paid; as where the landlord is assessed, and tenant pays; but in general where there is no name mentioned, or if both the names of landlord and tenant are inserted, but it does not appear which of them is rated; or if the tenant's name has been once introduced upon the rate book, though taken off in consequence of his poverty, and at his own request, and no other name inserted; it shall be considered, in all these cases, as an assessment upon the tenant; for the land tax is the tenant's tax, as between him and the public, and shall be so taken, unless it expressly appear, that the landlord is rated; but whether landlord or tenant be rated, is a question of fact for the Justices at Session to decide.

A landlord cannot pay the tax for the tenant; and therefore where a farm was rated by a particular name, and neither the name of the landlord or tenant on the rate, and the landlord paid the tax and received it again from the tenant, it was held, that this did not give the tenant a settlement: but if a tenant be rated and abscond, and his landlord desire the Collectors to levy it by distress, lest he should lose the money; and on their going to the premises, a friend of the tenant's pays it to him; this is equal to payment by the tenant himself, and he thereby gains a settlement. So also, if the Collectors of the Land-tax demand payment of the tenant, and on his refusing to pay, they shew him a paper-writing and read it, and tell him the sum he is to pay, and on his refusal levy the money by distress, and he afterwards pays such sum as an assessment on him, it shall be intended that he was in fact assessed, unless the contrary clearly appear.

7. IF any person, who shall come to inhabit in any town or parish, shall for himself, and on his own account, execute any *public annual Office*, or charge, in the said town or parish *during one whole year*, he shall have a legal settlement in the same. *Stat.* 3 & 4 *W.* & *M.* c. 11. § 6.

If a certificate person shall serve an annual office in such parish, being legally placed in such office, he shall thereby gain a settlement. *Stat.* 9 & 10 *W.* 3. c. 11.

The *kind* of office; the office need not to be what is generally called a parish office, for if it be an annual office, and served *in* the parish, it is sufficient; and therefore, it has been held, that serving the office of *warden of a borough*; or the office of *parish clerk*, though chosen by the parson, and not by the parishioners, and although he has no licence from the Ordinary, for the office is annual; or the office of *collector of the land-tax*; or the office of collector of the *duties on births and burials*; or the office of *tithingman*; or the office of *constable of a city*, although the election is not in the parishioners; or the office of *petty constable*, if sworn in at the leet, though served by deputy; or the office of *bailiff* or ale-conner; or the office of *sexton*; or the office of *hog-ringer*, being annual offices, *will* gain a settlement:—but

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—but the office of *deputy constable*; or the office of *school-master* to a charity school, established by private donation; or the office of deputy *tithingman*; or the office of *curate* under a sequestration; are *not* annual offices, and therefore the serving them will *not* gain a settlement.

The party also must be regularly and legally *appointed* to the office; or the serving it will not be sufficient; and therefore, although an inhabitant of a parish has a tally left at his house, signifying that he is chosen *borsholder* or *tithingman*, yet if he is not presented and admitted in the Court leet, he is not legally placed in the office, and cannot gain a settlement by serving it. So also, where a man was chosen *constable*, and even sworn in, yet not being presented at the leet, it was held that he gained no settlement by serving the office: but when a person was appointed a *tithingman* by the steward of the leet, and served the office for a whole year, it was held; that he thereby gained a settlement, although he was not sworn in until half the year was expired.

The office must be completely *served* for a year; and therefore, if the party become chargeable before the year expires, this is an interruption to the service, and will prevent his gaining a settlement, although no other person is appointed in his stead, until the year expires: and so strictly has this part of the statute been construed, that when a tithingman served two half years at different times, it was held, that they could not be joined so as to make a service for a year, although there was a custom in the parish not to serve the office longer than half a year at a time; for the very custom proved that in this parish the office of *tithingman* was not an annual office. If, however, two parishes use the same church, and the sexton live in that parish, in which neither the church nor the burial part of the church-yard lies; yet, by serving this office, he shall gain a settlement in that parish where he resides.

8. THE class of *Settlements, by Hiring and Service*, is, perhaps, above all others, obscured by an innumerable variety of cases; the determinations in which, unless very minutely attended to, will frequently appear contradictory. The following summary is intended to contain a statement, of the general rules on this head, as concise as possible; without entering into exceptions, caused, for the most part, rather by the particular circumstances of the cases, than by any uncertainty in the Law.

If any unmarried person, not having child or children, shall be lawfully hired into any parish or town, for one year, such service shall be adjudged and deemed a good settlement therein. *Stat.* 3 & 4 *W.* & *M. c.* 11. § 6. But no person, so hired as aforesaid, shall be deemed to have a good settlement in any such parish or township, unless such person shall continue and abide in the same service during the space of one whole year. *Stat.* 8 & 9 *W.* 3. *c.* 30. § 4.

Under *stat.* 9 & 10 *W.* 3. *c.* 11, Certificated persons cannot gain a settlement by hiring and service: And by *stat.* 12 *Ann. st.* 1. *c.* 18. § 2, it is expressly provided, that no hired servant to a certificated person shall gain a settlement, by such hiring and service.

No child, nurse, or servant, received into, maintained, or employed within the *Foundling Hospital*, shall gain any settlement in the parish where such hospital is situated, by virtue of being so received, employed, or maintained. *Stat.* 13 *Geo.* 2. *c.* 29. § 7.

No person, who shall be admitted into the *Magdalen Hospital* as a penitent prostitute, or who shall be employed in the said hospital as a hired servant, shall, by reason of such admittance, or service, gain a settlement in the parish in which the said hospital is or shall be situate. *Stat.* 9 *Geo.* 3 *c.* 31. § 8.

Who shall gain such settlement:—The clause in the *stat.* 3 & 4 *W.* & *M. c.* 11, which prevents married persons, having children, from gaining settlements by hiring and service, was made merely for the protection of parishes; and therefore, a widower, although he has children, if such children are emancipated, and have gained settlements for themselves, may gain a settlement by hiring and service; for, in such case, there is no danger of the parish being burdened with the children, by settlement derivatively from their father; and, upon this principle, it has been settled, that a daughter, who is emancipated, may gain a new settlement, by hiring and service with her father. And, indeed, this clause has always been considered as favourably as possible to settlements; and therefore, if a wife, where the husband is abroad, is hired as a servant, and, before the year expires, her husband dies, a continued service for a year, from the time of his death, will gain a settlement, although, at the time of the hiring, she was a married person. So also, if a servant be unmarried at the time when he is *hired*, he gains a settlement by a year's service, although he marry before the service commences: So also, if a married man hire himself conditionally, and, before the condition performed, his wife dies without issue, he is an unmarried person within the statute; and shall gain a settlement, if the hiring takes place, and he serves a year from the time the condition was performed.

To complete this species of settlement, there must be such a *Contract*, between the master and servant, as will amount to what the Law considers as a hiring; for a hiring cannot be intended, where no contract appears: and therefore, where a gentleman, wishing to have his footboy instructed in the art of shaving, sent him to a barber to learn to shave, where he staid three years, and afterwards became chargeable to the parish: the Court held, that there was not such a contract in this case as would amount to a hiring and service; for there was no implied agreement, much less a positive contract, between the boy and the barber: so also, where a Captain brought a female negro slave from *America* to *England*, who lived with him here in the capacity of a servant, but there was no hiring; it was held, that the service, under this circumstance, would not entitle her to a settlement, because there was no contract appeared: so also, where a boy worked for several years with his uncle, who allowed him board, lodging, clothes, and pocket money; yet, because there was no contract between them for a hiring, it was held, that the boy did not gain any settlement under this service: so also, where the waiter of an inn being ill, procured another waiter of his acquaintance to assist him, who continued, with the knowledge of the master of the inn, boarding and lodging in the inn for the course of nineteen months, when the waiter went away, and the assistant continued to serve for more than twelve months afterwards, as he had done before, without making any agreement with the master; it was held, he did not gain any settlement by this service; because there was no contract for such service with the master.

And

And when a contract of hiring does appear, or can, from the circumstances, be inferred; yet it must also appear that the hiring was *for a year*. If, however, there be a hiring *in general terms* without any designation of time, it is always understood that such general hiring is for a year. Therefore, where a boy went into a service without any express contract being made, and his master told him, that if he staid a year, and behaved himself well, he would give him, the next year, a livery and full wages; the Court held, that although there were no express hiring, yet, as it was clearly a general hiring, it amounted, by construction of Law, to a hiring for a year; for a general hiring shall always be construed into a hiring for a year: of which, it would be needless here to multiply examples.

But a hiring at weekly wages, for so long time as the master should want a servant, is not a hiring for a year; for the contract is at the will of the master, and is so far from being for a year, that the servant may be turned away at the end of the week. And the same principle seems to apply to all cases where, by the express contract, the hiring may be determined either by the master or the servant before the year expired: and to make a hiring such as will gain a settlement, there must be, in the original agreement, something by which it appears to be a hiring for a year; as that the party should have so much a week the year round, or so much a week both summer and winter.

A hiring at eight shillings a month, with liberty to let himself out in harvest time, and depart at a month's wages, or a month's warning, is not a hiring for a year: and the distinction in this species of hiring seems to be, that where the liberty either to work for another master, or not to work for the master hiring, forms *part of the contract*, that such hiring is not a hiring for a year, and, of course, a service under it will not gain a settlement; for, to gain a settlement, the servant must continue and abide in a state of servitude, all the time, during a whole year. But where the exception does not form any part of the original agreement or contract, then an exemption from service, during part of the year, particularly if it arise from usage, will not vitiate the hiring. And even where the hiring is accompanied with an agreement to be absent; yet if it be for the purpose of a duty, which the Law would have compelled the master to permit the servat to perform, it will not vitiate the contract; as where a man was hired to serve a year, with an express exception to be absent for a month on the duty of a militia-man. In all cases, if the contract be legal at the time of the hiring, a new agreement, during the service, will not avoid a settlement under it; as where a man hired himself to a turner for a year for board, lodging, pocket money, and clothes, but in the middle of the year it was agreed, that instead of these, he should work by the piece, and have what he could earn.

As to customary and retrospective Hirings:—A hiring from *May-day* to *Lady-day*, and from *Lady-day* to *May-day*; or from the 3d of *October* to the *Michaelmas* following; or from *Michaelmas* to *Michaelmas*, with liberty of absence during sheep-shearing or harvest month, will not gain a settlement; although in all these cases it is the custom of the country to consider such hiring as a hiring for a year, but a hiring from *Whitsuntide* to *Whitsuntide*, if it be the custom of the country to consider such hiring as a hiring for a year, will gain a settlement, although it fall short of 365 days: So also, a hiring at a statute fair, held the day after *Michaelmas-day*, from that time till the *Michaelmas* following; or from the second day of one year until the first day of the next year, are hiring, for one year; for the days shall be taken inclusively: But where such a number of days intervene, as to prevent the principle of there being no fraction of a day, by analogy to the rule of Law in other cases, from applying; or where such terms as will warrant a construction of intent between the parties, are wanting; in such case no custom of the country shall avail to control the Law, and give a retrospect; therefore, where there was a hiring at a statute fair held three days after *Martinmas* to serve till the *Martinmas* following; the Court held it was not a hiring for a year, although it was so considered by the custom of the country: So also, a hiring three days after *Michaelmas* till the *Michaelmas* following, is not a hiring for a year, although, by its happening to be leap year, the number of days amounted to 365. It seems, therefore, to be most clearly settled, that a *retrospective hiring* will in no case be considered as a hiring for a year; as where *Michaelmas* was on *Thursday*, and upon the *Saturday* following, a man was hired from the said *Michaelmas day* to *Michaelmas* following: But a *conditional hiring* may be a good hiring for a year; as where a woman agreed to live with a man as a servant for three months, at the rate of 3 *l.* a year; and if he and she liked one another, that then she would continue his servant for the remainder of the year, and continued without any other agreement to serve the whole year; the opinion of the Court *uno ore* was, that the woman, by this hiring and service, had gained a settlement: So, where a person, in the common case, is hired upon a month's liking, and to go away on a month's wages, or a month's warning, to be at any time paid or given on either side, and the servant continues to serve a year under this hiring, it is held, that he or she thereby gains a settlement.

The Courts of Justice lean so much in favour of settlements, that if, from the circumstances, a *contract for a year* appears, it is considered as good, although it was not made by one, but by *several hirings*: therefore, where a person was hired from three weeks after *Michaelmas* to the *Michaelmas* following, and on the expiration of this hiring, was hired again for a year, and there was a service for a year under both hirings; it was held, that the party gained a settlement, although the service, under the second hiring, was only for 40 days: So also, where a servant was hired from *Christmas* to *Michaelmas*, and served accordingly, and at the said *Michaelmas* was hired again by the same master for a year, but served only till *Midsummer* following; it was held, that these several hirings might be joined so as to form a hiring for a year. The general principle in these causes is, that though the *service* must be immediately continued, yet the *hiring*, under which such service is performed, need not be by one and the same contract; for if there be a continuation of the same service of 40 days, after a hiring for a year, such hiring will connect itself with any former hiring, by which the service was continued, so as to make a service for a year. The question, therefore, in this species of settlement, always is, whether the former service was discontinued?

discontinued? therefore, where a person was hired from *Ash Wednesday* until *Christmas*, and, after serving that time, left his master, and went home to his father, where he staid about a week; this was held a discontinuance, and that it could not be connected with a subsequent hiring for a year, and service under it for eleven months, so as to gain a settlement; But the mere absence of a day between two hirings, or increase of wages on the second hiring, or the former hiring's being from week to week, or absence on account of ill-health, or an omission during service to make a new agreement at the expiration of the first hiring, will not make a *discontinuance*. But the servant must, at the time of the second hiring, be in a capacity to gain a settlement by hiring and service; and therefore, if a servant be unmarried at the first hiring, and married at the second hiring, they cannot be so connected as to gain a settlement under him by any length of service.

Of service in different places; at different times; and to different masters:—It is not necessary that the whole year's service, under any hiring for a year, should be performed in the parish where the hiring is made; and therefore if, under a hiring for a year, the servant serves half a year in one parish, and then removes with his master, and serves the other half of the year in another parish, he gains a settlement, where he serves the last 40 days; even although the master went into the other parish merely on a visit, or for his health, as to a watering-place. It is not necessary that the service should be performed in the place where the servant lives, or where the master dwells: therefore, where a house stood in two parishes, the part of the house in which the master lived, and in which the servant constantly worked, stood in one parish; but that part in which the servant lodged stood in another, and the settlement was held to be in that parish where the servant lodged: So also, where a groom was hired for a year to a Nobleman who resided at *Weybridge*, to look after his running horses, which stood in the parish of *Barrowbrook*; it was held, that a residence in this last parish for 40 days gained a settlement, although the master had neither house, nor land, nor settlement in the parish.

The 40 days' residence need not be 40 successive days; for if a servant serves more than 40 days in the whole, he gains a settlement; and where the last 40 days are in a place where no settlement can be gained, the settlement shall be in the place where the last preceding 40 days were served. In the case of alternate residence, the settlement shall be in that parish where the servant sleeps the last night of the last 40 days. There must, however, be a residence of 40 days in some one parish; and therefore, where a person who was hired to a waterman, served a year by navigating a boat to and from *London*, and it did not appear, that he had, during the year, slept for 40 days in any one parish at different times, either in going to or returning from *London*, he having in general lived and slept in the boat; it was held, that he did not gain a settlement in either place.

The Service may not only be performed in different places, but with different masters, provided there be no dissolution of the original hiring; and the servant be unmarried at the time such original hiring took place; for marriage, during the service, as has already been said, will not vacate the settlement, or entitle the master to turn the servant away.—Service with the *executor* of the master for the remainder of a year, though in a different parish from that in which the hiring for a year was made, is good: for the death of the master does not dissolve the contract: and the servant, by such service, gains a settlement in the second parish.

Of absence from service:—The *year's* service must be performed; and therefore, if the servant voluntarily and without sufficient cause go away, or absent himself from the service, at any period previous to the expiration of the year,* this absence operates as a dissolution of the contract; and this, though done by collusion between the master and servant, for the purpose of avoiding a settlement; if a discharge is procured under the order of a Justice, and no actual fraud be positively found:—So also, an absence in the servant, arising from his criminal conduct, or even though involuntary on his part, will, under certain circumstances, prevent a settlement: thus, where a maid servant served till within three weeks of the end of the year, when her master discovering her to be with child, turned her away, and paid her her year's wages, and half a crown over; it was held an insufficient service, and no settlement gained under it; for this was a good cause to discharge her: So, where a man servant is turned away by his master before the expiration of the year, on the fact of his being the reputed father of a bastard child, he thereby loses his settlement; for the being taken into custody, and detained for this offence, renders him incapable to perform his service, and gives the master a right to discharge him.

The *contract*, if once dissolved by any species of absence on the part of the servant, cannot be set up again or renewed between the parties by the return of the servant, and subsequent agreement; but an absence created by the default, or fraudulent contrivance, of the master, shall not impede a settlement; as if he turn a servant away or remove him, on his falling sick; or he goes away on being disabled by accident, though he be thereby prevented from returning to his service during the remainder of the year: So also, an absence procured by the fraud of others will not prevent the party from a settlement; as where the parish officers give a servant money to leave the parish, in order to prevent his becoming chargeable when the year expires; or if the servant, before the year expires, declare to his master that he does not wish to be settled in that parish, and goes away with his master's consent, merely to avoid the gaining of a settlement: An express, or even an implied consent of the master to the absence of the servant, will prevent such absence from dissolving the contract; and the taking the servant again into his service, during the year, is evidence of his implied consent to such absence. Thus, where a man, hired from *Martinmas* to *Martinmas*, for a year, about the middle of the year absented himself from his master's service, without his consent, for above three weeks together, but, on the demand of his master, returned, and served out the remainder of the year; it was held, that the absence of the servant was purged by the master's receiving him again: So also, where the servant served till within three weeks of the end of the year, when he asked his master leave to go to the herring fishery, and his master consented he should go, if he would get a man to do the work in the mean time, to his master's liking, which he did, and then received part of his

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his wages, and went away, and returned after the year expired, and received the residue; this was held an absence with the master's consent, and therefore a good service: So also, on a hiring from *Michaelmas* to *Michaelmas*, if the servant tell his master, at the time of hiring, that he cannot come till the day after *Michaelmas*, and the master says he will shift till that time; this is a permission of absence till the time, and will gain a settlement, although the servant quit his service the day before the ensuing *Michaelmas-day*, if he so quit by the leave of his master; and where the dispensation of service, at the end of the year, is *bonâ fide*, the absence does not dissolve the contract, though a new service is entered on before the first year actually expires; and indeed, absence with consent is always good, unless where, as has been before observed, it is an *exception* in the original contract of hiring.

9. If any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement. *Stat.* 3 & 4 *W. & M. c.* 11. § 8.

Certificate persons, under *stat.* 9 & 10 *W.* 3. *c.* 11, cannot gain a settlement by apprenticeship. And by *stat.* 12 *Ann. c.* 18. § 2, Apprentices to any person, residing in any parish under a certificate, *and who shall not have gained a legal settlement*, shall not gain any settlement *in such parish*, by reason of such apprenticeship or binding: But an apprentice to a certificate-man may gain a settlement by serving him in *another parish*, or even in the certified parish, if his master purchase an estate there; or if he serves 40 days *before* the master is certificated; or if the master is certificated to another parish, and the apprentice serves the last 40 days in the parish first certified.

No person, bound apprentice by any deed, writing, or contract not indented, being first legally stamped, shall be liable to be removed from any parish, &c. where he shall have been so bound an apprentice, and has resided 40 days, on account of such deed, writing, or contract not being *indented* only. *Stat.* 31 *Geo.* 2. *c.* 11.

An apprentice, by being bound and inhabiting in the parish where his master lives, or where his servitude is performed under the indenture, thereby gains a settlement, although it be to a master who has no right to take an apprentice; and although the apprentice, at the time he binds himself, is an infant; and though the binding is for a less term than *seven years*, if not avoided, on this account, by *the parties* themselves during the time: So also, although the apprentice-fee is not inserted in the indentures, pursuant to *stat.* 8 *Ann. c.* 9. § 39: or though the indenture, or its counterpart, is not executed by the master, or the apprentice: or although the master be an infant. But there must be a binding as an apprentice, either by indenture or by deed properly stamped; and if the indentures are absolutely void, he cannot gain a settlement *as a servant*, by his servitude under them: So also, where a contract or agreement was made to serve for [illegible] years, it was held not to amount to a sufficient binding as an apprentice, for a hiring as a servant, and an agreement to bind as an apprentice, are distinct and independent contracts, and never can be converted one into another. Thus, where a written agreement was made between the parents of a boy and his intended master, to bind him apprentice for seven years; but no indenture of apprenticeship was executed, pursuant to the agreement; the Court held, that although an apprenticeship was intended between the parties, yet he could not gain a settlement as a hired servant, by serving under this agreement as an apprentice, nor could he gain a settlement as an apprentice, because no indenture of apprenticeship was executed.

There must also be *a residence of* 40 *days* under the indenture, to give a settlement to an apprentice; but the 40 days may be at different times; and though, in the interval of these times, the apprentice gain a new settlement, yet they will connect so as to form a 40 days' residence under the indenture, and give him a settlement in the parish where he lodges the last night, although the master himself has no settlement in the parish. This species of settlement arises from the binding *and inhabiting*, and not, as in the case of a servant, from hiring and service; and, therefore, the apprentice gains his settlement in that place where he inhabits, and not where his service is performed: therefore, an apprentice who serves his master in one parish, and boards and lodges with his father in another, although such board and lodging is paid for by the master pursuant to a covenant in the indenture, does not gain a settlement in the master's parish: So also, where a boy was bound apprentice to a mariner, and served his master in the day-time for a quarter of a year at his house on shore, but lay every night on board his master's ship at her moorings in the *Thames*; it was held, that he gained no lodging in the master's parish on shore; although, if it had appeared, that he slept on board in his master's service, he might thereby have gained a settlement in the parish within which the ship lay; for although the service relates to one place and the inhabitancy is in another, yet that is sufficient: and therefore, an apprentice to a Captain of a ship, who served and lodged the last 40 days on board the ship, while lying in the harbour, gained a settlement in the parish within which the harbour lay; the said harbour being considered by the Captain and Sailors as the proper home of the ship. So also, where an apprentice married during his apprenticeship, and served his master by day in one parish, and slept with his wife and family in a different parish, he gained a settlement in the parish where he slept; for that was the parish of his habitation: So, where a boy was bound an apprentice for three years, and after a service of more than 40 days with his master, his master died, and he, with the consent of his mistress, and before administration taken out, went from his master's house to his father's, there being no work for him to do, and continued with his father till his time expired; yet it was held, that he gained a settlement in the master's parish: So, where an apprentice, after a residence with his master of forty days, fell sick, and, on account thereof, went home into a different parish with his master's consent, and remained ill until his time expired, he gained a settlement in the master's parish.

An apprentice, while the indentures subsist, is not *sui juris*, and therefore cannot serve another person without his master's consent: but if the original master consent, such service is a service under the indenture, and he gains a settlement in the parish where he lives with such second master; although the hiring out by the first to the second

master

master is by parol, or the agreement be made by the widow of the first master before administration taken out. As to what shall be considered as a consent on the part of the first master, it must always depend on the particular circumstances of each case. For further matter relating to parish apprentices, see further this Dict. title *Apprentice*, 1, 2.

10. By the Common Law, founded on *Magna Charta*, no person can be removed from his own landed estate, however inconsiderable its value may be; and this Law still continues, provided such estate come to him by operation of Law: but by *stat.* 9 *Geo.* 1. *c.* 7. § 5, it is enacted, that "no person shall acquire any settlement, in any parish or place, for or by virtue of any purchase of any estate or interest in such parish or place, where the consideration for such purchase doth not amount to the sum of 30*l.* *bona fide* paid, for any longer or further time than such person shall inhabit such estate."

An estate by operation of Law is, that estate which the party gains without any act of his own. Thus, a husband may gain a settlement by residing on an estate vested in trustees for the [illegible] use of his wife, or on an estate to be purchased [illegible] previous to the marriage, though of the value of less than 30*l.* [illegible] the husband of an administratrix, who is entitled as a trustee to a lease for years, has the [illegible] estate by operation of Law [illegible] a residence thereon for 40 days will [illegible] a settlement: but it seems, that the 40 days' [illegible] ought to be subsequent to his obtaining letters of administration; for it hath been adjudged, that [illegible] next of kin, who, after his father's death, lives [illegible] during the remainder of the [illegible] tion until [illegible] by his residence [illegible] a [illegible] entitled [illegible] use, [illegible] by [illegible] without [illegible] dence of 40 days [illegible] a settlement; and therefore [illegible] tees to be sold to pay debts, and [illegible] divide the surplus, if any, between *A.*, *B.*, and *C.*, [illegible] by operation of Law, as will gain a [illegible] a person, entitled as executor to the [illegible] of a term of 99 years, of a [illegible] gains a settlement by residing on such estate 40 [illegible] So also, where a man built a cottage upon [illegible] lands of a nobleman, and lived on it and [illegible] more than 20 years, and it descended to his daughter: it was held, that the daughter, or, if married, her husband, gained a settlement by a residence of 40 days upon this estate: for although her father had not originally any right to the land on which the cottage was built, yet the [illegible] having been permitted so many years, and a descent [illegible], the right of entry on the land is taken away; and having thereby gained the right of possession, it is sufficient to render her irremoveable: and it makes no difference, though the possession for more than 20 years was not an adverse possession; and even although the ground and cottage was originally obtained by fraud. An estate in fee, belonging to a married woman, and enjoyed by her husband as tenant by the curtesy, will, after his death, give his son and heir a settlement, although under the value of 10*l.* a year: So, the widow of a man, who dies seized of a house, gains a settlement by residence therein for 40 days in right of her dower; but this species of estate will not give a settlement to the widow, where the husband was certificated; nor can she communicate a settlement thereby to any future husband, unless her dower be assigned. A conveyance from a father to his daughter, in consideration of natural love and affection, of the residue of a term determinable upon lives, is an estate by operation of Law; and a residence thereon, of 40 days, will give such daughter a settlement, although the original consideration paid for such estate, by the father, was only 10*s.* So also, a conveyance after marriage, by the wife's father to the husband only, if it appear to be grounded on natural affection, and intended for the use both of husband and wife, is an estate by operation of Law, which will give a settlement, though under the value, of 30*l.* and *à fortiori*, an estate of whatever value, conveyed from a father to his son, in consideration of natural affection, although it is also expressed to be in consideration of 10*l.* paid by the son to the father: So also, where a woman, on her marriage with the copyholder of a manor, where the widows are entitled to free bench, gave a bond, that the son of her intended husband, by a former wife, should have possession of part of the copyhold estate after the death of her husband, on condition of his repairing the part of the house reserved for her, and, after the death of her husband, delivered up the possession to the son, according to the bond; it was held, that the son gained a settlement by residing 40 days on this estate: So also, the surrender of an old lease, which had been many years in the family, and the taking a new one, is an estate by operation of Law: So also, a married daughter, who resides with her family on the estate of her mother, for 40 days after her mother's death, gains a settlement, although the estate was devised to the mother only during her life, and then to be sold for the benefit of her children. But residence on leasehold premises, determinable on the death of the mother, and from the profits of which the daughter is entitled to an annuity, will not gain her a settlement; neither can a remainder-man gain a settlement by residing on the estate during the life of the tenant for life; nor a mortgagor, who, after the mortgagee has recovered possession in ejectment, is permitted to reside thereon for a particular purpose; for he is not in possession as mortgagor; nor a man who, having conveyed over his estate in trust for the benefit of his creditors, afterwards gets fraudulently into possession; nor can a wife, in any case, gain a settlement in her own right by residing, either on her own estate, or the estate of her husband, during his life.

An estate by purchase is, in contemplation of Law, that estate which a man acquires by his own act and agreement; and it has been held, that a copyhold estate, surrendered by a father to his son, and to which the son is admitted, is an estate acquired by purchase, within the meaning of the statute 9 *Geo.* 1. *c.* 7. § 5; and therefore, will not gain a settlement by a residence thereon of 40 days, unless it be of the value of 30*l.* So also, is a grant of a copyhold, with a fine, heriot, and rent.

As to what purchase shall be considered as amounting to the value of 30*l.* it has been held, that an acre of land purchased for 25*l.* on which the purchaser erects a tenement, and makes other improvements, so as

so to enable him to sell the whole for more than 30*l.* is an estate of sufficient value: So also, a lease of 50 years of a cottage worth 5*l.* a year, at sixpence a year rent, and which, after 20 years, sold for 30*l.* is an estate of sufficient value: So also, where a man purchased a house and curtilage for 39*l.* but paid only 9*l.* the remainder being paid for him by a friend, to whom he mortgaged the premises as a security, and who, after the expiration of four years, entered under his mortgage and turned out the purchaser; this was held an estate of sufficient value: So also, the mortgagee of a term for 15*l.* to whom 30*s.* were due, and 18*l.* 10*s.* more by bond and simple contract, who, on the death of the mortgagor, takes out administration as a principal creditor, thereby acquires an estate of sufficient value to gain a settlement: Parol evidence may be given of the value, though the consideration is expressed in the deed

The residence must be in the parish, but need not be on the estate; nor need the 40 days be all at one time, although the estate is held in common between the pauper, his mother, and his sisters.

V. Any person may go into any parish to work *in time of harvest*, or at any other time, so that he carry with him a *Certificate* from the Minister of the parish, and one of the Churchwardens, and one of the Overseers, that he hath a dwelling, and hath left his family, and is declared an inhabitant there; and such certificate-person shall not gain a settlement in the parish in which he goes to work. *Stat.* 13 & 14 *C.* 2. *c.* 12. § 3.

If any person whatever shall come into any parish to inhabit, and shall bring and deliver to the Churchwardens or Overseers *a Certificate*, under the hands and seals of the Churchwardens and Overseers of any other parish, or the major part of them, or under the hands and seals of the Overseers only of any place where there are no Churchwardens, to be attested respectively by two or more credible witnesses, thereby owning and acknowledging the person or persons, mentioned in the said certificate, to be inhabitants legally settled in that parish; every such certificate, having been allowed of and subscribed by two or more Justices of the Peace within the parish or place from whence any such certificate shall come, shall oblige the said parish or place to receive and provide for the person mentioned in the said certificate, together with his or her family, as inhabitants of that parish; whenever he, she, or they shall happen to become chargeable to, or be forced to ask relief of, the parish, to which such certificate was given: And then, and not before, it shall be lawful for any such person, and his or her children, *though born in that parish*, (see *ante* IV. 1.) not having otherwise acquired a legal settlement there, to be removed, conveyed, and settled in the parish or place, from whence such certificate was brought. *Stat.* 8 & 9 *W.* 3. *c.* 30.

No person whatever, who shall come into any parish by such certificate, shall gain any settlement therein, unless he shall take a lease of a tenement of the value of 10*l.*; (see *ante* IV. 6.) or shall execute some annual office, being legally placed therein. See *ante* IV. 7.—See also *ante* IV. 8 & 9.

The Witnesses, who attest the execution of such certificates, or one of them, shall make oath before the Justices who allow the same, that he saw the Parish-Officers sign and seal the certificate, and that the names of the Witnesses, attesting the same, are of their own proper hand-writing; and the said Justices shall also certify, that such oath was made before them; and then such certificate shall be taken to be fully proved; and shall be evidence without further proof. *Stat.* 3 *Geo.* 2. *c.* 29. § 8.—The Overseers, or other persons removing back any certificated persons, shall be reimbursed such reasonable charges as they may have been put to, in maintaining and removing such persons, by the Parish Officers of the parish or place to which they are removed; the said charges being first ascertained by a Justice of the Peace of the county or place to which such removal shall be made; to be levied by distress, &c. § 9.

The Parish Officers cannot be compelled to grant a certificate; and, if granted, it is not binding, unless signed by the majority of them; and parol evidence may be given, that those who signed were not Officers of the parish; but if signed by the majority, a mistake in its direction is not material. And if a certificate be lost, and the Parish Officers refuse to grant another, yet the pauper cannot, on that account, be removed, though actually chargeable. The Justices may attest a certificate as witnesses, as well as allow it as Justices; and if it appear to have been legally allowed, it shall be intended to have been well attested; but unless the allowance, which is discretionary in the Justices, be signed, the certificate is invalid: if, however, a certificate be above 30 years old, the allowance thereof, written in the margin and signed, is sufficient, although there is no certificate of one of the witnesses; and one of the witnesses may attest the signing of the other.

A *Certificate*, after its delivery to the Parish Officers as the statute requires, virtually includes all the legitimate children of the persons certified, who are born while the certificate continues in force; and if it promise to provide for the parties as man and wife, the certifying parish cannot afterwards controvert the fact of their marriage. See *ante* IV. 3. So, if it be given to a woman, stating, that she is unmarried and with child, and promise to provide for the child she then goes with, they cannot object that such child is not settled in their parish because born a bastard in another. See *ante* IV. 1.—Persons residing under a certificate cannot be removed until some one or more of them become actually chargeable; and therefore, that one of the family is *likely* to become chargeable is no cause of removing them; and it is only the individual person who receives relief that shall be removed; but relief afforded by a parishioner is not sufficient, although he is reimbursed by the Parish Officers.

A *Certificate* is only conclusive upon the parish granting it, with respect to that parish to which it is granted, although it is *primâ facie* evidence as to others; and it is only conclusive as between them as to the facts stated in it.

A *Certificate* is discharged by the removal of the pauper to the parish that gave the certificate; or by the pauper's voluntary return to the certifying parish; or by quitting the parish to which he was certified, if it appear that he meant to abandon the certificate; or by an order of removal from a third parish to the certifying parish; or by a second certificate: The Court, however, will not presume a certificate to be discharged; and, therefore, a clear ground of discharge must be shewn.

VI. It

VI. It has already been been noticed, (see *ante* IV. 4;) that by *stat.* 13 & 14 *Car.* 2. *c.* 12. § 1, upon complaint by the Churchwardens and Overseers to one Justice within 40 days, of a person coming to reside in a tenement under 10*l.* a year, any *two Justices* of the division might, on his being *likely to become chargeable* to the parish, remove such person to the place of his last legal settlement. And, by § 3, of the said act, if such person refused to go, or returned back, when sent, he might be committed to the House of Correction as a vagabond; and if the Parish Officers of his own parish refused to receive him, they might be indicted for their default.

This provision had long been considered as equally cruel and impolitic: see 1 *Comm. c.* 9, and the Notes there: and has at length been remedied by the interference of the Legislature.

By *stat.* 35 *Geo.* 3. *c.* 101, the first (and consequently the third) section of this *stat.* 13 & 14 *C.* 2, is *repealed*; and the reason assigned in the preamble of the *stat.* 35 *Geo.* 3, is, that, "many industrious poor persons chargeable to the parish, &c. where they live, merely from want of work there, would, in any other place where sufficient employment is to be had, maintain themselves and families, without being burdensome to any parish; and that such poor persons are, for the most part, compelled to live in their own parish, and not permitted to inhabit elsewhere, under *pretence* that they are *likely* to become chargeable to the parish where they go for employment; although their labour might, in many instances, be very beneficial to such parish."—This preamble also states, that the remedy intended to be applied by the granting of *certificates*, under *stat.* 8 & 9 *W.* 3. *c.* 30, (see *ante* V,) hath been found *very ineffectual*:—The statute then enacts, "That no poor person shall, in future, be removed, by virtue of any order of removal, from the parish or place where such poor person shall be inhabiting, to their last settlement, until such person *shall have become actually chargeable* to the parish or place in which they shall inhabit; when they may be removed by *two* Justices; in the same manner, and subject to the same appeal, and with the same powers, as might have been formerly done, with respect to persons *likely* to become chargeable."

This provision had been previously made as to members of *Friendly Societies*, (see that title,) by *stat.* 33 *Geo.* 3. *c.* 54.

Persons convicted of larceny or other felony, rogues, vagabonds, idle and disorderly persons, and reputed thieves; as also unmarried women with child; shall be considered as actually chargeable. *Stat.* 35 *Geo.* 3. *c.* 101. § 5, 6.

By the same statute, Justices are empowered to suspend the removal of sick persons; the charges incurred by such suspension to be born by the parish to which they are removable. § 2.—And any *Bastard*, born during such suspension, on behalf of its mother, shall belong to the mother's settlement. § 3. See *ante* IV. 1, 2.

Officers refusing to receive a pauper, removed by warrant of two Justices, shall forfeit 5*l.* to the use of the Poor; to be levied by distress. *Stat.* 3 *W.* 3. *c.* 11. § 10.

Persons, who shall unlawfully return to the parish from whence they are legally removed, shall be deemed idle and disorderly persons, and may be committed to the House of Correction for one month. *Stat.* 17 *Geo.* 2. *c.* 5.

It seems, that nearly all the determinations, as to orders for removal of persons *likely* to become chargeable, now apply, *mutatis mutandis*, to the removal of those who are actually so.

The first step which the Parish Officers are to take, in order to procure the removal of a pauper, chargeable to their parish, is, to make a *Complaint* to a Justice of the Peace; for the complaint is the foundation of the Justice's jurisdiction. The *order of removal*, therefore, must state not only a complaint, but that it is upon complaint of the Parish Officers, and shew in certain the persons, with their names, who are become chargeable; and the order cannot remove more persons than the Officers have complained of.

The next proceeding is *The Examination*; for this order must state, that the removal was made, on due examination; it need not, however, state, that the examination was on oath; but ought to shew that the pauper was summoned and heard; but even this is not, in all cases, absolutely necessary. The examination must be taken before two Justices, and it must be by the same two Justices who signed the order; and therefore, an order stating it, in the alternative, to have been taken "before us or one of us," is bad. The two Justices also must sign the order in the presence of each other; and the Justices of one county cannot make an order of removal on an examination taken and transmitted to them by Justices of another county, although such examination be verified by oath. An order signed by two Justices separately, and in different counties, is not *void*, but only voidable on appeal.

The next proceeding is the *Adjudication*; for an order of removal cannot be good, if it omit to adjudge that the persons complained of actually became chargeable to the parish complaining, and that they are last legally settled in the parish to which they are intended to be removed. An order, removing nurse children to their derivative settlement, is good, without stating the death of the parent, or adjudging the place, to which they are removed, to be the settlement of their parents. The order must state, that the Justices are Justices of the Peace for, and not in, the county; but it need not state that they were of the division where the pauper lives; and it is enough to name the county in the margin of the order; for the margin of an order of removal is part of the order itself: if, however, two counties are named, and it state them to be Justices of the Counties aforesaid, it is bad.

The power given to a Justice, on a pauper's returning to the parish from whence he was removed, cannot be exercised, unless a previous charge be made on oath against the pauper who returns; and it seems that, previous to the repeal of *stat.* 13 & 14 *Car.* 2. *c.* 12, this offence must have been proceeded against, under *stat.* 17 *Geo.* 2. *c.* 5, only; for an order of removal does nothing more than prevent the party thereby removed from returning in a state of vagrancy.

If an order of removal be made, and the parish, to which the pauper is thereby removed, neglect to appeal to the next General or Quarter Session, pursuant to *stats.* 13 & 14 *Car.* 2. *c.* 12: 3 & 4 *W.* & *M. c.* 11. § 10, such order becomes conclusive, and no new settlement can

can be gained but by some act subsequent to such removal; but it is only conclusive between those two parishes, and the persons who are mentioned in the order. To render an order thus final, for want of an appeal, it must not only be a legal order, but it must be subsisting; for if it be deserted or made to an improper place, the neglect to appeal will have no effect.

If an order of removal be appealed against, and reversed, two Justices may remove the pauper back to the parish from whence he was sent; but if the order be confirmed, it is then conclusive that the appellant parish is the place of the pauper's last legal settlement; and of course he cannot be removed to any other parish, on any settlement gained previous to the confirmation of the order. But if an order of removal be reversed on appeal, the respondent parish may remove the pauper to a third parish on a settlement gained previous to the former removal; for an order reversed is only conclusive as to the appellant parish; and a bad order reversed, not on the merits, but merely for want of form, is not conclusive on either parish.

POPE, *Papa*.] A term anciently applied to some clergymen in the *Greek* church; but by usage particularly appropriated in the *Latin* church to the Bishop of *Rome*, and who formerly had great authority in these kingdoms. As to the encroachments of the See of *Rome*, it is said to be the general opinion, that Christianity was first planted in this island by some of the *Eastern* church; which is very probable, from the ancient *Britons* observing *Easter* always on the fourteenth day of the month, according to the custom of the *East*: but the *Saxons*, being converted about the year 600, by persons sent from *Rome*, and wholly devoted to the interest thereof, it could not be expected that such an opportunity, of enlarging the jurisdiction of that See, should be wholly neglected; and yet there are few instances of the Papal power in *England* before the *Norman* conquest; though four or five persons were made Bishops by the Pope at the first conversion, and there was an instance or two of appeals to *Rome, &c.* But Pope *Alexander* II. having favoured and supported *William* the First, in his invasion of this kingdom, made that a handle for enlarging his encroachments; and, in this King's reign, began to send his legates hither. *Ermenfroy*, Bishop of *Sion*, was the first who had ever appeared with that character in any of the *British* Islands. And afterwards *Paschal* II. prevailed with *Henry* I. to give up the donation of bishopricks. In the reign of *Stephen*, the pontifical authority was permitted to make farther encroachments: appeals to the Pope, which had been always strictly prohibited, became now common in every ecclesiastical controversy. And in the reign of *Hen.* II. Pope *Alexander* III. exempted all clerks from the secular power; indeed, this King at first strenuously withstood those innovations; but on the death of *Becket*, who, for having violently opposed the King, was slain by some of his servants, the Pope got such an advantage over him, that he was never able to execute the Constitutions of *Clarendon*. And not long after this, by a general excommunication of the King and People, for several years, because they would not suffer an Archbishop to be imposed on them, *John* was reduced to such straits, that he surrendered his kingdoms to Pope *Innocent* III. to receive them again, and hold them of him under the rent of a thousand marks. And in the reign of *Hen.* III. partly from the profits of our best church benefices, which were generally given to *Italians*, and others residing at the Court of *Rome*, and partly from the taxes imposed by the Pope, there went yearly out of the kingdom seventy thousand pounds sterling; a great sum in those days: the nation, being thus burdened and under necessity, was obliged to provide for the prerogative of the Prince, and the liberties of the People, by many strict laws. And hence, in the reign of *Edw.* I. it was declared in Parliament, that the Pope's taking upon him to dispose of *English* benefices to aliens, was an encroachment not to be endured; and this was followed with the *stat.* 25 *Ed.* 3. *st* 6, called the Statute of Provisors, against Popish bulls, and disturbing any patron to present to a benefice, *&c.* See also the *stats.* 12 *R.* 2. *c.* 15: 16 *R.* 2. *c.* 5: 2 *H.* 4. *c.* 3, 4: 7 *H.* 4. *c.* 8: 3 *H.* 5. *c.* 4: 25 *H.* 8. *c.* 21: 28 *H.* 8 *c.* 16—The maintaining by writing, preaching, *&c.* the Pope's power here in *England*, is made a *præmunire* upon the first conviction; and High Treason on the second. *Stat.* 5 *Eliz. c.* 1. In the construction of which statute, it has been held, that he who, knowing the contents of a Popish book, written beyond sea, brings it over, and secretly sells, or conveys it to a friend; or having read the book, or heard of its contents, doth after in discourse allow it to be good, *&c.* is in danger of the statute; but not he who, having heard thereof, buys and reads the same. *Selden's Janus Anglor* ;: *Davis*, 90, *&c.*: *Dyer* 282: 2 *Inst.* 580: See this Dictionary, titles *Papists*; *Bull*; *Præmunire*.

POPISH RECUSANTS; See *Papists*.

POPULAR ACTION, An action given by statute to any one who will sue for a penalty. See titles *Action*; *Information*; *Limitation of Actions*.

PORT, *Portus*.] A harbour or place of shelter, where ships arrive with their freight, and customs for goods are taken. The Ports in *England* are *London*, *Ipswich*, *Yarmouth*, *Lynn*, *Boston*, *Hull*, *Newcastle*, *Berwick*, *Carlisle*, *Chester*, *Milford*, *Cardiff*, *Gloucester*, *Bristol*, *Bridgwater*, *Plymouth*, *Exeter*, *Poole*, *Southampton*, *Chichester*, and *Sandwich*; all which are declared lawful Ports, *& infra corpus comitatus*: to these Ports there are certain members belonging, and a number of creeks, where commonly officers are placed, by way of prevention of frauds in the customs; but these are not lawful places of exportation or importation, without particular licence from the Port or Member under which they are placed. *Lex Mercat.* 132. See further, titles *Harbours* and *Havens*.

PORTER, In the circuit of Justices; An officer who carries a white rod before the Justices in *eyre*, so called *à portando virgam*. *Stat.* 13 *Ed.* 1. *c.* 41. See *Vergers*. There is also a Porter bearing a verge before the Justices of either Bench, *Cowell*.

PORTER of the door in the Parliament-house. An officer belonging to that high and honourable Court, and enjoys privileges accordingly. *Crom. Juris.* 11.

PORTERAGE, A kind of duty paid at the Custom-house to those who attend the water-side, and belong to the package office; and these porters have tables set up ascertaining their dues for landing of strangers' goods, and for shipping out the same. *Merch. Dict.*

PORTGREVE, or PORTREVE, *Portgreuius*; Sax. *portgerefa*; *urbis vel portûs præfectus*.] A Magistrate in certain sea-coast towns; and as *Camden*, in his *Britannia*, says.

says, the Chief Magistrate of *London* was anciently so called, as appears by a charter of King *William* the Conqueror to the City.

Instead of the Portgreve, *Richard* the First ordained two bailiffs, but presently after him King *John* granted them a Mayor for their yearly Magistrate. See title *London*.

PORTION. That part of a person's estate which is given or left to a child.

If a term of years settled to raise a daughter's Portion is so short, that the ordinary profits of the land are not sufficient, the Court of Chancery may order timber to be felled, &c. to make up the money at the time appointed. *Prec. Ch.* 27.

A sale of lands has been also decreed, for payment of Portions devised to be paid at a certain time out of the rents and profits, where they were not judged sufficient for raising the money; although the land subject to the Portions was given to others in remainder. *Ibid.* 396. See *Treat. of Equity, lib.* 1. *c.* 6. § 18: *lib.* 2. *c.* 8. § 6, 7: *Vin. Abr.* title *Portions*: and this Dictionary, titles *Marriage*; *Trustees*; *Uses*; *Will*, &c.

PORTIONER, *Portionarius.*] Where a parsonage is served by different ministers alternately, the ministers are called Portioners; because they have but their Portion, or proportion, of the tithes or profits of the living: the term Portion is also applied to that allowance which a Vicar commonly has out of a rectory or impropriation. See *stat.* 27 *H.* 8. *c.* 28.

PORTMEN. The burgesses of *Ipswich* are so called. So also are the inhabitants of the *Cinque Ports*, according to *Camden*.

PORTMOTE, from *portus & gemote, conventus.*] A Court kept in haven-towns, or ports; and is called the *Portmote Court.* 43 *Eliz. c.* 15. The Portmote, or *portmannimote*, i. e. Portmen's Court, is said to be held not only in port towns, as generally rendered, but in inland towns—the word *port* in *Saxon* signifying the same with city.

PORTSALE, A public sale of goods to the highest bidder; or of fish presently on its arrival in the port or haven. See *stat. antiq.* 35 *H.* 8. *c.* 7.

PORTSOKA, or PORTSOKNE, The suburbs of a city, or any place within its jurisdiction; from the Saxon *port, civitas*, and *soca, jurisdictio. Somner's Gavelkind.* 135.---*Hen.* III. granted by charter to the City of *London*---*Quietantiam murdri, &c. infra urbem & in* Portsokne, *viz.* within the walls of the city, and the liberties without the walls. *Placit. Temp. Ed.* 1.

PORTUAS, mentioned in *stat.* 3 & 4 *Ed.* 6. *c.* 10; and reckoned amongst books prohibited by that statute;] A breviary. *Cowell.* It is also, by some, called *portuos* or *porthose*.

POSITIVE PROOF; See title *Evidence*.

POSSE, An infinitive mood, used substantively, to signify a possibility; such a thing is *in posse*, that is, such a thing may possibly be; but, of a thing in being, we say it is *in esse*.

POSSE COMITATUS, The power of the County; according to *Lambard*, includes the aid and attendance of all knights, and other men above the age of fifteen, within the county; because all of that age are bound to have harness, by the statute of *Winchester*: but ecclesiastical persons, and such as labour under any infirmity, are not compellable to attend. Persons able to travel are required to be assistant in this service. It is used where a riot is committed, a possession is kept on a forcible entry, or any force or rescue made contrary to the commandment of the King's writ, or in opposition to the execution of justice. *Stat* 2 *H.* 5. *c.* 8.

But with respect to writs that issue, in the first instance, to arrest in civil suits, such as bailable *latitat*, bill of *Middlesex*, or *capias*, &c. the Sheriff is not bound to take the *Posse Comitatus*, to assist him in the execution of them. See title *Escape*. Though he may, if he pleases, on forcible resistance to the execution of the process. See 2 *Inst.* 193: 3 *Inst.* 161.

Sheriffs are to be assisting to Justices of Peace in suppressing riots, &c. and raise the *Posse Comitatus*, by charging any number of men to attend for that purpose, who may take with them such weapons as shall be necessary; and they may justify the beating, and even killing such rioters as resist, or refuse to surrender; and persons, refusing to assist herein, may be fined and imprisoned. See *stats.* 17 *R.* 2 *c.* 8: 13 *Hen.* 4. *c.* 7: 2 *Hen* 5. *c.* 8: *Lamb.* 313, 318: *Cromp.* 62: *Dalt. c.* 46: 2 *Inst* 193.

Justices of Peace, having a just cause to fear a violent resistance, may raise the *Posse* in order to remove a force, in making an entry into or detaining lands: and a Sheriff, if need be, may raise the power of the county to assist him in the execution of a precept of restitution; therefore, if he make a return thereto, that he could not make a restitution by reason of resistance, he shall be amerced. See titles *Forcible Entry*; *Sheriff*.

Also it is the duty of a Sheriff, or other minister of Justice, having the execution of the King's writs, and being resisted in endeavouring to execute the same, to raise such a power as may effectually enable them to quell such resistance; though it is said not to be lawful for them to raise a force for the execution of a civil process, unless they find resistance. 2 *Inst.* 193: 3 *Inst.* 161.

It is lawful for a Peace Officer, or a private person, to assemble a competent number of people, and sufficient power to suppress rebels, enemies, rioters; but there must be great caution, lest, under a pretence of keeping the peace, they cause a greater breach of it; and Sheriffs, &c. are punishable for using heedless violence, or alarming the country in these cases, without just grounds. See further, titles *Sheriff*; *Riot*; *Contempt*.

POSSESSIO FRATRIS, Where a man hath a son and a daughter by one *venter*, (i. e. wife,) and a son by another *venter*, and dies; if the first son enters and dies without issue, the daughter shall have the land, as heir to her brother; although the second son, by the second venter is heir, to the father. But if the eldest son dies without issue, not having made an actual entry and seisin, the younger brother by the second wife, as heir to the father, shall enjoy the estate; not the sister. *Co. Litt.* 11, 15.

Lands are settled on a man and the heirs of his body, and he hath issue a son and daughter by one woman, and a son by another, and dieth; and then the eldest son dies, before any entry made on the lands either by his own act, or by the possession of another; the younger brother shall inherit, he claiming as heir of the body of the father, and not generally, as heir to his brother; yet, if the eldest brother enter, and by his own act gained the possession; or if the lands were leased for years, or in hands of a guardian, there the possession of the lessee

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or guardian doth vest the fee in the elder brother, and then on his death the sister shall inherit, as heir to her brother, for there is *Possessio Fratris* 3 *Rep* 42 There can be no *Possessio Fratris* of a dignity; in such case the younger brother is *haeres natus*: Lord *Grey*, being created a Baron to him and his heirs, had issue a son and a daughter by one venter, and a son by another; and after his death, the elder being possessed of the barony, and dying without issue, it was adjudged, that the younger brother, and not the sister, should have it. *Cro. Car.* 437: See title *Descent*.

POSSESSION, *Possessio, quasi pedis positio.*] Is either actual, where a person actually enters into lands or tenements descended or conveyed to him: or, in Law, when lands, &c are descended to a man, and he hath not actually entered into them. So before, or till an office is found of lands escheated to the King by attainder, he hath only a Possession in Law. *Bract. lib.* 2. *c.* 17.

Possession, beyond the memory of man, establishes a right; but if by the knowledge of man, or proof of record, &c. the contrary is made out, though it exceeds the memory of man, this shall be construed within memory. *Co. Litt.* 115. A long Possession the Law favours, as an argument of right, although no deed can be shewn; rather than an ancient deed, without Possession. *Co. Litt.* 6. Continued quiet Possession is a violent presumption of a good title; and where two persons enter into and claim the same land, the Possession will always be adjudged in him who has right, &c. 2 *Inst.* 256, 323.

He who is out of Possession, if he brings his action, must make a good title: and to recover any thing from another, it is not sufficient to destroy the title of him in Possession; but you must prove your own better than his. *Vaugh.* 8, 58, 60.

In an action against a person for digging of coney-boroughs in a common, &c. it was held, that the action, being grounded on the Possession of the tenement, to which the common belonged, the plaintiff need not shew a title; and in this case the defendant may be a stranger; besides the title is not traversable, but ought to be given in evidence upon the trial of the issue, 3 *Salk.* 12.

A defendant in trespass, &c. for taking cattle damage feasant, has been allowed to justify the taking on his Possession, without shewing his title; the matter of justification being collateral to the title of the land, 2 *Mod.* 70: 3 *Salk.* 220. See title *Trespass*.

In replevin, if defendant had the Possession, it is a good bar against the plaintiff if he has no title; but there cannot be a return, unless he shews a property in the goods. See title *Replevin*.

Action of the case lies for shooting at and frighting away ducks from a decoy pond, which is in the plaintiff's Possession, without shewing that he had any property in them. 3 *Salk*, 9.

A man on a lease and release of lands, &c. is in Possession to all intents, except bringing trespass, which cannot be without actual entry, *pedis positio*. 2 *Lil. Abr.* [illegible]. And to make Possession good on entry, the former possessor and his servants, &c. are to be removed from the land; and if Possession be lost by entry of another, it must be regained by re-entry. *Hil.* *Pasch.* 1650.

A person in Possession may bring an action, for loss of his shade, shelter, fruit, when trees are injured; and he in reversion for spoiling the trees. 3 *Lev.* 209 One, in defence of his lawful Possession, may assemble his friends to resist those who threaten to make an unlawful entry into a house, &c. 5 *Rep.* 91. There is an unity of Possession, when by purchase the seigniory and tenancy become in one man's Possession. *Kitch* 134. See 16 *Vin. Abr.* 454, 460: 3 *Comm* c. 10; and this Dictionary, titles *Ejectment*; *Entry*; *Writ of Right*; and other appropriate titles.

The Possession of lands *in fee simple* uninterruptedly for 60 years, is at present a sufficient title against all the world: and cannot be impeached by any dormant claim whatsoever. 3 *Comm.* c 10. *p.* 196. This being the term of limitation in a writ of right. See this Dictionary, title *Limitation of Actions* II. 1.

Mr. *Christian*, apparently not adverting correctly to the terms of the above sentence of *Blackstone*, says, the position there laid down is far from being universally true. His subsequent explanation is correct, but does not impeach the rule stated by the Learned Commentator. An uninterrupted Possession for 60 years, (says Mr. C.) will not create a title, where the claimant or demandant had no right to enter within that time; as where an estate *in tail*, for *life*, or *for years*, continues above 60 years, still the *reversioner* may enter and recover the estate, the Possession must be adverse: and *Coke* says, it has been resolved, that though a man has been out of Possession of land for 60 years; yet, if his entry is not tolled, he may enter and bring any action of his own Possession; and if his entry be congeable, and he enter, he may have an action of his own Possession. 4 *Co.* 11. *b.*

POSSIBILITAS, Is taken from an act wilfully done, and *Impossibilitas* for a thing done against our will. *Leg. Alfred. cap.* 38: *Ll. Canuti, c.* 66: *Leg. Sax Edw. senior. c.* 88.

POSSIBILITY, Is defined to be an uncertain thing, which may or may not happen. 2 *Lil. Abr.* 336. And it is either near or remote; as for instance: Where an estate is limited to one, after the death of another, this is a near Possibility; but that one man shall be married to a woman, and then that she shall die, and he be married to another; this is a remote or extraordinary Possibility: And the Law doth not regard a remote Possibility, that is never like to be. 15 *H.* 7. 10: *Hardr.* 417: 2 *Rep.* 50. At Common Law, a Possibility could not be granted or assigned; but where such Possibilities are real interest, they will be attended to accordingly in equity: Thus, a covenant for a valuable consideration, to settle or convey a Possibility, when it arises, will be enforced. See *Treat. Eq.* 202: and this Dictionary, titles *Assignment*; *Release*.

If husband and wife are tenants in special tail, and the husband only levies a fine of the lands, &c. the wife's estate is turned into a Possibility, and only reducible by entry, if she survive. *Hob.* 257.

Where a lease is made for life, the remainder to the right heirs of *J. S.* this is good; for by common Possibility *J. S.* may die during the life of tenant for life. 2 *H.* 7. 13: 3 *Shep. Abr.* 56.

A man made a lease to his brother for life, and that if he married, and his wife should survive, then she should have it for her life; the lessee, before he married, made a feoffment of the lands to another, and afterwards the lessor

lessor levied a fine to him; then the lessee married, and died, and his wife survived: And it was held, that the remainder to the wife for life was gone by this feoffment, and the Possibility of her having it was included in the fine, which was likewise barred. *Moor* 554. See title *Fine of Lands*.

A testator, possessed of a lease for years, devised the profits thereof to *W. R.* for life, remainder to another; and afterwards the devisee for life entered with the assent of the executor, and then he in remainder for life assigned all his interest to another, and after the devisee for life died; it was resolved, that this assignment was void, because, whilst the devisee for life was living, he in remainder had only a Possibility to have the term; for the devisee for life had an interest in it *sub modo*, and might have survived the whole term. 4 *Rep.* 64.

The devise of the Possibility of a term is void; as where a term is devised to *A* for life, remainder to *B.*, and *B.* devises this remainder to *C.* and dies; and then *A.* dies; this devise to *C.* is void, and the executors of *B.* shall have it. 3 *Lev.* 427. See titles *Will*; *Remainder*.

A Possibility founded on a trust, differs from a mere Possibility; the first may be devised, but the other cannot. *Moor* 808.

POST, A swift or speedy messenger to carry letters.

POST-OFFICE.—The Office for the conveyance of letters through the Kingdom, as well from foreign parts, as from place to place within *Great Britain*.—This was attempted by the Parliament in 1643; an office was erected first in 1657, during the Usurpation, and after the Restoration established by *stat.* 12. *Car.* 2. *c.* 35. See 1 *Comm.* 321.

The rates of letters have been from time to time altered, and some further regulations added by *stats.* 9 *An. c.* 10: 6 *Geo.* 1. *c.* 21: 26 *Geo.* 2. *c.* 13: 5 *Geo.* 3. *c.* 25: 7 *Geo.* 3. *c.* 50: and 28 *Geo.* 3. *c.* 9; and penalties are imposed in order to confine the carriage of letters to the public office only; except in some few cases.

The privilege of letters coming free of postage to and from Members of Parliament was claimed by the House of Commons in 1660, but dropped, on a private assurance that it should be allowed—And accordingly a warrant used to be issued to the Postmaster-General to allow the same; till at length it was expresly confirmed by *stat.* 4 *Geo.* 3. *c.* 24; which, and *stats.* 24 *Geo.* 3. *st.* 2. *c.* 37: 35 *Geo.* 3. *c.* 53, add many new regulations; rendered necessary by the great abuses crept into the practice of franking.

The preamble of the ordinance made in 1657, states that the establishing one General Post-Office, besides the benefit to commerce, and the convenience of conveying public despatches, "will be the best means to discover and prevent many dangerous and wicked designs against the Commonwealth." The policy of having the correspondence of the Kingdom under the inspection of Government is still continued; for by a warrant from one of the Principal Secretaries of State, letters may be detained and opened. 1 *Comm.* 322. *edit.* 1793, *n.* 28. But by *stat.* 9 *Ann. c.* 10, § 40, if any person shall, without such authority, wilfully detain or open any letter or packet delivered to the Post-Office, he shall forfeit 20*l.* and be incapable of future employment in the Post-Office.—It has been decided, that no person is subject to this penalty but those who are employed in the *Post-Office*. 5 *Term. Rep.* 101. And see *stat.* 24 *Geo.* 3. *st.* 2. *c.* 37. § 4, 5, as to opening foreign letters suspected to contain prohibited goods; and *stat.* 35 *Geo.* 3. *c.* 62, enabling the Postmaster-General to open and return certain letters to *Holland*; when the communication with that country was stopped, on account of the Revolution which had taken place there by the arts and intrigues of the French.

It was determined so long ago as 13 *Will.* 3. in the case of *Lane* v. *Cotton*, by three Judges of the Court of *K. B.* though contrary to Lord C. J. *Holt*'s opinion, that no action could be maintained against the Postmaster-General, for the loss of bills or articles sent in letters by the Post. 1 *Ld. Raym.* 646: 1 *Com. Rep.* 100. A similar action was brought against Lord *Le Despencer*, and Mr. *Carteret* Postmaster-General in 1778, to recover a bank note of 100*l.* which had been sent by the Post and was lost. Lord *Mansfield* delivered the opinion of the Court, that there was no resemblance, or analogy, between the Postmasters and a common Carrier; and that no action for any loss in the Post-Office could be brought against any person, except him, by whose actual negligence the loss accrued. *Cowp.* 754—765. For this reason, it is recommended by the Secretary of the Post-Office, to cut bank notes, and to send one half at a time. This is the only safe method, of sending bank notes; as the Bank would never pay the holder of that half which had been fraudulently obtained.

Sir *Wm. Jones* in his excellent Treatise on the Law of Bailments, published in 1781, does not advert to the case in *Cowper*, and expresses his coincidence in opinion with Lord C. J. *Holt*.

Many attempts have been made by Postmasters in country towns, to charge ½*d.* and 1*d.* a letter on delivery, at the houses in the town, above the Parliamentary rates; under the pretence, that they were not obliged to carry the letters out of the Office *gratis*. But it has been repeatedly decided, that such a demand is illegal, and that they are bound to deliver the letters to the inhabitants, within the usual and established limits of the town, without any addition to the rate of postage. 5 *Burr.* 2709: 2 *Rol. Rep.* 906: *Cowp.* 182.

PENNY-POST. Letters or parcels, not exceeding sixteen ounces weight, or ten pounds value, are conveyed daily by the Penny-post, to and from all places within the Bills of Mortality, and ten miles (or more, by *stat.* 34 *Geo.* 3. *c.* 17,) distance from the General Post-Office, for 1*d.* each packet, letter, &c. See *stat.* 9 *Ann. c.* 10. Several general offices are kept at convenient distances, to receive Penny-post letters every day, *Sundays* excepted: Also letters that come from all parts by the General Post, directed to persons in any country towns to which the Penny-post goes, are delivered the same day they come to *London*: And the answers are carried every post night to the General Post Office in *Lombard-street*, being left at the receiving houses.

Penny-post men, carrying letters out of the Cities of *London* and *Westminster*, or Borough of *Southwark*, and the suburbs thereof, may demand and take 1*d.* at delivery for every letter, above the penny paid on putting the letters into the Penny-post Office. See *stat.* 34 *Geo.* 3. *c.* 17, which enlarges the limits of the Penny-post; and contains several other beneficial regulations.

POST.

POST, *writ of entry in.* A writ given by the statute of *Marlbridge*, (52 *Hen.* 3.) *c.* 30; which provides, that when the number of alienations or descents exceed the usual degrees, a new writ shall be allowed, without any mention of degrees at all. And accordingly, this writ has been framed, which only alleges the injury of the wrong-doer, without deducing all the intermediate titles from him to the tenant: stating it in this manner; that the tenant had no legal entry unless *after*, or subsequent to, the *ouster* or injury done by the original dispossessor; "*non habuit ingressum nisi* post *intrusionem quam* Gulielmus *in illud fecit*;" 3 *Comm.* 182. and see this Dictionary title *Entry*.

POST CONQUESTUM, *after the Conquest*: Words inserted in the King's title, by King *Edw.* I. and constantly used in the time of *Edw.* III. *Claus.* 1 *Edw.* 3. *indorf. m.* 33.

POST DIEM, Where a writ is returned after the day assigned, the *custos brevium* hath a fee of 4*d.* whereas he hath nothing if it be returned at the day.

POST-DISSEISIN, Is a writ that lies for him who, having recovered lands or tenements by a force of *novel disseisin* is again disseised by the former desseisor. See title *Assise of Novel Disseisin*.

POSTEA, The return of the Judge, before whom a cause was tried, after a verdict, of what was done in the cause; and is endorsed on the back of the *Nisi Prius* record: It began thus in *Latin*, *Postea, die & loco*, &c. in English, *Afterwards* (i. e. after joining issue and awarding the trial), on the *day* named, the plaintiff and defendant appear at the *place* of trial, &c. See titles *Pleading*; *Record*; *Practice*; *Trial*.

POSTERIORITY, *Posterioritas*.] Signifies the being or coming after, and is a word of comparison and relation in tenures, the correlative whereof is Priority: As a man holding lands or tenements of two lords, holds of his ancienter lord by priority, and of his latter lord by Posteriority. *Staundf. Prærog.* 10, 11: 2 *Inst.* 392. See titles *Priority*; *Tenure*.

POST-FINE, A duty to the King for a fine formerly acknowledged in his Court, paid by the cognisee *after* the fine is fully passed. See title *Fine of Lands*, I.

POST-HORSES, See titles *Horses*, *Taxes*.

POSTHUMOUS Child, A child born after his father's death, &c. By *stat.* 10 & 11 *W.* 3. *c.* 16, *Posthumous* children are enabled to take estates by remainder, in settlements, in the same manner as if born in their father's lifetime, though no estate be limited to trustees to preserve them till they come *in esse*. See titles *Infant*, II; *Remainder*.

POST-MAN, See *Pre-audience*.

POST-NATUS, The second son, or one born afterwards; often mentioned in *Bracton*, *Glanvile*, *Fleta*, and other ancient writers. In another sense it is distinguished from *ante natus* in the case of aliens, becoming subjects; and as to *Post-nati* and *ante nati*, it was solemnly adjudged, that those who after the descent of the Crown of *England* to King *James* I. were born in *Scotland*, were not aliens here in *England*: But the *ante-nati*, or those born in *Scotland* before the descent, were aliens here, in respect of the time of their birth. *Calvin's case.* Children of persons attainted of Treason, born after the King's pardon, may inherit lands; though not those born before, &c. *Co. Lit.* 391. See this Dictionary, titles *Descent*, I. VI; *Alien*; *Attainder*, &c.

POST-TERMINUM, The return of a writ, not only after the return thereof, but *after the term*; on which the *custos brevium* takes a fee. It is also used for the fee so taken.

POSTULATION, *Postulatio*.] A petition. Formerly when a Bishop was translated from one bishopric to another, he was not elected to the new see; for the Canon Law is *electus non potest elegi*; and the pretence was, that he was married to the first church, which marriage could not be dissolved but by the Pope; thereupon, he was petitioned, and consenting to the petition, the Bishop was translated, and this was said to be by Postulation: But this was restrained by *stat.* 16 *R.* 2. *c.* 5. See titles *Pope*; *Papists*; *Bishops*.

Postulations were made on the unanimous voting any person to a dignity or office; of which he was not capable by the ordinary canons or statutes, without special dispensation: And by the ancient customs, an election could be made by a majority of votes; but a Postulation must have been *nemine contradicente*.

POUND, *Parcus*.] Generally any place inclosed, to keep in beasts; but especially a place of strength to keep cattle which are distrained, or put in for any trespass done by them, until they are replevied or redeemed. In this signification, it is called Pound overt and Pound covert; a Pound overt is an open Pound, usually built on the lord's waste, and which he provides for the use of himself and tenants, and is also called the lord's or the common Pound; and a backside, yard, &c. whereto the owner of beasts impounded may come to give them meat, without offence, is a Pound overt: A Pound covert is a close place, which the owner of the cattle cannot come to, without giving offence; such as a house, &c. *Kitch.* 144: *Terms de Ley*: *Co. Lit.* 96.

There is a difference between a common Pound, an open Pound, and a close Pound, as to cattle impounded: For where cattle are kept in a common Pound, no notice is necessary to the owner to feed them; but if they are put into any other open place, notice is to be given; and he is then also bound to feed them; and if beasts are impounded in a Pound close, as in part of the distrainer's house, stable, &c. he is to feed them at his peril. *Co. Lit.* 47. A distress of household goods, or dead chattels, which are liable to be stolen, or damaged by the weather, ought to be impounded in a Pound covert; else the distrainer must answer for the consequences; and for this purpose, under *stat.* 11 *Geo.* 2. *c.* 19, any person distraining for rent may turn any part of the premises upon which a distress is taken into a Pound, *pro hac vice* for securing such distress. See title *Distress*, II.

A common Pound belongs to a township, lordship, or village; and ought to be in every parish, kept in repair by them who have used to do it time out of mind: The oversight whereof is to be by the Steward in the Leet, where any default herein is punishable. *Dyer* 288: *Noy* 52.

POUNDAGE, A subsidy to the value of twelvepence in the pound, anciently granted to the King, of all merchandize exported or imported. See this Dictionary, title *Customs on Merchandize*.

POUND-BREACH. If a distress be taken and impounded, though without just cause, the owner cannot break the pound, and take away the distress; if he doth, the party destrained may have his action, and retake the distress wherever he finds it: And for Pound-breaches, &c. action of the case lies, whereon treble damages may be recovered. *Co. Lit.* 261: *stat.* 2 *W.* & *M. st.* 1. *c.* 5. Also Pound-breaches may be inquired of in the Sheriff's turn; as they are common grievances, in contempt of the authority of the Law. 2 *Hawk. P. C. c.* 10. § 56.

POUND IN MONEY, from the *Sax. pund*, i. e. *pondus*.] Twenty shillings: In the time of the *Saxons* it consisted of 240 pence, as it doth now: and 240 of those (silver) pence *weighed* a pound, but 720 scarce weigh so much at this day. *Lambard* 219.

POUR FAIR PROCLAIMER, *que null inject Fimes ou Ordures en Fosses, ou Rivers, pres Cities*, &c.] An ancient writ directed to the Mayor or Bailiff of a city or town, requiring them to make proclamation, *That none cast filth into places near such city or town*, to the *nusance* thereof: and if any be cast there already, to remove the same; founded on the *stat.* 12 *R.* 2. *c.* 13. *F. N. B.* 176. Indictments for nusances now supply the place of this writ. See title *Nusance*.

POURPARTY, *Propars, propartis, propartia*, Fr. *pourpart: pro parte*.] That part or share of an estate, first held in common by parceners, which is by partition allotted to them. Thus it is contrary to *pro indiviso*: For to make Pourparty is, to divide the lands that fall to parceners, which, before partition, they hold jointly and *pro indiviso*. *Old Nat. Brev.* 11. See title *Parceners*.

POURPRESTURE, *Pourprestura*, from the Fr. *pourpris, conseptum*, an inclosure.] Any thing done to the nusance or hurt of the King's demesnes or the highways, &c. by inclosure or buildings; endeavouring to make that private which ought to be public. *Glanv. l.* 9. *c.* 11: 1 *Inst.* 38, 272. See this Dictionary title *Nusance* I.

Crompton in his *Jurisd.* 152, defines it thus: Pourpresture is properly when a man taketh unto himself, or incroacheth any thing he ought not, whether it be in any jurisdiction, land, or franchise; and generally when any thing is done to the nusance of the King's tenants. See *Kitchen* 10; *Manwood's Forest Laws, cap.* 10; *Glanville, lib.* 9. *c.* 11.

Skene de verbor. signif. verbo Pourpresture, makes three sorts of this offence; one against the King, a second against the lord of the fee, the third against a neighbour by a neighbour. See 2 *Inst.* 38 & 272. *Et lib. niger in scac.* 37 & 38. That against the King happens by the negligence of the Sheriff or deputy, or by the long continuance of wars, inasmuch as those, who have lands near the crown lands, take or inclose a part of them, and it to their own.

Pourpresture against the Lord is, when the tenant neglects to perform what he is bound to do for the Chief Lord, or in any wise deprives him of his right. *Cowell.*

Pourpresture against a neighbour is of the same nature: It is mentioned in the *Monast.* 1 *tom.* 843; and in *Thorn.* 2623.

POUR SEISIR TERRES *la fame que tient en dower*, &c.] An ancient writ whereby the King seized the land which the wife of his tenant, who held *in capite*, deceased, had for her dowry if she married without his leave; it was grounded on the statute of the King's prerogative, *cap.* 3. See *F. N. B.* 174. This writ does not now lie. See *stat.* 12 *Car.* 2. *c.* 24, abolishing these and other feudal effects of tenures.

POURSUIVANT, from the Fr. *poursuivant*, i. e. *persequi*.] The King's messenger attending him, to be sent on any occasion or message; as for the apprehending a person accused or suspected of any offence: Those employed in martial causes are called Pursuivants at Arms. See *Herald*.

The rest are used upon other messages in time of peace, and especially in matters touching jurisdiction. *Nicholas Upton*, in his book *De militari Officio, lib.* 1. *c.* 11, mentions the ancient form of making these *Pursuivants*; and tells us, that they were called *milites linguares*; because their chief honour was *in custodia linguae*, and he divides them into *cursores equitantes* and *prosecutores*. *Cowell.*

POURVEYANCE, or PURVEYANCE; The providing necessaries for the King's house.

The profitable prerogative of *Purveyance* and *Preemption*, was a right enjoyed by the Crown, of buying up provisions and other necessaries, by the intervention of the King's Purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner; and also, of forcibly impressing the carriages and horses of the Subject, to do the King's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price.

This prerogative prevailed pretty generally throughout *Europe*, during the scarcity of gold and silver, and the high nominal valuation of money consequential thereupon. In those early times, the King's household (as well as those of inferior Lords) was supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the Royal use. 4 *Inst.* 273. And this answered all purposes, in those ages of simplicity, so long as the King's Court continued in any certain place. But when it removed from one part of the kingdom to another, (as was formerly very frequently done,) it was found necessary to send Purveyors beforehand, to get together a sufficient quantity of provisions and other necessaries for the household: And, lest the unusual demand should raise them to an exorbitant price, the powers before-mentioned were vested in these Purveyors; who, in process of time, greatly abused their authority, and became a great oppression to the Subject, though of little advantage to the Crown; ready money, in open market, (when the Royal residence was more permanent, and specie began to be plenty,) being found upon experience to be the best proveditor of any. Wherefore, by degrees, the powers of Purveyance have declined, in foreign countries as well as our own; and having fallen into disuse here during the suspension of Monarchy, King *Charles* II. at his Restoration consented, by *stat.* 12 *Car.* 2. *c.* 24, to resign intirely these branches of his revenue and power: And the Parliament, *in part* of recompence, settled on him, his heirs and successors, for ever, the hereditary excise of fifteen pence *per* barrel on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors. 1 *Comm.* 287.

By this *stat.* 12 *Car.* 2. *c.* 24. it is provided, "That no person, by colour of buying or making provision or Purveyance, shall take any thing of any Subject, without the full and free consent of the owner, obtained without menace or force," *&c.*

Temporary acts have been passed suspending this statute in favour of the King's Royal progresses, *viz.* *Stat.* 13 *Car.* 2. *st.* 1. *c.* 8; 1 *Jac.* 2. *c.* 10; and in favour of the Navy and Ordnance. *Stat.* 13 & 14 *C.* 2. *c.* 20. See further, title *Purveyance.*

POURVEYOR or PURVEYOR, *Provisor,* derived from the Fr. *pourvoir,* i. e. *providere.*] The officer of the King or Queen, or other great Personage, who provided corn and other victual for their house. See *Magna Charta, c.* 22: *stat.* 3 *Ed.* 1. *c.* 7 & 31. & *anno* 28. *ejusdem, Articuli super chartas,* 28 *E.* 1. *st.* 3, *c.* 2. and other statutes. The name of Purveyor was so odious in times past, that by *stat.* 36 *Edw.* 3. *c.* 2, the heinous name of Purveyor was changed into buyer; but the office is restrained by *stat.* 12 *Car.* 2. *c.* 24. See *ante Pourveyance.*

POW-DIKE. To perversely and maliciously cut down or destroy the Pow-dike, in the fens of *Norfolk* and *Ely,* is felony, by *stat.* 22 *Hen.* 8. *c.* 11.

POWER.

An Authority which one man gives another to act for him; a term commonly applied to a reservation made in a conveyance for persons to do some certain acts; as to make leases, raise portions, or the like. 2 *Lill. Abr.* 339.

1. *Upon what Estate, and by what Words, a Power shall be raised.*
2. *How a Power shall be expounded and executed.*

1. In conveyances to an use, a man may direct or model the use, as he pleases, and the *stat.* 27 *H.* 8. *c.* 10, executes the possession to the use: therefore he may annex Powers to estates, which cannot be annexed to them by a conveyance at the Common Law. *Co. Litt.* 237. *a*: *Mo.* 610. And therefore, to the limitation of an use for life, he may annex a power to make leases for years, or lives, or to make a jointure to a wife. *Mo.* 381: 2 *Lev.* 58: Or to grant annuities, raise portions, *&c.* *Mo.* 381: Or to make a jointure, and also a lease to commence after his death, for portions, *&c.* *Hard.* 413. So, he may annex a power of revocation of all uses limited, and to make a limitation of new uses; and this will not be repugnant. *Co. Litt.* 237. *a.*

So, a Power may be annexed to an estate by another deed, executed at the same time, though it be not in the same conveyance by which the estate is conveyed. 2 *Vern.* 279. So, a man may give a Power or authority by will, which is a naked authority, not annexed to an estate; as, if he devises to *A.* for life, and afterwards that it shall be at his disposal to any of his children then living; he hath but an estate for life, with a naked Power to dispose, in the manner directed by the will. 1 *Salk.* 24: 3 *Salk.* 276. So, he may give a Power to a stranger, which is a naked collateral Power, and annexed to an estate. Or a Power in gross, which takes effect after his estate is determined. *Hard.* 415.

If a Power be to *A.* or his assigns, to make leases, *&c.* the Power runs with the estate to the assignee in deed, or in law. 1 *Vent.* 340: 2 *Jon.* 210. So, in all cases a Power coupled with an interest may be assigned: as, a Power to a lessor, and his assigns, to cut down trees. 2 *Mod.* 317.

Powers which are given to mere strangers, that is, to persons who have neither a present nor future estate or interest in the land, are said to be *collateral* to the land; those which are reserved to a person, who has either a present or future estate or interest in the land, are said to be *relating* to the land; and these again are subdivided into two classes, Powers *annexed* to the estate in the land; and Powers *in gross.* Powers *annexed* are, where a person has an estate in the land, and the estate to be created by the Power, is to take effect in possession during the continuance of the estate to which the Power is annexed; such is the Power usually given in settlements to tenants for life, when respectively in possession, to make leases. Powers *in gross* are, where the person to whom they are given has an estate in the land; but the estate to be created under or by virtue of the Power, is not to take its effect till after the determination of the estate to which it relates; such are the Powers usually inserted in settlements, to jointure an after-taken wife. 1 *Inst.* 342, *b. in n.*

If a man, seised in fee, covenant to stand seised to the use of himself for life, with Power to make leases, remainder to another in fee, the Power is not well raised. *Ch. Ca.* 161. If the consideration of the covenant does not extend to the Power to make leases. *Mo.* 145: 1 *Co.* 175: *Raym.* 148. So, upon such covenant, he cannot reserve a Power to make leases, jointures, or for preferment of younger children, *&c.* *Mo.* 381, 383.

Words, which shew the intent of the party, are sufficient to create a Power; as if a Power be to demise or lease, though the intent is, that he declare the uses of the first settlement for life or years; for the lease does not take effect by demise, but by declaration of the uses. *Mo.* 611. So, if a man expresses the Power only by implication, it is well; as, provided, that he shall not have Power to alien, *&c.* otherwise than to make a jointure, and leases for 21 years, it is a good Power to make a jointure and leases. 1 *Leo.* 148. So, if a devise be to *A.* for life, to set, let, and make estates out of it as I might, and afterwards to his daughter in tail; *A.* has power to make leases, it being the custom of the country where the land lies, to let for lives or years. 2 *Rol.* 261. *l.* 35.

But a Power, being executory, may be restrained or enlarged by a subsequent deed: as, if a Power be general, to revoke; by a covenant afterwards, that he will not revoke without the consent of *B.* the Power is restrained. *Jon.* 412. So, if the consideration, upon which the Power was founded, does not extend to the person to whom the lease is made, the lease shall be void; as, if a man covenant, in consideration of natural affection, to stand seised to the use of himself for life, *&c.* with Power to make leases, *&c.* a lease to a stranger is void; for he is not within the consideration. 2 *Rol.* 260. *l.* 30. So, if a Power at its creation be, to make leases to a person, to whom the consideration does not extend, it will be void, though the lease be executed to a person within the consideration. 2 *Rol.* 260. *l.* 35.—But a man cannot annex a Power of revocation to a feoffment or grant, for that will be void. 1 *Inst.* 237. *a*: *Mo.* 610.

Powers of revocation of uses of lands are very frequent in merely voluntary conveyances, but have of late been disused in marriage-settlements; doubts having arisen

arisen whether such settlements are not fraudulent within the *stat.* 27 *Eliz. c.* 4: *T. Jones* 94, 95. Powers of revocation in their creation are to be construed favourably; and therefore no express or technical words are necessary to the creating of such Powers; but any expression which denotes an intent to reserve such Power, will be sufficient. 2 *Vern.* 376: 3 *Keb.* 26. But if such Power be once executed, that is, the old uses over the whole estate revoked, and new uses limited, such new uses cannot be revoked, without an express reservation of a Power for such purpose. *Pre. Ch.* 474: 2 *Burr.* 1136: 2 *Vef.* 211. A Power of revocation may extend to all the limitations, or be restricted to a particular estate, limited by the conveyance; as where the use is to *A.* for life, remainder over, with Power to revoke the estate for life only, this seems to be a good Power. 2 *Rol. Ab.* 262. *pl.* 1. See further, *Fonblanque Treat. Eq. lib.* 2. *c.* 6. § 6, 7, and the notes there.

2. A POWER shall be expounded strictly; therefore if a man has Power to make leases generally, this extends to make leases in possession only, and not in reversion. 2 *Roll.* 261. *c.* 5: *Cro. Jac.* 318: *Yelv.* 222: *Ray.* 248: 1 *Ld. Raym.* 267: 2 *Salk.* 537: 1 *Lev.* 168: 6 *Co.* 33. *a*: *Mo.* 199: 1 *Leo.* 35: 3 *Leo.* 131. Nor a lease to commence *in futuro. Raym.* 248: 1 *Leo.* 35: *Yel.* 222: *Cro. Jac.* 318: *Mo.* 494. So, if the Power be to make leases for two or three lives, he cannot make a lease to one not *in esse*; as to the son of *B.* not born, *&c. Raym.* 163. So, if the Power be to make leases in possession, he cannot make a lease of land in reversion, though it be to commence *in presenti*, 1 *Sid.* 101: *Ch. Ca.* 18.

So, if part of a lease be in reversion, the whole lease shall be void. 3 *Salk.* 276. So, if the Power be to make leases in possession, or in reversion, he cannot make a lease in possession, and another lease of the same land in reversion; but his Power to lease in reversion extends only to make leases of the land, which was not then in possession. 1 *Ld. Raym.* 269: 2 *Salk.* 537. So a Power to make a lease of three lives or three years in possession, or for two lives or thirty years in reversion, warrants only a concurrent lease for two lives; for a lease for lives cannot commence at a future day. 1 *Ld. Raym.* 269: 2 *Salk.* 537.

But if a Power be annexed to the estate of him in reversion, to make leases generally, he may make a lease *in presenti* of the reversion. 1 *Lev.* 168. Though the Power be to make leases in possession. *Ch. Ca.* 18: 1 *Lev.* 168: 1 *Sid.* 260, 261. So, if a fine be to the conusee for 15 years, afterwards to *B.* for life, *&c.* with Power to lease for three lives, or 21 years in possession; he may make a lease during the 15 years of land in lease at the time of the fine, when such lease expires. 2 *Rol.* 260. *l.* 50: *Cro. Jac.* 347: 1 *Rol.* 12: 2 *Rol.* 216. So if husband and wife lease pursuant to the *stat.* 32 *H.* 8. *c.* 28; and then, by act of Parliament, the estate is settled to the husband for life, with Power to lease for three lives, or 21 years; he may make leases of the reversion during the first lease by the husband and wife. 2 *Rol.* 261. *l.* 15: 1 *Lev.* 36: *cont. Dyer* 357. *a.* So, if a Power be to make leases in reversion for three lives, *&c.* he may lease for three lives, when there is another life *in esse*, though the Power does not say, to make leases of the reversion; for there is no prejudice. 2 *Rol.* 261. *l.* 30. So, he may make a lease for years determinable upon three lives, to commence after the end of the former lease *in esse*. 8 *Co.* 70. See title *Lease* I. 2.

Whatever is an equitable, ought to be deemed a legal, execution of a Power; and the reason is obvious; for Powers were originally in their nature equitable, but are, by the Statute of Uses, transferred to Common Law. See 2 *Burr.* 1147: 1 *Cowp.* 266.

There is a distinction between the *Non-execution* of a Power, and a *defective* execution of a Power: for though a Court of Equity will, under certain circumstances, help the latter, it will never aid the former; because so to do would be repugnant to the nature of a Power, which always leaves it to the free will and election of the party to whom the Power is given, to execute it, or not; for which reason Equity will not compel the execution of a Power, or construe the act as done when there is no evidence of the intention of the party to do it. 2 *P. Wms.* 490: and see *Powell on Powers.*—The declaration of such intent is, however, a sufficient ground for the interference of a Court of Equity, 2 *Vern.* 69. A covenant in a marriage settlement, referring to a Power, or to the estate on which the Power attaches, is, in respect of the consideration, a sufficient indication of an intent to execute such Power. 2 *Freem.* 256: 2 *Vern.* 379: See 2 *P. Wms.* 222: *Gilb. Rep.* 166: *Ambl.* 3.

The interference of Courts of Equity, in cases of a defective execution of a Power, proceeds upon the same principles as those on which those Courts will supply any defect in the surrender of a copyhold estate, and is therefore bound by the same considerations. *Treat. Eq.* i. 314. *n.* See this Dictionary, title *Copyhold.*

In *Bath* and *Montague*'s Case, (3 *Ch. Ca.* 69, 93,) it is said, by the two Chief Justices, that if the party appear to have intended to execute his Power, and is prevented by death, Equity shall interpose to effectuate his intent, for it is an impediment by the act of God; and the case of *Smith* v. *Ashton*, (1 *Ch. Ca.* 264: *Finch. Rep.* 273.) is relied on as an authority to such an effect; but this not being an original opinion of the learned Chief Justices, and founded only on the case cited, can be carried no farther than that case warrants; upon reference to the circumstances, it will be found to afford an authority rather against, than in support of the notion, that where a man is only preparing to execute a Power, and dies before he does execute it, the preparatory steps amount to such an execution as Equity will make effectual; for it is observable, that the Court, in *Smith* v. *Ashton*, directed an issue to try whether the notes or instructions for the will, from which the intent of the donee of the Power was inferred, were part of his will; which issue would have been unnecessary, if the Court could have relieved on the ground of preparatory measures only: the relief afforded in that case must therefore be referred to the result of the issue, which was, that the notes or instructions were part of the will. *Treat. Eq.* i. 315. *in n.*

It is said, that Equity will relieve the defective execution of a Power to make leases; but this must be understood of such leases as are not derived under Powers limited in their nature to a particular mode of execution: for in the construction of Powers, originally in their nature

were legal, Courts of Equity must follow the law, be the consideration ever so meritorious; for instance, in the case of *Powers* by tenant in tail, to make leases under the statute, if not executed in the requisite form, no consideration, however meritorious, will avail. So, with respect to defective executions of Powers under the Civil-List Act, Powers under particular family entails, Equity can no more relieve from them than it can from defects in a common recovery. The principle upon which the rule of construction is founded, in these cases is, that there is nothing to affect the conscience of the remainder-man. *Cowp.* 267.

In the case of defective execution of Powers, it is not necessary, in order to induce the interference of a Court of Equity, that the consideration should be strictly valuable; but it is sufficient that it be meritorious; *i.e.* founded on some moral obligation. *Tr Eq.* l. 316. *in n.*

Though equity will not, even in favour of creditors, execute a Power which the party himself has omitted to execute; yet, if a Power be executed in favour of a volunteer, though a child, it seems agreed by all the cases, that the money shall be assets for the benefit of creditors. 2 *Vern.* 319: 1 *Atk* 495: 2 *Ves.* 1. Nor can a Power be so framed as to protect an appointment, under it, from payment of the debts of the person appointing. 2 *Ves* 640. See title *Executor* V. 6.

It is agreed in the Books, that a wife may, without her husband, execute a naked authority, whether given before or after coverture, and though no special words are used to dispense with the disability of coverture; and the rule is the same where both an interest and an authority pass to the wife, if the authority is collateral to, and doth not flow from, the interest; because then the two are as unconnected, as if they were vested in different persons. *Finch. Rep.* 346. As too, a *feme covert* may, without her husband, convey lands in execution of a mere Power or authority, so may she with equal effect in performance of a condition, where land is vested in her on condition to convey to others. *W. Jones* 137, 8. The reason why, in these instances, the wife may convey without her husband, seems to be, that he can receive no prejudice from her act, but a great one might arise to others, if his concurrence should be essential. 1 *Inst.* 112. *a in n.* See title *Baron and Feme.*

As to the *Suspension* and *Extinction* of Powers, see 1 *Inst.* 342, *b. in n.*: and as to the rules by which the creation and execution of Powers in general are governed; see *Powell on Powers*: and further, with respect to subjects connected therewith, this Dictionary, titles *Authority*; *Estate*; *Limitation of Estate*; *Lease*; *Remainder*; *Trust*; *Use*, &c.

POWER OF THE COUNTY; See *Posse Comitatus.*

POWER OF THE CROWN; See title *King.*

POWER OF THE PARENT; See *Parent.*

POYNING'S LAW. An act of Parliament made in *Ireland*, in the reign of *Hen.* VII. so called because Sir *Edward Poyning* was Lieutenant there when it was made, whereby all the statutes in *England* were declared of force in *Ireland*; which before that time they were not. 12 *Rep.* 109. See title *Ireland.*

PRACTICE. This term is sometimes applied in an unfavourable sense, to signify fraud, or *bad* practice; Thus clandestine proceedings are said to be *by Practice.*

PRACTICE OF THE COURTS.

By this is understood the form and manner of conducting and carrying on suits or prosecutions, at Law or in Equity, civil or criminal, through their various stages, from the commencement of the process to final judgment and execution; according to the principles of Law, and the rules laid down by the several Courts.

Though the knowledge of this *Practice* is to be acquired chiefly by experience, it is founded on the original structure and progressive improvements of our Laws. Several modern treatises have been written on the Practice of the several Courts of *King's Bench*, *Common Pleas*, *Chancery*, and *Exchequer*; some of which are by no means liable to the censure passed on former productions of that nature, by the learned and ingenious writer, from whom the following abridgment is extracted. The nature of this Dictionary precludes the possibility of entering into any thing like a general detail on so complicated a subject: the various points of which are incidentally noticed, under the several heads to which they apply.

Some idea of the *Visible Practice* of the Courts is given under title *Motion in Court*; and which the following summary may serve further to illustrate. It is taken from a work, which would probably have secured to its author a fame more adequate to his deserts; had not the splendour of *the Commentaries* obscured all inferior exertions of ingenuity and elegance. See *Eunomus*, *Dial.* 2. § 23—40.

It must be owned, (says that writer,) that the knowledge of Practice can be acquired only by Practice: though, as its rules depend on principles, it is as much a science, as any other part of the Law. It is impossible even to recollect those rules, and often difficult to investigate them. The very few books of any credit that have been written on this subject, are written on a loose and unconnected plan, and, after all, speak only to the learned. This branch of Law is more than any other destitute of any elementary treatise.

But this defect has since been very much supplied by *Crompton's* Book of Practice in the Courts of K. B. and C. P. since enlarged by *Sellon*; *Impey's Practice* in the same Courts; *Tidd's Practice* in the Court of K. B.; and perhaps others which might be named, if not as of equal merit, yet of considerable utility.

The following idea of Practice, given by the author of *Eunomus*, is new, and, it is believed, accurate as far as it goes: it may afford a pleasing view of the *rationale* of Practice, even to adepts; but it is chiefly adapted to the instruction of those who are first setting out in the Profession; who, either from lectures in the University, or in their own private studies, have a tolerable notion of the general principles of Law: though they may have barely set foot in *Westminster Hall*, and consequently have but little idea of the Practice of a Court. It arises on the following case:

A person who has a cause of complaint, either for a right detained, or an injury done, is determined to bring his *Action*: and by his attorney takes out *Process* against the party complained of; in consequence of which, the latter (who is called the defendant) puts in *Bail*; either

common or special, as the case requires. The defendant being thus secured, the plaintiff *declares* in proper form the nature of his cause; the defendant answers this declaration; and the charge and defence, by due course of *Pleading*, (in the course of which may be introduced a *Demurrer* on either side,) are brought to one or more plain simple facts: these facts, arising out of the pleadings, and thence called *Issues*, come next to *Trial* by a *Jury*; who, having heard the *Evidence* on an issue before them, find (let it be supposed) a *Verdict* for the plaintiff; on which verdict *Judgment* is afterwards entered. The plaintiff's costs of suit are then taxed by the Officer of the Court; and the judgment is put in *Execution*, by levying on the defendant's effects the *Damages* given by the Jury, and the *Costs* allowed by the Court; which being done, there is an end of the suit, and both parties are once more out of Court. [By referring to the titles in this Dictionary, distinguished by *Italic* words, in the above sentence, further information on each head will be obtained.]

But the Practice of a Court in civil suits arises, in a great measure, from the interruption in the above regular stages, and course of a cause. Those regular stages (as to the time and manner of carrying them on) are themselves the legitimate offspring of the established Practice of the Court where the cause is brought: when they are pursued, the course of the proceeding runs on smooth and silent, transacted by the Attornies in the cause, and the Officers of the Court, without ever being heard of in open Court: and the method of transacting this business is that *Practice*, the knowledge of which more immediately concerns the Attornies and Officers. The irregularities and informalities, that push a cause out of its course, must be redressed by the interposition of the Court; and it is this kind of business that furnishes and makes up a great part of the visible Practice of the Courts of Law in Term time.

It was above stated, that the Attorney first takes out *process* against the defendant, in order to make him appear. But this *process* may be irregular, and then it will produce *motions to set it aside*; as for instance, where the defendant is a privileged person. It may not only be irregular, but highly oppressive; and then it grounds a *motion for an attachment*, against the parties executing the process, as for a constructive *contempt* of the Court. This is a general motion, and may, as the oppression which produces it, arise in any stage of the cause. The *suit* itself, as well as the process, may be irregular, and then it will occasion *a motion to stay proceedings* in a cause; as where the parties have agreed to compromise the matters in difference, and a release is not executed; for the release when executed may be pleaded in bar of the action. The first process may be regular, and the *Bail* may not, and thence arise various motions, either *to discharge the defendant on common bail*, where it appears from the affidavit that he is not liable to give special bail; or where the affidavit to hold to bail is defective. —*To set aside a Judge's order*, made at his chambers, relating to the bail: which kind of motion may be made on other grounds. If the bail is regular in the manner of putting it in, but suspicious as to the competency of the bail, the plaintiff gives notice, and the defendant moves *to justify bail in open Court*.

The *Declaration* may furnish several motions; as to the delivery of it; its frame and structure; or the neglect of it by the defendant. Perhaps it cannot be delivered in the common form, the party absconding to avoid it; and then the plaintiff moves *that some other service* of the declaration may be sufficient. The declaration being delivered, the defendant may apprehend it to be immoderately prolix and impertinent; in which case he will move *to strike out some counts in the declaration*. The Court usually upon this order it to be referred to the Master of the Plea Office, and the Master's report is the ground of the rule afterwards made. *A motion for the Master's Report* is another motion, that may arise in various parts of a cause. In an action, that is in its nature transitory, if the declaration lays the cause of action in one county, and it did in reality arise in another, the defendant may avail himself of that circumstance; and upon affidavit apply to the Court for the plaintiff *to change the Venue*, (that is, the place where the cause of action is declared to have happened,) from the first county to the latter. The *venue* may likewise be changed from any county in *England*, wherever the cause of action arose, to that of *Middlesex*, where the Court sits, if the defendant is privileged as attendant on that Court. Where the Jury, and not the *venue*, is to be changed, as where the material evidence arises in the place laid, but no Jury, common or special can be had, disinterested, (as in case of a county cause about a bridge, or the like,) it is usual to move for a trial *in the adjoining county*, upon entering *a suggestion on the roll*. See this Dictionary, titles *Venue*; *Trial*.—A suggestion on the roll is sometimes entered for other purposes; as where the Sheriff, who regularly returns the process, is partial. See titles *Jury*; *Sheriff*; *Coroner*.

If a declaration is substantially defective, the defendant, instead of answering, *demurs* to it. See title *Demurrer*. If, on the other hand, the declaration is delivered, and is unexceptionable, and the defendant neglects to answer it in due time, the plaintiff has his *judgment by default*; but if the plaintiff is over-hasty in signing this judgment, the Court will interpose on a *motion to set it aside*; in consequence of which, the defendant will be at liberty to plead. The motion to set aside a judgment, obtains, in other instances; and the motion for *judgment, as in case of a nonsuit*, arises on another ground, as will be shewn hereafter; and see title *Nonsuit*.

When the defendant comes to *plead* to the declaration, instead of making, in due time, a plain denial of the charge, called the *General Issue*, he may find it necessary to vary the common course, either by enlarging the time, or the manner of pleading: he may, therefore, *move for time to plead*, which being a matter of indulgence, the Court, on the equity of the case, may refuse or grant; and grant without or upon terms. At Common Law a defendant could only plead a single matter; but this is now remedied by statute; (see title *Pleading*;) and, if necessary, the defendant accordingly moves the Court *for leave to plead several matters*, which he mentions. Sometimes this expedient is an afterthought, and then, as it tends to delay the plaintiff, the defendant moves for leave to *withdraw the general issue*, and to be at liberty to *plead specially*; sometimes he moves the contrary.

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The plea, replication, rejoinder, &c. are at length settled on record, and come to an issue; which remains to be settled by a Jury; in order to which all the record down to the issue, which it includes, is transcribed from what is called the plea-roll, and which is only part of a large bundle, comprehending the cases of many other persons; and never stirs out of the custody of the Court: That manuscript is called the *Nisi Prius* Roll, as the *Nisi-Prius* roll, after it is returned from the trial, assumes the name of the *Postea*. See titles *Pleading*; *Nisi Prius*; *Postea*; *Record*.

Between the issue and the trial, several motions may happen, which may either put off the trial or not; of the latter kind, and at this stage, is a motion by the defendant *for leave to pay money into Court*. See title *Money into Court*.

Many circumstances may make it necessary to postpone a trial, or vary the common forms of examination. The necessary witnesses in the cause may reside altogether abroad, or being there for a time, may not be likely to return at the regular time of the trial: In the first case, the Court is moved *for a commission, to examine witnesses on interrogatories*; which are settled here, sent over, and with their answers properly attested, are sent back and read in evidence at the trial. See title *Depositions*. In the latter case, the trial is delayed on motion, *to put it off for the absence of a material witness*. But if, by this delay, the other party is likely to lose evidence that is ready at the time; either in case a witness is so old and infirm, as not to be likely to survive the arrival of the evidence on the other side, or in case his necessary business obliges him to leave *England* before the trial can come on; in this case, a motion is made by the party affected, to examine such witness *de bene esse*, that is, to admit the depositions, so taken, as evidence, if the person cannot afterwards be examined at the trial. If a witness, under none of these capacities, being duly summoned, neglect to attend, he is liable to an action on the statute (5 *Eliz. c.* 9) for damages; or the Court will punish him criminally for the contempt on a *motion for an Attachment*. See title *Evidence* II. 2. Motions may also arise, respecting written evidence, as for *leave to inspect and take copies of Corporation books*, or for an order *to produce them at the trial*.

Not only the Witnesses in a cause, but the Jury, may occasion particular applications to the Court: so may the nature of the cause in question, and so may the course of Judicature itself. The nature of the cause sometimes requires the Jury to see the very spot where the matter in dispute arises; in which case, after issue joined, the Court is moved *for a view*. See titles *Jury* I; *View*. In cases also, where the cause is either of a nature to exceed the apprehension, or to inflame the passions, of a Common Jury, a *Special Jury* will be moved for. See title *Jury* I. Sometimes the cause is apparently likely to be very long, intricate, and important, either in its value, or its consequences; from whence arises a motion for a *Trial at Bar*. See title *Trial*.

When the cause is brought to the Assises, the Jury sworn, and the Witnesses examined; the trial goes on, or it does not; if it goes on, either a verdict is given, or it is not: if a verdict is given, it is either for the plaintiff or the defendant. The Jury may be sworn, and the witnesses may be in part examined; and yet the trial may stop; because the parties may then, or at any time, compromise the matter in difference, or agree to refer it to arbitrators; in either case, a rule is made at the Assises, (called an order of *Nisi Prius*,) and motion is afterwards made, *to make the order of Nisi Prius a Rule of Court*. See title *Award* VI.

But the cause may go on, and yet not get to a verdict; for if the plaintiff does not prove his case, the defendant calls no evidence; and, instead of a verdict on either side, there is a *Nonsuit*. Wherever a verdict is given, the plaintiff at least must give evidence to maintain his declaration. Where evidence is produced on both sides, the verdict is given for the plaintiff or defendant, according to the superior weight of evidence. See title *Jury* III.

Here closes the trial; and from this period it is that the record assumes the name of the *Postea*; and if the trial is decisive, neither the Law nor the fact being afterwards controverted, the *postea* is delivered by the proper officer to the Attorney of the victorious party, to sign his judgment. but in many cases, after a verdict given, there is room to question its validity; in which case, the *postea* remains in the custody of the Court. The *verdict* may be exceptionable, either from misdirection of a Judge in point of Law, or the misbehaviour of the Jury; in which case, a motion may be made to *set it aside*. as it may on other grounds; as, from its being clearly contrary to evidence, or in the damages given greatly exceeding the injury sustained; on both which accounts, a *new trial* may be moved for. See title *Trial*. If the verdict itself stands unimpeached, yet some original defect may appear on the face of the record, which shows that no verdict ought to have been given; or, though given, no judgment can be had on it; and when this happens, the motion is in *Arrest of Judgment*. See title *Judgment* III.

Supposing the verdict and record to stand clear of all objections, the judgment follows of course; and, after judgment, *Execution*, the purpose of which execution is, to levy the damages assessed by the Jury, and the costs allowed by the Court. The execution however may for a short time be interrupted, in case any objection arises to the taxation of costs, and then a motion may be made, *for the Master to review his taxation*: this, and every act of the Master, being liable to be reviewed on appeal to the Court; though in judging of ordinary stages of Practice, he is invested with original, and competent jurisdiction. If the *Sheriff*, or his Officers, misbehave in respect to the execution, (as in any other service of a writ,) this may produce a *motion for an Attachment* against them.

When execution is over, the cause is over: but a cause may, on many occasions, come much sooner to an end, and in a direction very different from what has been mentioned; it may come sooner to a trial, or it may come to execution without a trial.

In the case put at setting out, and, in the general exposition of the case, it has been supposed that the defendant pleaded to the declaration: but it was intimated, that, if he neglected to plead, judgment would be had against him by default; in consequence of this default of a plea, the truth of the fact is confessed, and cannot be afterwards litigated, as on a trial; but this judgment, though it operates so as to preclude the defendant from controverting the fact, which is the cause of action, does

not

not go to a confession of the damages laid in the declaration; which must be ascertained on *a Writ of Inquiry.* See title *Judgment* I.—In this course of proceeding, motions may arise *to set aside the judgment,* and *writ of inquiry* issued thereon, as irregular;—*to execute a writ of Inquiry before a Judge,* instead of a Sheriff, where it is a matter of importance;—and sometimes *for a new Writ of Inquiry,* for excessive damages, in the same manner as for a new trial on those grounds. See title *Trial.*

There are two cases however, where the admission of the defendant silences all future inquiry, either as to the truth of the fact, or the quantity of the damages; that of a direct confession of the action; and a warrant of attorney, to confess a judgment: this latter occasions a motion very often; for where it is above a year standing, motion must be made *for leave to file the Warrant of Attorney,* on affidavit of the defendant being still alive, and the debt unpaid: And motions may be made *to set aside the Warrant of Attorney,* if not regularly executed. See title *Judgments acknowledged for Debts.*

A matter may come sooner to a trial, by means of an *Issue directed* by the Court; which obtains, in a Court of Law, principally where a question of civil right is involved in a criminal prosecution for a misdemeanor; in which case, it is the usual lenity of the Court, to suspend the latter till the former has been tried: Or where a Court of Equity directs facts to be inquired of at Law, and does not rest the case on depositions. See title *Feigned Issue.*

What has been said relates merely to the Practice of the Courts *in civil Suits*: and, in general, concerns the trial of a cause. To give a full or general idea of Practice, it may be necessary to establish a distinction between such motions, as are in their nature *previous* to the trial itself or *subsequent* to it: Of the former sort, are motions to stay proceedings in a cause; motions relating to bail; to declarations; to the time and manner of pleading; for changing *venues*; Special Juries; and many others above particularised: Of the latter sort necessarily, are motions; to set aside verdicts; for new trials; in arrest of judgment; on writs of inquiry; and others, that are easily classed according to this division. There are some motions that, in the abstract, are of an ambiguous nature, and may arise in any part of the cause, either before or after a trial; as, Motions for an Attachment; for a Master's report; and others.

Every motion hitherto has been supposed to have some relation to the trial of a cause: there are some few entirely independent of it; as, a *Motion for a Prohibition*; applications for summary relief, under various statutes, relating to articles of Clerks; to Attornies; Insolvent debtors; and others of that stamp. See further title *Motion in Court.*

Part of the visible Practice of the Court also arises from *Cases directed out of Chancery*; *Special Verdicts*; and *Writs of Error*; all of which are argued at the bar, and determined by the Judges.

The Practice of *Courts of Equity* may be deduced in a manner similar to the above, by attending to the several stages, from the filing of the bill to the execution of the decree. See title *Chancery.*

The *Crown-business, or Criminal Practice,* of which the Court of K. B. has exclusive jurisdiction, does not admit of the application of the same idea; much the greatest part of it is independent of any solemn trial; and the trials themselves are too simple to endure much interruption, or branch out into many points of Practice. This Crown Practice may be divided into such matters as originally commence in that Court; and such as are removed into it, from other inferior jurisdictions: Of both which kinds, taken together, are, motions for an *Habeas Corpus*; *Mandamus*; (though this and the motion for a *Quo Warranto,* in cases relating to Corporations, partake also of a civil as well as a criminal nature;) to exhibit *Articles of the Peace*; motions relating to the discharge of *Recognisances*; to remove *Indictments,* orders of *Sessions, Convictions,* made by Justices, *&c.* from their common ordinary course of proceeding, by writ of *Certiorari* into this Court, on some foundation of complaint against them. The visible Practice, that occasions this removal, and that arises from it, may be resolved into these few motions, very simple in their kind, though infinitely diversified as to their objects. *viz.* The general *Motion to remove* the indictment, order or conviction by *Certiorari*; *Motion to quash* the indictment, &c. when it is removed. In the case of an indictment, removed, either on a *demurrer,* it is set down to be argued; or motion is made to quash it before trial; or *Motion in Arrest of Judgment*; or *Motion for Judgment* after the trial.

But the most extensive Jurisdiction is involved in matters of original cognisance, whether it regards indictments or informations; or such matters as are entirely independent of either, or any solemn trial; such as begin and end on motions.

There is little or no difference between an indictment commenced in this Court, or removed from another Jurisdiction, as to motions concerning them. As to *Informations,* though altogether the Creature of this Court, they admit but of three motions; *the application to the Court to grant it*: when granted, and tried, a casual motion, *in arrest of judgment,* on grounds arising from the record itself: or, where the charge, in the information and the verdict are both incontestable, the *motion for judgment.*

To recapitulate all in a few words:—Practice in general, it appears, is either in civil or Crown causes. In civil causes, it is either independent of a trial, or relative to it; if relative to it, it arises from something applied for either before or after a trial. In Crown causes, the only distinction made was, either as it concerned the original jurisdiction of the Court, or such as is exercised, as it were, on appeal. "And unless (concludes the Writer, from whom the foregoing sketch has been extracted and abridged) I was to read over to you a hundred (he might have added *or more*) rules of Court, and the several cases and books on this subject, (which, by the bye, I would not wish any enemy I have to do,) I cannot undertake to be more explicit on this subject."

PRÆCEPTORIES, *Præceptoria.*] A kind of benefices, having their name from being possessed by the more eminent *Templars,* whom the Chief Master by his authority, created and called *Præceptores Templi.* And of these *Præceptories* there are recorded sixteen, as belonging to the *Templars* in *England,* viz. *Cressing Temple, Balshal, Shengay, Newland, Yeveley, Witham, Temple-bruere, Willington, Roibeley, Ovenington, Temple Combe, Trebigh, Ribstane, Mount St. John, Temple Nusum,* and *Temple*

Temple Harst. Mon. Angl. ii. 543. But some Authors say, these places were cells only, subordinate to their principal mansion in the *Temple* in *London*. See *stat. antiq.* 32 *Hen.* 8. *c.* 24.

PRÆCIPE; See title *Original*.

PRÆCIPE IN CAPITE, The writ of right for the King's immediate tenants *in capite*, when they are deforced of lands or tenements. 3 *Comm. c.* 10. *p.* 195. See title *Writ of Right*.

PRÆCIPE QUOD REDDAT; See titles *Fine of Lands*; *Recovery*.

PRÆCIPITIUM, A punishment inflicted on criminals, by casting them from some high place. *Malmsf. lib.* 5. *p.* 155.

PRÆFECTUS VILLÆ, Is the same as *præpositus villæ*, i. e. the Mayor of a town. *Leg. Ed. Confess. c.* 28.

PRÆFINE, That fine, which on suing out the writ of covenant, on levying fines, is paid before the fine is passed. See title *Fine of Lands*.

PRÆMUNIRE,

[Corrupted from, or apparently synonimous with, *Præmoneri*, "to be forewarned;" and therefore, according to the proverb, *fore-armed*: see *Du Cange in v.*] The writ so called, or the offence whereon the writ is granted; the one may be understood by the other. The offence is of a nature highly criminal, though not capital, and more immediately affecting the King or his Government. It is named, from the words of the writ, preparatory to the prosecution thereof, "*Præmunire facias* A. B.—Cause *A. B.* to be forewarned—that he appear before us to answer the contempt wherewith he stands charged;" which contempt is particularly recited in the preamble to the writ. It took its original from the exorbitant power claimed and exercised in *England* by the Pope; and was originally ranked as an offence immediately against the King; because it consisted in introducing a foreign power into this land, and creating *imperium in imperio*, by paying that obedience to papal process, which constitutionally belonged to the King alone, long before the Reformation in the Reign of *Henry* VIII. See 4 *Comm. c.* 8.

The church of *Rome*, under pretence of her supremacy, and the dignity of St. *Peter*'s chair, took on her to bestow most of the ecclesiastical livings, of any worth in *England*, by mandates, before they were void; pretending therein great care to see the Church provided of a successor before it needed. Whence these mandates or bulls were called *gratiæ expectativæ* or *provisiones*, whereof see a learned discourse in *Duarenus de Beneficiis, lib.* 3. *c.* 1.—These provisions were so common, that at last it was necessary to restrain them by the Laws of the Land.

In the 35th year of *Edw.* I. was made the first statute against papal provisions, *stat.* 35 *E*, 1. *st.* 1; being, according to *Coke*, the foundation of all the subsequent statutes of *Præmunire*. It recites, that the abbots, priors, and governors, had, at their own pleasure, set divers impositions upon the monasteries and houses in their subjection; to remedy which, it was enacted, that in future, religious persons should send nothing to their superiors beyond the sea; and that no imposition whatever should be taxed by priors-aliens. By *stat.* 25 *E.* 3. *st.* 5. *c.* 22, it was enacted, that if any one purchased a provision of an abbey or priory, he should be out of the King's protection. And by *stat.* 25 *E.* 3. *st.* 6. (*c.* 2): 27 *E.* 3. *st.* 1. *c.* 1: 38 *E.* 3. *st.* 1, *c.* 4: and *stat.* 2. *cc.* 1, 2, 3, 4, it was enacted, that the Court of *Rome* should not present or collate to any Bishopric or living in *England*: and that whoever disturbed any patron in the presentation to a living, by virtue of a papal provision, such person should pay fine and ransom to the King, at his will; and be imprisoned till he renounced such provision. The same punishment was inflicted on such as should cite the King, or any of his Subjects, to answer in the Court of *Rome*. By *stats.* 3 *R.* 2. *c.* 3: 7 *R.* 2. *c.* 12, it was enacted, that no alien should be capable of letting his benefice to farm; in order to compel such as had crept in, at least to reside on their preferments: and that no alien should be capable of being presented to any ecclesiastical preferment, under the penalty of the statutes of Provisors. By *stat.* 12 *R.* 2. *c.* 15, all liegemen of the King, accepting of a living by any foreign provision, were put out of the King's protection, and the benefice made void; to which *stat.* 13 *R.* 2. *st.* 2. *c.* 2, adds banishment and forfeiture of lands and goods; and by *c.* 3, of the same statute, it was enacted, that any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of Provisors, should be imprisoned, forfeit his lands and goods, and moreover suffer pain of life and member.

In the writ for the execution of these statutes, the words *Præmunire facias* being used, to command a citation from the party, have denominated, in common speech, *not only the writ, but the offence itself*, of maintaining the papal power by the name of *Præmunire*. The *stat.* 16 *R.* 2. *c.* 5, which is the statute generally referred to by all subsequent statutes, is, accordingly, usually called *the Statute of Præmunire*. It enacts, that whoever procures, at *Rome, or elsewhere*, any translations, processes, excommunications, bulls, instruments, or other things, which touch the King, against him, his Crown and Realm, and all persons aiding and assisting therein, shall be put out of the King's protection; their lands and goods forfeited to the King's use; and they shall be attached by their bodies to answer to the King and his Council; or process of *Præmunire facias* shall be made out against them as in other cases of Provisors. By *stat.* 2 *H.* 4. *c.* 3, all persons who accept any provision from the Pope, to be exempt from canonical obedience to their proper Ordinary, were also subjected to the penalties of *Præmunire*. This is said to be the last ancient statute concerning this offence till the Reformation.

But by *stat.* 2 *Hen.* 4. *c.* 4, whoever shall put in execution bulls purchased by those of the order of *Cisteaux*, to be discharged of tithes, shall incur the like penalty: they were also further restrained by *stats.* 6 *Hen.* 4. *c.* 1: 7 *Hen.* 4. *c.* 8: 9 *Hen.* 4. *c.* 8: and 3 *Hen.* 5. *cap.* 4; by which, the statutes abovementioned are enforced and explained. And by *stat.* 23 *Hen.* 8. *c.* 2. § 22, whoever shall sue for or execute any licence, dispensation, or faculty from the See of *Rome*; and by *stat.* 28 *Hen.* 8. *c.* 16, (by which all bulls, briefs, &c. obtained from *Rome*, are made void,) whoever shall use, allege, or plead the same in any Court, unless they were confirmed by

by this statute, or afterwards by the King, shall incur the like penalty. *Vide Reg.* 54: 3 *Inst.* 127.

The penalties of *Præmunire* have been since applied to other offences, some of which bear more, some less, and some no relation to this original offence, as shall be hereafter noticed.

Whenever it is said, that a person, by any act, incurs a *Præmunire*, it is meant to express, that he thereby incurs the penalties which, by the different statutes above mentioned, are inflicted for the offences therein described. See 4 *Comm. c.* 8: 1 *Inst.* 391. *in n.* 2.

Prosecutions on a *Præmunire*, it is remarkable, are unheard of in our Courts: there is only one instance of such a Prosecution in the State Trials: in which case, the penalties of a *Præmunire* were inflicted upon some persons, for refusing to take the Oath of Allegiance (see *post* I.) in the reign of King *Charles* II. *Harg. St. Tr.* ii. 263.

Having said thus much generally, we may proceed further to consider the subject under the following heads:

I. *What Offences, besides those already specified, come under the Notion of a* Præmunire.

II. *Of the Punishment in a* Præmunire.

I. At the time of the Reformation, the penalties of *Præmunire* were extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the See of *Rome*, though not all the doctrines of the *Roman* Church. And therefore, by the several statutes 24 *Hen.* 8. *c.* 12: 25 *Hen.* 8. *cc.* 19, 21, to appeal to *Rome* from any of the King's Courts, which (though illegal before) had at times been connived at; to sue to *Rome* for any licence or dispensation; or to obey any process from thence; are made liable to the pains of *Præmunire*. And, in order to restore to the King, in effect, the nomination of vacant bishoprics, and yet keep up the established forms, it is enacted by *stat.* 25 *Hen.* 8. *c.* 20, that if the Dean and Chapter refuse to elect the person named by the King, or any Archbishop or Bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *Præmunire*.

Exercising the jurisdiction of a Suffragan, without the appointment of the Bishop of the diocese, is also made a *Præmunire*: by *stat.* 26 *H.* 8. *c.* 14; which sets forth at large how Suffragans are to be nominated, &c. See title *Bishops*.

Also by *stat.* 5 *Eliz. c.* 1, to refuse the Oath of Supremacy will incur the pains of *Præmunire*; and to defend the Pope's jurisdiction in this realm, is a *Præmunire* for the first offence, and High Treason for the second. So too, by *stat.* 13 *Eliz. c.* 2, any person importing any *Agnus Dei*, crosses, beads, or other superstitious things pretended to be hallowed by the Bishop of *Rome*, and tendering the same to be used; or receiving the same with such intent, and not discovering the offender; or a Justice of the Peace, who, knowing thereof, shall not within 14 days declare it to a Privy Counsellor; all incur a *Præmunire*. Lastly, to contribute to the maintenance of a Jesuit's college, or any popish seminary whatever, beyond sea; or any person in the same; or to contribute to the maintenance of any Jesuit or popish priest in *England*, is by *stat.* 27 *Eliz. c.* 2, made liable to the penalties of *Præmunire*.

Thus far the penalties of *Præmunire* seem to have kept within the proper bounds of their original institution,—the depressing the power of the Pope: but they being pains of no inconsiderable consequence, it has been thought fit to apply the same, as already hinted, to other heinous offences.

Derogating from the King's Common Law Courts, is said to have been an high offence at Common Law, and is made a *Præmunire* by many antient statutes; for, by the *stat.* 27 *Ed.* 3. *c.* 1, of Provisors, If any Subject draw any out of the realm in plea, whereof the cognizance pertains to the King's Court, or of things whereof judgments be given in the King's Courts, or sue in any other Court to defeat or impeach the judgments given in the King's Courts, he shall be warned to appear, &c. in proper person, at a day, containing the space of two months, at which if he appear not, he and his proctors, &c. shall be put out of the King's protection, his lands and chattels forfeited, his body imprisoned, and ransomed at the King's will, &c. See also *stat.* 16 *R.* 2. *c.* 5.

In the construction of these statutes it hath been held, that certain Commissioners of Sewers, for summoning one before them who had got a judgment at law, and imprisoning him till he would release it, were guilty of a *Præmunire*. 2 *Bulst.* 299: 3 *Inst.* 125: *Cro. Jac.* 336.

Also suits in the Admiralty or Ecclesiastical Courts within the Realm, for matters which, upon the face of the libel itself, appear to belong only to the cognizance of the temporal Courts, are said to be within *stat.* 16 *Rich.* 2. by force of the words, "or elsewhere." 1 *Hawk. P. C. c.* 19. § 14—19.

And it hath been formerly holden, that even suits in a Court of Equity, to relieve against a judgment at Law, were within the danger of these statutes; especially if they tended to controvert the very point determined at Law, or to relieve in a matter relievable at Law. 4 *New Abr.* 146.

By *stat.* 1 & 2 *P. & M. c.* 8. § 40, to molest the possessors of abbey lands, granted by Parliament to *Hen.* VIII. and *Edw.* VI. is a *Præmunire*.—So likewise is the offence of acting as a broker or agent in any usurious contract, where above 10 *per cent.* interest is taken; by *stat.* 13 *Eliz. c.* 8.—To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *Præmunire*; by *stat.* 21 *Jac.* 1. *c.* 3. § 4.—To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *Præmunire* by two statutes: the one, *stat.* 16 *Car.* 1. *c.* 21, the other, *stat.* 1 *Jac.* 2. *c.* 8.—On the abolition, by *stat.* 12 *Car.* 2. *c.* 24, of purveyance, and the prerogative of pre-emption, or taking any victual, beasts, or goods for the King's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *Præmunire*. See title *Pourveyance*.—To assert, maliciously and advisedly, by speaking or writing, that both or either House of Parliament have a legislative authority without the King, is declared a *Præmunire* by *stat.* 13 *Car.* 2. *stat.* 1. *c.* 1.—So, to conspire to avoid the seizure or forfeiture, upon the importation of cattle, as mentioned in *stat.* 20 *Car.* 2. *c.* 7.—By the *Habeas-Corpus* Act also, *stat.* 31 *Car.* 2. *c.* 2, it is a *Præmunire*, and incapable of the King's pardon, besides other heavy penalties, to send any Subject of this

this Realm a prisoner into parts beyond the seas. See title *Habeas Corpus*.—By *stat.* 1 *W.* & *M. st.* 1. *c.* 8, persons of eighteen years of age, refusing to take the new Oaths of Allegiance, (and formerly of Supremacy, see title *Nonjurors*; *Oaths*,) upon tender by the proper Magistrate, are subject to the penalties of a *Præmunire*: and, by *stat.* 7 & 8 *W.* 3. *c.* 4, Serjeants, Counsellors, Proctors, Attornies, and all Officers of Courts, practising without having taken the Oaths of Allegiance, (and formerly of Supremacy, and subscribed the declaration against Popery,) are guilty of a *Præmunire*, whether the oaths be tendered or not. See title *Oaths*.—By *stat.* 6 *Ann. c.* 7, to assert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended Prince of *Wales*, or any person other than according to the Acts of Settlement and Union, hath any right to the throne of these kingdoms; or that the King and Parliament cannot make Laws to limit the descent of the Crown; such preaching, teaching, or advised speaking, is a *Præmunire*: as writing, printing, or publishing the same doctrines amount to High Treason.—By *stat.* 6 *Ann. c.* 23, if the Assembly of Peers of *Scotland*, convened to elect their sixteen representatives in the *British* Parliament, shall presume to treat of any other matter, save only the election, they incur the penalties of a *Præmunire*.—The *stat.* 6 *Geo.* 1. *c.* 18, (enacted in the year after the infamous South Sea project had beggared half the nation,) makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the name of Bubbles, subject to the penalties of a *Præmunire*: with power to the Court to moderate the judgment.—The *stat.* 12 *Geo.* 3. *c.* 11, subjects to the penalties of the statute of *Præmunire* all such as knowingly and willingly solemnize, assist, or are present at, any forbidden marriage, of such of the descendants of the body the King *George* II, as are by that act prohibited to contract matrimony, without the consent of the Crown. See titles *Marriage*; *King*.

II. The Punishment of this offence may be learned from the foregoing statutes, which are thus mostly summed up by *Coke*: "That, from the conviction, the defendant shall be out of the King's protection, and his lands and tenements, goods and chattels, forfeited to the King; and that his body shall remain in prison at the King's pleasure; 1 *Inst.* 129; or (as other authorities have it) during life;" 1 *Bulst.* 199: both which amount to the same thing; as the King, by his prerogative, may any time remit the whole, or any part, of the punishment 2 *Bulst.* 209; except in the case of transgressing the statute of *Habeas Corpus*. These forfeitures, here inflicted, do not (by the way) bring this offence within the general definition of felony; being inflicted by particular statutes, and not by the Common Law. But so odious, Sir *Edw. Coke* adds, was this offence of *Præmunire*, that a man, who was attainted of the same, might have been slain by any other man, without danger of Law; because it was provided, by *stat.* 25 *Edw.* 3. *st.* 6. *c.* 22, that any man might do to him as to the King's enemy; and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the laws of nature and nations, to kill him in the heat of battle, or for necessary self-defence. And to obviate such savage and mistaken notions, the *stat.* 5 *Eliz. c.* 1, provides, that it shall not be lawful to kill any person attainted in a *Præmunire*; any law, statute, opinion, or exposition of Law to the contrary notwithstanding. But still such delinquent, though protected, as a part of the Public, from public wrongs, can bring no action for any private injury, how atrocious soever; being so far out of the protection of the Law, that it will not guard his civil rights, nor remedy any grievance which he, as an individual, may suffer. 1 *Inst.* 130. And no man, knowing him to be guilty, can with safety give him comfort, aid, or relief. 1 *Hawk. P. C. c.* 19. See 4 *Comm. c.* 8.

If the defendant be condemned on his default of not appearing, whether at the suit of the King or party, the same judgment shall be given as to the being out of the King's protection and the forfeiture; but instead of the clause, that the body shall remain in prison, there shall be awarded a *capiatur*. *Co. Litt.* 129. *b*: 3 *Inst.* 125, 218.

A statute, by appointing that an offender shall incur the penalty and danger mentioned in *stat.* 16 *Ric.* 2. *c.* 5, does not confine the prosecution for the offence to the particular process thereby given. 1 *Vent.* 173.

It is holden, that the statute of *Præmunire*, which gives a general forfeiture of all the lands and tenements of the offender, extends not to lands in tail. *Co. Litt.* 130.

It is said, the statute of *Præmunire* doth not extend to the forfeiture of rents, annuities, fairs, &c. or any other hereditaments that are not within the word *terræ*. 3 *Inst.* 126.

This suit need not be by original in *B. R.* for if defendant be *in custodiâ Mareschalli*, the suit may be against him by bill; and defendants cannot be sued in any other Court when they are *in custodiâ Mareschal'*. And if a defendant come not at the day, &c. or if he appears and pleads, and the issue be found against him, or he demurs in law, &c. judgment shall be given, that he shall be out of protection, &c. 3 *Inst.* 124.

Tenant in tail is attainted in a *Præmunire*, he shall forfeit his lands only during life; and afterwards the issue in tail shall inherit. 11 *Rep.* 56.

A person, being seised in fee of lands, was indicted for a *Præmunire* upon *stat.* 13 *Eliz. c.* 2; but before conviction he made an entail of his lands; and it was adjudged, that the attainder should relate to the time of the offence, and that was before he entailed the lands, and not the time of the judgment which was afterwards; and the freehold being in him at the time of the attainder, shall not be divested without an inquisition under the Great Seal. *Cro. Car.* 123, 172.

It hath been adjudged, that a pardon of all misprisions, trespasses, offences, and contempts, will pardon a *Præmunire*, *Cro. Jac.* 336: 2 *Bulst.* 299.

The defendant in a *Præmunire* must regularly appear in person, whether he be a Peer or Commoner, unless he is dispensed with by some writ or grant for that purpose; but in the case of Sir *Anthony Mildmay*, he was allowed to plead a pardon to a *Præmunire* by Attorney; but it has been thought, that there was some clause to this effect in the pardon. 3 *Inst.* 125: 1 *Roll. Rep.* 190: 2 *Bulst.* 290.

On an indictment of a *Præmunire*, a Peer of the Realm shall not be tried by his Peers, 12 *Co.* 92.

On

On an information on the *stat.* 6 *Geo.* 1. *c.* 18, for setting up a bubble called the *South Sea*, it was determined that the Court was not obliged by that act to give the whole judgment, as in case of a *Præmunire* against a defendant, but only such parts of it as in their discretions they should think fit; and accordingly, a fine of 5*l.* was set on the party convicted, and judgment that he should remain in prison during the King's pleasure. 2 *Ld. Raym.* 361.

PRÆPOSITUS ECCLESIÆ, A Church reeve, or *Church-warden*; See that title.

PRÆPOSITUS VILLÆ, Sometimes is used for the constable of a town, or petit constable. *Cromp. Jurisd.* 205. Yet the same author, 194, seems to apply it otherwise; for there *quatuor homines præpositi* are those four men, who must appear for every town, before the Justices of the forest in their circuit. It is sometimes used for an head or chief Officer of the King, in a town, manor, or village, or a reeve. See *Reeve*. *Animalia & res inventæ coram ipso* (*præposito*) *& sacerdote ducendæ erant. LL. Edw. Confessor. cap.* 28. Thus *Præpositus Villæ*, in our old records, does not answer to our present constable, or head-borough of a town; but was no more than the reeve, or bailiff, of the Lord of the Manor, sometimes called *Serviens Villæ*.

By the Laws of *Henry* I. the Lord answered for the town where he was resident; where he was not, his dapifer, or seneschal, if he were a Baron: but if neither of them could be present, then *Præpositus & quatuor de unaquâque villa*, i. e. the reeve and four of the most substantial inhabitants were summoned. See *Brady's Glossary to Introduction to English History, pag.* 57. *in voc. Præpositus*.

PRÆROGATIVE; See *Prerogative*.

PRAYER; See *Service and Sacraments*.

PRAYERS OF THE CHURCH; See *Common Prayer*.

PREACHING. Every beneficed Preacher, residing on his benefice, and having no lawful impediment, shall in his own cure, or some neighbouring church, preach one sermon every *Sunday* of the year: And if any beneficed person be not allowed to be a Preacher, he shall procure sermons to be preached in his cure by licensed Preachers; and every *Sunday*, whereon there shall not be a sermon, he or his curate is to read one of the homilies: No person, not examined and approved by the Bishop, or not licensed to preach, shall expound the Scripture, &c.: nor shall any be permitted to preach in any Church, but such as appear to be authorised thereto, by shewing their licence; and Churchwardens are to note in a book the names of all strange clergymen who preach in their parish; to which book every Preacher is to subscribe his name, the day he preached, and the name of the Bishop of whom he had licence to preach. *Can.* 44, 45, 49.

If any person, licensed to preach, refuses to conform to the Ecclesiastical Laws, after admonition, the licence of every such Preacher shall be void: And if any Parson preach doctrine contrary to the word of God, or the Articles of Religion, notice is to be given of it to the Bishop by the Churchwardens, &c. So likewise of matters of contention and impugning the doctrine of other Preachers in the same Church; in which case, the Preacher is not to be suffered to preach, except he faithfully promise to forbear all such matter of contention in the Church, until the Bishop hath taken further order therein. *Can.* 53, 54.

No Minister shall preach or administer the sacrament in any private house, unless in times of necessity, as in case of sickness, &c. on pain of suspension for the first offence, and excommunication for the second; which last punishment is also inflicted on such Ministers as meet in private houses, to consult on any matter tending to impeach the doctrine of the Church of *England*. *Can.* 71, &c.

PREAMBLE, *Proœmium*, from the preposition *præ*, before, and *ambulo*, to walk.] The begining of a statute is called the Preamble; which is a key to the intent of the makers of the act, and the mischiefs which they would remedy by the same. See title *Statute*.

PRE-AUDIENCE, In the Courts, is of considerable consequence; the following short table of the precedence, which usually obtains among the practisers, is taken from 3 *Comm* c. 3. p 97. *in n.*

1. The King's *premier* Serjeant; (so constituted by special patent).
2. The King's *ancient* Serjeant, or the eldest among the King's Serjeants.
3. The King's Advocate-General.
4. The King's Attorney-General.
5. The King's Solicitor-General.
6. The King's Serjeants.
7. The King's Counsel, with the Queen's Attorney and Solicitor, and those who have patents of precedence. See title *Barrister*.
8. Serjeants at Law.
9. The Recorder of *London*.
10. Advocates of the Civil Law.
11. Barristers.

In the Court of Exchequer, two of the most experienced Barristers, called the Post-man and the Tub-man, (from the places in which they sit,) have also a precedence in motions. See title *Motion in Court*.

PREBEND, *Prebenda*.] The portion which every Prebendary of a Cathedral Church receives, *in right of his place*, as one of the *Chapter* of the Dean, for his maintenance; as *canonica portio* is properly used for that share, which every canon receiveth yearly out of the common stock of the Church. And *Præbenda* is a several benefice rising from some temporal land, or some Church appropriated towards the maintenance of a Clerk, or Member of a Collegiate Church; and is commonly named of the place where the profit arises.

Prebenda, strictly taken, is that maintenance which daily *præbetur* to another; but now it signifies the profits belonging to the Church, divided into those portions called *Præbendæ*, and is a right of receiving the profits for the duty performed in the Church, sufficient for the support of the Parson in that divine office where he resides. *Decret.* title *De Præbend.*

The Spiritualty and Temporalty make a Prebend, but the Spiritualty is the highest and most worthy; and a person is not a complete Prebendary, to make any grant, &c. before installation and induction. *Dyer* 221.

Prebends are simple and dignitary:

A simple *Prebend* hath no more than the revenue for its support; but a *Prebend* with dignity hath always a

jurisdiction annexed; and for this reason the Prebendary is stiled a *dignitary*, and *his jurisdiction is gained by prescription*.

Prebends are some of them donative; and some are in the gift of laymen; but in such case they must present the Prebendary to the Bishop, and the Dean and Chapter inducts him, and *places him in a Stall* in the Cathedral Church, and then he is said to have *locum in choro*: At *Westminster*, the King collates by patent, and, by virtue thereof, the Prebendary takes possession without institution or induction. 2 *Rol. Abr.* 356.

As a *Prebend* is a benefice without cure, &c. a *Prebend* and a parochial benefice are not incompatible promotions; for *one man may have both without any avoidance of the first*: For though Prebendaries are such as have *no cure of souls*, yet there is *a sacred charge* incumbent on them in those Cathedrals where they are resident, and they are obliged to preach by the canons of the Church; and it is not lawful for a *Prebendary* to possess two *Prebends* in *one* and the *same* Collegiate Church. *Rol. Abr.* 361.

Prebendaries are said to have *an estate in fee-simple in right of their Churches*, as well as Bishops of their Bishoprics, Deans of their Deaneries, &c.

Corpus Præbendæ, is that which is received by a Prebendary above the profits which are always for his daily maintenance. See further titles *Chapter*; *Clergy*; *Dean*.

PRÆBENDA and PROBANDA were also in old deeds used for provisions, provand or provender. *Pro equo suo unum bushel avenarum pro* Præbenda *capienda*. *Coucher Book in Dutchy Office*, i. 45; *Cowell*.

PREBENDARY, *Prebendarius*.] He who hath a *prebend*; so called, not a *præbenda auxilium & consilium episcopo*, &c. but *from receiving the prebend*: And if a manor be the body of a prebend, and is evicted by title paramount; yet the Prebend is not destroyed. 3 *Rep.* 75.

There is a *golden Prebendary of Hereford*, otherwise termed *Prebendarius Episcopi*, who is one of the twenty-eight minor Prebendaries there, and has, *ex officio*, the first canon's place that falls; he was anciently *confessarius* of the Cathedral Church, and to the Bishop, and had the offerings at the altar; whereby, in respect of the gold commonly given there, he had the name of *Golden Prebendary*. *Blount*.

PRECARIÆ, Days-works, which tenants of some manors were bound, by reason of their tenure, to do for their Lord in harvest; and, in divers places, are still vulgarly called Bind days, for biden-days, which, in the *Saxon*, *dies Precarias sonat*: For bidden is to pray or intreat. This custom is plainly set forth in the great book of the *Customs of the Monastery of Battel*, title *Appelderham*, *fol.* 60. *Cowell*.

PRECEDENCE. The Commonalty of the Realm, like the Nobility, are divided into several degrees: and as the Lords, though different in rank, yet all of them are Peers in respect of their Nobility; so the Commoners, though some are greatly superior to others, yet all are in Law Peers, in respect of their want of Nobility. 2 *Inst* 29. See 1 *Comm.* c. 12.

The rules of Precedence in *England* are reduced by *Blackstone* to the following table: in which those marked * are entitled to the rank here allotted them, by *stat.* 31 *Hen.* 8. c. 10.—those marked †, by *stat.* 1 *W.* & *M.* c. 21.—those marked ‖, by letters patent 9, 10, and 14 *Jac.* I. which see in *Seld. tit. of Hon.* II. 5. 46. and II. 11. 3.—those marked ‡, by ancient usage and established custom; for which see (among others) *Camden's Britannia, title Ordines*; *Milles's Catalogue of Hon. edit.* 1610; *and Chamberlayne's present State of England*, b. 3. c. 3.

TABLE OF PRECEDENCE.

* The King's children and grandchildren.
* - - - - - - - brethren.
* - - - - - - - uncles.
* - - - - - - - nephews.
* Archbishop of Canterbury.
* Lord Chancellor or Keeper, if a Baron.
* Archbishop of York.
* Lord Treasurer. } if Barons
* Lord President of the Council. } if Barons
* Lord Privy Seal. } if Barons
* Lord Great Chamberlain. But see private *stat.* 1 *Geo.* 1. c. 3. } above all Peers of their own degree.
* Lord High Constable. }
* Lord Marshal. }
* Lord Admiral. }
* Lord Steward of the Household. }
* Lord Chamberlain of the Household. }
* Dukes.
* Marquesses.
‡ Dukes' eldest sons.
* Earls.
‡ Marquesses' eldest sons.
‡ Dukes' younger sons.
* Viscounts.
‡ Earls' eldest sons.
‡ Marquesses' younger sons.
* Secretary of State, if a Bishop.
* Bishop of London.
* - - - - - - Durham.
* - - - - - - Winchester.
* Bishops.
* Secretary of State, if a Baron.
* Barons.
† Speaker of the House of Commons.
† Lords Commissioners of the Great Seal.
‡ Viscounts' eldest sons.
‡ Earls' younger sons.
‡ Barons' eldest sons.
‖ Knights of the Garter.
‖ Privy Counsellors.
‖ Chancellor of the Exchequer.
‖ Chancellor of the Duchy.
‖ Chief Justice of the King's Bench.
‖ Master of the Rolls.
‖ Chief Justice of the Common Pleas.
‖ Chief Baron of the Exchequer.
‖ Judges, and Barons of the Coif.
‖ Knights Bannerets, Royal.
‖ Viscounts' younger sons.
‖ Barons' younger sons.
‖ Baronets.
‖ Knights Bannerets.
‡ Knights of the Bath.
‡ Knights Bachelors.
‖ Baronets' eldest sons.

‖ Knights' eldest sons.
‖ Baronets' younger sons.
‖ Knights' younger sons.
‡ Colonels.
‡ Serjeants at Law.
‡ Doctors:—With whom, it is said, rank Barristers at Law; as to whose Precedence among each other, see title *Pre-audience.*
‡ Esquires.
‡ Gentlemen.
‡ Yeomen.
‡ Tradesmen.
‡ Artificers.
‡ Labourers.

Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves: except such rank is merely professional or official;—and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers. 3 *Comm. c.* 21. *p.* 405. *in n.*

PRECEDENT CONDITIONS; See *Condition* IV.

PRECEDENTS, Authorities to follow in determinations in Courts of Justice.

Precedents have always been greatly regarded by the Sages of the Law: The Precedents of the Courts are said to be the Laws of the Courts, and the Court will not reverse a judgment, contrary to many Precedents. 4 *Rep.* 93: *Cro Eliz* 65: 2 *Lil Abr.* 344. But new Precedents are not considerable; Precedents without judicial decision on argument are of no moment: and an extra-judicial opinion given in or out of our Court, is no good Precedent. *Vaugh.* 169, 382, 399, 429.

It has been held, that there can be no Precedent in matters of Equity, *as Equity is universal truth* but, according to Lord *Keeper Bridgman*, Precedents are necessary in Equity *to find out the reasons thereof for a guide*; and, besides the authority of those who made them, it is to be supposed they did it on great consideration, and it would be strange to set aside what has been the course for a long series of time. 1 *Mod.* 307. If a man doubt whether a case be equitable, or no, in prudence he will determine as the Precedents have been; especially if made by men of good authority and learning. *Ibid.* See titles *Chancery*; *Equity.*

Precedents must be shewn by the plaintiff for the Court to go against what is generally held. 1 *Keb.* 47. And where Precedents are alleged, contrary to the opinion of the Court, a day may be given to produce them. *Mod. Cas.* 199.

Precedents in some cases may make an act good, which otherwise would be void in strictness of Law: And though the forms of writs ought not to be altered, yet Precedents and constant usage must be observed. *Jenk. Cent.* 162, 172.

If there be cause to alter an ancient Precedent of a writ, by reason of any new statute, *&c.* the Cursitors are not to keep to the old form, but to alter it as the case requires; to prevent abatement of writs, and vexation to the People. *Trin.* 1630. See titles *Writ*; *Action.*

Lord *C. Talbot* said, He thought it much better to stick to the *known general rules*, than to follow any one particular Precedent, which may be founded on reasons unknown to us. Such a proceeding would confound all property. *Cases in Chan. in Ld. Talbot's Time*, 26, 27, 196. See 16 *Vin. Abr.* title *Precedents.*

PRECE PARTIUM, When a suit is continued *by the prayer*, assent, or agreement of both *parties.* See *stat.* 13 *Ed.* 1. *st.* 1. *c.* 27.

PRECEPT, *Praeceptum.*] Is diversly taken in Law; as sometimes for a command in writing, by a Justice of Peace, or other Officer, for bringing a person or records before him; of which there are many examples in the table of the *Register Judicial.* And in this sense it seems to be borrowed from the customs of *Lombardy*, where *Praeceptum* signifieth *scriptura vel instrumentum. Hotom. in verb. Feudal,* & *lib.* 3: *Commentar in libros feudor' in praefatione.*—Sometimes it is taken for the provocation, whereby one man incites another to commit a felony, as theft, murder, *&c. Staundf. Pl Cor.* 105: *Bracton, lib.* 3. *tract.* 2. *cap.* 9. calls it *praeceptum* or *mandatum.* Whence we may observe three divisions of offending in murder, *praeceptum, fortia, consilium*; *praeceptum* being the instigation used beforehand; *fortia* the assistance in the fact, as to help to bind the party murdered or robbed; *consilium*, advice either before or in the fact. The *Civilians* use *mandatum* in this case. *Cowell.*

PRE-CONTRACT, mentioned in *stat.* 2 & 3 *Ed.* 6. *c.* 23.] A contract made before another contract; the term hath relation especially to marriage. See *Marriage.*

PREDIAL TITHES, *Decimae praediales*] Are those which are paid of things arising and growing from the ground only, as corn, hay, fruit of trees, and such like. See *stat.* 2 & 3 *Ed.* 6. *c.* 13: 2 *Inst.* 649: 2 *Comm. c.* 3: and this Dictionary, title *Tithes.*

PRE EMPTION, *Prae-emptio*] The first buying of a thing; it was a privilege heretofore allowed the King's Purveyor, but abolished by *stat.* 12 *Car.* 2. *c.* 24: See title *Pourveyance.*

PREGNANCY (Plea of). Where a woman is capitally convicted, and pleads her pregnancy, though this is no cause to stay the judgment, yet it is to respite the execution, till she is delivered. See title *Execution of Criminals.*

PREMISES, (or PREMISSES.) That part in the beginning of a deed, the office of which is to express the grantor and grantee, and the land, or thing granted or conveyed. 5 *Rep.* 55. See title *Deed* II.

No person, not named in the Premises, can take any thing by the deed, though he be afterwards named in the *habendum*, because the Premises of the deed make the gift; therefore, when the lands are given to one in the Premises, the *habendum* cannot give any share of them to another, because that would be to retract the gift made, and, consequently, to make a deed repugnant in itself. Thus, for instance; If a charter of feoffment be made between *A.* of the one part, and *B.* and *D.* of the other part, and *A.* gives land to *B. habendum* to *B.* and *D.* and their heirs; *D.* takes nothing by the *habendum*, because all the lands were given to *B.* consequently *D.* cannot hold those lands which are given before to another; but in this case, if the *habendum* had been to *B.* and *D.* and their heirs, to the use of *B.* and *D.*; this had been a good limitation of a use; consequently, the statute of uses would carry the possession to the use, and *B.* and *D.* thereby become joint-tenants. *Co. Lit.* 6. *a*: 9 *Co.* 47. *b*: *Hob.* 275, 313: 2 *Rol. Abr.* 65: *Cro. Jac.* 564: *Cro. Eliz.* 58: 13 *Co.* 54: *Poph.* 126.

If lands be given to *a husband, habendum* to him and his wife, and to the heirs of their two bodies, the wife takes nothing, because *she was not mentioned in the Premises*; therefore shall take nothing of that which was before given entirely to her husband. 2 *Rol. Abr.* 67.

But there are four exceptions to this rule: 1. If the lands be given in frank-marriage, the woman, who is *the cause of the gift*, may take by the *habendum*, though she be not named in the Premises; as if lands be given to *J. S. habendum maritagium unà cum* the woman who is daughter of the donor; this is a good estate in frank-marriage to them both; because the gift being totally on her account, it is necessary to the creation of the estate in the husband that the wife should take. *Co. Litt.* 21: *Plowd.* 158: *Cro. Jac.* 454: *Poph.* 126: 2 *Roll Abr.* 67.

2. In grants of copy of Court-roll; as If a copyholder surrenders to his Lord, without limiting any use, and then the Lord grants it in this manner; *J. S. cepit de Domino, habendum* to the said *J. S.* and his wife, and the heirs of their bodies begotten, this is a good estate-tail in the wife; for these customary grants, that are made in pursuance of a former surrender, are construed according to the intention of the parties, as wills are; besides, the custom of the manor is the rule for the exposition of such sorts of grants, and, in many manors, such form is usual. *Poph.* 125. 126: *Cro. Jac.* 434: 2 *Rol. Abr.* 67: *Cro. Eliz.* 323.

3. A man not named in the Premises may take an estate in remainder by limitation in the *habendum*. 2 *Rol. Abr.* 68: *Hob.* 313: *Cro. Jac.* 564.

4. In wills; for if a man devises lands to *J. S. habendum* to him and his wife, this is a good devise to the wife; because, in construction of wills, the intention of the devisor is chiefly regarded; and wherever that discovers itself it shall take place, though it be not expressed in those legal forms that are required in conveyances executed in a man's lifetime. *Plowd.* 158, 414: 2 *Rol. Abr.* 68.

PREMIUM, *Præmium*] A reward: Among merchants it is used for the money the Insured gives the Insurer for insuring the safe return of any ship or merchandize. See title *Insurance*.

PRENDER, The power or right of taking a thing before it is offered; from the French *prendre*, i. e. *accipere*: hence the phrase of Law, it lies in *render*, but not in *Prender*. *Rep.* 1:

PRENDER DE BARON, To take an husband.] It is used for an exception to disable a woman from pursuing an appeal of murder, against one who killed her former husband. *St. P. C. lib.* 3. *c.* 59.

PREPENSED, *Præpensus*] Forethought; as prepensed Malice is *Malitia Præcogitata*: which makes killing, murder: and when a man is slain on a sudden quarrel, if there were malice Prepensed formerly between the parties, it is murder, or as it is called by the statute, Prepensed murder. See title *Homicide* III. 3.

PREROGATIVE, from *præ* and *rogo*, to ask or demand, before or above others] A word of large extent including all the rights, which, by Law, the King hath as Chief of the Kingdom; and as intrusted with the execution of the Laws. See this Dictionary, title *King* V.

PREROGATIVE COURT, *Curia Prærogativa Archiepiscopi Cantuariensis*.] The Court wherein all wills are proved, and all administrations taken which belong to the Archbishop by his Prerogative; that is, in case where the deceased had goods of any considerable value out of the diocese wherein he died; and that value is ordinarily 5*l.* except it be otherwise by composition between the Archbishop, and some other Bishop, as in the diocese of *London* it is 10*l.* and if any contention grow between two or more, touching such will or administration, the cause is properly decided in this Court: The Judge whereof is termed *Judex curiæ Prærogativæ Cantuariensis*, the Judge of the Prerogative Court of *Canterbury*. See titles *Courts Ecclesiastical*; *Will*.

The Archbishop of *York* hath also the like Court, which is termed his *Exchequer*, but inferior to this in power and profit. 4 *Inst.* 335. As to the Prerogative of the Archbishop of *Canterbury* or *York*, see the book intitled, *De Antiquitate Brittannicæ Ecclesiæ Cantuariensis Historia*, especially the eighth chapter, *pag.* 2: *Cowell.*

PRESBYTER, A priest, elder, or honourable person. *Isidore, lib.* 7.

PRESBYTERIUM, A Presbytery; that part of the church where divine offices are performed, applied to the choir, or chancel; because it was the place appropriated to the Bishop, priests, and other clergy, while the laity were confined to the body of the church. *Mon. Ang.* i. 243.

PRESBYTERIAN, A sectarist, or dissenter from the church. See titles *Nonconformists*; *Dissenters*.

PRESCRIPTION,

Præscriptio.] A title acquired by use and time, and allowed by Law; as when a man claims any thing, because he, his ancestors, or they whose estate he hath, have had or used it all the time, whereof no memory is to the contrary: or it is, where for continuance of time, *ultra memoriam hominis*, a particular person hath a particular right against another. *Kitch.* 104: *Co. Litt.* 114: 4 *Rep.* 32.

Blackstone classes *Title by Prescription* among the methods of acquiring real property *by purchase*; as when a man can shew no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. As to customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, see this Dictionary, title *Custom*.

I. *Of the Distinction between a Prescription and a Custom or Usage; and who may prescribe.*

II. *What Sort of Things may be prescribed for.*

I. Custom is properly a local usage, and not annexed to any person; such as a custom in the manor of *Dale*, that lands shall descend to the youngest son: Prescription is merely a personal usage; as, that such an one and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege. 1 *Inst.* 113.--As for example: If there be a usage in the parish of *Dale*, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation; (which is held to be a lawful usage, 1 *Lev.* 176. See *post.* II.;) this is strictly a custom, for it is applied to the place in general, and not to any particular persons: but if the tenant, who is seised of the

manor of *Dale* in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a Prescription; for this is an usage annexed to the person of the owner of his estate. 2 *Comm. c.* 17.

The difference between Prescription, custom, and usage, is also thus stated: Prescription hath respect to a certain person, who by intendment may have continuance for ever; as for instance, he and all they whose estate he hath in such a thing, this is a Prescription.

Custom is local, and always applied to a certain place; as, time out of mind there has been such a custom in such a place, &c. And Prescription belongeth to one or a few only; but custom is common to all.—Usage differs from both, for it may be either to persons or places; as, to inhabitants of a town, to have a way. &c. 2 *Nels. Abr.* 1277.

A custom and Prescription are in the right; usage is in possession; and a Prescription that is good for the matter and substance, may be bad by the manner of setting it forth; but where that which is claimed as a custom, in or for many, will be good, that regularly will be so when claimed by Prescription for one. *Godb.* 54.

Prescription is to be time out of mind; though it is not the length of time that begets the right of Prescription, nothing being done by time, although every thing is done in time; but it is a presumption in Law that a possession cannot continue so long quiet, if it was against right, or injurious to another. 3 *Salk.* 278.

All Prescription must be either in a man and his ancestors, or in a man and those whose estate he hath; which last is called prescribing in a *que estate*. 4 *Rep.* 32. And formerly a man might, by the Common Law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. *Co. Litt.* 113. But by the statute of Limitation, 32 *Hen.* 8. *c.* 2, it is enacted, that no persons shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within threescore years next before such Prescription made. See title *Limitation of Actions*, II. 1.

Prescriptions are properly personal, therefore are always alleged in the person of him who prescribes, *viz.* That he, his ancestors, or all those whose estate he hath, &c. or of a body politic or corporation, they and their predecessors, &c. Also a parson may prescribe, *quod ipse & prædecessores sui*, and all they whose estate, &c. for there is a perpetual estate, and a perpetual succession, and the successor hath the very same estate which his predecessor had, which continues, though the person alters, like the case of ancestor and heir. 3 *Salk.* 279.

A Prescription must always be laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates. 4 *Rep.* 31, 32. For as Prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for any thing, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe, under cover of his Lord's estate, and the tenant for life under cover of the tenant in fee-simple. As, if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple; and must plead that *John Stiles* and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that *John Stiles* demised the said manor, with its appurtenances, to him the said tenant for life. 2 *Comm. c.* 17.

Tenants in fee-simple are to prescribe in their own names, and tenants for life or years, &c. though they may not prescribe in their own names, yet they may in the name of him who hath fee: and where a person would have a thing that lies in grant by Prescription, he must prescribe in himself and his ancestors, whose heir he is by descent; not in himself, and those whose estate, &c.; (unless the *que estate* is but a conveyance to the thing claimed by Prescription;) for he cannot have their estate that lies in grant without deed, which ought to be shewn to the Court. *Co. Litt.* 113.

Parishioners cannot generally prescribe, but they may allege a custom; and inhabitants may prescribe in a matter of easement, way to a Church, burying place, &c. 2 *Saund.* 325: 1 *Lev.* 253: *Cro. Eliz.* 441: *Cro. Car.* 419; 2 *Rol.* 290.

A *custom* for *all the inhabitants* of a parish to play at all kinds of lawful games, sports, and pastimes in a certain close, at all seasonable times of the year, at their free will and pleasure, is good. But a similar custom for all *persons*, for the time being, in the said parish is bad. 2 *H. Black. Rep.* 393. See *post* II.

A Prescription may be laid in several persons, where it tends only to matters of easement or discharge; though not where it goes to matter of interest or profit *in alieno solo*, for that is a title, and the title of one doth not concern the other; therefore several men, having several estates, cannot join in making a Prescription. 1 *Mod.* 74: 3 *Mod.* 250.

Where a man prescribes for a way to such a close, he must shew what interest he hath in the close: *Aliter*, if he prescribes for a way to such a field; because that may be a common field by intendment. *Latch.* 160.

Plaintiff declared, that the *occupiers* of the adjoining field, have, time out of mind, repaired the fences, which being out of repair, his beasts escaped out of his own ground, and fell into a pit; it is good without shewing any estate in the occupiers; but it had not been so if the defendant had prescribed. 1 *Ventr.* 264.

It should seem that a Prescription by the *owner of land*, adjoining to a wood, to take underwood there-growing, to repair the fence belonging to the wood, is not good: for of common right the making of the hedge doth appertain to the owner of the wood: and the Prescription is no more than to take wood in the lands of another, to make the hedges of the same land in which the wood groweth, which cannot be a good Prescription, for it sounds only in charge, and not to the profit of him who prescribes. 1 *Leon.* 313.

Estates gained by Prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the Prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo*: and therefore, if a man prescribes for a right

right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the Prescription in this case being indeed a species of descent. But, if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the Prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase: for every accessory followeth the nature of its principal. 2 *Comm. c.* 17. *p.* 266.

II. NOTHING but incorporeal hereditaments can be claimed by Prescription; as a right of way, a common, &c.; but no Prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had. *Dr. & St. Dial.* 1. *c.* 8: *Finch.* 132.—For a man shall not be said to prescribe, that he and his ancestors have immemorially used to hold the castle of *Arundel*: for this is clearly another sort of title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of Prescription. But as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage.

A Prescription cannot be for a thing which cannot be raised by grant. For the Law allows Prescription only in supply of the loss of a grant, and therefore every Prescription presupposes a grant to have existed. Thus, the Lord of a Manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by Prescription. 1 *Ventr.* 387.

What is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the Royal franchises of deodands, felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a Jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by Prescription; for they arise from private contingencies, and not from any matter of record. *Co. Litt.* 114. See title *Franchise*.

Among things incorporeal, which may be claimed by Prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate*, (that is, in himself and those whose estate he holds,) nothing is claimable by this Prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence, or appendix, of an estate, with which the thing claimed has no connexion: but, if he prescribes in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross. *Litt.* § 183: *Finch.* L. 104.—Therefore a man may prescribe, that he, and those whose estate he hath in the manor of *Dale*, have used to hold the advowson of *Dale*, as appendant to that manor: but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also, a man may prescribe in a *que estate* for a common appurtenant to a manor; but if he would prescribe for a common in gross, he must prescribe in himself and his ancestors. 2 *Comm. c.* 17.

A person may make title by Prescription, to an office, a fair, market, toll, way, water, rent, common, park, warren, franchise, Court-leet, waifs, estrays, &c. But no person can prescribe against an Act of Parliament, or against the King, where he hath a certain estate and interest; against the public good, religion, &c. Nor can one Prescription be pleaded against another, unless the first is answered or traversed; or where one may stand with the other. *Lutw.* 381: *Raym.* 232: 2 *Rol. Abr.* 264: 2 *Inst.* 167: 7 *Rep.* 28: *Cro. Car.* 432: 1 *Bulst.* 115: 2 *Lil.* 346.

The word easement is a genus to several species of liberties, which one may have in the soil of another, without claiming any interest in the land itself; but where the thing set forth in a Prescription, was to catch fish in the water of another, &c. and no instance could be given of a Prescription for such a liberty by the word easement, a rule was made to set the Prescription right, and to try the merits. 4 *Mod.* 362. See title *Easement*.

In trespass for breaking the plaintiff's close, the defendant prescribed, that the inhabitants of such a place, time out of mind, had used to dance there, at all times of the year, for their recreation, and so justified; issue being taken on this Prescription, defendant had a verdict; it was objected against it, that a Prescription to dance in the freehold of another, and spoil his grass, was ill, especially as laid in the defendant's plea, *viz.* at all times of the year, and not at seasonable times, and for all the inhabitants; who, though they may prescribe in easements which are necessary, as a way to a Church, &c. they cannot in easements for pleasure only: but adjudged, that the Prescription is good, issue being taken on it, and found for the defendant; although it might have been ill on demurrer. 1 *Lev* 175. See *ante* I.

A custom that the farmers of such a farm have always found ale, &c. to such a value, at perambulations, was held naught; because it is no more than a Prescription in occupiers, which is not good in matter to charge the land. 2 *Lev* 164.

Prescription by the inhabitants of a parish to dig gravel in such a pit, the soil of *W. R.*, it was doubted whether this was good or not, though it was to repair the highway; but the inhabitants may prescribe for a way, and, by consequence, for necessary materials to repair it. 2 *Lutw.* 1346. *Sed. q.?* and see *Gateward*'s case, 6 *Co.* 60: where Prescription for common, for every inhabitant of an ancient messuage in a parish, is held not to be good.

Defendant pleaded, that within such a parish, all occupiers of a certain close *habent, & habere consueverent*, a way leading over the plaintiff's close, to the defendant's house; this was held ill, for it is not like a Prescription to a way to the Church or market, which are necessary, *et pro bono publico.* 2 *Ventr.* 186.

A man may claim a fold-course, and exclude the owner of the soil by Prescription. 1 *Saund.* 153.—But a diversity hath been taken where a Prescription takes away the whole interest of the owner of the land; and where a particular profit is restrained: in one case it is good; in the other void. 1 *Leon.* 11.

If a person prescribes for common appurtenant, it is ill, unless it be for cattle *levant & couchant*, &c. And the

the reason is, because by such a Prescription the party claims only some part of the pasture, and the *quantum* is ascertained by the levancy and couchancy, the rest being left for the owner of the soil; therefore, if he who thus prescribes, should put in more cattle than are levant and couchant on his tenement, he is a trespasser. *Noy* 145: 2 *Saund.* 324.

In a Prescription to have Common, the Jury found it to be, paying every year a penny. Here the Prescription is entire, whereof the payment of one penny is parcel; which ought to be entirely alleged in the Prescription in the plea, or it will not be good. *Cro. Eliz.* 563, 564. But where the payment is collateral from the Prescription, a Prescription may be good without alleging it. *Cro. Eliz.* 405.

It was a question, whether a toll, independent of markets and fairs, might be claimed by Prescription, without shewing that the Subject hath some benefit; and some arguments were brought for it, from an authority in *Dyer* 352. Though by *Holt*, this Prescription cannot be good, because there was no recompence for it; and every Prescription to charge the Subject with a duty, must import some benefit to him who pays it; or else some reason must be shewn why the duty is claimed. 4 *Mod.* 319.

A Court-leet is derived out of the hundred; and if a man claims a title to the leet, he may prescribe that he and his ancestors, and all those whose estate he hath in the hundred, time out of mind, had a leet. *Co. Litt.* 125.

There may be a Prescription for a Court to hold pleas of all actions, and for any sum or damage; and it will be good. *Jenk. Cent.* 327. If a Court held by Prescription is granted and confirmed by letters patent, this doth not destroy the Prescription; but it is said the Court may be held by Prescription as before. 2 *Rol. Abr.* 271.

A grant may enure as a confirmation of a Prescription; and the Prescription continue unaltered by a new charter, &c. where the charter is not contrary to the Prescription. *Moor* 818, 830 But in some cases it is intended, that a Prescription shall begin by grant; and as to Prescriptions in general, the Law supposes a grant, or purchase originally. *Cro. Eliz.* 709: *Co. Litt.* 113.

Every Prescription is taken strictly: and a man ought not to prescribe to that which the Law, of common right, gives. 3 *Leon.* 13: *Noy* 20.

A Prescription must have a lawful commencement, and peaceable possession and time are inseparably incident to it. *Co. Litt.* 113. Though a title gained by custom or Prescription, will not be lost by interruption of the possession for ten or twenty years; but it may be lost by interruption in the right. *Co. Litt.* 114: 2 *Inst.* 653.

PRESCRIPTIONS *against Actions and Statutes*; See title *Limitation of Actions* II. 2.

PRESCRIPTIONS by the Ecclesiastical Law, as to tithes, &c. See *Modus Decimandi*; *Tithes*.

PRESENCE. Sometimes the Presence of a superior Magistrate takes away the power of an inferior. 9 *Rep.* 118. And the Presence of one may serve for all the feoffees or grantees, &c. 3 *Rep.* 26. When the Presence of a man, in the place where an offence is done, may make him guilty, vide *Accessary*.

PRESENTATION, *Presentatio.*] The act of a patron, offering his clerk to the Bishop of the diocese, to be instituted in a church or benefice of his gift, which has become void. See titles *Advowson*; *Parson*.

PRESENTEE, The clerk presented to a church by the patron. In *stat.* 13 *R.* 2. *st.* 1. *c.* 1, there is mention of the King's Presentee, that is, he whom the King presents to a benefice.

PRESENTMENT, A mere denunciation of Jurors, or some officers, &c. (without any information) of an offence, inquirable in the Court where it is presented. *Lamb. Eiren. lib.* 4. *c.* 5. Or it may be defined to be an Information made by the Jury in a Court, before a Judge who hath authority to punish an offence. 2 *Inst.* 739.

The Presentment is drawn up in *English* by the Jury, in a short note, for instructions to draw the indictment by; and differs from an indictment, in that an indictment is drawn up at large, and brought ingrossed to the Grand Jury to find. 2 *Lill. Abr.* 353.

There are also Presentments of Justices of Peace in their Sessions, of offences against statutes, in order to their punishment in superior Courts; and Presentments taken before Commissioners of Sewers, &c. Presentments are made in Courts-leet and Courts-baron, before stewards; and, in the latter, of surrenders, grants, &c. Also, by constables, churchwardens, surveyors of the highways, &c. of things belonging to their offices. See this Dictionary, titles *Copyhold*; *Surrender*.

A *Presentment*, generally taken, is a very comprehensive term; including not only Presentments, properly so called, but also inquisitions of office, and indictments by a grand Jury. A Presentment, *properly speaking*, is the notice taken by a Grand Jury of any offence from their own knowledge or observation, without any bill of indictment laid before them, at the suit of the King. *Lamb. Eiren. l.* 4. *c.* 5.—As the Presentment of a nusance, a libel, and the like; upon which the officer of the Court must afterwards frame an indictment, before the party presented can be put to answer it. 2 *Inst.* 739. An inquisition of office is the act of a Jury, summoned by the proper officer to inquire of matters relating to the Crown, upon evidence laid before them. See title *Inquest*. Some of these are in themselves Convictions, and cannot afterwards be traversed or denied; and therefore the Inquest or Jury ought to hear all that can be alleged on both sides. Of this nature are all Inquisitions of *felo de se*; of flight in persons accused of felony; of deodands, and the like; and Presentments of petty officers in the Sheriff's-tourn or Court-leet, whereupon the presiding officer may set a fine. Other Inquisitions may be afterwards traversed or examined; as particularly the Coroner's inquisition of the death of a man, when he finds any one guilty of homicide: for in such cases the offender so presented must be arraigned upon this inquest, and may dispute the truth of it, which brings it to a kind of indictment. See further title *Indictment*.

PRESIDENT, *Præses.*] The King's lieutenant in any province; as, President of *Wales*, &c.

PRESIDENT OF THE COUNCIL, Is the fourth great officer of State. See title *Precedence*. He is as ancient as the reign of King *John*; and hath sometimes been called *Principalis Consiliarius*, and other times *Capitalis Consiliarius*.—During the reign of Q. *Elizabeth*, the

the office remained dormant. It appears to have been exercised in the reign of *Jac.* I. and was revived by *Charles* II. See title *Privy Council.*

The office of President of the Council hath been always granted by letters patent under the Great Seal *durante bene placito*; and this officer is to attend on the King, to propose business at the Council-table, and report to his Majesty the transactions there: also he may associate the Lord Chancellor, Treasurer, and Privy Seal, at naming of Sheriffs; and all other acts limited by any statute, to be done by them. 21 *Hen.* 8. *c.* 20. See 1 *Comm.* 230.

PRESS, *Liberty of the*; See *Libel* IV; *Jury.*

PRESSING, for the Sea-service; See this Dictionary, title *Impressing Seamen.*

PRESSING TO DEATH; See *Mute.*

PREST, A duty in money, to be paid by the Sheriff on his account, in the Exchequer, or for money left, or remaining in his hands. See *stat.* 2 & 3 *Ed.* 6. *c.* 4.

PRESTATION-MONEY, *Præstatio*, a paying or performing.] Is a sum of money paid by Archdeacons yearly to their Bishop *pro exteriore jurisdictione—Et sint quieti à* Præstatione *muragii. Chart. H.* 7. *Burgens. Mount-Gomer. Præstatio* was also anciently used for Purveyance. See *Philips*'s book on that subject, *p.* 222.

PREST-MONEY, from the French *prest, promptus, expeditus*; for that it binds those who receive, to be ready at all times appointed, being meant commonly of soldiers. See *stats.* 18 *H.* 6. *c.* 19: 7 *H.* 7. *c.* 1: 2 & 3 *Ed.* 6. *c.* 2.

PRESUMPTIO, Was anciently taken for intrusion, or the unlawful seizing of any thing. *Leg. Hen.* 1. *c.* 11.

PRESUMPTION, *Presumptio.*] A supposition, opinion, or belief previously formed. *Co. Lit.* 6, 375: *Wood's Inst.* 599.

Where many houses are let by one lease, the Court will presume that the lessee is in possession of them all, if he be in possession of any one of them, and the contrary doth not appear to the Court. See title *Lease.* I. 1. So in other cases, though Presumption is what may be doubted of, yet it shall be accounted truth, if the contrary be not proved. 2 *Lill. Abr.* 354. But no Presumptions ought to be admitted against the Presumptions of Law, and wrong shall never be presumed. *Co. Litt.* 232, 273.

If the eldest son be beyond sea at the death of the ancestor, and the youngest enters into the land, he is not accounted in Law a disseisor; because the Law presumes, that he preserves the possession for his brother; but if on his brother's return he keeps him out of possession, then the Law looks on him as a disseisor. *Latch.* 68. See titles *Evidence*; *Life Estate.*

Where the Law intrusts persons with the execution of a power, the Court ought to give credit to them in the execution of that power; though if they make a false return whereby the party and Justice are abused, they may be punished. 12 *Mod.* 382.

PRESUMPTIVE EVIDENCE OF FELONY; See titles *Evidence*; *Felony*; *Homicide*, &c.

PRESUMPTIVE HEIRS, Such persons who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born. See title *Descent* I.

PRETENDED TITLES, Buying or selling; See titles *Champerty*; *Maintenance.*

PRETENSED RIGHT, *Jus Prætensum*] Where one is in possession of land, and another who is out of possession claims and sues for it; here the Pretensed Right or title is said to be in him who so claims and sues for the same. See *Mod Cas.* 302.

PRETIUM SEPULCHRI; See title *Mortuary.*

PRICE; See titles *Consideration*; *Agreement*, &c.

PRIDE GAVEL, from *prid*, the last syllable of *lamprid*, and *gavel*, a rent or tribute] In the manor of *Rodeley* in the county of *Gloucester*, is a rent paid to the Lord, by certain tenants, in duty and acknowledgment to him for the privilege of fishing for lampreys or lamprids in the river *Severn. Tayl. Hist. Gavelk.* 112.

PRIESTS, In general signification, are any ministers of a church; but in our Law, this word is particularly used for ministers of the church of *Rome*. See title *Papists.*

PRIMAGE, A duty at the water-side, due to the master and mariners of a ship; to the master for the use of his cables and ropes, to discharge the goods of the merchant; and to the mariners for lading and unlading in any port or haven; it is usually about 12*d. per* ton, or six pence *per* pack or bale, according to custom. *Merch. Dict.* See *Stat. Antiq.* 32 *H.* 8. *c.* 14.

PRIMER-FINE, On suing out the writ or *præcipe*, called a writ of covenant, there is due to the King, by ancient prerogative, a Primer Fine, or a Noble for every five marks of land sued for; that is, one tenth of the annual value. See title *Fine of Lands* I. 1.

PRIMICERIUS, The first of any degree of men; sometimes it signifies the nobility. *Primicerios totius Angliæ*, the Nobility of *England. Mon. Angl.* i. 838.

PRIMIER SEISIN, *Prima seisina.*] The first possession, or seisin; heretofore used as a branch of the King's prerogative whereby he had the first possession, that is, the entire profits for a year of all the lands and tenements, whereof his tenant (who held of him *in capite*) died seised in his demesne as of fee, his heir being then at full age, until he did homage, or, if under, until he were of age. *Staundf. Prærog. cap.* 3. and *Bracton*, *l.* 4. *tr.* 3. *c.* 1. But all the charges arising by Primier Seisins are taken away by *stat.* 12 *Car.* 2. *c.* 24. See title *Tenures.*

PRIMIER SERGEANT, The King's first Serjeant at Law. See title *Precedence.*

PRIMO BENEFICIO, The first Benefice in the King's gift, &c. See *Beneficio primo*, &c.

PRIMOGENITURE, *Primogenitura.*] The title of an elder son or brother in right of his birth: the reason of which *Coke* says, is, *Qui prior est tempore, potior est jure*; affirming moreover, That, in King *Alfred*'s time, knights' fees descended to the eldest son; because, by the division of such fees between males, the defence of the realm might be weakened. And *Doderidge*, in his treatise of Nobility, saith, (*pag.* 119.) it was anciently ordained, That all knights' fees should come unto the eldest son by succession of heritage; whereby he, succeeding his ancestors in the whole inheritance, might be the better enabled to maintain the wars against the King's enemies, or his Lord's: and that the socage should be partible among the male children, to enable them to increase into many families, for the better furtherance

in,

ing and increase of, husbandry. *Cowell*, and *Leg. Alfred*: *Dodd. Treat. Nobil.* 119. See title *Descent*.

PRINCE, *Princeps.*] Sometimes taken at large for the King himself; but more properly for the King's eldest son, who is called PRINCE OF WALES. See title *King* II.

It is said by some writers, that the King's eldest son is Prince of *Wales* by Nativity; but others say, that he is born Duke of *Cornwall*, and afterwards created Prince of *Wales*, though from the day of his birth he is stiled Prince of *Wales*, a title originally given by *Edward* I. to his son. His titles are, Prince of *Wales*, Duke of *Cornwall*, and Earl of *Chester*.

Before *Edward* II. who was the first Prince of *Wales*, and born at *Caernarvon* in that Principality, (his mother being sent there big with child by *Edward I.* to appease the tumultuous spirit of the *Welch*,) the eldest son of the King was called Lord Prince; but Prince was a name of dignity long before that time in *England*. *Staundf. Prærog. c.* 22, 75. See *stats.* 27 *H.* 8. *c.* 26: 28 *H.* 8. *c.* 3. And *Stow's Annals*, *p.* 303. In a charter of King *Offa*, after the Bishops had subscribed their names, we read, *Brordanus Patritius*, *Binnanus Princeps*; and afterwards the Dukes subscribed their names. And in a charter of King *Edgar*, in *Mon. Angl. tom.* 3. *p.* 302; *Ego Edgarus Rex rogatus ab episcopo meo Deorivolfe, &* Principe *meo Alfredo*, &c. And in *Matt. Paris*, *p.* 155; *Ego Halden* Princeps *Regi: pro viribus assensum præbeo, & ego Turketillus Dux concedo.*

As Duke of *Cornwall*, and likewise Earl of *Chester*, the Prince of *Wales* is to appoint the Sheriffs, and other Officers, in those counties. The Prince of *Wales*, besides the revenues of the Principality of *Wales*, Duchy of *Cornwall*, &c. has also an income settled on him, from time to time, by Parliament. See *stat.* 33 *Geo.* 3. *c.* 78, enabling the Prince to make leases in the Duchy of *Cornwall*; and *stat.* 35 *Geo.* 3. *c.* 125, for preventing the accumulation of debts by any future Heir-Apparent of the Crown, and for regulating his mode of expenditure from the time of his having a separate establishment.

PRINCIPAL, *Principalium.*] Is variously used in our law; as an heir loom, *&c.*

The word Principal, was also sometimes anciently used for a mortuary, or corse-present. See title *Mortuary*.

In *Urchenfield* in the county of *Hereford*, certain Principals, as the best beast, the best bed, the best table, *&c.* pass to the eldest child, and are not liable to partition.

The chief person in some of the Inns of Chancery is called Principal of the House. *Cowell.*

PRINCIPAL AND ACCESSARY; See this Dictionary, title *Accessory*.

PRINCIPAL CHALLENGE, A species of the challenge to Jurors for suspicion of partiality. This takes place where the cause assigned carries with it *primâ facie* evident marks of suspicion, either of malice or favour. See titles *Jury* II; *Challenge*.

PRINTING; See *Books*; *Libel*; *Literary Property*.

PRINTS AND ENGRAVINGS; See title *Literary Property*.

PRIOR, Was in dignity next to the abbot, or the chief of a convent, *&c.* See title *Abbot*.

PRIORS ALIENS, *Priores Alieni.*] Were certain religious men, born in *France* and *Normandy*, Governors of Religious Houses erected for foreigners here in *England*; but were suppressed by *Henry* V. and afterwards their livings were given to other monasteries and houses of learning, and especially towards the erecting of the King's Colleges, at *Cambridge* and *Eaton*. 2 *Inst.* 584. See *Stow's Annals*, 582: and *stat.* 1 *Hen.* 5. *c.* 7.

PRIORITY, *Prioritas.*] An antiquity of tenure, in comparison of another less ancient. *Old Nat. Br.* 94. *Crompt.* in his *Jurisd. fol.* 117, useth this word in the same signification. The Lord of the Priority shall have the custody of the body, *&c.* and *fol.* 120; if the tenant hold by Priority of one, and by Posteriority of another, *&c.* To which effect, see also *F. N. B.* 142. and tit. *Posteriority*.

PRIORITY OF DEBTS AND SUITS: See titles *Action*; *Abatement*; *Pleading*, &c.—As to payment of Debts by an Executor in order of Priority; see this Dictionary, title *Executor*.—As to Priority of mortgages, see title *Mortgage*.

There is no Priority of time, in Judgments; for the Judgment first executed shall be first paid. See title *Judgment*.

Wherever any suit on a penal statute may be said to be actually depending, it may be pleaded in abatement of a subsequent prosecution, being expressly averred to be for the same offence. Neither will it be any exception to such a plea, that the offence in the subsequent prosecution is laid on a day different from that in the former. Neither doth a mistake in such a plea of the very day, whereon the suit pleaded as prior was commenced, seem to be material on the issue of *nul tiel record*, if it appear in truth to have been commenced before the other, and for the same matter.

And if two Informations be exhibited on the very same day, it seems that they may mutually abate one another; because there is no Priority to attach the right of the suit in one informer, more than in the other. Also it seems, that an information or bill the same day that they are filed, may be so far said to be depending before any process sued on them, that they may be pleaded in abatement of any other suit on the same statute. And from the same reason it seems also, that a writ of debt may be so pleaded in abatement of any other suit on the same statute; and from the same reason it seems also that a writ of debt may be so pleaded after it is returned; because then it seems to be agreed, that it may be properly said to be depending; and whether it may not also be so pleaded before it be returned, seems questionable; because, according to some opinions, a writ may be said to be depending as soon as purchased. 2 *Hawk. P. C. c.* 26. § 63. See title *Information*.

Those points of law, where *Hawkins* seems to doubt, are now, in general, pretty clearly settled, according to what appeared to be his opinion.

PRISAGE, *Prisagium.*] That share which belongs to the King, or Admiral, out of such merchandises as are taken at sea, by way of lawful prise, which is usually a tenth part. See *stat.* 31 *Eliz. c.* 5.

PRISAGE OF WINES is an ancient duty or custom on wines, payable at certain ports, except *London*, *Southampton*, &c. It is where the King claims out of every ship or vessel laden with wine, containing twenty tons or more, two tons of wine, the one before, the other behind the mast, at his price, which is twenty shillings for each ton; but this varies according to the custom of places; and at *Boston* every bark laden with ten tons of wine, or above,

above, pays Prisage. This word is almost out of use, being now called *Butlerage*, because the King's chief butler receives it. See title *Customs on Merchandise*.

PRISE; See *Prize*.

FRISO, A prisoner taken in war. *Hoveden*, *p*. 541.

PRISON, *Prisona*] A place of confinement for the safe custody of persons, in order to their answering any action, civil or criminal. See title *Gaol*.

Prison Breaking; See title *Gaol*, III.

PRISONER, *Prisonarius*, Fr. *Prisonnier*.] One confined in prison, on an action, or commandment: and a man may be a prisoner on matter of record, or of fact: a prisoner on matter of record, is he who, being present in Court, is by the Court committed to prison; and the other is on arrest, by the Sheriff, &c. *Staundf. P. C.* 34, 35. See titles *Gaol* II. [illegible] *Debtors*; *Execution* III. 4; *Insolvent Debtors*.

PRIT; See *Pleading*.

PRIVATEERS, A kind of private men of War, the persons concerned wherein administer, at their own costs, a part of a war, by fitting out these ships of force, and providing them with all military stores; and they have, instead of pay, leave to keep what they take from the enemy, allowing the Admiral his share, &c.

Privateers may not attempt any thing against the laws of nations; as to assault an enemy in a port or haven, under the protection of any Prince or Republic, whether he be friend, ally, or neuter; for the peace of such places must be inviolably kept; therefore by a treaty made between King *William* and the States of *Holland*, before a commission shall be granted to any Privateer, the commander is to give security, if the ship be not above 150 tons, in 1500*l*. and if the ship exceed that burden, in 3000*l*. that they will make satisfaction for all damages which they shall commit in their courses at sea, contrary to the treaties with those States, on pain of forfeiting their commissions; and the ship is made liable. *Lex Mercat*. 177, 178.

Besides these private commissions, there are special commissions for Privateers, granted to commanders of ships, &c. who take pay, and are under a marine discipline; and if they do not obey their orders, may be punished with death. And the wars in latter ages, have given occasion to Princes to issue these commissions, to annoy the enemies in their commerce, and hinder such supplies as might strengthen them, or lengthen out the war: and likewise to prevent the separation of ships of greater force from their fleets or squadrons. See titles *Letters of Marque*; *Admiralty*.

PRIVATION, *Privatio*.] A taking away or withdrawing: most commonly applied to a Bishop or Rector, when by death, or other act, they are deprived of their preferments; it seems to be an abbreviation of the word Deprivation. *Co. Litt*. 239.

PRIVEMENT ENSIENT, The term to signify a woman being with child; but not quick with child. *Wood's Inst*. 662.

PRIVIES, from the Fr. *Privé*, i. e. *Familiaris*.] Those who are partakers, or have an interest in any action or thing, or any relation to another; as every heir in tail is privy to recover the land entailed, &c. *Old Nat. Br*. 117.

There are five several kinds of Privies, *viz*. Privies of blood, such as the heir to the ancestor; Privies in representation, as executors or administrators, to the deceased; Privies in estate, between donor and donee, lessor and lessee, &c. Privies in respect of contract; and Privies on account of estate and contract together. 3 *Rep*. 23, 123: 4 *Rep*. 123: *Latch*. 260.

It is also said, that there are *three* sorts of Privies and Privities; in estate, in blood, and in law.

Privies in blood are intended of Privies in blood inheritable, and this in three manners, *viz*. inheritable as general heir, or as special heir, or as general and special heir.

Privies in estate, as joint-tenants, baron and feme, donor and donee, lessor, and lessee, &c.

Privies in law are, when the law, without blood or privity of estate, casts the land on one, or makes his entry lawful; as lord by escheat, lord who enters for mortmain, lord of villain, &c. 8 *Rep*. 42, *b*: *Jo*. 32.

The Author of the *New Terms of the Law* maketh many sorts of Privies, *viz*. Privies in estate, Privies in deed, Privies in law, Privies in right, and Privies in blood. See *Perkins*, 831, 832, 833. *Coke*, *lib*. 3. *f*. 23. and *lib*. 4, 123, 124, mentions four kinds of Privies, *viz*. Privies in blood, as the heir to his father; Privies in representation, as executors or administrators to the deceased; Privies in estate, as he in reversion, and he in the remainder, when land is given to one for life, to another in fee, for that their estates are created both at one time: the fourth is Privy in tenure, as the lord by escheat, that is, when the land escheateth to the lord for want of heirs. *Cowell*.

If a fine be levied, the heirs of him who levied it are termed Privies. See title *Fine of Lands* I. If a lessor grants his reversion, the grantee and lessee are Privies in estate: Privies in contract extend only to the persons of the lessor and lessee; and where the lessee assigns all his interest, here the lessor and lessee remain Privy in contract, but not in estate, which is removed by the assignment. 3 *Rep*. 23.

Privies, in respect of estate and contract, appear, where the lessee assigns his interest; but the contract between the lessor and lessee, as to action of debt, continues, the lessor not having accepted of the assignee. 3 *Lev*. 295.

If the lessor grants over his reversion, or if the reversion escheat, now between the grantee, or the lord by escheat, and the lessee, there is Privity in estate only.

Privity of contract only, is personal Privity, and extends only to the person of the lessor, and to the person of the lessee; as when the lessee assigned over his interest, notwithstanding his assignment, the Privity of the contract remained between them, though Privity of the estate be removed by the act of the lessee himself; and the reason of this is,

1st, Because the lessee himself shall not prevent by his own act such remedy, which the lessor had against him by his own contract; but when the lessor granted over his reversion, there, against his own grant, he cannot have remedy, because he has granted the reversion to the other, to which the rent is incident.

2dly, The lessee may grant the term to a poor man, who shall not be able to manure the land, and who will by indigence, or for malice, permit it to lie fresh, and then the lessor shall be without remedy, either by distress, or by action of debt, which shall be inconvenient, and will concern in effect every man (because for the most

most part every man is a lessor, or a lessee); and for those two reasons all the cases of entry by tort, eviction, suspension, and apportionment of the rent are answered; for in such cases it is either the act of the lessor himself, or the act of a stranger; and in none of the cases, the sole act of the lessee himself shall prevent the lessor of his remedy, for that it will introduce such inconvenience as has been said. See title *Lease* I. 3.

Privity of contract and estate together, is between the lessor and lessee himself. 3 *Rep.* 23.

Where there are Privies in contract, and the Privity is altered by assignment of an executor, &c. before any rent due, and after the Privity of estate, by the assignment of the executor's assignee, nothing remains whereby to maintain any action. *Latch* 260.

There are likewise Privies in deed, or in Law; where the deed makes the relation; or the Law implies it, in case of escheats to the Lord, &c. And only parties and Privies shall take advantage of conditions of entry on lands, &c. *Co. Litt.* 516.

If I deliver goods to a man, to be carried to such a place, and he, after he hath brought them thither, steal them, it is felony; because the Privity of delivery is determined as soon as they are brought thither. *Staundf. Pl. Cor. lib.* 1. *cap.* 15, 25. Merchants privy are opposed to merchant strangers, in *stat.* 2 *Ed.* 3. *c.* 9, 15.

Privies inheritable, as heir general, shall take benefit of the infancy; as if infant tenant in fee-simple makes feoffment, and dies, his heir shall enter. The same law of him who is heir general and special, and also of him that is heir special, and not general. But Privies in estate (unless in some special cases) shall not take advantage of the infancy of the other. 8 *Rep.* 42. *b.* 43.

PRIVILEGE,

Privilegium.] Is defined by *Cicero*, in his oration *pro domo suâ*, to be *lex privato homini irrogata*. It is, says another, *Jus singulare*, whereby a private man, or a particular Corporation, is exempted from the rigour of the Common Law. It is sometimes used in Law for a place which hath some special immunity. *Kitchin* 118.

Privilege is either personal or real: a personal Privilege is, that which is granted to any person, either against or beyond the course of the Common Law in other cases; as for example, Privilege of Parliament.

A Privilege real is, that which is granted to a place, as to the Universities, that none of either may be called to *Westminster Hall*, on any contract made within their own precincts, or prosecuted in other Courts: and one belonging to the Court of Chancery cannot be sued in any other Court, certain cases excepted; and if he be, he may remove it by writ of Privilege, grounded on the statute 18 *E.* 3. *Cowell.* Officers of that Court are to be sued in the petty bag office.

Privilege is an exemption from some duty, burden, or attendance, to which certain persons are entitled; from a supposition of Law, that the stations they fill, or the offices they are engaged in, are such as require all their care; that therefore, without this indulgence, it would be impracticable to execute such offices, to that advantage which the public good requires. 4 *New Abr.* 215.

I. *Of Privilege in Suits, allowed Officers and Attendants in the Courts of Justice*; and see titles *Abatement* I. 3. (*a*); *Attorny*.

II. *Of the Privilege of Peers and Members of Parliament*; in addition to what is said under titles *Parliament*; *Peer*.

III. *Of the Proceedings in Courts, by and against Persons entitled to Privilege of Parliament.*

I. The Officers, Ministers, and Clerks of the Courts in *Westminster Hall* are allowed particular Privileges in respect of their necessary attendance on those Courts; they are regularly to sue and be sued in the Courts they respectively belong to, and cannot (except in certain cases) be impleaded elsewhere; which Privilege arises from a supposition of Law, that the business of the Court, or their clients' causes would suffer by their being drawn into another than that in which their personal attendance is required. 2 *Inst.* 551: 4 *Inst.* 71: *Vaugh.* 154: *Dyer* 377. *a. pl.* 30.

The following extract from *Tidd's Pract. K. B.* applies in general, not only to Attornies, but to all other Officers of the Court; and details the nature of the practice by and against them; authorities are cited by Mr. *Tidd* for all the positions laid down.

Where an Attorney is plaintiff, he is entitled to sue in his own Court, by attachment of Privilege, and may lay the *venue* in *Middlesex*. But an Attorney, or other privileged person, defendant, has not the Privilege of changing the *venue* into *Middlesex*, when it is laid in another county. Where he is defendant, he must be sued in his own Court by bill, even as acceptor of a bill of exchange, or for a debt under forty shillings; and cannot be arrested or holden to special bail. It is also said, that an Attorney is entitled to have his cause tried at bar. These Privileges are allowed, not so much for the benefit of Attornies, as of their clients; and are therefore confined to Attornies who practise, or at least have practised within a year: and they are never allowed against the King; but actions *qui tam* are not considered as the King's actions. Neither are they allowed to Attornies, as against each other: it being a general rule, that there can be no Privilege against Privilege. But this rule only applies to Attornies of the same Court; for where they are of different Courts, the plaintiff is entitled to his Privilege. It is also settled, that an Attorney shall not be allowed his Privilege, where he sues or is sued *in auter droit*, as executor or administrator; or jointly with his wife, or other person who is not privileged; or where there would otherwise be a failure or defect of justice; as where an appeal, which only lies in the Court of K. B. is brought against an attorney of the Common Pleas, or such an Attorney is in the actual custody of the Marshal: but where an Attorney of the Common Pleas puts in bail, to an action depending in the Court of K. B. he does not thereby lose his Privilege; but may plead it in that action, or in any other brought against him by the bye: for it would be absurd, that he who founds his action on that of another, should be in a better condition than the original plaintiff. Yet where an Attorney, having put in bail, waives his Privilege, by pleading in chief, in one action, it is construed to be a waiver

waiver of Privilege, in all other actions brought against him by the bye, during the same term.

The Attachment of Privilege, at the suit of an Attorney, is in nature of a *Latitat*: therefore, in replying it to a plea of the statute of Limitations, the plaintiff must set forth the continuances: and, like a *Latitat*, it may be sued out, and will warrant proceedings, against several defendants for distinct causes of action. In suing it out, the rule is, that " every Attorney shall leave a *præcipe* with the signer of the writs, containing the defendants' names, not exceeding four in each writ, with the return and day of signing such writ, and the agent's or Attorney's name who sued out the same; and that all such *præcipes* shall be entred on the roll, where the *præcipes* of *Latitats*, and all other writs issuing out of this Court, are entered; and the Officer, that signs the writs in this Court, shall not sign such attachment, till a *præcipe* be left with him for that purpose." *R. Hil.* 20 *Geo.* 2.

An Attorney was formerly permitted to hold the defendant to special bail, upon an attachment of Privilege, for fees or disbursements, however trifling. But now, since the statutes for preventing frivolous and vexatious arrests, the defendant cannot be arrested and holden to special bail, upon an attachment of Privilege, or any other process, unless the cause of action amount to ten pounds or upwards. Where it is under that amount, the defendant must be served with a copy of the process, and notice to appear, as in other cases.

The time allowed for declaring upon an attachment of Privilege, is the same as upon a *Latitat*, or other process in trespass. And if an Attorney sue out an attachment of Privilege, and deliver or file his declaration, and give notice thereof, four days exclusive before the end of the term wherein the attachment is returnable, the defendant must plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea: but if he do not declare within that time, the defendant may impart to the next term; and if he do not declare before the essoin day, the defendant will have an imparlance to the term following.

The *bill against* an Attorney is a complaint in writing, describing the defendant as *being present in Court*; and generally concludes with a *prayer of relief*, though the declaration upon the bill is not demurrable for want of it. Formerly, the bill against an Attorney could only have been filed in term time, *sedente curiâ*, and not in vacation. But now it may be filed in vacation, as well as in term time: though if it be filed in vacation, otherwise than to avoid the statute of Limitations, the plaintiff will not be allowed his costs, if the action be settled before the ensuing term.

In practice, it is usual to file the bill, on stamped parchment, with the Clerk of the declarations, in the King's Bench Office; and to deliver a copy of it, on stamped paper, to the defendant, with notice thereon to plead in four days. And if the bill be filed, and a copy thereof delivered, four days exclusive before the end of the term, including *Sunday*, the defendant must plead as of that term; the plaintiff having entered a rule to plead, and demanded a plea: but if the bill be not filed, and a copy delivered within that time, the defendant is entitled to an imparlance. See title *Pleading*.

The rest of the Proceedings, by and against Attornies, are the same as in other cases; only that they are not bound to pay for copies of the pleadings.

Where *J. S.* was arrested in *B. R.* and after the arrest he procured himself to be made an Attorney of *C. B.* and prayed his Privilege, it was disallowed, because it accrued *pendente lite*. 2 *Rol. Rep.* 115.

If an Attorney lays his action in *London*, the Court will change the *venue* on the usual affidavit; for, by not laying it in *Middlesex*, he seems regardless of his Privilege, and is to be considered in the same light as an unprivileged person. 2 *Vent.* 47: *Salk.* 668.

As to other persons than Attornies claiming Privilege; the following cases are deserving notice:

Anderson, Ch. J. of *C. B.* brought trespass by bill for breaking his house in the city of *Worcester*, against a citizen of that city; the Mayor and Commonalty came and shewed a Charter granted by *Edward* VI. and demanded conusance of pleas; but it was refused, because the Privilege of that Court, of which the plaintiff was a Chief Member, is more ancient than the patent; for the Justices, Clerks, and Attornies, ought to be there attending their business, and shall not be impleaded or compelled to implead others elsewhere; and this Privilege was given the Court on the original erection of it. 3 *Leon.* 149.

In debt against the Warden of the *Fleet*, by bill of Privilege, he refused to appear; the Court doubted how they could compel him, as they could not forejudge him the Court, he having an inheritance in his office; but it being surmised that he made a lease of his office, it was held that he should not have his Privilege, for that the lessee, and not he, was the Officer during the lease. 2 *Leon.* 173.

So, if the Marshal of *B. R.* grants his place for life; the grantor has no Privilege during that time. 1 *Vent.* 65.

A Clerk of *B. R.* was sued in an inferior Court for a debt under five pounds, and had a writ of Privilege allowed; for the *stat.* 21 *Jac.* 1. *c.* 23, never intended to take away the Privilege of Attornies. *Palm.* 403.

In the Court of Exchequer there are three sorts of Privilege: 1st, As Debtor. 2dly, As Accountant. 3dly, As Officer. *Hard.* 365.

J. S. was sued in *London*, which he removed into *B. R.* and afterwards prayed his Privilege of the Court of Exchequer; and on the puisne Baron's coming into Court, and bringing the red book of the Exchequer, which shewed that he was an Escheator, and so an Accountant to the King, the Privilege was allowed. *Noy* 40. *Sed qu?* the Officer having chosen the Court of *B. R.* for determination of his suit, and thereby, as it seems, submitted to the jurisdiction.

If one holds of the Queen as of her manor, he shall not have the Privilege of the Exchequer for that cause; but if the King grants tithes, and thereupon reserves a rent *nomine decimæ*, and a tenure of him, there he shall have Privilege. 2 *Leon.* 21.

A *Latitat* being sued out against the Commissioners of the Treasury, the puisne Baron of the Exchequer came into the Court of *B. R.* and brought the red book of the Exchequer, which is deemed a Record in that Court; and thereby it appeared, that the Treasurer had Privilege of being sued only in that Court; and the patent being produced in Court which constituted the defendants, &c. and granted them the office of Treasurer of *England*, their Privilege was allowed without putting them

to bring a writ of Privilege; the Court grounding themselves on the Record before them. 2 *Show.* 299.

It hath been held, that the Treasurer of the Navy is *eo ipso* an accountant; and that an accountant's Privilege will hold against a special Privilege in another Court, as Officer of the Court or otherwise, though it be not alleged, that such an accountant is entered on his account; for that every accountant may be attached by the Court to make up his account, and must attend for that purpose *de die in diem*. *Hard.* 316. See *Moor* 753: 2 *Inst.* 23, 551: *Bro. Privilege* 16.

In debt in *B. R.* against *J. S.* he pleaded to the jurisdiction, That none of the Privy Chamber ought to be sued in any other Court, without the special licence of the Lord Chamberlain of the houshold, and that he was one of the Privy Chamber; on demurrer to this plea, the Court over-ruled it with great resentment, and awarded a *Respondeas ouster*. *Raym.* 34: 1 *Keb.* 137.

It was agreed, that the Privilege of the Court of *C. B.* which Serjeants claimed, extended only to inferior Courts, not to the Courts in *Westminster-Hall*; and that a Serjeant may be sued in any of these, because he is not confined to that Court alone, but may practise in any other Court; but it is otherwise as to Attornies or Philasers, who cannot practise in their own name in any other Court but such as they respectively belong to; and that a Serjeant at Law is to be sued by original, not by Bill of Privilege. 2 *Lev.* 129: 3 *Keb.* 42: *Moor* 296: *S. C.*

So, in action by bill brought in *C. B.* against a Serjeant at Law, he pleaded, that *he ought to have been sued by original, and not by bill*; and on demurrer, the Court held, that the case of a Serjeant and Prothonotary's Clerk were on the same footing, neither of them being bound to personal attendance, as Prothonotaries and Attornies were; that therefore he ought to have been sued by original; and accordingly gave judgment for the defendant. *Trin.* 7 *G.* 2. Serjeant *Girdler's* case.

J. S. being arrested by a writ out of *C. B.* brought his writ of Privilege as Clerk of the Crown Office; but, it appearing that he was only a Clerk to a Clerk of that Office, and not *an immediate Clerk* of the Office, a *supersedeas* to the writ of Privilege was granted, on motion; the Court having agreed, that he had no more Privilege than an Attorney's Clerk. 2 *Show.* 287.

A Serjeant at Law, or Barrister, as well as an Attorney, or other privileged person, whose attendance is necessary in *Westminster Hall*, may lay his action in *Middlesex*, though the cause of action accrued in another county; and the Court on the usual affidavit will not change the venue. *Sil.* 460: *Moor* 64: 2 *Show.* 242.

On a motion to discharge a rule which had been obtained for changing the *venue*, it appeared, that the plaintiff was a Barrister and Master in Chancery: and the Court held that he had Privilege, by reason of his attendance, to lay his action in *Middlesex*, therefore discharged the rule. 2 *Raym.* 1556.

As to the obstructions of public Justice, by means of pretended privileged places, see this Dictionary title *Arrest*: The following is a fuller statement of the statutes there referred to:

By *stat.* 8 & 9 *W.* 3. *c.* 27. § 15, for preventing the many ill practices used in privileged places to defraud persons of their debts; the pretended Privileges of *White Friars*, the *Savoy*, *Salisbury Court*, *Ram Alley*, *Mitre Court*, *Fuller's Rents*, *Baldwin's Gardens*, *Montague Close*, the *Minories*, *Mint*, *Clink*, or *Deadman's Place*, are taken away. And the Sheriffs of *London* or their Officers are enabled to take the *posse comitatûs*, and such other power as shall be requisite, and enter such privileged places to make any arrest on legal process, and in case of refusal to break open doors.

The *stat.* 9 *Geo.* 1. *c.* 28, enacts, That if any person within *Suffolk Place*, or the *Mint*, or the pretended limits thereof, wilfully obstruct persons executing any writ, &c. or abuse any person executing the same, whereby he receive damage or bodily hurt, the person offending shall be transported. And on complaint to three Justices, &c. by any person who shall have a debt owing from any one who resides in the *Mint*, having a legal process taken out for recovery thereof, if the debt be above 5 *l.* on oath thereof, the Justices are empowered to issue their warrant to the Sheriff of *Surry*, to raise the *posse*, and to enter the pretended privileged place, and arrest the party, &c. See also *stat.* 11 *Geo.* 1. *c.* 22, enforcing the above penalties.

II. In an indictment for treason or felony, trespass *vi & armis*, assault or riot, process of outlawry shall issue against a Peer; for the suit is for the King, and the offence is a contempt against him; but in civil actions between party and party, regularly a *Capias* or *Exigent* lies not against a Lord of Parliament. 2 *Hal. Hist. P. C.* 199: 2 *Hawk. P. C. c.* 44. § 16. See *post.* III. & title *Outlawry*.

If a Peer of Parliament be convicted of a disseisin with force, a *capias pro fine* and *exigent* shall issue; for the fine is given by statute, in which no person is exempted. *Cro. Eliz.* 170: See *Dyer* 314.

So, in debt on an obligation against the Earl of *Lincoln*, who pleaded *non est factum*, which being found against him, the judgment was *ideo capiatur*; on a writ of error brought by him, it was objected that a *capias* does not lie against a Peer; *sed non allocatur*: for by this plea found against him, a fine is due to the King, against whom none shall have any Privilege. *Cro. Eliz.* 503.

An information was exhibited in *B. R.* against the Earl of *Devonshire*, for striking in the King's Palace; which being in time of Parliament, he insisted on his Privilege, and refused to plead in chief, but sent in his plea of Privilege, to which there was a demurrer and the plea over-ruled, and he was fined 30,000*l.* *Comb.* 49.

Peers are punishable by attachment for contempts in many instances; as for rescuing a person arrested by due course of Law; for proceeding in a cause against the King's writ of prohibition; for discharging other writs, wherein the King's Prerogative, or the liberty of the Subject are nearly concerned; and for other contempts which are of an enormous nature. 2 *Hawk. P. C. c.* 22. § 33.

If a Peer be returned on a Jury, on his bringing a writ of Privilege he may be discharged; also it seems the better opinion, that without such writ he may either challenge himself or be challenged by the party. *Dyer* 314: *Moor* 767: 9 *Co.* 49: *Co. Lit.* 157: 1 *Jon.* 153. See title *Jury*.

So, if a Peer be made Steward of a base Court, or Ranger of a Forest, he may, from the dignity of his person,

fon, and the presumption that he is engaged in the more weighty affairs of the Commonwealth, exercise these Offices by deputy; though there are no words for this purpose in his creation. 9 *Co.* 49. *a.*

So if a licence be granted to a Peer to hunt in a chase or forest, he may take such a number of attendants with him as are suitable to his dignity. 9 *Co.* 49. *b.*

If a Peer bring an appeal, the defendant shall not be admitted to wage battle, by reason of the dignity of his person. 2 *Hawk. P. C. c.* 45. § 5.

III. There are two ways of proceeding against Peers of the Realm and Members of the House of Commons; first, by original writ; and, secondly, by bill. See title *Original.*

The method of proceeding by Original is by Summons, Attachment, and Distress infinite. The Original should issue into that county where the defendant lives; and a copy of it is usually made out by the plaintiff's Attorney for the Sheriff, and served as the *summons* on the defendant. And it is said, that a Peer or Peeress, cannot be attached (on civil process), but should be brought in by summons. Before, or on the *quarto die post* of the return of the Original, the defendant either appears or makes default; for he cannot cast an essoin. If he make default, the plaintiff should sue out a *Distringas*, and after that (if necessary) an *alias* or *pluries distringas*; upon which he may move to increase and sell the issues, as before directed. Or if the Sheriff return, upon the *distringas, &c.* that the defendant hath nothing by which he can be distrained, the plaintiff may have a *testatum distringas* into another county.

The *distringas* and other subsequent process upon the Original, state the cause of action at large; and must be made returnable on a general return day, *ubicunque*, or wheresoever the King shall then be in *England*. Each succeeding writ must be teste'd on the *quarto die post* of the return of the preceding one; and there must be fifteen days at least between the teste and return.

If the defendant appear, upon any of these writs, he should enter his appearance with the Filaser; and when the purpose of the writ is thus answered, "the issues (if any have been levied) shall be returned; or, if sold, what shall remain of the money arising by such sale shall be repaid to the party distrained upon." See *stat.* 10 *Geo.* 3. *c.* 50. § 4. But the plaintiff, in such case, is entitled to his costs: and where he had obtained rules for selling the issues levied upon a *distringas, alias*, and *pluries*, and also a rule for an attachment against the Sheriff, but the defendant appeared before any issues had been actually levied; the Court ordered, that upon payment of the costs of issuing the writs, the rules should be discharged; being of opinion, that these costs were not to abide the event of the suit, but were to be paid to the plaintiff immediately; and at all events, whether he should finally succeed in the suit or not.

At Common Law, it was not usual to proceed by bill against Peers of the Realm, or Members of the House of Commons; but now by statute 12 & 13 *W.* 3. *c.* 3. extended by *stat.* 10 *Geo.* 3. *c.* 50 to *Scotland*; "Any person or persons, having cause of action against any Knight, Citizen, or Burgess of the House of Commons, or any other person entitled to Privilege of Parliament, may prosecute such Knight, *&c.* in his Majesty's Courts of King's Bench, Common Pleas, or Exchequer, by summons and distress infinite, or by original bill and summons, attachment and distress infinite; which the said respective Courts are empowered to issue against them, or any of them, until he or they shall enter a common appearance, or file common bail, to the plaintiff's action, according to the course of each respective Court." Since the making of this statute, Peers of the Realm, and Members of the House of Commons, may be sued by bill and summons, *&c.* as well as by original writ. But this mode of proceeding is not allowed as against unprivileged persons.

The bill against a Peer of the Realm, or Member of the House of Commons, is a complaint in writing, describing the defendant as having Privilege of Parliament; and concludes with a prayer by the plaintiff, of process to be made to him, according to the form of the statute, *&c.* This bill is filed on stamped parchment, with the Clerk of the Declarations, in the King's Bench Office: and the first process thereon is a writ of Summons; which is a judicial writ, issuing out of the same Office, and directed to the Sheriff of the county where the *venue* is laid, commanding him to summon the defendant. Upon this writ the defendant should be summoned, in like manner as upon the Original; and, if he do not appear at the return of it, is subject to the like process of *Distringas, &c.*

The writ of Summons, and other subsequent process upon the bill, differ from the process by Original, in the following particulars; first, that they do not state the cause of action at large, but only require the defendant to answer the plaintiff, generally, in a plea of trespass on the case, to his damage of, *&c.* (according to the plea), as he can reasonably shew, that thereof he ought to answer; secondly, that they are teste'd on the very return, and not on the *quarto die post* of the return, of each other; thirdly, that they are made returnable on days certain, and not on general return days; and fourthly, that there need not be fifteen days between the teste and return of them.

If the defendant appear, he files common bail; and the plaintiff declares against him. The time of declaring against a Peer of the Realm, or Member of the House of Commons, is the same as in other cases. But there are these differences in the manner of declaring: first, that the declaration by bill begins with a *Memorandum*; and secondly, that in assigning the breach in *Assumpsit*, against a Peer of the Realm, whether by Bill or Original, as well as in the Bill or Original itself, the plaintiff must not charge the defendant with 'contriving and fraudulently intending craftily and subtilly to deceive and defraud him;' for the House of Lords have adjudged it a very high contempt and misdemeanor, to charge a Member of their House with any species of fraud or deceit.

All further proceedings against Peers of the Realm, and Members of the House of Commons, are the same as against other persons; only it should be remembered, that as no *capias* lies against them in civil actions, they cannot be taken in execution; unless where the judgment is obtained upon a statute-staple, or statute-merchant, or upon the statute of *Acton Burnel*; in which cases a *capias* lies, even against Peers of the Realm: And see *ante* II.

Lord

Lord *Stourton* brought a bill against Sir *Thomas Meers*, to compel him to a specific performance of articles for purchasing Lord *Stourton's* estate. Sir *Thomas* in his defence insisted, that there were defects in Lord *Stourton's* title to the estate; and it being ordered that Lord *Stourton* should be examined on interrogatories touching his title; it was objected, that Lord *Stourton*, being a Peer, ought to answer on Honour only; but it was ruled by Lord *Harcourt*, that though privilege did allow a Peer to put in his answer on Honour only, yet this was restrained to an answer; and as to all affidavits, or where a Peer is examined as a witness, he must be on oath; and that this examination on interrogatories, being in a cause wherein his Lordship was plaintiff, to force the execution of an agreement, as his Lordship would have Equity, so he should do Equity; and allow the other side the benefit of a discovery, and that in a legal manner; and accordingly ordered Lord *Stourton* to put in his examination on oath. 1 *P. Wms.* 145.

Peers, in suits in Equity, are entitled to a letter missive, which method was introduced on a presumption that Peers would pay obedience to the Chancellor's letter; and is founded on that respect which is due to the Peerage. *Jenk.* 107. If the Lord doth not appear on the letter, a *subpœna*, on motion, is awarded against him; because no subsequent process can be awarded but on a contempt to the Great Seal, and the Chancellor's letter is only *ex gratia*. If, on the service of the *subpœna*, the Peer doth not appear, or if he appears, and does not put in his answer, no attachment can be awarded against him, because *his person cannot be imprisoned*; but the proceedings must be by sequestration, unless cause, *&c.* and this is regularly made out, on affidavit made of the service of the letter and *subpœna*, though sometimes it is moved for without, since the Peer may shew want of service at the day assigned to shew cause why the sequestration should not issue; and this order for a sequestration is never made absolute *without an affidavit* of the service of the order to shew cause, and a certificate of no cause shewn. 2 *Vent.* 342. See title *Chancery*.

A sequestration was granted, unless cause, against Lord *Clifford*, for want of an answer; he afterwards put in an answer, which being reported insufficient, it was moved for a sequestration absolutely, an insufficient answer being as no answer; but the Court thought it a hardship, in the case of a Peer or Member of the House of Commons, that a sequestration, which in some respects is in nature of an execution, should be the first process against them; therefore allowed, that in case of an answer which is reported insufficient, the plaintiff is to move again *de novo*, for a sequestration *nisi*. 2 *P. Wms.* 385. See 3 *Atk.* 740.

It was moved for a sequestration *nisi*, for want of an answer, against a menial servant of a Peer, as the first process for contempt, in the same manner as in the case of the Peer himself; and though the motion was granted by the Master of the Rolls, yet the Registrar refused to draw it up, as thinking it against the course of the Court; which being moved again before the Chancellor, his Lordship, on reading the *stat.* 12 & 13 *W.* 3. *c.* 3, likewise granted the motion, it appearing to be both within the meaning and words of the statute; and if it were not so, as it was plain no attachment would lie against their persons, consequently there would be no remedy against them, and they would have a greater privilege than their Lord, if the process against such menial servant were to be a *subpœna*. 1 *P. Wms.* 535.

PRIVITY, *Privité*.] Private familiarity, friendship, inward relation: If there be Lord and tenant, and the tenant holds of the Lord by certain service, there is a Privity between them in respect of the tenure. *Cowell.* See title *Privies*.

PRIVY, from the French *privé*, *familiaris*.] Signifies him who is partaker, or hath an interest in any action or thing; *Old Nat. Brev.* 117. See title *Privies*.

PRIVILEGIUM CLERICALE, Or, in common speech, the Benefit of Clergy; See *Clergy, Benefit of*.

PRIVILEGIUM Property *propter*. A man may have a qualified property in animals *feræ naturæ*, *propter Privilegium*: that is, he may have the Privilege of hunting, taking and killing them, in exclusion of other persons. 2 *Comm. c.* 25. *p.* 394. See title *Game*.

PRIVY-COUNCIL,

[Concilium Regis, Privatum Consilium.] A most Honourable Assembly of the King himself and his Privy Counsellors in the King's Court or Palace, for matters of State. 4 *Inst.* 53.

This is the principal Council belonging to the King, and is generally called, by way of eminence, The Council. According to *Coke's* description of it at length, it is a Noble, Honourable, and Reverend Assembly, of the King and such as he wills to be of his Privy Council, in the King's Court or Palace. The King's will is the sole constituent of a Privy Counsellor; and this also regulates their number, which, of ancient time, was twelve or thereabouts. Afterwards it increased to so large a number, that it was found inconvenient for secrecy and dispatch; and therefore King *Charles* II. in 1679 limited it to thirty: whereof fifteen were to be the Principal Officers of State, and those to be Counsellors, *virtute officii*; and the other fifteen were composed of ten Lords and five Commoners of the King's choosing. But since that time the number has been much augmented, and now continues indefinite. At the same time also, the ancient Office of Lord President of the Council was revived in the person of Anthony Earl of *Shaftesbury*. See title *President of the Council*.

Next to the Lord President of the Council, the Lord Privy Seal sits in Council, the Secretaries of State, and many other Lords and Gentlemen: And in all debates of the Council, the lowest delivers his opinion first, and the King declares his judgment last; and thereby the matter of debate is determined. 4 *Inst.* 55.

No inconvenience now arises from the extension of the number of the Privy Council, as those only attend who are especially summoned for that particular occasion, upon which their advice and assistance are required. *The Cabinet Council*, as it is called, consists of those Ministers of State, who are more immediately honoured with his Majesty's confidence, and who are summoned to consult upon the important and arduous discharge of the Executive Authority: their number and selection depend only on the King's pleasure; and each Member of that Council receives a summons or message for every attendance. 1 *Comm. c.* 5. *p.* 230. *in n.*

Privy Counsellors are made by the King's nomination, without either patent or grant; and, on taking the necessary

necessary oaths, they become immediately Privy Counsellors, during the life of the King that chooses them, but subject to removal at his discretion.

As to the qualifications of Members to sit at this Board: any natural-born Subject of *England* is capable of being a Member of the Privy Council; taking the proper oaths for security of the Government, and the test for security of the Church. But, in order to prevent any persons under foreign connections from insinuating themselves into this important trust, as happened in the reign of King *William* in many instances, it is enacted by the act of Settlement, *Stat.* 12 & 13 *W.* 3. *c.* 2, that no person born out of the dominions of the Crown of *England*, unless born of *English* parents, even though naturalized by Parliament, shall be capable of being of the Privy Council.

The duty of a Privy Counsellor appears from the oath of Office, which consists of seven articles: 1. To advise the King, according to the best of his cunning and discretion. 2. To advise for the King's honour and good of the public, without partiality through affection, love, meed, doubt, or dread 3. To keep the King's Counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be there resolved. 6. To withstand all persons who would attempt the contrary. And, lastly, in general, 7. To observe, keep, and do all that a good and true Counsellor ought to do, for his Sovereign Lord. 4 *Inst.* 54.

The power of the Privy Council is to inquire into all offences against the Goverment; and to commit the offenders to safe custody, in order to take their trial in some of the Courts of Law. But their jurisdiction herein is only to inquire, and not to punish: and the persons committed by them are entitled to their *Habeas Corpus* by *stat.* 16 *Car.* 1. *c.* 10; as much as if committed by an ordinary Justice of the Peace. By the same statute, the Court of Star-chamber, and the Court of Requests, both of which consisted of Privy Counsellors, were dissolved; and it was declared illegal for them to take cognizance of any matter of property, belonging to the Subjects of this kingdom. But, in Plantation or Admiralty causes, which arise out of the jurisdiction of this kingdom; and in matters of lunacy or idiocy, being a special flower of the prerogative; with regard to these, although they may eventually involve questions of extensive property, the Privy Council continue to have cognizance, being the Court of Appeal in such cases: or, rather, the Appeal lies to the King's Majesty himself in Council; which is, in fact, a Court of Justice, which must at least consist of three Privy Counsellors. See 3 *P. Wms.* 108: 1 *Comm.* *c.* 5. Whenever also a question arises between two provinces in *America* or elsewhere, as concerning the extent of their Charters and the like, the King in his Council exercises original jurisdiction therein, upon the principles of feodal Sovereignty. And so likewise when any person claims an island or a province, in the nature of a feodal Principality, by grant from the King or his Ancestors, the determination of that right belongs to his Majesty in Council: as was the case of the Earl of *Derby*, with regard to the Isle of *Man*, in the reign of Queen *Elizabeth*; and the Earl of *Cardigan* and others, as representatives of the Duke of *Montague*, with regard to the Island of *St. Vincent* in 1764. But from all the dominions of the Crown, excepting *Great Britain* and *Ireland*, an appellate jurisdiction (in the last resort) is vested in the same tribunal; which usually exercises it's judicial authority in a committee of the whole Privy Council, who hear the allegations and proofs, and make their report to his Majesty in Council, by whom the judgment is finally given. See 3 *Inst.* 182: 4 *Inst.* 53.

The Court of Privy Council cannot decree *in personam* in *England*, unless in certain criminal matters: nor the Court of Chancery *in rem* out of the kingdom. See Lord *Hardwicke's* argument in *Pen v. Baltimore*, where the jurisdiction of the Council and Chancery upon questions arising on subject-matters abroad, is very fully discussed. 1. *Ves.* 444.

The privileges of Privy Counsellors, as such, (abstracted from their honorary precedence, see title *Precedence*,) consist principally in the security which the Law has given them against attempts and conspiracies to destroy their lives. For, by *stat.* 3 *Hen.* 7. *c.* 14, if any of the King's servants, of his household, conspire or imagine to take away the life of a Privy Counsellor, it is felony, though nothing be done upon it. The reason of making this statute, *Coke* says, was because such a conspiracy was, just before this Parliament, made by some of King *Henry* VII.'s household servants, and great mischief was like to have ensued thereupon. 3 *Inst.* 38. This extends only to the King's menial servants. But the *stat.* 9 *Ann.* *c.* 16, goes further; and enacts, that *any person* who shall unlawfully attempt to kill, or shall unlawfully assault, and strike, or wound, any Privy Counsellor in the execution of his office, shall be a felon without benefit of clergy. This statute was made upon the daring attempt of the Sieur *Guiscard*, who stabbed Mr. *Harley*, afterwards Earl of *Oxford*, with a pen-knife, when under examination for high crimes in a Committee of the Privy Council. And anciently if one did strike another in the house of a Privy Counsellor, or in his presence, the party offending was to be fined. 4 *Inst.* 53.

The dissolution of the Privy Council depends upon the King's pleasure; and he may, whenever he thinks proper, discharge any particular Member, or the whole of it, and appoint another. By the Common Law also it was dissolved *ipso facto* by the King's demise; as deriving all its authority from him. But now, to prevent the inconveniences of having no Council in being at the accession of a new Prince, it is enacted by *stat.* 6 *Ann.* *c.* 7, that the Privy Council shall continue for six months after the demise of the Crown, unless sooner determined by the successor. See 1 *Comm.* *c.* 5.

It is consistent with safety for a Privy Counsellor to give the King counsel when demanded; and the best counsel is ever given to a Prince, when the question is evenly propounded, so as the Counsellor cannot discern which way the King himself inclines; resolution should never precede deliberation, nor execution go before resolution; and when, on debate and deliberation, any matter is well resolved by the Council, a change of it on some private information is neither safe nor honourable. 4 *Inst.*

The Court of Privy Council is of great antiquity: The Government in *England* was originally by the King and Privy Council; though at present the King and Privy Council only intermeddle in matters of complaint

plaint on sudden emergencies; their constant business being to consult for the public good in affairs of State. 4 *Inst.* 53.

The Lords and Commons assembled in Parliament have often transmitted matters of high concern to the King and Privy Council: And acts of the Privy Council, whether orders or proclamations, were of great authority: *Hen.* VIII. procured an act of Parliament to be made, that, with the advice of his Privy Council, he might set forth proclamations, which should have the force of acts of Parliament; but that statute was repealed in the reign of *Ed.* VI.

Acts of the Privy Council continued of great authority until the reigns of K. *Charles* I. and II.: And by these were controversies sometimes determined touching lands and rights, as well as the suspension of penal Laws, &c. But this seemed to be contrary to *stat.* 25 *Ed.* 3. *st.* 5. *c.* 4. And by *stat.* 16 *Car.* 1. *cap.* 10. § 5. it is declared, that neither the King, nor the Privy Council, have authority by petition, &c. to determine or dispose of lands, &c. of any Subject. See *ante*: and title *Liberty*.

The King, with advice of his Council, publishes proclamations binding to the Subject; but they are to be consonant to, and in execution of, the Laws of the land.

It is in the power of the Privy Council to inquire into crimes against Government; they may commit persons for Treason, and other offences against the State, in order for their trial in other Courts; and any of the Privy Council may lawfully do it. See title *Commitment* I.

By *stat.* 33 *Hen.* 8. *c.* 23, persons examined by the Privy Council, on treasons, &c. done within or without the realm, may be tried before Commissioners of *Oyer and Terminer*, appointed by the King in any county of *England*: This statute, as far as it relates to treason committed within the kingdom, is repealed by *stat.* 1 & 2 *P.* & *M.* *c.* 10. See title *Treason*.

If a person be killed beyond sea, out of the realm, the fact may be examined by the Privy Council, and the offender tried according to the aforesaid statute. See title *Homicide*.

PRIVY SEAL, *Privatum Sigillum*.] A Seal which the King useth to such grants or things, as pass the Great Seal. 2 *Inst.* 554. See *Keeper of the Privy Seal*.

No protection can be granted under the Privy Seal, but under the Great Seal: But a warrant of the King under the Privy Seal to issue money out of his coffers, is sufficient; though not under the Privy Signet. 2 *Inst.* 555: 2 *Rep.* 17: 2 *Rol. Abr.* 183. The Privy Seal is sometimes used in things of less consequence, that never pass the Great Seal; as to discharge a recognizance, debt, &c. But no writ shall pass under the Privy Seal, which toucheth the Common Law. 2 *Inst.* 555. Matters of the Privy Seal are not issuable, or returnable in any Court, &c. 3 *Nels. Abr.* 211. See title *Grant of the King*.

PRIVY VERDICT; See title *Jury*.

PRIZES, *Captio*; *præda*; from the Fr. *prendre*.] A booty taken from an enemy in time of war: generally applied to the cases of Capture at Sea.

The Prize Courts in the Admiralty, and the Courts of Lords Commissioners of Appeals, have the sole and *exclusive* jurisdiction over the question of Prize or no Prize, and who are the Captors, notwithstanding any of the Prize Acts: and if they pronounce a sentence of condemnation, adjudging also who are the Captors, the Courts of Common Law cannot examine the justice or propriety of it, even though, perhaps, they would have put a different construction on the Prize Acts. And the same Courts have power to enforce their decrees. 4 *Term Rep.* 382. See this Dict. title *Admiral, ad fin.* and 2 *Show.* 232: *Comb.* 474: 1 *Sid.* 320.

PRO, A preposition, signifying *for*, or in respect of a thing; as *pro consilio*, &c. And in Law, *pro* in the grant of an annuity *pro consilio*, shewing the cause of the grant, amounts to a condition: But in a feoffment, or lease for life, &c. it is the consideration, and doth not amount to a condition; and the reason of the difference is, because the state of the land by the feoffment is executed, and the grant of the annuity is executory. *Plowd.* 412. See titles *Condition*; *Grant*.

PROBARE, To claim a thing as a man's own. *Leg. Canut. c.* 44.

PROBATE OF TESTAMENTS, *Probatio Testamentorum*.] The exhibiting and proving Wills and Testaments before the Ecclesiastical Judge, delegated by the Bishop, who is Ordinary of the place where the party dies. If all the deceased's goods, chattels, and debts owing to him, were in the same diocese, then the Bishop of the diocese, &c. hath the Probate of the Testament; but if the goods and chattels were dispersed in divers dioceses, so that there were any thing out of the diocese where the party lived, to make what is called *bona notabilia*, then the Archbishop of *Canterbury*, or *York*, is the Ordinary to make Probate by his prerogative. *Blount.* See title *Executor* V. 3.

The Probate of a will is usually made in the Spiritual Court, and is done by granting letters testamentary to the executor under seal of the Court, by which the executor is enabled to bring any action, &c. And if such letters testamentary are granted to the party who exhibits the will, merely on his oath, by swearing that he believeth it to be the last will of the deceased, this is called proving it in common form; and such a Probate may be controverted at any time: but if the executor, besides his own oath, produces witnesses to prove it to be the last will of the deceased, and this in the presence of the parties who claim any interest, or in their absence, if they are summoned, and do not appear; this is termed a *Probate per testes*, which cannot be questioned after thirty years. 2 *Nels. Abr.* 1301.

On an issue whether the deceased made an executor or no, the Probate of the will was adjudged good proof. 2 *Lill. Abr.* 375. And where the Probate of a will is produced in evidence at a trial, the defendant cannot say that the will was forged, or that the testator was *non compos mentis*; because it is directly against the seal of the Ordinary, in a matter where he had a proper jurisdiction: but the defendant may give in evidence that the seal itself was forged, or that the testator had *bona notabilia*, or he may be relieved on appeal. 1 *Lev.* 235: *Raym.* 405: 1 *Strange* 481. The Probate is evidence only in questions relating to the personal estates; as a will relating to real estate, only, need not be proved. See title *Will*.

As the Judge of the Spiritual Court only can determine the validity of wills for things personal; therefore the Probate of such a will is undeniable evidence to a Jury, and may not be controverted at Common Law. 1 *Ld. Raym.* 262.

A Probate, according to *Holt*, is evidence of a will only as to chattels: but if a will of lands be lost, it shall be allowed for such a will concerning lands. 1 *Ld. Raym.* 731, 735.

When Probate is to be granted of a will, wherein a legacy is interlined in a different hand, and supposed to be forged, the executor has no remedy but in the Spiritual Court; where the will ought to be proved, with a special reservation as to that clause. 1 *P. Wms.* 388.

Notwithstanding appeal from a will, a person is complete executor by the Probate; though the Probate may be traversed, if an executor plaintiff do not conclude with a *profert hic in curiâ*, or the defendant may demand oyer of the will. 3 *Bulst.* 72.

An executor being made by the act of the party deceased, the law entitles him to the Probate of the will, and the Probate cannot be revoked or altered, which would in effect make a new will; yet it may be suspended by an appeal: but if administration be granted to one, this is by act of the Court; and if he afterwards become bankrupt, *&c.* the administration may be repealed. 1 *Rol. Rep.* 226: *Show.* 293: 1 *Salk.* 36: 2 *Nelf. Abr.* 1302. See title *Executor* V. 3.

By *stat.* 21 *H.* 8. *c.* 5, which first settled the fees to be taken by a Registrar and Judge in the Probate of wills, it is enacted, that if the officer takes more than his due fees, he shall forfeit 10*l.* to be divided between the King and party grieved.

By several acts of Parliament, stamps are imposed on the Probates of wills and letters of administration, according to the value of the property of the deceased.

The power of granting Probates and administration of the goods of persons dying, for wages or work done in the King's docks and yards, shall be in the Ordinary of the diocese where the person dieth; or in him to whom power is given by such Ordinary, to the exclusion of the Prerogative Court, *&c.* *Stat.* 4 *&* 5 *Ann. c.* 16. Several statutes have also been passed, regulating and alleviating the expence of the Probates of the Wills, or Administrations of the effects, of sailors, *&c.* in the King's service.

PROBATOR, An accuser, or approver, or one who undertakes to prove a crime charged upon another.

The word was strictly meant of an accomplice in felony, who, to save himself, confessed the fact, and accused any other principal or accessary, against whom he was bound to make good the charge by duel, or trial by the country, and then was pardoned life and members, but yet to suffer transportation. *Bracton*: *Fleta, lib.* 2. *c.* 52. §42, 44. See titles *Accessary*; *Approver*.

PROCEDENDO, or *Procedendo in loquelâ*.] A writ which lieth where an action is removed from an inferior to a superior Jurisdiction, as the Chancery, King's Bench, or Common Pleas, by *Habeas Corpus*, *Certiorari*, or writ of privilege; to send down the cause to the Court from whence removed, to proceed on it; it not appearing to the higher Court that the suggestion is sufficiently proved. *F N. B.* 153: 5 *Rep.* 63. See *stat.* 21 *Jac.* 1. *c.* 23. So, where a cause has been removed from an inferior Court, the Court of K. B. will grant a *Procedendo* if the debt or damages appear to be under 10*l.* *Tidd's Pract. K. B.*

If the party who sues out the *Habeas Corpus*, or *Certiorari*, doth not put in good bail in time, (where good bail is required) then there goes this writ to the inferior Court to proceed notwithstanding the *Habeas Corpus*, *&c.* *Rule, Mich.* 1654. § 8

If a *Certiorari* or *Habeas Corpus*, to remove a cause, be returned before a Judge, the Judge will give a rule thereon to put in good bail, by such a day, which if the defendant, on serving his attorney with a copy of the rule, doth not do, then the Judge will sign a note or warrant for a *Procedendo*, to remove the cause where the action was first laid, unless bail is perfected in four days after service of the rule: Also if bail be put in at the time, and do not prove good, the Judge will grant a rule for better bail to be put in by a certain day, or else to justify the bail already put in; which if defendant doth not do, the Judge will then likewise grant a warrant for a *Procedendo*. *Tidd. Pract. K. B.* See titles *Certiorari*; *Habeas Corpus*.

Where bail, put in on removal of a cause into *B. R.* is disallowed by the Court, if the defendant on a rule for that purpose, and notice given, refuse to put in better bail, such as the Court shall approve of, a *Procedendo* may be granted; for disallowing the bail makes the defendant in the same condition as if he had put in no bail, and until the bail is put in and filed, the Court is not possessed of the cause so as to proceed in it. *Mich.* 24 *Car. B. R.*

After a record returned, and the defendant hath filed bail in *B. R* on a cause being removed, a *Procedendo* ought not to be granted; because by giving and filing bail in this Court, the bail below is discharged. *Sid.* 313.

The *Procedendo* removes the suspension created by the *Habeas Corpus*, and a cause once remanded thereby, cannot afterwards be removed or stayed before judgment. *Stat.* 21. *Jac.* 1. *c* 23. § 3.

This writ may also be awarded when it appears upon the return of the *Habeas Corpus*, that the Court above cannot administer the same justice to the parties, as the Court below. As where an action is brought in *London* on a custom or bye-law, which is only suable there. See titles *Habeas Corpus* IV. *ad fin.*

Where an *Habeas Corpus* is brought, after interlocutory, and before final, judgment in an inferior Court, and the defendant dies before the return of it, a *Procedendo* shall be awarded; because, by *stat.* 8 *&* 9 *W.* 3. *c.* 11, the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in another Court: and by this means he would be deprived of the effect of his judgment, which would be unreasonable. *Salk.* 352. So where an action was brought in the Sheriffs Court of *London* against two partners, and one of them brought a *Habeas Corpus*, and put in bail for himself only, a *Procedendo* was granted; for otherwise the plaintiff would have been disabled from going on in either Court. 1 *Stra.* 527.

PROCEDENDO ON AID PRAYER. If a man pray in aid of the King, in a real action, and aid be granted; it shall be awarded that he sue to the King in Chancery, and the Justices in the Common Pleas shall stay until the writ of *Procedendo de loquelâ* come to them: And if it appear to the Judges by pleading, or shewing of the party, that the King hath interest in the land, or shall lose rent, *&c.* there the Court ought to stay until they have from the King a *Procedendo in loquelâ*: And then they may proceed in the plea, until they come to give judgment; when the Justices ought not to proceed to judgment, without a writ for that purpose. So in a personal action, if defendant pray in aid of the King, the

Judges are not to proceed till they receive a *Procedendo in loquelâ.* And though they may then proceed and try the issue joined, they shall not give judgment until a writ comes to proceed to judgment. *New Nat. Brev.* 342.

Procedendo ad Judicium; A remedial writ in case of refusal or neglect of justice, which issues out of the Court of Chancery, where Judges of any subordinate Court do delay the parties; for that they will not give judgment, either on the one side or the other, when they ought so to do. In this case a writ of *Procedendo* shall be awarded, commanding them, in the King's name, to proceed to judgment; but without specifying any particular judgment: for that (if erroneous) may be set aside in the course of appeal, or by writ of error, or false judgment: and upon further neglect or refusal, the Judges of the inferior Court may be punished for their contempt by writ of attachment, returnable in the Court of King's Bench or Common Pleas. 3 *Comm* c. 7: *F N B.* 153, 154. 240.

If a verdict pass for the plaintiff in assise of novel disseisin before the Justices of assise, and before they give judgment, by a new commission, new Justices are made; the plaintiff in assise may sue forth a *Certiorari*, directed to the other Justices to remove the record before the new Justices; and another writ to the new Justices to receive and inspect the record, and then proceed to judgment, &c. *New Nat. Brev.* 342, 343.

Where the authority of Commissioners of *Oyer and Terminer*, &c. or of *Justices of the Peace*, is suspended by writ of *supersedeas*; their power may be restored by a writ of *Procedendo. Regist.* 124: 12 *Ass.* 21: *H. P. C.* 162.

PROCESS,

Processus; *à procedendo ab initio usque ad finem.*] Is so called, because it proceeds or goes out, upon former matter, either original or judicial; and hath two significations: First, it is largely taken for all the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end: Secondly, that is termed *the Process* by which a man is called into any temporal Court, because it is the beginning or principal part thereof, by which the rest is directed; or, taken strictly, it is the proceeding, after the original, before judgment. *Britton* 138: *Lamb. lib.* 4: *Crompt.* 133: 8 *Rep.* 157.

I. *Of Process in civil Cases.*

II. *In criminal Cases.*

I. Blackstone considers Process in civil cases as the means of compelling the defendant to appear in Court. This is sometimes called *original Process*, being founded upon the original writ; and also to distinguish it from mesne or intermediate Process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon Juries, Witnesses, and the like. *Finch. L.* 436. Mesne Process is also sometimes put in contradistinction to final Process, or Process of execution; and then it signifies all such Process as intervenes between the beginning and end of a suit. 3 *Comm.* c. 19.

Process therefore, as it is now to be considered, is the method taken by the law to compel a compliance with the original writ; of which the primary step is by giving the party *Notice* to obey it. This notice is given upon all real *præcipes*, and also upon all personal writs for injuries not against the peace, by summons; which is a warning to appear in Court at the return of the original writ, given to the defendant by two of the Sheriff's messengers called *Summoners*, either in person or left at his house or land. *Finch. L.* 436. This warning on the land is given, in real actions, by erecting a white stick or wand on the defendant's grounds; *Dalt. Sher.* c. 31. And by *stat.* 3 *Eliz* c. 3, the notice must also be proclaimed on some Sunday before the door of the parish church.

If the defendant disobeys this verbal monition, the next Process is by writ of attachment, or *Pone*; so called from the words of the writ, "*pone per vadium et salvos* "*plegios:* Put by gage and safe pledges *A. B.* the de-" fendant, &c" This is a writ, not issuing out of Chancery, but out of the Court of Common Pleas, being grounded on the non appearance of the defendant at the return of the original writ; and thereby the Sheriff is commanded to attach him, by taking gage, that is, certain of his goods, which he shall forfeit if he doth not appear; or by making him find safe pledges or sureties, who shall be amerced in case of his non-appearance. This is also the first and immediate Process, without any previous summons, upon actions of trespass *vi et armis*, or for other injuries, which though not forcible are yet trespasses against the peace, as deceit and conspiracy; where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any precedent warning. 3 *Comm.* 280.

If, after attachment, the defendant neglects to appear, he not only forfeits this security, but is moreover to be farther compelled by writ of *Distringas*, or distress-infinite; which is a subsequent Process issuing from the Court of Common Pleas, commanding the Sheriff to distrain the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands, which are called *issues*; and which by the Common Law he forfeits to the King if he doth not appear. But now the issues may be sold, if the Court shall so direct, in order to defray the reasonable costs of the plaintiff. *Stat.* 10 *Geo.* 3. c. 50. See title *Privilege.*

And here, by the Common Law, the Process ended in cases of injury *without force:* the defendant, if he had any substance, being gradually stript of it all by repeated distresses, till he rendered obedience to the King's writ; and if he had no substance, the Law held him incapable of making any satisfaction, and therefore looked upon all farther Process as nugatory: but by degrees the *Capias*, which was originally applied only to cases of injury, accompanied by force, was found to be a convenient remedy in cases merely civil, and was accordingly introduced into practice. If, therefore, a defendant, being summoned or attached, makes default, and neglects to appear; or if the Sheriff returns a *nihil*: (i. e. that the defendant hath *nothing* whereby he may be summoned, attached, or distrained;) or taking all or any of these circumstances for granted, the *Capias* now usually issues; being a writ commanding the Sheriff *to take* the body of the defendant and have him in Court at the day of the return. As to the origin and application of this

this writ in civil suits, see further this Dict. titles *Capias*; *Common Pleas*.

This writ, and all others, subsequent to the original writ, not issuing out of Chancery, but from the Courts into which the original was returnable, and being grounded on what has passed (or supposed to have passed) in that Court, in consequence of the Sheriff's return, are called *judicial*, and not *original* Writs: they issue under the Private Seal of that Court, and not under the Great Seal of *England*; and are teste'd not in the King's name, but in that of the Chief (or if there be no chief, of the senior) Justice only. And these several writs, when actually grounded on the Sheriff's return, must respectively bear date the same day on which the writ immediately preceding was returnable. See 3 *Comm. c.* 19. *p.* 282.

Such is the first Process in the Court of Common Pleas: as to the proceeding by *Original quare clausum fregit*. See this Dict. title *Common Pleas*.

In the *King's Bench* they may also, and frequently do, proceed in certain causes, particularly in actions of *Ejectment* and *Trespass*, by original writ, with attachment and *capias* thereon; returnable, not at *Westminster* where the Common Pleas are now fixed in consequence of *Magna Charta*, but *ubicunque fuedrimus in Angliâ*, wheresoever the King shall then be in *England*; the Court of King's Bench being removable into any part of *England* at the pleasure and discretion of the Crown. But the more usual method of proceeding therein is without any original, but by a peculiar species of Process called a *bill of Middlesex*: and which is so intitled, because the Court now sits in that county; for if it sate in *Kent*, it would then be a *bill of Kent*. For though, as the Justices of this Court have, by its fundamental Constitution, power to determine all offences and trespasses, by the Common Law and custom of the realm, it needed no original writ from the Crown to give it cognizance of any misdemeanor in the county wherein it resides; yet, as by this Court's coming into any county, it immediately superseded the ordinary administration of justice by the general commissions of *Eyre* and of *Oyer and Terminer*, a Process of its own became necessary within the county where it sate, to bring in such persons as were accused of committing any forcible injury. The bill of *Middlesex*, (which was formerly always founded on a plaint of trespass *quare clausum fregit*, entered on the records of the Court,) is a kind of *capias*, directed to the Sheriff of that county, and commanding him to take the defendant, and have him before our Lord the King at *Westminster* on a day prefixed, to answer to the plaintiff of a plea of trespass. For this accusation of trespass it is, that gives the Court of King's Bench jurisdiction in other civil causes; since, when once the defendant is taken into custody of the Marshal, or prison-keeper of this Court, for the supposed trespass, he, being then a prisoner of this Court, may here be prosecuted for any other species of injury. Yet, in order to found this jurisdiction, it is not necessary that the defendant be actually the Marshal's prisoner; for, as soon as he appears, or puts in bail, to the Process, he is deemed, by so doing, to be in such custody of the Marshal, as will give the Court a jurisdiction to proceed. And, upon these accounts, in the bill, or Process, a complaint of trespass is always suggested, whatever else may be the real cause of action. This bill of *Middlesex* must be served on the defendant by the Sheriff, if he finds him in that county; but, if he returns "*non est inventus*," then there issues out a writ of *Latitat*, to the Sheriff of another county, as *Berks*; which is similar to the *Testatum Capias* in the Common Pleas, and recites the bill of *Middlesex* and proceedings thereon, and that it is testified that the defendant "*latitat et discurrit*," lurks and wanders about in *Berks*; and therefore commands the Sheriff to take him, and have his body in Court on the day of the return. But, as in the Common Pleas the *Testatum Capias* may be sued out upon only a supposed, and not an actual, preceding *Capias*; (see title *Capias*;) so in the King's Bench a *Latitat* is usually sued out upon only a supposed, and not an actual, bill of *Middlesex*. So that, in fact, a *Latitat* may be called the first Process in the Court of King's Bench, as the *Testatum Capias* is in the Common Pleas. Yet, as in the Common Pleas, if the defendant lives in the county wherein the action is laid, a common *Capias* suffices; so in the King's Bench likewise, if he lives in *Middlesex*, the Process must be by bill of *Middlesex* only. See further this Dictionary, title *Latitat*.

In the *Exchequer* the first Process is by writ of *Quo minus*, in order to give the Court a jurisdiction over pleas between party and party. In which writ the plaintiff is alledged to be the King's farmer or debtor, and that the defendant hath done him the injury complained of; *quo minus sufficiens existit*, "*by which he is the less* able," to pay the King his rent, or debt. And upon this the defendant may be arrested as upon a *Capias* from the Common Pleas.

Thus differently do the three Courts set out at first, in the commencement of a suit, in order to entitle the two Courts of King's Bench and Exchequer to hold plea in causes between Subject and Subject, which by the original constitution of *Westminster-Hall* they were not empowered to do. Afterwards, when the cause is once drawn into the respective Courts, the method of pursuing it is pretty much the same in all of them.

If the Sheriff has found the defendant upon any of the former writs, the *Capias*, *Latitat*, &c. he was anciently obliged to take him into custody, in order to produce him in Court upon the return; however small and minute the cause of action might be. For not having obeyed the original summons, he had shewn a contempt of the Court, and was no longer to be trusted at large. But when the summons fell into disuse, and the *Capias* became in fact the first Process, it was thought hard to imprison a man for a contempt which was only supposed: and therefore in common cases by the gradual indulgence of the Courts (at length authorized by *stat.* 12 *Geo.* 1. *c.* 29; amended by *stat.* 5 *Geo* 2. *c.* 27, made perpetual by *stat.* 21 *Geo.* 2. *c.* 3, and extended to all inferior Courts by *stat.* 19 *Geo* 3. *c.* 70;) the Sheriff or proper officer can now only personally serve the defendant with the copy of the writ or Process, and with notice in writing to appear, by his attorney, in Court, to defend this action; which in effect reduces it to a mere summons. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience; which sureties are called *Common Bail*, being the same two imaginary persons as are pledges for the plaintiff's prosecution; *John Doe* and *Richard Roe*. See title *Pledges*.

Or, if the defendant does not appear upon the return of the writ, or within eight days after, exclusive of the return day, the plaintiff may enter an appearance for him, as if he had really appeared in the Common Pleas; and may file common bail in the King's Bench in the defendant's name, and proceed thereupon as if the defendant had done it himself.

But if the plaintiff will make affidavit, or assert upon oath, that the cause of action amounts to 10*l.* or upwards, then he may arrest the defendant, and make him put in substantial sureties for his appearance, called *Special Bail*. In order to which, it is required by *stat.* 3 *Car.* 2. *st.* 2. *c.* 2, that the true cause of action should be expressed in the body of the writ or Process; else no security can be taken in a greater sum than 40*l.* This statute (without any such intention in the makers) had like to have ousted the King's Bench of all its jurisdiction over civil injuries without force; for, as the bill of *Middlesex* was framed only for actions of trespass, a defendant could not be arrested and held to bail thereupon for breaches of civil contracts. But to remedy this inconvenience, the officers of the King's Bench devised a method of adding what is called a clause of *ac etiam* to the usual complaint of trespass: the bill of *Middlesex* commanding the defendant to be brought in to answer the plaintiff of a plea of trespass, *and also* to a bill of debt: the complaint of trespass giving cognizance to the Court, and that of debt authorizing the arrest. In imitation of which, the Lord Chief Justice of the Common Pleas a few years afterwards, in order to save the suitors of that Court the trouble and expence of suing out special originals, directed that, besides the usual complaint of breaking the plaintiff's close, a clause of *ac etiam* might also be added to the writ of *Capias*, containing the true cause of action: as, "that the said *Charles* the defendant may answer to the plaintiff of a plea of trespass in breaking his close: and also, *ac etiam*, may answer him, according to the custom of the Court, in a certain plea of trespass upon the case, upon promises, to the value of 20*l.*" &c. The sum sworn to by the plaintiff is marked upon the back of the writ; and the Sheriff, or his officer, the bailiff, is then obliged actually to *arrest* or take into custody the body of the defendant; and, having so done, to return the writ with a *cepi corpus* indorsed thereon. See this Dictionary, titles *Arrest*; *Bail*.

From the foregoing it appears, that Process is only meant to bring the defendant into Court, in order to contest the suit, and abide the determination of the Law. When he appears, then follow the *Pleadings*, &c. between the parties. See that title.

As to the origin and foundation of the above modes of Process, and of the jurisdiction of the several Courts, see more at large the Introduction to *Crompton's Practice*; and the Appendixes to *Sellon's Practice*, founded on that Introduction.

As to the language of the Process and Records of Law, see this Dictionary, title *Pleading* III; and for further matter, explanatory of the several sorts of writs and Processes, various apposite titles throughout the whole of this work.

Original Process to call persons into Court, &c. must be in the name of the King; and if it issue from the Court of King's Bench, it ought to be under the *teste* of the Chief Justice, or of the senior Judge of the Court, if there be no Chief Justice: and if it issueth from any other Court, it is to be under the *teste* of the first in commission, &c. *Dalt. ch.* 132: *Finch.* 456: *Cro. Car.* 393.

If Process is awarded out of a Court, which hath not jurisdiction of the principal cause, it is *coram non judice* and void: and the Sheriff executing it will be a trespasser. 2 *Leon.* 89.

II. There is no need of Process on an Indictment, &c. where the defendant is present in Court; but if he hath fled, or secretes himself, in capital cases, or hath not, in smaller misdemeanors, been bound over to appear at the Assises or Sessions, still an indictment may be preferred against him in his absence; since, were he present, he could not be heard before the Grand Jury against it. And, if it be found, then Process must issue to bring him into Court; for the indictment cannot be tried, unless he personally appears: according to the rule of equity in all cases, and the express provision of *stat.* 28 *Edw.* 3. *c.* 3, in capital ones, that no man shall be put to death, without being brought to answer by due Process of Law.

No Process shall regularly issue in the King's name, and by his writ, to apprehend a felon or other malefactor, unless there be an indictment or matter of record in the Court, upon which the writ issues. 1 *Hale's Hist. P. C.* 575.

The proper Process on an indictment for any petty misdemesnor, or on a penal statute, is a writ of *Venire Facias*, which is in the nature of a summons to cause the party to appear. And if by the return to such *Venire* it appears, that the party hath lands in the county whereby he may be distrained, then a distress infinite shall be issued from time to time till he appears. But if the Sheriff returns that he hath no lands in his bailiwick, then (upon his non-appearance) a writ of *Capias* shall issue, which commands the Sheriff to take his body, and have him at the next assizes; and if he cannot be taken upon the first *Capias*, a second, and a third shall issue; called an *Alias*, and a *Pluries Capias*. But on indictments for treason or felony, a *Capias* is the first Process; and for treason or homicide, only one shall be allowed to issue, or two in the case of other felonies, by *stat.* 25 *Edw.* 3. *c.* 14; though the usage is to issue only one in any felony; the provisions of this statute being in most cases found impracticable. 2 *Hal. P. C.* 195. And so, in the case of misdemesnors, it is now the usual practice for any Judge of the Court of King's Bench, upon certificate of an indictment found, to award a writ of *Capias* immediately, in order to bring in the defendant. But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For, in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry; that is, he shall be exacted, proclaimed, or required to surrender, at five county Courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be outlawed, or put out of the protection of the Law; so that he is incapable of taking the

the benefit of it in any respect, either by bringing actions or otherwise. See *stat.* 8 *H.* 6. *c.* 10; and this Dictionary, title *Outlawry* III.

The punishment, for outlawries upon indictments for misdemeanors, is the *same* as for outlawries upon civil actions; (as to which, and the previous Process by writs of *capias, exigi facias*; and proclamation, see this Dictionary, title *Outlawry*;) *viz.* forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country. 2 *Hal. P. C.* 205. His life is however still under the protection of the Law, so that though anciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf, by any one that should meet him: because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him: yet now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in so doing is guilty of murder, unless it happens in the endeavour to apprehend him. 1 *Hal. P. C.* 497: *Bracton, fol.* 125. For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ of warrant of *capias utlagatum*, in order to bring him to execution. But such outlawry may be frequently reversed by writ of error; the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial; and, if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed: upon which reversal the party accused is admitted to plead to, and defend himself against, the Indictment. See further title *Outlawry* V.

The above is the Process to bring in the offender after indictment found: during which stage of the prosecution it is, that writs of *Certiorari facias* are usually had; though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior Court of criminal jurisdiction into the Court of King's Bench; which is the sovereign ordinary Court of justice in causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of criminal appeals or indictments, and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the Court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the Court of King's Bench, or before the Justices of *Nisi prius*: or, 3. It is so removed, in order to plead the King's pardon there: or, 4. To issue Process of outlawry against the offender, in those counties or places where the Process of the inferior Judges will not reach him. 2 *Hal. P. C.* 210. Such writ of *Certiorari*, when issued and delivered to the inferior Court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior Court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the Court of King's Bench remands the record to the Court below, to be there tried and determined. A *Certiorari* may be granted at the instance of either the prosecutor or the defendant: the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the Justices of gaol-delivery, or after issue joined, or confession of the fact, in any of the Courts below. 4 *Comm. c.* 24. See this Dictionary, title *Certiorari*.

At this stage of prosecution also it is, that indictments found by the Grand Jury against a Peer must in consequence of a writ of *Certiorari* be certified and transmitted into the Court of Parliament, or into that of the Lord High Steward of *Great Britain*; and that, in places of exclusive jurisdiction, as the two Universities, indictments must be delivered (upon challenge and claim of cognizance) to the Courts therein established by charter, and confirmed by act of Parliament, to be there respectively tried and determined. 4 *Comm. c.* 24.

Obstructing the execution of lawful Process, is an offence against public justice, of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an arrest upon criminal Process. And it hath been holden, that the party opposing such arrest becomes thereby *particeps criminis*; that is, an accessary in felony, and a principal in treason. 4 *Comm. c.* 10. *p.* 129. See titles *Arrest*; *Privilege*; *Accessary*; *Misdemesnor*, &c.

PROCESSION. In cathedral and conventual churches, the members had their stated Processions, wherein they walked in their most ornamental habits, with music, singing hymns, and other suitable solemnity: and in every parish, there was a customary annual Procession of the parish priest, the patron of the church, with the chief flag, or holy banner, and the other parishioners, to take a circuit round the limits of the parish or manor, and pray for a blessing on the fruits of the earth; to which we owe our present custom of perambulation, which in most places is still called *processioning* and *going in Procession*, though we have lost the order and devotion, as well as pomp and superstition of it. See *Perambulation*.

PROCESSUM CONTINUANDO, A writ for the Continuance of Process, after the death of the Chief Justice, or other Justices in the commission of *Oyer* and *Terminer*. *Reg. Orig.* 128.

PROCHEIN AMY, *Proximus amicus*.] The *Next Friend*, or next of kin to a child in his nonage; who in that respect is allowed to deal for the infant in the management of his affairs; as to be his guardian if he holds lands in socage, and in the redress of any wrong done him. See *stat. West.* 1. 3 *Ed.* 1. *c.* 47: *West.* 2. 13 *E.* 1. *st.* 1. *c.* 15: 2 *Inst.* 261; and this Dict. title *Infant* V.

Prochein Amy is commonly taken for guardian in socage; but otherwise it is he who appears in Court for an infant who sues any action, and aids the infant in pursuit of his action: for to sue, an infant may not make an attorney, but the Court will admit the next friend of the infant plaintiff; and a guardian for an infant defendant.

If no guardian is appointed by the father, &c. of an infant, the course of *B. R.* hath been used to allow one of the officers of the Court to be *Prochein Amy* to the infant to sue. *Terms de Ley.* 2 *Lil. Abr.* 52.

Prochein Amy was never before the statute *Westm.* 1, and was appointed in case of necessity, where an infant was to sue his guardian, or the guardian would not sue for him. 2 *Nels. Abr.* 997.

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The plaintiff infant may *sue* by guardian, or by *Prochein Amy*; and if the admission is to sue by Guardian when it should be by *Prochein Amy*, it will be well enough, there being many precedents both ways: but if he *is sued*, it must be by Guardian. *Cro. Car.* 86, 115: *Hut.* 92.

If an infant be eloigned or disturbed by his guardian, or any other, so that he cannot bring assise, his *Prochein Amy* shall be admitted. *Stat.* 3 *Ed.* 1. *c.* 47. So generally, by *stat.* 13 *Ed.* 1. *c.* 15. Since these statutes, the common rule seems to have been that the infant shall sue by *Prochein Amy*, and defendant by Guardian.

To constitute a *Prochein Amy* (or Guardian), the person intended, who is usually some near relation, goes with the infant before a Judge, at his chambers; or else a petition is presented to the Judge on behalf of the infant, stating the nature of the action; or if he is defendant, that he is advised, and believes, he has a good defence thereto; and praying in respect of his infancy, that the person intended may be assigned him as his *Prochein Amy*, or Guardian, to prosecute or defend the action. This petition should be accompanied with an *Agreement*, signifying the assent of the intended *Prochein Amy*, or Guardian: and an affidavit made by some third person, that the petition and agreement were duly signed: On one or other of these grounds, the Judge will grant his *fiat*; upon which a rule or order is drawn up, with the Clerk of the Rules for the admission of the *Prochein Amy*, or Guardian; which admission is either special, to prosecute or defend a particular action, or general, to prosecute or defend all actions whatsoever: though it is said, that by the practice of the Court of King's Bench, a special admission of a Guardian to appear in one cause, will serve for others. 1 *Stra.* 304, 5. See *Tidd's Pract. K. B.*: and *Sellon's Pract.*

PROCHEIN AVOIDANCE, A Power to present a minister to a church when it shall become void: as where one hath presented a clerk to a church, and then grants the next Avoidance to another, &c. See titles *Avoidance*; *Advowson*.

PROCLAMATION, *Proclamatio.*] A notice publicly given of any thing, whereof the King thinks fit to advertise his Subjects; and so it is used in *stat.* 7 *R.* 2. *c.* 6. See title *King* V. 3.

PROCLAMATION OF COURTS, Is used particularly in the beginning or calling of a Court, and at the discharge or adjourning thereof; for the attendance of persons, and dispatch of business.

Before a Parliament was dissolved, it was anciently held, that public Proclamation was to be made, that if any person had any petition, he should come in and be heard. *Lex Constitut.* 156. See title *Parliament*.

Proclamation is made in Courts Baron, for persons to come in and claim vacant copyholds, of which the tenants died seised since the last Courts; and the lord may seise a copyhold, if the heir come not in to be admitted on Proclamation, &c. 1 *Lev.* 63. See title *Copyhold*.

PROCLAMATION OF EXIGENTS. On awarding an *Exigent*, in order to outlawry, a writ of Proclamation issues to the Sheriff of the county where the party dwells, to make three Proclamations for the defendant to yield himself, or be outlawed. See title *Outlawry* III.

PROCLAMATION OF A FINE. When any fine of land is passed, Proclamation is solemnly made thereof in the Court of Common Pleas where levied, after engrossing it; and transcripts are also sent to the Justices of Assise, and Justices of the Peace of the county in which the lands lie, to be openly proclaimed there. *Stat.* 1 *R.* 3. *c.* 7. See title *Fine of Lands* V.

PROCLAMATION OF NUSANCES. Proclamation is to be made against Nusances, and for the removal of them, &c. *Stat.* 12 *R.* 2. *c.* 13. See title *Nusance*.

PROCLAMATION OF REBELLION; Is a writ whereby a man not appearing upon a *subpœna*, or an attachment in the Chancery, is deputed and declared a rebel, if he render not himself by a day assigned. See titles *Commission of Rebellion*; *Chancery*.

PROCLAMATION OF RECUSANTS. A Proclamation whereby Recusants were heretofore convicted, on non-appearance at the assizes. See *stats.* 29 *Eliz.* *c.* 6: 3 *Jac.* 1. *c.* 4, 5. and this Dict. title *Papists*.

PRO CONFESSO, Where a bill is exhibited in Chancery, to which the defendant appears, and is afterwards in contempt for not answering; the matter contained in the bill shall be taken *as if it were confessed* by defendant. *Terms de Ley*.

If a defendant is in custody for contempt in not answering, on a *Habeas Corpus*, which is granted by order of Court, to bring him to the bar, the Court assigns him a day to answer, and the day being expired, and no answer put in, a second *Habeas Corpus* is issued, and the party being brought into Court, a further day is assigned; by which day, if he answer not, the bill on the plaintiff's motion shall be taken *pro confesso*, unless cause be shewed by a day; and for want of such cause shewed on motion, the substance of the bill shall be decreed to the plaintiff. *Hil.* 1662. Also after a fourth insufficient answer, the matter of the bill, not sufficiently answered unto by the defendant, shall be taken *pro confesso*, and decreed accordingly.

If in any suit in equity any defendant, against whom any process shall issue, shall not cause his appearance to be entered according to the rules of the Court, in case such process had been served, and affidavit shall be made, that such defendant is beyond the seas; or that, on inquiry at his usual place of abode, he could not be found, so as to be served, and that there is just ground to believe that such defendant is gone out of the realm, or absconds to avoid being served; the Court may make an order, appointing the defendant to appear at a day therein to be named and a copy of such order shall, within fourteen days, be inserted in the *London Gazette*, and published on some Lord's Day, after divine service, in the parish church where the defendant made his usual abode within thirty days next before his absenting; and a copy of such order shall be posted up, *viz.* a copy of such order made in Chancery, Exchequer or Duchy Chamber, shall be posted up at the *Royal Exchange*; and a copy of every such order made in any of the Courts of Equity of the counties palatine, or of the Great Sessions in *Wales*, shall be posted up in some market town within the jurisdiction of the Court, nearest to the place where the defendant made his usual abode, such place of abode being also within the jurisdiction of the Court; and if the defendant do not appear within such time

as the Court appoint, then, on proof made of publication of such order as aforesaid, the Court may order the plaintiff's bill to be taken *pro confesso*, and make such decree as shall be just; and the defendant's estate shall be sequestered: and the Court may order the plaintiff to be paid his demands out of the estate sequestered according to the decree; such plaintiff giving security, to abide such order touching the restitution of such estate, as the Court shall make on the defendant's appearance. But in case the plaintiff refuse to give security, then the Court shall order the effects sequestered to remain under the direction of the Court, until the appearance of the defendant to defend such suit.—Provided, that this act shall not affect persons beyond the seas, unless affidavit be made of their being in *England* within two years before the *subpœna*: nor extend to Courts having a limited jurisdiction, unless oath be made of personal residence in such jurisdiction one year before the *subpœna*. *Stat.* 5 *G.* 2. *c.* 25.

It is not sufficient on this statute to make affidavit, that the party making it was informed, and believes, that the defendants withdrew themselves in order to avoid being served with the process of the Court. But it must be likewise sworn by whom the deponent received such information. *Barn.* 401.

A defendant appeared, and stood out to a sequestration, and afterwards, on getting time, put in an answer, which was reported insufficient in near twenty exceptions, and was served with a *subpœna* to make a better answer. The defendant put in another answer, alike insufficient. It was insisted for the defendant, that the practice of taking bills *pro confesso* is not of long standing, the ancient way being to put the plaintiff to make proof of the substance of the bill; and that, in this case, taking all the bill *pro confesso*, where part had been sufficiently answered, seemed very strange. But it was answered, that an insufficient answer is as no answer, therefore the whole to be taken *pro confesso*; and the Master of the Rolls decreed for the plaintiff; but Lord Chancellor *King*, on an appeal, said, he would consider how matters stood at the time of such decree, and that it was sufficient that there then was an answer, and which the plaintiff had admitted to be so by suing his process for a better; and that so to make the defendant confess the whole bill true, when by the Master's report (which was a record of the same Court) he had answered the greatest part, and when the plaintiff himself had taken the first answer to be an answer in part by serving the defendant with process to put in a better, was against common sense: and reversed the former decree. 2 *P. Wms.* 556.

If, on demurrer to a bill in equity, the defendant obstinately insists on his demurrer, and refuses to answer, where the Court is of opinion, that sufficient matter is alleged in the bill to oblige him to answer, and for the Court to proceed upon, the Court will decree the matter of the plaintiff's bill; for by the demurrer are confessed all matters of fact that are alleged. *Curs. Canc.* 509. See further, title *Chancery*.

PROCTOR, *Procurator*.] He who undertakes to manage another man's cause, in any Court of Civil or Ecclesiastical Law, for his fee: *Qui aliena negotia procurata suscipit*. A Proctor not to practise, if a Popish recusant. *Stat.* 3 *Jac.* 1. *c.* 5. But see, title *Papists*. Not to act as Justice of Peace. 5 *Geo.* 2. *c.* 18. See title *Justices of the Peace* III.

PROCTORS OF THE CLERGY, *Procuratores Cleri*.] They who are chosen and appointed to appear for cathedral or other collegiate churches; as also for the common Clergy of every diocese, to sit in the Convocation-house in the time of Parliament.

On every new Parliament the King directeth his writ to the Archbishop of each province, for the summoning of all Bishops, Deans, Archdeacons, &c. to the Convocation, and generally of all the Clergy of his province, assigning them the time and place in the writ; then the Archbishop of *Canterbury*, on his writ received, according to custom directs his letters to the Bishop of *London*, as his provincial Dean, first citing him peremptorily, and then willing him to cite in like manner all the Bishops, &c. and generally all the Clergy of his province, to the place, and against the day prefixed in the writ; but directeth withal, that one Proctor be sent for every cathedral or collegiate church, and two Proctors for the body of the inferior Clergy of each diocese; and by virtue of these letters authentically sealed, the Bishop of *London* directs his like letters severally to the Bishop of every diocese of the province, citing them in like sort, and willing them not only to appear, but also to admonish the Deans and Archdeacons personally to appear; and the cathedral and collegiate churches, and the common Clergy of the diocese, to send their Proctors to the place at the day appointed; and also willeth them to certify to the Archbishop the names of every person so warned by them, in a schedule annexed to their letter certificatory: then the Bishops proceed accordingly, and the cathedral and collegiate churches, and the body of the Clergy make choice of their Proctors; which being done and certified to the Bishop, he returneth all at the day. *Cowell*. See title *Convocation*.

PROCONSULES, A name applied to Justices in eyre, or *Justiciarii errantes*, in *England*. *Cowell*.

PROCURATIONS, *Procurationes*.] Certain sums of money which parish priests pay yearly to the Bishop or Archdeacon, *ratione visitationis*; formerly the visitor demanded a proportion of meat and drink for his refreshment, when he came abroad to do his duty, and examine the state of the church; afterwards these were turned into annual payments of a certain sum, which is called a Procuration, being so much given to the visitor, *ad procurandum cibum & potum*. And complaints were often made of the excessive charges of the Procurations, which were prohibited by several councils and bulls; and that of *Clement* IV. is very particular, wherein mention is made that the Archdeacon of *Richmond*, visiting the diocese, travelled with one hundred and three horses, twenty-one dogs, and three hawks, to the great oppression of religious houses, &c.

A libel was brought in the Spiritual Court for Procurations by the Archdeacon of *York*, setting forth, that for ten or twenty years, &c. there had been due and paid to him so much yearly by a Parson and his predecessors; who suggested for a prohibition, that a duty had been payable, but denied the prescription, and that the Ecclesiastical Court cannot try prescriptions; but it was adjudged, that Procurations are [illegible] of common right, [illegible] and no [illegible] the same at Common Law; if he had [illegible] the [illegible], then a prohibition [illegible]. [illegible] 34 & 35 *H.* 8. *c.* 19.

These are also called *Proxies*; and it is said there are three sorts of Procurations or Proxies; *ratione visitationis, consuetudinis, & pacti*; and that the first is of ecclesiastical cognisance, but the two last are triable at law. *Hardr.* 180.

PROCURATOR. One who hath a charge committed to him by any person; in which general signification it hath been applied to a vicar or lieutenant, who acts instead of another; and we read of *Procurator regni*, and *Procurator reipublicæ*, which is a public magistrate: also Proxies of Lords in Parliament are in our law books called *Procuratores*; the Bishops are sometimes termed *Procuratores ecclesiarum*; and the advocates of religious houses, who were to solicit the interests, and plead the causes, of the societies, were denominated *Procuratores monasterii*; and from this word comes the common word *Proctor*. It is likewise used for him who gathers the fruits of a benefice for another man; and Procuracy is used in *stat.* 3 *R.* 2. *c.* 3. for the writing or instrument whereby he is authorised.

PROCURATORES ECCLESIÆ PAROCHIALIS. The Churchwardens; so called because they were to act as proxies and representatives of the church, for the true honour and interest of it. *Paroch. Antiq.* 562.

PROCURATORIUM, The procuratory, or instrument by which any person or community did constitute or delegate their proctor or proctors, to represent them in any judicial Court or cause.

PRODES HOMINES, A title often given in our [illegible] books to the Barons of the realm, or other military tenants, who were summoned to the King's Council; *discreti & fideles (probi) homines*, who, according to their prudence and knowledge, were to give their counsel and advice.

PRODITORIE, *Treasonably*.] The technical word in indictments for treason, when indictments were in *Latin*.

PROFANENESS, *Quasi procul à fano*.] A disrespect to the name of God, and to things and persons consecrated to Him. *Wood's Inst.* 396.

Profaneness is punishable by statute; as for reviling the Sacrament of the Lord's Supper, profanely using the name of God in plays, *&c.* Profaning the Lord's Day; cursing and swearing, *&c.* See *stats.* 1 *Ed.* 6. *c.* 1: 1 *Eliz.* *c.* 1: 3 *Jac.* 1. *c.* 21: 1 *Car.* 1. *c.* 1: and this Dictionary, titles *Blasphemy*; *Swearing*; *Sunday*.

PROFER, *Profrum*, vel *proferum*, from the Fr, *proferer*, i. e. *producere*.] The time appointed for the accounts of offices in the Exchequer, which is twice in the year. *Stat.* 51 *H.* 3. *st.* 5.

As to the Profers of Sheriffs, though the certain [illegible] of the Sheriff could not be known before the finishing of his accounts; yet it seems there was anciently an estimate made of what his constant charge of the annual revenue amounted to, according to a medium, which was paid into the Exchequer at the return of the writ of summons of the Pipe; and the sums so paid were and are to this day called *Profer vicecomitis*; but although these Profers are paid, if on the conclusion of the Sheriff's accounts, and after allowances and discharges had by him, it appears that there is a surplusage, or that he is charged with more than he could receive, he hath his Profers paid or allowed him again. *Hale's Shr. Accompt.* 52. See title *Sheriff*.

There is a writ *de attornato vicecomitis pro profro faciendo*, *Reg. Orig.* 139. And we read of Profers in the *stat.* 32 *H.* 8. *c.* 21; in which place Profer signifies the offer and endeavour to proceed in an action. See *Brit.* *c.* 28: *Fleta*, *lib.* 1. *c.* 38.

PROFER THE HALF-MARK, To offer or tender the Half-mark. See title *Half-Mark*.

PROFERT IN CURIA. Where the plaintiff in an action declares on a deed, or the defendant pleads a deed, he must do it with a *Profert in curiâ*, to the end that the other party may at his own charges have a copy of it, and until then he is not obliged to answer it. 2 *Lil. Abr.* 382. And if a man pleads by virtue of an indenture, which is lost, on affidavit made thereof, the Court will compel the plaintiff to shew the counterpart, that the defendant may plead thereto; or will grant an imparlance. *Cro. Jac.* 429.

When he who is party or privy in estate or interest, or who justifies in the right of him who is party or privy, pleads a deed; notwithstanding the party privy claims but part of the original estate, yet he must shew the original deed. But where a man is a stranger to a deed, and claims nothing in it, *&c.* there he may plead the patent or deed, without a *Profert in curiâ*. 10 *Rep.* 92, 93.

A man may claim under a deed of uses, without shewing it; because the deed [illegible] belong to him, (though he claims by it,) but [illegible] covenantees, and he hath no means to obtain it; and [illegible] that it is an estate executed by the statute of uses, so as the party is in by law, like to tenant in dower, or by statute, *&c.* who may have a rent-charge extended, and need not shew the deed. *Cro. Car.* 442. And in things executed, or estates determined, there need not be any *Profert in curiâ*. 3 *Lev.* 204.

No advantage or exceptions shall be taken for want of a *Profert in curiâ*; but the Court shall give judgment according to the very right of the cause, without regarding any such omission and defect, except the same be specially and particularly set down, and shewn for cause of demurrer. *Stat.* 4 *&* 5 *Ann.* *c.* 16. See title *Amendment*; and also *Deed* IV; *Monstrans de fait*; *Oyer*, &c.

PROFESSION, *Professio*.] Was used particularly for the entering into any religious order, *&c.* This entering into religion, whereby a man was shut up from all the common offices of life, was termed a Civil Death. See 1 *Comm.* 132.

PROFITS. A devise of the Profits of lands, is a devise of the land itself. *Dyer* 210.

A husband deviseth the Profits of his lands to his wife, until his son came of age, this was held to be a devise of the lands until that time: though if the lands were devised to the son, and that his mother should take the profits of it until he came of age, *&c.* this would give the mother only an authority, not an interest. 2 *Lev.* 221.

By devise of Profits, the lands usually pass; unless there are other words to shew the intention of the testator to be otherwise. *Moor* 753, 758: 2 *Nels. Abr.* 1051. See title *Wills*.

PROFITS OF COURTS. The Profits arising from the King's ordinary Courts of Justice make a branch of his revenue. And these consist not only in fines imposed upon offenders, forfeitures of recognizances, and amercements levied on defaulters; but also in certain

fees due to the Crown in a variety of legal matters; as for setting the Great Seal to charters, original writs, and other forensic proceedings, and for permitting fines to be levied of lands in order to bar entails, or otherwise to insure titles. As none of these can be done without the immediate intervention of the King, by himself or his officers, the law allows him certain perquisites and Profits, as a recompense for the trouble he undertakes for the Public. These, in process of time, have been almost all granted out to private persons, or else appropriated to certain particular uses. So that, though our law proceedings are still loaded with their payment, very little of them is now returned into the King's Exchequer; for part of whose royal maintenance they were originally intended. All future grants of them, however, by *stat.* 1 *Ann st.* 2. *c* 7, are to endure for no longer time than the life of the Prince who grants them. 1 *Comm. c.* 8 *p.* 289.

PROHIBITION,

PROHIBITIO] A Writ to forbid any Court to proceed in any cause there depending, on suggestion that the cognizance thereof belongeth not to the Court. *F. N. B* 39. But it is now most usually taken for that writ which lieth for one who is impleaded in the *Court christian*, for a cause belonging to the temporal jurisdiction, or the conusance of the King's Court; whereby as well the party and his counsel, as the Judge himself, and the Registrar, are forbidden to proceed any further in that cause. *Cowell.*

The Writ of Prohibition is the remedy provided by the Common Law, against the encroachment of jurisdiction; where one is called *coram non judice*, to answer in a Court that has no legal cognizance of a cause; which is enumerated by *Blackstone* among the grievances cognizable by the Courts of Common Law. See 3 *Comm. cap.* 7.

As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a variety of Courts; hence it hath been the care of the Crown, that these Courts keep within the limits and bounds of the several jurisdictions prescribed them; for this purpose the writ of Prohibition was framed; which issues out of the superior Court of Common Law to restrain inferior Courts, whether such Courts be temporal, ecclesiastical, maritime, military, &c. on a suggestion that the cognizance of the matter belongs not to such Courts; and in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases the Judge who gives it, are punishable in such superior Courts, sometimes at the suit of the King, sometimes at the suit of the party, sometimes at the suit of both, according to the variety of the case. 2 *Inst.* 601: *F. N. B.* 40: 12 *Co.* 6: 1 *And.* 279: 2 *Jon.* 213: *Show* 628.

The reason of Prohibitions in general is, that they preserve the right of the King's Crown, and Courts, and the quiet of the Subject; that it is the wisdom and policy of the Law, to suppose both best preserved when every thing runs in its right channel, according to the original jurisdiction of every Court; as by the same reason that one might be allowed to encroach, another might; which would produce nothing but confusion in the administration of justice. *Show. Par. Ca.* 63.

So that Prohibitions do not import that the ecclesiastical or other inferior temporal Courts are *alia* than the King's Courts, but signify that the cause is drawn *ad aliud examen* than it ought to be; therefore it is always said in all Prohibitions, (be the Court ecclesiastical or temporal to which it is awarded,) that the cause is drawn *ad aliud examen, contra coronam & dignitatem regiam.* 2 *Inst.* 602: 1 *Roll. Rep.* 252: 3 *Bulst.* 120: *Palm.* 297.

A Prohibition is a writ issuing, properly, out of the Court of King's Bench, being the King's prerogative writ; but, for the furtherance of justice, it may now also be had, in some cases, out of the Courts of Chancery, Common Pleas, or Exchequer; see *post* I.: It is directed to the Judge and parties of a suit in any inferior Court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court. This writ may issue either to inferior Courts of Common Law; as, to the Courts of the Counties-palatine or principality of *Wales*, if they hold plea of land or other matters not lying within their respective franchises; to the County Courts, or Courts Baron, where they attempt to hold plea of any matter of the value of 40*s*: or it may be directed to the Courts-christian, the University Courts, the Court of Chivalry, or the Court of Admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made, or to be executed, within this kingdom. Or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of *England*; as where they require two witnesses to prove the payment of a legacy, a release of tithes, or the like; in such cases also a Prohibition will be awarded. For, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those Courts, because incident or accessary to some original question clearly within their jurisdiction, it ought, therefore, where the two laws differ, to be decided, not according to the spiritual, but the temporal law; else the same question might be determined different ways, according to the Court in which the suit is depending: an impropriety, which no wise government can or ought to endure, and which is therefore a ground of Prohibition. And if either the Judge or the party shall proceed after such Prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the Court that awarded it; and an action will lie against them, to repair the party injured in damages. 3 *Comm. c.* 7. *p.* 112, 114.

So long as the idea continued among the Clergy, that the Ecclesiastical State was wholly independent of the civil, great struggles were constantly maintained between the temporal Courts and the spiritual, concerning the writ of Prohibition and the proper objects of it; even from the time of the constitutions of *Clarendon*, made in opposition to the claims of Archbishop *Becket* in 10 *H.* 2, to the time of exhibiting certain articles of complaint to the King by Archbishop *Bancroft* in 3 *Jac.* 1, on behalf of the Ecclesiastical Courts; from which, and from the an-

fwers to them figned by all the Judges of *Weftminfter-Hall*, much may be collected, concerning the reafons of granting and methods of proceeding upon, Prohibitions. See 2 *Inft*. 601—618.

I. *What Courts may grant a Prohibition; and whether the granting it be difcretionary, or* ex debito juftitiæ.

II. *Who have a Right to, and may demand, and join in a Prohibition.*

III. *Of the Suggeftion for, and Manner of obtaining a Prohibition; and the Decifion of the Court thereon.*

IV. *In what Cafes it may be granted, to inferior Temporal Courts, or Jurifdictions; and at what Time.*

V. *In what Cafes to the Spiritual Courts; and at what Time.*

I. The Superior Courts of *Weftminfter*, having a fuperintendency over all Inferior Courts, may in all cafes of innovation, &c. award a Prohibition; in this the power of the Court of *B. R.* has never been doubted, being the Superior Common Law Court in the kingdom. *F. N. B.* 53: 4 *Inft*. 71.

Alfo the Court of Chancery may award a Prohibition; which may iffue as well in vacation as in term time, but fuch writ is returnable into *B. R.* or *C. B. Bro. Prohibition, pl.* 6: 4 *Inft*. 81: 1 *P. Wms*. 43, 476.

If one be fued in an inferior Court for a matter out of the jurifdiction, the defendant may either have a Prohibition from one of the Common Law Courts of *Weftminfter-Hall*; or in regard this may happen in vacation, when only the Chancery is open, he may move that Court for a Prohibition; but then it muft appear by oath, that the fact did arife out of the jurifdiction, and that the defendant tendered a foreign plea, which was refufed; and if a Prohibition has been granted out of Chancery *improvidè* and without thefe circumftances attending it, the Court will grant a *fuperfedeas* thereto. 1 *P. Wms*. 476.

As the jurifdiction of the Court of *C. B.* is founded on original writs iffuing out of Chancery, it hath been doubted, whether this Court could, without writ or plea depending, award a Prohibition; but this point has been determined, *viz.* that this Court may on a fuggeftion grant Prohibitions, to keep as well Temporal as Ecclefiaftical Courts within their jurifdictions, and that without any original writ or plea depending; the Common Law being, in thefe cafes, a Prohibition of itfelf, and ftanding inftead of an original. *Bro. Prohibition, pl.* 6: *Noy* 153: 12 *Co.* 58, 108: *Bro. Confultation, pl.* 5: 4 *Inft*. 99: 2 *Brownl*. 17.

Accordingly it hath been adjudged, that a Prohibition ought to be granted by *C. B.* to the Court of Delegates, for fuing there to avoid the inftitution of a clerk to a church in *Lancafhire*, after induction; though the *quare impedit* for the church could not be brought in *C. B.* but only in the county of *Lancafter*; becaufe the title of the advowfon was not queftioned by this Prohibition, but the intrufion on the Common Law, of which this Court has fpecial care. *Moor* 861: 2 *Rol. Abr*. 317: *Hob*. 15.

But as to the Courts of *B. R.* and *C. B.* this difference hath been made, That in the firft of thofe Courts a Prohibition may be awarded on a bare furmife, without any fuggeftion on record; and fuch writ is only in nature of a commiffion prohibitory, which is difcontinued by demife of the King; but that as to a Prohibition iffuing out of *C. B.* the fuggeftion muft be on record, therefore is confidered as the fuit of the party, and in which he may be nonfuited, and is not difcontinued by demife of the King. *Noy* 77: *Palm*. 422: *Latch*. 114. Yet, if infifted on, a profecution cannot be moved for in *B. R.* till the fuggeftion be entered on the roll. And indeed it is the conftant practice, to enter the fuggeftion on the roll, and to leave a copy thereof with the clerk of the papers, previous to the motion. See 1 *Salk*. 136.

If the King's farmer, or copyholder of the King's manor, be fued in the Ecclefiaftical Court for tithes, on a fuggeftion in the Court of Exchequer that he prefcribes to pay a certain *modus* in lieu of tithes, he fhall have a Prohibition, and fuch *modus* fhall be tried there. *Palm*. 523—5: *Lane* 39: 1 *Roll. Abr*. 539.

The Grand Seffions of *North Wales* may fend a Prohibition, and write to the Spiritual Courts there. 1 *Sid*. 92. but for this fee *Cro. Car*. 341: 1 *Jon*. 330: *Vaugh*. 411.

It is laid down, that though a furmife be a matter of fact, and triable by a Jury, yet it is in the difcretion of the Court to deny a Prohibition, when it appears to them that the furmife is not true. *Hob*. 67.

But it hath been held, that awarding a Prohibition is a matter difcretionary; that is, that from the circumftances of the cafe, the fuperior Courts are at liberty to exercife a legal difcretion therein; but not an arbitrary one in refufing Prohibition, where in fuch like cafes they have been granted, or where by Law they ought to be granted. *Winch*. 78.

It hath been determined in the Houfe of Lords, that no writ of error will lie on the refufal of a Prohibition; but when a confultation is awarded, it is within an *ideo confideratum eft*, and then a writ of error will lie. 1 *Ld. Raym*. 545.

If the mafter of a fhip fues in the Admiralty for his wages, and a Prohibition is moved for, on a fuggeftion that the contract was made on land, and the Court is of opinion that a Prohibition ought to be granted; in this cafe they will not compel the party to find fpecial bail to the action in the Court above. *Salk*. 33: *Carth*. 518: *Com*. 74: 1 *Ld. Raym*. 576.

If there is judgment againft a fimonift, who by the affent of parties is to continue for a certain time on the benefice, and who at the expiration of the time refufes to remove, but commits wafte, a Prohibition to ftay wafte may be had by the patron, incumbent, or any other perfon, becaufe that is the King's writ; and any one may pray a Prohibition for the King, and it is grantable *ex debito juftitiæ*, and not in the difcretion of the Court. 1 *Sid*. 65: *Hob*. 247.

II. The King may fue for a Prohibition, though the plea in the Spiritual Court be between two common perfons; becaufe the fuit is in derogation of his Crown and dignity. *F. N. B.* 40.

If the Ecclefiaftical Court hold plea of any matter which belongs not to their jurifdiction, it has been already ftated, that, on information thereof to the King's Courts, a Prohibition will iffue. 2 *Inft*. 607. And if a

man libels in the Spiritual Court for a matter which does not appertain to that Court, but to the Common Law, as a matter of frank-tenement; yet he himself, against his own suit, may pray a Prohibition, and have it. *2 Roll. Abr.* 312: 1 *Leon.* 130: *Gouldf.* 149: 12 *Co.* 56.

So, where the plaintiff in the Spiritual Court brought a Prohibition to stay his own suit there, for that he suing for tithes by virtue of a lease made by the vicar of *A.* for three years, the defendant claimed to be discharged of tithes by a former lease and composition by deed; and in this case it was held, that the plaintiff himself may have a Prohibition to stay the suit; for the ecclesiastical Judges are not to meddle with the trial of leases or real contracts, though they have jurisdiction of the original cause, (*viz.* the tithes); for the lease is in the realty, and is not merely accidental; and it makes no difference, that the plaintiff brings Prohibition to stay his own suit; for if the Temporal Court has knowledge by any means, that the Spiritual Court meddles with temporal trials, a Prohibition ought to be awarded. *Cro. Jac.* 351: 2 *Bulst.* 283: *Lutt. Rep.* 20.

If a vicar sues a parishioner for tithes in the Spiritual Court, and the parson appropriate appears there *pro interesse suo*, and prays a Prohibition, it shall be granted. *2 Rol. Abr.* 312: *Cro. Eliz.* 251: *Kelw.* 110.

If lessee for years is sued in the Spiritual Court for tithes, he in reversion may have a Prohibition. *Moor* 915: *Cro. Eliz.* 55.

But no man is entitled to a Prohibition, unless he is in danger of being injured by some suit actually depending; therefore, on a petition to the Archbishop, or other Ecclesiastical Judge, no Prohibition lies. *March* 22, 45. A Prohibition *quia timet* does not lie. *Allen* 56.

If several libels are exhibited against *A.* and *B.* in a matter in which the Court hath not conusance, *A.* and *B.* cannot join in a Prohibition; so if the griefs be several, as some books say. *Noy* 131: 1 *Leon.* 286: *Cro. Car.* 129.

But where the vicar of *A.* libelled several persons severally for tithes, who joined in a Prohibition, suggesting a *modus*; though the Court held in this case, that the Prohibition was not regularly brought, being in all their names, when there were several libels; yet inasmuch as this was on a custom, and matter triable at Common Law, in which the Ecclesiastical Court was properly prohibited, though not in exact form, they refused to award a consultation; but directed that the parties should put in several declarations, as if there had been several Prohibitions. *Yelv.* 128—9: *Owen* 13.

So if *A.* libels against *B.* and *C.* for defamation, and they sue a Prohibition, they shall join in attachment on it; and it is no objection to say, that the defamation was several. 1 *Ld. Raym.* 127; and see 1 *Vent.* 266: *Raym.* 425: *Comb.* 448.

Where two or more are allowed to join in a Prohibition, and one dies, the writ shall not abate; because nothing is to be recovered; they are only to be discharged. *Owen* 13.

III. The party aggrieved in the Court below applies to the superior Court, setting forth, in a suggestion upon record, the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom: upon which, if the matter alledged appears to the Court to be sufficient, the writ of Prohibition immediately issues; commanding the Judge not to hold, and the party not to prosecute, the plea.

But sometimes the point may be too nice and doubtful to be decided merely upon a motion: and then, for the more solemn determination of the question, the party applying for the Prohibition is directed by the Court to declare in Prohibition; that is, to prosecute an action, by filing a declaration, against the other, upon a supposition or fiction (which is not traversable) that he has proceeded in the suit below, notwithstanding the writ of Prohibition. And if, upon demurrer and argument, the Court shall finally be of opinion, that the matter suggested is a good and sufficient ground of Prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior Court, shall be prohibited from proceeding any farther. On the other hand, if the superior Court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the Prohibition in the Court above, and a writ of *consultation* shall be awarded; so called, because, upon deliberation and consultation had, the Judges find the Prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined, in the inferior Court. 3 *Comm. c.* 7.

Leave to declare in Prohibition will be granted only when the Court inclines to prohibit, not when it inclines to the contrary. 1 *Black. Rep.* 81. *Doug.* 620, (528).—The party applying for a Prohibition has no right to insist on declaring, when the Court is satisfied that his application is groundless; but the defendant in Prohibition may, when the opinion of the Court is against him. 1 *Burr.* 198.

Even in ordinary cases, the writ of Prohibition is not absolutely final and conclusive. For, though the ground be a proper one in point of law, for granting the Prohibition, yet, if the fact that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a custom be pleaded in the Spiritual Court, a Prohibition ought to go, because that Court has no authority to try it; but, if the fact of such a custom be brought to a competent trial, and be there found false, a writ of consultation will be granted. For this purpose the party prohibited may appear to the Prohibition, and take a declaration, (which must always pursue the suggestion,) and so plead to issue upon it; denying the contempt, and traversing the custom upon which the Prohibition was grounded: and, if that issue be found for the defendant, he shall then have a writ of consultation.

The writ of consultation may also be, and is frequently, granted by the Court without any action brought; when, after a Prohibition issued, upon more mature consideration the Court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. 3 *Comm. c.* 7.

Where the matter suggested for a Prohibition appears on the face of the libel, to be out of the jurisdiction of the Inferior Court, an affidavit of the truth of the suggestion, is never insisted on; but if it does not appear on the face of the libel, or if a Prohibition is moved for, for more than appears on the face of the libel, to be out of their

their jurisdiction, there ought to be an affidavit. 2 *Salk.* 549: 1 *P. Wms.* 65, 477: *Andr.* 304.

The suggestion in the Temporal Courts may be traversed. 2 *Inst.* 611: 2 *Co.* 44: *Moor* 525.

On a rule to shew cause, why a Prohibition should not be granted, to stay a suit in the Court of the Archdeacon of *Litchfield*, against one for not going to church, nor receiving the sacrament thrice a year, on suggestion of the statute of *Eliz.* and Toleration Act, and then qualifying himself within the act, and alledging, that he pleaded it below, and they refused to receive his plea; cause was shewn, that this fact was false, and that the plaintiff was not a Dissenter, nor had qualified himself *ut supra*, and that there was no affidavit of the fact by the plaintiff; by which means any person might come and suggest a false fact, and oust the Spiritual Court of their jurisdiction; which the Court admitted, therefore for want of such affidavit the rule was discharged. 1 *Ld. Raym.* 1211.

If a plea to an inferior jurisdiction be properly tendered, which they refuse, though this be a good cause for a Prohibition, yet an affidavit must be made of the refusal. *Skin.* 20: *Hard.* 406: 3 *Keb.* 217.

A motion was made for a Prohibition to the Ecclesiastical Court of *London*, for calling a woman *whore*, on a suggestion that the words were actionable there by the custom of the place; but the Court would not grant a Prohibition without oath made, that if any such words were spoken, it was in *London*, and not elsewhere. 4 *Mod.* 367.

On a libel for calling the plaintiff old thief and old whore; the defendant suggested for a Prohibition, that if any such words were spoken, they were spoken at the same time; but this suggestion was held ill, because the words ought to have been fully confessed. 1 *Vent.* 10.

By *stat.* 2 & 3 *Ed* 6. *c.* 13, it is enacted, " That if, in cases of suits in the Ecclesiastical Court for *Tithes*, any party sue for any Prohibition, that then the same party, before any Prohibition shall be granted, shall bring and deliver to the hands of some of the Judges of the same Court, where the party demanded Prohibition, the very true copy of the libel depending in the Ecclesiastical Court, concerning the matter where the party demandeth Prohibition, subscribed with the hand of the same party; and under the copy of the libel shall be written the suggestion, wherefore the party demandeth the Prohibition; and in case the suggestion, by two witnesses at the least, be not proved true, in the Court where the Prohibition shall be granted, then the party, that is hindered of his suit in the Ecclesiastical Court by such Prohibition, shall, on his request, without delay have a consultation granted in the same case, in the Court where the Prohibition was granted; and shall recover double costs and damages against the party that so pursued the Prohibition; the costs and damages to be assessed by the Court where the consultation shall be granted; for which costs and damages the party to whom they shall be awarded may have an action of debt by bill, plaint, or information, in any Court of Record. See *stats.* 27 *H.* 8. *c.* 20: 32 *H.* 8. *c.* 7. to which this act refers.

In the construction of the above-mentioned statute the following opinions have been holden.

That this statute, referring to *stats.* 27 *H.* 8. *c.* 20; 32 *H.* 8. *c.* 7; which extend to tithes and offerings generally, all such tithes and church duties as are mentioned in those statutes are as much within this act as if particularly enumerated. 2 *Inst.* 662: *Dyer* 170, *b.*

Therefore it extends to Prohibitions to suits of small tithes as well as great. *Yelv.* 102: 2 *Ld. Raym.* 1172.

So it hath been adjudged, that the suggestion of a *modus decimandi* ought to be proved within six months, being within the act. *Noy* 148: *Yelv.* 104.

So where one, who was sued for tithe of hay in the Spiritual Court, suggested for a Prohibition, that he was to pay so much on an arbitrament; and it was held, that this suggestion ought to be proved, as well as one made of a *modus decimandi*: so on a suggestion on the *stat.* 31 *H.* 8. *c.* 13. § 21, that lands are tithe-free; because the clause requiring the proof of a suggestion, is general, and not limited to real composition. 1 *Roll. Rep.* 55.

So on a suggestion, that the suit in the Spiritual Court was for tithes of heath and barren ground improved, within seven years after the improvement, contrary to the statute; in this case proof of the suggestion within six months was held necessary. 1 *Jon.* 231: *Cro. Car.* 208.

But it hath been held, that there needs no proof of the suggestion where the suit is for tithes contrary to common right, or where the contract of the party is suggested. *Comb.* 147.

It hath been held, that the suggestion need not be proved strictly, nor with precise certainty as to all its circumstances; but that if it be proved in substance, or in such a manner as to shew that the Ecclesiastical Court has not jurisdiction, it is sufficient. *Cro. Eliz.* 736: *Moor* 911.

The suggestion must be proved by honest and sufficient witnesses, which is required by the express words of the statute; therefore the testimony of one attainted of felony, excommunicated or convicted of recusancy, is, as in other cases, to be rejected. 2 *Bulst.* 154.

But it hath been held, that persons, such as parishioners, &c. who may not be sufficient and able witnesses at a trial at Law, may notwithstanding be sufficient witnesses to prove the suggestion; the chief intent of the statute being to prevent vexatious suggestions; also it hath been held, that after the admitting and recording the proof of the suggestion, nothing is to be objected against the persons of the evidence. *Mich.* 27 *Car.* 2. in *C. B.*

If a suggestion consists of two parts, it is said to be sufficient to produce one witness to one, and another to another. 1 *Vent.* 107.

It hath been held, that the six months, for proof of the surmise, shall be accounted according to the calendar; for that this being a computation which concerns the church, it is but reasonable that it should be done according to the computation used in the Ecclesiastical Law. *Hob.* 197: *Lit. Rep.* 19: 2 *Mod.* 58.

It is said, that the time of six months, given by the statute to prove the suggestion, ought to be intended six months in term time, and that the vacation should be no part of the time; but this hath been since adjudged otherwise, and that the time shall commence from the *teste* of the writ of Prohibition, and not from the time of the rule made for awarding it. *Moor* 573: *Noy* 30: 2 *Ld. Raym.* 1172: 2 *Salk.* 554.

If the surmise be proved before one of the Judges within the six months, although it be not recorded till after the six months by the Court, it is well enough. *Noy* 30. It must be entered in the office. 2 *Show.* 308.

It hath been held, that proof which is not sufficient, may be supplied by better proof within the six months, but not after. *Litt. Rep.* 155.

The party, on failure of proof of the suggestion, shall not only have double costs and damages, but also his costs and damages in the action he brings for recovery of them. *Bendl.* 143. See *stat.* 8 & 9 *W.* 3. c. 11. § 3; and this Dictionary, title *Costs*.

But if the Prohibition be grounded partly on a *modus*, which needs no proof, and partly on the contract of the parties which doth need proof, there ought not to be double costs; for mixing the contract with the matter of tithing privileges the whole. *Brownl.* 99: *Yelv.* 119.

So, where for a variance between the libel and suggestion, a consultation was awarded, and double costs adjudged to the defendant; this was held to be error by the very letter of the statute, which gives double costs only for want of proving the suggestion, and for no other cause. *Yelv.* 79, 80.

So, where a Prohibition was obtained, on a suggestion which was not proved within the six months, in which the defendant took issue with the plaintiff, which was found for the plaintiff; in this case it was resolved, that the defendant should not have double costs for want of the suggestion's being proved; for the statute is, that he shall have a consultation and double costs; but in this case he could not have a consultation, the matter in issue being found against him; but ought to have prayed a consultation on the suggestion not being proved, and then should have had his double costs. *Latch.* 140.

The surmise or suggestion may be brought in by attorney, and need not be in proper person. 1 *Leon.* 286.

A Prohibition is not to be grantedt he last day of term; but on motion a rule may be obtained to stay proceedings till the ensuing term. *Latch.* 7: 2 *Roll. Rep.* 456.

By *stat.* 50 *E.* 3. *c.* 4, no Prohibition shall go after a consultation; unless the libel be enlarged, or otherwise changed. And therefore, regularly, where a consultation is awarded upon the merits, the party shall not have another Prohibition on the same suggestion. But if a consultation is awarded, for want of form in the suggestion or proceeding thereon, another Prohibition may be allowed; or if a consultation goes for a collateral matter, as if the plaintiff is nonsuited. So if a consultation goes, and the party against whom it is granted, appeals, the appellee may have a Prohibition, though the appellants cannot. So, if after consultation the plaintiff pleads the same matter (which was suggested and found against him at Common Law) in the Spiritual Court, which is accepted, and proceeds there for trial, the former defendant may have a new Prohibition. See *Com. Dig.* title *Prohibition* (K. 3).

A Suggestion for Prohibition begins thus;

BE IT REMEMBERED, *That on,* &c. *comes before our Lord the King at Westminster,* C. D. *in his proper person, and gives this Court here to understand and be informed, That whereas* A. B. &c. (setting forth the complaint and proceeding in the other Court.) *contrary to the laws and customs of the kingdom: Wherefore the said C. imploring the aid of this Honourable Court, before the King himself, prayeth to be relieved, and that he may have his Majesty's writ of Prohibition, directed to the Judge of the said Court,* &c. *to prohibit him and them from taking any further cognizance of the said plea before them, touching or concerning the premises: And it is granted him accordingly,* &c.

The common form of a Prohibition runs thus:

GEORGE, &c. *To* A. B. &c. *Greeting. We prohibit you, that you hold not plea in the Court,* &c. *of,* &c. *whereof* C. D. *complains, that* E. F. *draws him into plea before you,* &c. And to the party himself; *We prohibit or forbid you* E. F. *that you follow not the plea in the Court of,* &c. *whereof* C. D. *complains, that you draw him into the Court,* &c.

IV. A PROHIBITION doth lie as well to a Temporal Court as to the Spiritual; Court of Admiralty, or other Court, whose proceedings are different from those in the Superior Courts of Common Law; if such Temporal Court exceed the bounds of its jurisdiction, or take cognizance of matters not arising within its jurisdiction. *F. N. B.* 45: 2 *Inst.* 229, 243, 601: 2 *Roll. Rep.* 379: 1 *Roll. Rep.* 252.

A Prohibition lies to a Court of Appeal, where it appears they have no jurisdiction over the subject; even after they have remitted the suit to the Court below, and awarded costs against the appellant, and though the party applying for the Prohibition be the appellant. 1 *Term Rep.* 552. See *post.* V. and *Com. Dig.* title *Prohibition* D. as to the *time* when a Prohibition shall be granted.

If trespass *vi & armis* be brought in the County-court, a Prohibition lies to the plaintiff. *F. N. B.* 47.

So if one sueth another in a Court-Baron or other Court, which is not a Court of Record, for charters concerning inheritance or freehold, he shall have a Prohibition. *F. N. B.* 47.

A person having obtained judgment in *B. R.* for his debt and damages, brought action for recovery of them against the bail in the Court of the *Tower of London*, in which action the party was taken on a *capias*, and was rescued, after which the plaintiff brought his action *on the case* in that Court for the rescue; and all this appearing to the Court of *B. R.* they granted a Prohibition. 1 *Rol. Rep.* 54.

So where an action of debt was brought in the *Marshalsea*, on a judgment in *B. R.* a Prohibition was granted. 2 *Salk.* 439.

A suit was surmised to be before the Lord President of the Marches, for an office, between the grantee of the Lord President and a stranger, wherein the only question would be, whether the grant of that office belonged to the Lord President; and, because in this case he would be as it were both judge and party, a Prohibition was granted. 1 *Keb.* 648.

If there be one entire contract above 40*s.* and a man sues for it in a Court Baron, severing it into small sums under 40*s.* a Prohibition shall be granted, because this is done to defraud the Court of the King. 19 *Hen.* 6. 54: 2 *Rol. Abr.* 280: *F. N. B.* 46.

An action was brought in the Hundred Court for 40*s.* in which the plaintiff confessed that he was satisfied *one shilling*, which being done with an intent to give that Court jurisdiction, and to defraud the Superior Courts, a Prohibition was granted. *Palm.* 564.

If there be several contracts between *A.* and *B.* at several times for divers sums, each under 40*s.* but amounting in the whole to a sum sufficient to entitle the superior Court to a jurisdiction, they shall be sued for in such superior, and not in an inferior Court, which is not of record. 1 *Vent.* 65.

So in a Prohibition to the Court of the Honour of *Eye*, where the case was; one contracted with another for divers parcels of malt, the money to be paid for each parcel being under 40*s.* he levied divers plaints thereupon in the said Court; wherefore the Court of *K. B.* granted a Prohibition; because though there be several contracts, yet as the plaintiff might have joined them all in one action, he ought to have so done, and sued in *B. R*; and not put the defendant to unnecessary vexation; any more than he can split an entire debt into divers, to give the inferior Court jurisdiction *in fraudem legis*. 1 *Vent.* 73: 2 *K. b.* 617: 1 *Show.* 11.

It is laid down by *Coke*, and admitted in a variety of cases, that no inferior Court can hold plea of any transitory action, if not made within the jurisdiction, and that the cause of action must be alleged to arise within such jurisdiction. 2 *Inst.* 231: 1 *Saund.* 74: 2 *Jon.* 230: 1 *Show.* 10: and see titles *Courts*; *County Court*.

Therefore, in an action on a promise in an inferior Court, not only the promise, but the consideration must be alleged to arise within the inferior jurisdiction, and must be so proved on the trial. 1 *Rol. Abr.* 5 5.

But if the plaintiff had shewn that the money had been lent within the jurisdiction of the Court, or if it had been for goods there sold, the plaintiff would have had no need to say, that the defendant assumed to pay within the jurisdiction; because the law creates the promise on the creation of the debt, which debt being within the jurisdiction, the promise shall be intended there also. *Ld. Raym.* 211.

In all cases where inferior Courts assume a jurisdiction, or hold plea of a matter not arising within their limits, the party hath his remedy, and may stay their proceedings by Prohibition; but such Prohibition can only regularly be obtained by its appearing, on oath made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused. 6 *Mod.* 146: *Carth.* 402: 1 *Salk.* 201: 1 *P. Wms.* 476.

In the case of *Mendyke* v. *Stint* it was greatly insisted upon, that though the party neglected to plead to the jurisdiction, yet, the matter arising out of the inferior jurisdiction, the superior Courts ought to grant a Prohibition; for otherwise the parties, their counsel, and attornies, would give a jurisdiction to inferior Courts which they were not entitled to by law; but it was otherwise adjudged; and it seems to be now agreed, that after admitting the jurisdiction, or after imparlance, the party cannot apply for a Prohibition. 2 *Mod.* 271.

But these things were agreed by the Court.

If any matter appears in the declaration, which sheweth that the cause of action did not arise within the jurisdiction, there a Prohibition may be granted at any time. If the subject-matter in the declaration be not proper for the judgment and determination of such Court, there also a Prohibition may be granted at any time. If the defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the Attorney's refusing to plead it, &c. or if his plea be not accepted, or is over-ruled; in all these cases a Prohibition likewise will lie at any time. 2 *Mod.* 273.

A motion was made for a Prohibition, to be directed to the Sheriff's Court in *Bristol*, on suggestion that causes of action arising out of the jurisdiction of the Sheriff's Court ought not to be sued there; and this motion was made in behalf of a defendant in an action, before he had appeared, to stay the proceedings in the Court, who proceeded to attach his goods in the hands of a garnishee; and the motion was opposed; because the defendant could not pray a Prohibition on suggestion of a matter which he could not plead; and as here he could not plead this before appearance, so he ought not to make such a motion before appearance. And *per Holt*, a man shall not plead to the jurisdiction until he appear; but if the original cause of action arose out of the jurisdiction of the Court, the garnishee may plead it; and of that opinion was *Hale* Ch. J. but if it was debt on a simple contract, it is attachable where the person of the debtor is. 1 *Ld. Raym.* 346.

So, where a Prohibition was moved for to the Court of the Sheriffs of *London* to stay proceeding, where they attached the debt of the garnishees, because it arose out of the jurisdiction, it was denied, because the debt was on simple contract, which follows the person of the debtor. *Ld. Raym.* 347.

V. The general grounds for a Prohibition to the *Ecclesiastical Courts*, are either a defect of jurisdiction, or a defect in the mode of trial. If any fact be pleaded in the Court below, and the parties are at issue, the Court has no jurisdiction to try it, because it cannot proceed according to the rules of the Common Law; and in such case a Prohibition lies: Or where the Spiritual Court has no original jurisdiction, a Prohibition may be granted, even after sentence. But where it has jurisdiction, and gives a wrong judgment, this is the subject of appeal, and not of Prohibition. 3 *Term Rep.* 4.—But when a Prohibition is granted after sentence, the want of jurisdiction must appear upon the face of the proceedings of the Spiritual Court. *Ibid*: *Cowp.* 422: 4 *Term Rep.* 382.

In all cases where it appears on the face of the libel, that the Spiritual Court, &c. have not a jurisdiction, a Prohibition may be awarded, and is grantable as well after as before sentence; for the King's superior Courts have a superintendency over all inferior jurisdictions, and are to take care that they keep within their due bounds. 2 *Inst.* 602: 2 *Rol. Abr.* 319: *Noy* 137: 1 *Sid.* 65: *Cro. Eliz.* 571: *Moor* 462, 907: *Skin.* 299: *Car* 463: *Ma* 153: 2 *Rol. Rep.* 24: *Comb.* 356.

But where the Court has a natural jurisdiction of the thing, but is restrained by some statute; as by *stat.* 23 *H.* 8 *c.* 9, for not citing out of the diocese, there the party must come before sentence; for after pleading and admitting the jurisdiction of the Court below, it would be hard and inconvenient to grant a Prohibition. See the authorities *supra*; and *Cro. Car.* 97: 2 *Show.* 145: *Vent.* 61: 6 *Mod.* 252: 7 *Mod.* 137: *Godb.* 163, 243: 5 *Mod.* 541: *Hetl.* 19: 12 *Co.* 76: *Salk.* 543.

On a motion for Prohibition the case was, the defendant libelled in the Spiritual Court for tithes of faggots made of loppings of trees; and the suggestion for a Prohibition was, that these loppings were cut from the stumps of timber trees above the growth of twenty years; and it was alleged, that sentence was given in the Spiritual Court, therefore the plaintiff comes here too late to have a Prohibition: but *per Holt*, the sentence will not hinder the having a Prohibition in any case, but in the case of Prohibitions grounded on *stat.* 23 *H.* 8. c. 9, for citing out of the diocese; but because the plaintiff had not pleaded this matter in the Spiritual Court, they denied the Prohibition, because the Spiritual Court has a general jurisdiction of tithes; and if any special matter deprives them of their jurisdiction, it must be pleaded there: and if it had been pleaded there, and issue joined on it, and on the trial it had been found not to be *silva cædua*, it had been well; but if they had refused to admit the plea, a Prohibition should have been granted. 2 *Ld. Raym.* 835.

If one sues another in the Spiritual Court for a chattel or debt, the defendant shall have a Prohibition. So if he sues for a trespass. *F. N. B.* 40.

If the Spiritual Courts take on them to try the boundaries of a parish, a Prohibition lies. 2 *Rol. Abr.* 291: 7 *Co.* 44: 1 *Rol. Rep.* 332: *Cro. Eliz.* 228: 3 *Leon.* 829: 3 *Keb.* 286. *S. P.* because the prescription is the ground thereof.

If a suit be by a parson for tithes, and the defendant plead, that the place where, is in another parish, a Prohibition lies; because they meddle with that which is out of their jurisdiction, though the original thing be of their cognizance, and this comes in obliquely. 2 *Rol. Abr.* 282: 1 *Show.* 10: *Noy* 147.

So if the vicar of a parish libels against another to avoid his institution to the church of *D.* which he supposes to be a chapel of ease, appertaining to his vicarage, and the defendant suggests, that *D.* is a parish of itself, and not a chapel of ease; a Prohibition will be granted, for they shall not try the bounds of the parish. 2 *Rol. Abr.* 291.

So, if the question be in the Court-Christian, whether a church be a parochial church, or a chapel of ease, a Prohibition lies. *Ibid.*

But if the bounds of two vills lying in the same parish come in question in the Spiritual Court, no Prohibition lies; for such bounds are triable in the Ecclesiastical Court, though those of parishes are not. 1 *Lev.* 78.

The Ecclesiastical Courts have cognizance of a way to a church; and for not repairing such way the parties may be proceeded against in the Spiritual Court. *March* 45.

So, if a parson is prevented from carrying away his tithe by the stopping up the usual way, he may have his remedy in the Ecclesiastical Court, grounded on the statute 2 & 3 *Ed.* 6. *c.* 13: *Bulst.* 67: 1 *Jon.* 230.

But if the question be, whether he is to have one way or another, or whether such a way be a highway or not; this cannot be tried in the Spiritual Court. *March.* 15: 1 *Bulst.* 67: 2 *Rol. Abr.* 287.

So if the Churchwardens of a church sue for a way to the church, which they claim to appertain to all the parishioners by prescription, a Prohibition shall be granted; for this right being grounded on the prescription, is to be tried in the Temporal Courts. 2 *Roll. Rep.* 41, 287.

If a man be admitted, instituted, and inducted, and a suit is commenced in the Ecclesiastical Court to avoid the institution, supposing it not valid; though the thing be of their cognizance, yet because the induction, which is temporal, and gives a lay right, may depend on it, a Prohibition lies. *Hob.* 15: *Latch.* 205: 1 *Bulst.* 179: *Lit. Rep.* 165: *Popb.* 133: 1 *Rol. Abr.* 282: 1 *Show. Rep.* 10.

If there be a suit for tithes in the Ecclesiastical Court, and the tenant pleads, that the party who sues is not incumbent, but that *J. S.* is; and this plea, because it goes to the right of the incumbency, is rejected, a Prohibition lies; for by denying the tenant this liberty he might be twice charged for tithes. *Cro. Eliz.* 228: 3 *Leon.* 265.

There are frequent instances of Prohibitions being granted to the Ecclesiastical Courts, to stay suits for fees by chancellors, registrars, and proctors in those Courts; on this foundation, that demands for work and labour, are properly determinable at Common Law, and fees cannot be settled by the canon law; and that the Spiritual Court can only give costs and expences of suit, but that no action of debt will lie for such costs at Common Law; and that the profits of an office being temporal, the remedy for them ought to be by *quantum meruit*; or, in case it be an office of freehold, by assise; the denial of just fees being a disseisin; therefore it seems to be now settled, that neither a proctor nor registrar can sue for fees in the Spiritual Court, but that the proper remedy is, in case of a fee certain, by an *indebitatus assumpsit*, or in case of an uncertain fee, by *quantum meruit*; and in such suits it is not necessary to prove a retainer, that being implied by law. 2 *Rol. Rep.* 59: 3 *Leon.* 268: 1 *Mod.* 176: 2 *Keb.* 615: 3 *Keb.* 303, 441, 516: 1 *Salk.* 333: 4 *Mod.* 254.

If a legatee takes a bond from the executor for payment of the legacy, and afterwards sues him in the Spiritual Court for the legacy, a Prohibition will be granted; for by taking the obligation the nature of the demand is changed, and becomes a debt or duty recoverable in the Temporal Court. *Yelv.* 38: 2 *Vern.* 31. But 2 *Rol. Rep.* 160. *S. P. cont.* And see title *Legacy* 4.

Matters of freehold, and the rights of inheritances, are only determinable in the Temporal Courts; so that if the Ecclesiastical Courts intermeddle with those, a Prohibition lies. *F. N. B.* 40: 2 *Rol. Abr.* 286: *Lit. Rep.* 164.

As in a feoffment of tithes and lands, where there is no livery, if they adjudge the tithes to pass, notwithstanding there is no livery, a Prohibition will lie. *Cro. Jac.* 270: 1 *Vent.* 41.

So, if a man devises, that his lands shall be sold for the payment of his debts, and that the overplus shall be paid to such persons in certain shares; the legatees in this case cannot sue in the Ecclesiastical Court; for the provisions intended them arise originally out of lands, and their proper remedy in this case is in a Court of Equity. *Dyer* 151, 264: *Hob.* 265: 2 *Rol. Abr.* 284–5: 2 *Show.* 50: *Cro. Car.* 16.

But if a rent be devised out of a farm for years, the Ecclesiastical Courts may hold plea thereof; for the term for years, being only a chattel, is testamentary,

con-

consequently the rent devised thereout. 1 *Sid.* 279: 2 *Keb.* 5: 1 *Lev.* 179.

The rights to offices for life in the Ecclesiastical Courts, or Courts of Admiralty, are determinable at Common Law; as in the question concerning the validity of two patents, by which the office of Registrar to a Bishop was granted; it was held, that this should not be tried in the Spiritual Court, though the subject-matter be spiritual; because the office itself being matter of freehold is, for that reason, of temporal cognizance. 2 *Rol. Abr.* 285—6: *Noy* 91: *Latch.* 228: *Palm.* 450: *Godb.* 390: *Cro. Car.* 65: 2 *Rol. Rep.* 306: *Raym.* 88: 1 *Lev.* 125: 4 *Mod.* 27: *Comb.* 306.

When the right of election to the office of Canon-residentiary, a freehold office, is in the Dean and Chapter, a Prohibition shall go to the Bishop, claiming a right to present by lapse, under pretence of his visitatorial authority. 1 *Term Rep.* 650.

Trespass on a glebe, being freehold, cannot be determined in the Ecclesiastical Court. *Bro. Jurisdiction, pl.* 41.

A parson libelled against the defendant in the Spiritual Court of *York* for having cut elms in the church-yard; and a Prohibition was granted, on suggestion that they grew on his freehold. 1 *Ld. Raym.* 212.

If a remedy be given in any case by statute, in a Temporal Court, a Prohibition lies to the Spiritual Court, if a suit be there, though the matter be of a spiritual nature; except where the jurisdiction of the Spiritual Court is saved by the same statute. 1 *Inst.* 96, *b.*

Preaching without licence is within the act of Uniformity, and therefore Prohibition lies to a suit in the Spiritual Court for it. *Fort.* 345.

A Prohibition lies to a suit for marrying without banns or licence, since *stat.* 26 *Geo.* 2. *c.* 33, by which it is made felony. 2 *Wils.* 79.

But Prohibition does not lie to a suit in the Ecclesiastical Court against a Quaker for repairs of the church, on *stat.* 7 & 8 *W.* 3. *c.* 34; though the act gives a remedy before Justices of the Peace; for the old remedy is not taken away: nor in the case of small tithes, under *stat.* 7 & 8 *W.* 3. *c.* 6. *Fort.* 347.

For more learning on this subject, see 4 *New Abr*: and 17 & 18 *Vin. Abr.* and *Kyd's Com. Dig.* under title *Prohibition.*

PROHIBITIO DE VASTO, DIRECTA PARTI, A judicial writ directed to the tenant, prohibiting him from making *waste* on the land in controversy, during the suit. *Reg. Judic.* 21.

A Prohibition shall be granted to any one who commits waste, either in the house or buildings of the incumbent of a spiritual living; or who cuts down trees on the glebe, or doth any other waste. *Moor* 917.

PRO INDIVISO, *For undivided.*] The possession or occupation of lands or tenements belonging to two or more persons, whereof none knows his several portion; as coparceners before partition. *Bract. lib.* 5. See title *Parceners.*

PROLES, *Lat.*] Progeny; Such issue as proceeds from a lawful marriage; though, if the word be used at large, it may denote others.

PROLOCUTOR OF THE CONVOCATION-HOUSE, *Prolocutor domûs convocationis.*] An officer chosen by Ecclesiastical persons, publicly assembled in convocation by virtue of the King's writ at every Parliament: there are two Prolocutors, one of the higher House of Convocation, the other of the lower House; the latter of which is chosen by the lower House, and presented to the Bishops of the higher House as their Prolocutor, that is the person by whom the lower House of Convocation intend to deliver their resolutions to the upper House, and have their own House especially ordered and governed: his office is to cause the clerk to call the names of such as are of that House, when he sees cause; to read all things propounded, gather suffrages, &c. See further title *Convocation.*

PROMISE; See *Assumpsit.*

PROMISSORY NOTES; See title *Bill of Exchange.*

PROMOTERS, *Promotores.*] Persons who in popular and penal actions prosecuted offenders, in their name and the King's, as informers, having part of the fines or penalties for their reward: they belonged chiefly to the Exchequer and King's Bench; and Sir *Edward Coke* calls them *turbidum hominum genus.* 3 *Inst.* 191.

To PROMULGE A LAW, *Promulgare Legem.*] To declare, publish, and proclaim a Law to the people; and so promulged, *promulgatus,* signifies published or proclaimed. See *stat.* 6 *H.* 6. *c.* 4: 1 *Comm.* 45: and this Dictionary, title *Statute.*

PRONOTARY; See *Prothonotary.*

PROOF, The shewing the truth of any matter alleged, or the trial, or making out, of any thing, by a Jury, witnesses, &c.

Bracton says, there is *Probatio duplex,* viz. *Vivâ voce,* by witnesses; and *Probatio mortua,* by deeds, writings, &c.

Proof, according to *Lilly,* is either in giving evidence to a Jury on a trial, or else on interrogatories, or by copies of records, or exemplifications of them. 2 *Lil. Abr.* 393.—Though where a man speaks generally of Proof, it shall be intended of Proof by a Jury, which in the strict signification is legal Proof. 3 *Bulst.* 56.

Condition of a bond was to pay such money as an apprentice should mispend, on Proof made by the confession of the apprentice or otherwise; and it was held, that although generally Proof shall be intended to be made on a trial by Jury, in this case it being referred to the confession of the party, it is sufficient if he confess it under his hand. *Cro. Jac.* 381.

It hath been insisted, that the Law knows no other Proof but before a Jury in a judicial way, and that which is on record; but if the Proof is modified by the agreement of the parties, that it shall be in such a manner, or before such a person, that modification which allows another manner of Proof shall be observed and prevail against the legal construction of the word Proof. *Sid.* 313: 2 *Lutw.* 436.

In articles the parties bound themselves in the penalty of 100*l.* &c. to be paid on due Proof of a breach; Proof at a trial will maintain the action. *Lutw.* 441. See further title *Evidence.*

PRO PARTIBUS LIBERANDIS, An ancient writ for partition of lands between coheirs. *Reg. Orig.* 316. See title *Parceners.*

PROPER FEUDS; See title *Tenures* I.

PROPERTY, *Proprietas.*] The highest right a man can have to any thing; being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on another man's curtesy.

Before men entered into society there was not any Property, but an universal right instead of it; every man might then take to his use what he pleased, and retain it, if he had sufficient power: but when men entered into society, and industry, arts, and sciences were introduced, Property was gained by various means; for the securing whereof, proper laws were ordained.

It seems, that the abstract right of Property originates in *Occupancy*, or when any thing is separated for private use from the common stores of nature: and this appears agreeable to the reason and sentiments of mankind, prior to all civil establishments. See 2 *Comm. c.* 1; and 2.; and this Dictionary, titles *Occupant*; *Liberty*; *Title*.

According to our law, Property in lands and tenements is acquired either by entry, descent by law, or conveyance; and in goods or chattels, it may be gained many ways, though usually by deed of gift, or bargain and sale. 2 *Lil. Abr.* 400.

For preserving Property the Law hath these rules:

1st, No man is to deprive another of his Property, or disturb him in enjoying it.

2dly, Every person is bound to take due care of his own Property, so as the neglect thereof may not injure his neighbour.

3dly, All persons must so use their right, that they do not, in the manner of doing it, damage their neighbour's Property.

There are also three sorts of Properties, *viz.* Property absolute; Property qualified; and Property possessory; an absolute proprietor hath an absolute power to dispose of his estate as he pleases, subject to the laws of the land. The husband hath a qualified Property in his wife's land, real chattels and debts; but in her chattels personal, he hath an absolute Property. *Plowd.* 5.

The right of possession of real Property, though it carries with it a strong presumption, is not always conclusive evidence of the right of Property, which may still subsist in another man; for as one man may have the possession, and another the right of possession, which is recovered by possessory actions; so one man may have the right of possession, and so not be liable to eviction by any possessory action, and another may have the right of Property, which cannot be otherwise asserted than by a *Writ of Right*. 3 *Comm. c.* 10. See this Dict. titles *Action*; *Writ of Right*.

Property in chattels personal may be either in *possession*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of the thing; or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment: and of these the former, or Property in possession, is divided into two sorts, an *absolute* and a *qualified* Property. Property in possession *absolute* may be in all inanimate things, and in all such animals as are naturally tame; a qualified Property is had, under certain circumstances, in *wild animals*, being tamed; or being unable to escape *propter impotentiam*, as birds in the nest; or may be obtained *propter privilegium*, by the privilege of hunting, &c. in exclusion of others. So, a qualified Property exists in the elements of light, air, and water. See 2 *Comm. c.* 25.

Every owner of goods, &c. hath a general Property in them: though a legatee of goods hath no Property in the goods given him by will until actually delivered him by the executor, who hath the lawful possession. See title *Legacy*.

And though, by a bare agreement, a bargain and sale of goods may be so far perfected, without delivery or payment of money, that the parties may have an action of the case for non-performance, yet no Property vests until delivery; therefore it is said, if a second buyer gets delivery, he has the better title. 3 *Salk.* 61, 62.

But if one covenant with me, that if I pay him so much money such a day, I shall have his goods in such a place, and I pay him the money: this is a good sale, and by it I have the Property of the goods. 27 *H.* 8. 16. See titles *Agreement*; *Fraud*.

As to Property of Things in Possession or Action;

In Possession, it is generally, when no other can have them from the owner, or with him, without his act or default; or specially, when some other hath an interest with him, or where there is a Property also in another as well as in the owner; as by bailment, delivery of things to a carrier, or innkeeper, where goods are pawned or pledged, distrained or leased, &c. And Property in Action, is when one hath an interest to sue at law for the things themselves, or for damages for them; as for debts, wrongs, &c. and all these things, in possession, or action, one may have in his own right, or in the right of another, as executor. *Wood's Inst.* 314.

A person hath such a special Property in goods delivered him to keep, that he may maintain actions against strangers who take them out of his possession: so of things delivered to a carrier, and when goods are pawned, &c. *Lil. Abr.* 400, 401.

An executor or administrator hath the Property of the goods of the deceased. But a servant hath neither a general or special Property in his master's goods; therefore to take them from his master may be trespass or felony, according to the value and other circumstances. *Goldsb.* 72. See titles *Servant*; *Apprentice*.

If a man hires a horse, he hath a special Property in the horse during the time, against all men, even against the right owner; against whom he may have an action if he disturbs him in the possession. *Cro. Eliz.* 236. But it hath been adjudged, that if a man deliver goods, &c. to another to keep for a certain time, and then to redeliver them; if he to whom they were delivered sell them in open market, before the day appointed for the redelivery, the owner may seize them wherever he finds them, because the general Property was always in him, and not altered by the sale. *Godb.* 160: 3 *Nels. Abr.* 18. And if one delivers a horse or other cattle, or goods, to another to keep, and he kills the horse, or spoils the goods, trespass lies against him; for by the killing or spoiling, the Property is destroyed. 5 *Rep.* 13. See title *Bailment*.

If a swarm of bees light on a tree, they are not the owner's of the tree, till covered with his hive; no more than hawks that have made their nests there, &c. But their young ones will be his Property, and for them he may have trespass. *Doct. & Stud. c.* 5: *Co. Litt.* 145.

A man's geese, &c. fly away out of sight, wherever they go, he hath still a Property in them. *Staundf. lib.* 1. *c.* 16: 3 *Shep. Abr.* 121.

 Wild

Wild beasts, deer, hares, conies, &c. though they belong to a man on account of his game and pleasure, none can have an absolute real Property in; but if they are inclosed and made tame, there may be a qualified and possessory Property in them. See title *Game*.

One may have absolute Property in things of a base nature, as mastiff dogs, hounds, spaniels, &c. but not in things *feræ naturæ*, unless when dead. *Dalt.* 371: *Finch.* 176: 11 *Rep.* 50: *Raym.* 16.

Property in lands, goods, and chattels, may be forfeited or lost, by treason, felony, flight, outlawry; also of goods by their becoming deodand, waif, estray, &c. *Bac. Elem.* 77, 78. See title *Forfeiture*.

PROPERTY IN HIGHWAYS, &c. He who hath the land which lies on both sides the Highway, hath the Property of the soil of the Highway in him, notwithstanding the King hath the privilege for his people to pass through it at their pleasure; for the Law presumes that the way was at first taken out of the lands of the party who owns the lands lying on both sides the way: And divers lords of manors claim the soil as part of their waste. 2 *Lil. Abr.* 400. See title *Highway*.

If the sea or a river, by violent incursion, carries away the soil or ground in so great a quantity, that he who had the Property in the soil can know where his land is, he shall have his land; but if his soil or land be insensibly wasted by the sea or river, he must lose his Property, because he cannot prove which is his land. *Pasch.* 1650. See title *Occupant*.

A tenant hath only a special Property in the trees on the lands demised, so long as they remain part of the freehold; for, when they are severed, his Property is gone 11 *Rep.* 82.

PROPERTY ALTERED. A man borrows or finds my goods, or takes them from me; neither of these acts will alter the Property. *Bro. Propert.* 27.

If one having taken away corn, make it into malt; turn plate into money, or timber into a house, &c. the Property of them is altered. *Dodderidge Law* 132, 133.

And where goods are generally sold in a market overt, for a valuable consideration, and without fraud, it alters the Property thereof. 5 *Rep.* 83. Except in some particular cases. See title *Market*.

To alter or transfer Property, is lawful; but to violate Property is never lawful, Property being a sacred thing which ought not to be violated. And every man (if he hath not forfeited it) hath a Property, and a right allowed him, to defend his life, liberty, and estate; and if either be violated, the Law gives an action to redress the injury and punish the wrong. 2 *Lil. Abr.* 400. See title *Liberty*.

PROPHECIES, *Prophetiæ*.] The foretelling of things to come, in hidden mysterious speeches; whereby commotions have been often caused in the kingdom, and attempts made by those to whom such speeches promised good success, though the words were mystically framed, and pointed only to the cognizance, arms, or some other quality of the parties: But these, for distinction sake, are called *false or fantastical Prophecies*.

False Prophecies, (where persons pretend extraordinary commissions from God) to raise jealousies in the people, to terrify them from impending judgments, &c. are punishable at Common Law, as impostures: They are reckoned by *Blackstone* among offences against the public peace; and were punished capitally by *stat.* 1 *E.* 6. *c.* 12; which was repealed in the reign of Queen *Mary*. And now by *stat.* 5 *Eliz. c.* 15, none shall publish or set forth any false Prophecy, with an intent to make any rebellion or disturbance, on pain of 10*l.* for the first offence, and a year's imprisonment; and for the second offence to forfeit all his goods and chattels, and suffer imprisonment during life: The prosecution to be within six months. See 3 *Inst* 128, 129.

PROPORTION, *Proportio*] See *De Onerando pro Rata* Portionis.

PROPORTUM, *Purport.*] Intent or meaning. *Cowell.*

PROPOUNDERS The 85th chapter of *Coke*'s 3d *Institutes* is intitled, against Monopolists, Propounders, and Projectors, where it seems to signify the same as Monopolists: *Cowell*:—rather as Projectors.

PROPRIETARY, *Proprietarius*] He who hath a property in any thing, *quæ nullius arbitrio est obnoxia*; but was heretofore chiefly used for him who had the fruits of a benefice to himself, his heirs and successors, as abbots and priors had to them and their successors. See title *Appropriations*.

PROPRIETATE PROBANDA, A writ to the Sheriff to inquire of the property of goods distrained, when the defendant claimeth property on a *Replevin* sued; for the Sheriff cannot proceed till that matter is decided by writ; and if it is found for the plaintiff, then the Sheriff is to make replevin; but if for the defendant, he can proceed no further. *F. N B.* 77: *Finch* 316, 450: *Co. Lit.* 145. *b.* See title *Replevin*.

PRO RATA, *Pro proportione*.] In proportion:—As jointenants, &c. are to pay *Pro Rata*, i e. in proportion to their estates. See titles *Joint tenants*; *Parceners*.

PROROGUE, To prolong, or put of to another day. See title *Parliament*.

PROTECTION, *Protectio*.] Is generally taken for that benefit and safety which every Subject hath by the King's Laws; every man who is a loyal Subject is in the King's Protection; and, in this sense, to be out of the King's Protection, is to be excluded the benefit of the Law. See title *Præmunire*.

In a special signification, a Protection of the King is an act of grace, by writ issued out of Chancery, which lies where a man passes over the sea in the King's service; and by this writ (when allowed in Court) he shall be quit from all personal and real suits between him and any other person; except assises of *novel disseisin*, assise of *darrein presentment*, attaints, &c. until his return. 2 *Lil. Abr.* 398.

This term is thus further explained, *viz.* Protection is an immunity granted by the King to a certain person, to be free from suits at Law for a certain time, and for some reasonable cause; and it is a branch of the King's prerogative so to do: There are two sorts of these Protections; one is *cum clausulâ, Volumus*; and of that Protection there are three particulars; one is called *quia profecturus*, and is for him who is going beyond sea in the King's service; another is *quia moraturus*, which is for him who is already abroad in the King's service, as an ambassador, &c. and another is for the King's debtor, that he be not sued till the King's debt is satisfied: The other sort of Protection is *cum clausulâ, Nolumus*, &c. which is granted to a spiritual corporation, that their goods or chattels be not taken by the Officer of the King.

King, for the King's service; it may likewise be granted to a spiritual person single, or to a temporal person. *Reg. Orig.* 23.

By the Common Law the King might take his debtor into his Protection, so that no one might sue or arrest him till the King's debt were paid. *F. N. B.* 28: *Co. Lit.* 131: But by *stat.* 25 *E.* 3. *st.* 5. *c.* 19, notwithstanding such Protection, another creditor may proceed to judgment against him with a stay of execution, till the King's debt be paid; unless such creditor will undertake for the King's debt, and then he shall have execution for both. 3 *Comm. c.* 19.

On a person's going over sea, in the service of the King, writ of Protection shall issue, to be quit of suits till he return; and then a resummons may be had against him: But one may proceed against a defendant having such Protection, until he comes and shews the Protection in Court, and hath it allowed; when his plea or suit shall go *sine die*; though if after it appears that the party who hath the Protection, goes not about the business for which the Protection was granted, the plaintiff may have a repeal, &c. *Terms de Ley*: 2 *Lil. Abr.* 398. And by *stat.* 33 *E.* 1. *st.* 1. the plaintiff may challenge the Protection, and aver, that the defendant was within the four seas; or not in the King's service, &c.

A Protection is to be made for one year, and may be renewed from year to year; but if it be made for two or three years, the Justices will not allow it: And if the King grant a Protection to his debtor, that he be not sued till his debt is paid; on these Protections none shall be delayed; the party is to answer and go to judgment, and execution shall be staid. *Co. Lit.* 130: See *ante*: and *stat.* 25 *Ed.* 3. *c.* 19.

The King granted a Protection to one of his debtors; and on demurrer it was alleged, that by *stat.* 25 *Ed.* 3. *st.* 5. *c.* 19, Protections of this kind are expresly, that none shall be delayed on them; and the Court ordered, that when it came to execution they would advise; so a *respondeas ouster* was awarded. *Cro. Jac.* 477.

In all Protections there ought to be a cause shewn for granting them: If obtained pending the suit, they are bad; and a person giving bail to an action on arrest, it is said, may not plead his Protection; one may not be discharged out of prison to which he is committed in execution, by Protection to serve the King, &c. Nor will a Protection be allowed where a person is taken on a *capias utlagatum*, after judgment; for though the *capias utlagatum* is at the King's suit in the first place, it is in the second degree for the Subject. *Latch.* 197: 1 *Leon.* 185: *Dyer* 162: *Hob.* 115.

But in action on *assumpsit* a Protection under the Great Seal was brought into Court, for that defendant was in the wars in *Flanders*, &c. and it was allowed though after an *exigent*. 3 *Lev.* 332.

A Plaintiff in an action cannot cast a Protection; for the Protection is for the defendant, and shall be always for him, if it be not in special cases where the plaintiff becomes defendant. *New Nat. Br.* 62. And no Protection shall be allowed against the King. *Co. Lit.* 131.

A Protection to save a default, is not good for any place within the kingdom of *England*: And regularly it lies only where the defendant or tenant is demandable; for the Protection is to excuse his default, which cannot be made when he is not demanded. *Jenk. Cent.* 66, 94.

These Protections are now very rarely used; the last instance of one was in 1692, when King *William* III. granted one to Lord *Cutts*, to protect him from being outlawed by his tailor. 3 *Lev.* 332.

FORM of the WRIT of PROTECTION:

GEORGE the Third, &c. *To all and singular Sheriffs*, &c. *and others, who shall see and hear our present letters*, Greeting. Know you, *that we have taken into our special Protection* A. B. *and all his servants, lands and tenements, goods and chattels, in*, &c. *in the county of* S. *and in*, &c. *and also all his writings whatsoever: Therefore We command you, that you protect and defend the said* A. B. and *his servants*, &c. *aforesaid, not doing to him or them, or any of them, or permitting to be done to them, any injury, damage, or violence, on pain of grievous forfeiture*, &c. In testimony *of which*, &c. *for one year to endure*. In Witness, &c.

PROTECTION OF AMBASSADORS; See *Ambassadors*.

PROTECTION OF CHILDREN; See titles *Parent*; *Bastard*; *Poor*; *Homicide*.

PROTECTION OF PARLIAMENT; See titles *Parliament*; *Privilege*.

PROTECTION OF THE COURTS AT WESTMINSTER. The Protection of the Court of *B. R.* is allowed for any person who attends his own business in that Court, or by virtue of any *subpœna*. See titles *Arrest*; *Privilege*.

PROTECTIONIBUS, The statute allowing a challenge to be entered against a Protection, &c. 33 *Ed.* 1. *st.* 1. See title *Protection*.

PROTEST, *Protestatio*.] Hath two applications; one, by way of caution, to call witnesses (as it were) or openly affirm that he doth either not at all, or but conditionally, yield his consent to any act, or unto the proceeding of a Judge in a Court, wherein his jurisdiction is doubtful, or to answer on his oath further than by Law he is bound. See *Plowden* 676. and *Reg. Orig.* 306.

The other is by way of complaint, as to protest a man's bill. See title *Bills of Exchange*.

Each Peer has a right, by leave of the House, when a vote passes contrary to his sentiments, to enter his dissent on the Journals of the House, with the reasons of such dissent; which is usually styled his Protest. See title *Parliament* V. 1.

PROTESTATION, *Protestatio*.] A defence or safeguard to the party who maketh it, from being concluded by the action he is about to do, that issue cannot be joined by it. *Plowd.* 276. See title *Pleading*.

It is a form of pleading when one does not directly affirm or deny any thing alleged by another, or which he himself allegeth. *Cowell*. As, *protestando* that he made no testament *pro placito* that he made not the plaintiff his executor; because if he made no testament he could make no executor. *Heath's Max.* 26. cites *Pl. C.* 276.

Coke defines a Protestation to be *an exclusion of a conclusion*. 1 *Inst.* 124. For the use of it is, to save the party from being concluded with respect to some fact or circumstance, which cannot be directly affirmed or denied without falling into duplicity of pleading; and which yet, if he did not thus enter his Protest, he might be deemed to have tacitly waived or admitted. Thus, while tenure in villenage subsisted, if a villein had brought

brought an action against his lord, and the lord was inclined to try the merits of the demand, and at the same time to prevent any conclusion against himself that he had waived his signiory; he could not in this case both plead affirmatively that the plaintiff was his villein, and also take issue upon the demand; for then his plea would have been double, as the former alone would have been a good bar to the action: but he might have alleged the villenage of the plaintiff, by way of Protestation, and then have denied the demand. By this means the future vassalage of the plaintiff was saved to the defendant, in case the issue was found in his (the defendant's) favour: for the Protestation prevented that conclusion, which would otherwise have resulted from the rest of his defence, that he had enfranchised the plaintiff; since no villein could maintain a civil action against his lord. *Co. Lit.* 126.* So also, if a defendant, by way of inducement to the point of his defence, alleges (among other matters) a particular mode of seisin or tenure, which the plaintiff is unwilling to admit, and yet desires to take issue on the principal point of the defence, he must deny the seisin or tenure by way of Protestation, and then traverse the defensive matter. So lastly, if an award be set forth by the plaintiff, and he can assign a breach in one part of it, (*viz.* the non-payment of a sum of money) and yet is afraid to admit the performance of the rest of the award, or to aver in general a non-performance of any part of it, lest something should appear to have been performed; he may save to himself any advantage he might hereafter make of the general non-performance, by alleging that by Protestation; and plead only the non-payment of the money. 3 *Comm.* *c.* 20. *p.* 312.

Protestation is said to be of two kinds, 1st, When a man pleads any thing which he dare not directly affirm, or cannot plead, for fear of making his plea double; as if in conveying to himself by his plea a title, he ought to plead divers descents by divers persons, and he dare not affirm that they were all seised at the time of their death, or although he could do it, yet it will be double to plead two descents, of both which each one by itself may be a good bar, then the defendant ought to plead and allege the matter, introducing the word *protestando*; as to say (by Protestation) that such a one died seised, &c. and that the adverse party cannot traverse. 2dly, When one is to answer two matters, and yet by Law he ought to plead but to one, then in the beginning of his plea he may say *protestando & non cognoscendo* such part of the matter to be true, (and then making his plea further) *sed pro placito in hac parte*, &c. and so he may take issue on the other part of the matter; and then he is not concluded by any of the rest of the matter which he hath by Protestation so denied. *Reg. Plac.* 70, 71. See 18 *Vin. Abr.* title *Protestation*.

In other terms, the use of a Protestation in pleading seems to be this, *viz.* When one party alleges or pleads several matters, and the other party can only offer, or take issue on one of them, he protests against the others: in such case should the issue, on trial, be found against the latter party, the record would not be evidence against him in another suit, as to those matters or points, against which he protested; which it otherwise might be, had he admitted, or not protested against them. *Dict.*

PROTESTANT CHILDREN OF PAPISTS AND JEWS. The Lord Chancellor, how to make an order on Popish and Jewish parents refusing to allow their Protestant Children a maintenance, *stats.* 11 & 12 *Will.* 3. *c.* 4. § 7: 1 *Ann. st.* 1. *c.* 30. See title *Peer.*

PROTESTANT DISSENTERS. See titles *Dissenters*; *Nonconformists*.

PROTESTANT SUCCESSION. See title *King* I.

PROTHONOTARY, *Protonotarius, vel Primus Notarius.*] A chief Officer or Clerk of the Common Pleas and King's Bench; for the first Court there are three Prothonotaries, and the other hath but one: He of the King's Bench records all civil actions; as the Clerk of the Crown Office doth all criminal causes in that Court: Those of the Common Pleas, since the order 14 *Jac.* I., on agreement entered in between the Prothonotaries and Filazers of that Court, enter and inrol all manner of declarations, pleadings, assises, judgments, and actions: They make out all judicial writs, except writs of *Habeas Corpus* and *Distringas Jurator'*; (for which there is a particular office erected, called the *Habeas Corpora Office*;) also writs of execution, and of seisin, of privilege for removing causes from inferior Courts, writs of *procedendo*, *scire facias's*, in all cases, and writs to inquire of damages; and all process upon prohibitions, on writs of *auditâ querelâ*, false judgment, &c. They likewise enter recognizances acknowledged in that Court; and all common recoveries; and make exemplifications of records, &c. See *stat.* 5 *H.* 4. *c.* 14.

PROVER, *Probator*, mentioned in *stats.* 28 *Ed.* 1. *st.* 2: 5 *H.* 4. *c.* 2; See title *Approver*, and 3 *Inst.* 129. A man became an *approver*, and appealed five, and every of them joined battel with him: *Et duellum percussum fuit cum omnibus, &* Probator *devicit omnes quinque in duello; quorum quatuor suspendebantur, & quintus clamabat esse clericum & allocatur, & Probator pardonatur. Mich.* 39 *E.* 3. *coram Rege*; *Rot.* 97. *Suff.*

PROVINCE, *Provincia.*] An out country, governed by a Deputy or Lieutenant. *Lit. Dict.* See this Dict. title *Plantation.*

It was used among the *Romans* for a country, without the limits of *Italy*, gained to their subjection by the sword; whereupon that part of *France* next the *Alps* was so called by them, and still retains the name; *Provence.*

But with us a Province is most usually taken for the circuit of an Archbishop's jurisdiction; as the *Province of Canterbury*, and that of *York*: Yet it is mentioned in some of our statutes, for several parts of the realm; and sometimes for a county. See *stat. antiq.* 32 *H.* 8. *c.* 23.

PROVINCIAL, *Provincialis.*] Of or belonging to a Province; also a chief Governor of a religious order; as of friars, &c. *Stat. antiq.* 4 *H.* 4. *c.* 17.

PROVISION, *Provisio.*] Was used for the providing a Bishop, or any other person an Ecclesiastical Living, by the Pope, before the incumbent was dead: It was also called *gratia expectativa*, or *mandatum de providendo*: The great abuse whereof produced the statutes of *Provisors* and *Præmunire*: See the latter title.

PROVISIONES. The acts to restrain the exorbitant abuse of arbitrary power, made in the Parliament at *Oxford* 1258, were called *Provisions* by *Rishanger*, who continued

continued, *Mat. Paris, anno* 1260; being to provide againſt the King's abſolute will and pleaſure. See *Matt. Paris ſub annis* 1244 & 1254. *Proviſiones* ſignifies alſo *Providentiæ*, or Proviſions of victual. *Cowell.*

PROVISIONS, *Selling unwholſome*, Is reckoned by *Blackſtone* among offences againſt public health. To prevent which the *ſtat.* 51 *Hen.* 3. *ſt.* 6; and the ordinance for bakers, *c.* 7, prohibit the ſale of corrupted wine, contagious or unwholſome fleſh, or fleſh that is bought of a Jew; under pain of amercement for the firſt offence, pillory for the ſecond, fine and impriſonment for the third, and abjuration of the town for the fourth. And by *ſtat.* 12 *Car.* 2. *c.* 25. § 11, any brewing or adulteration of wine is puniſhed with the forfeiture of 100*l.* if done by the wholeſale merchant; and 40*l.* if done by the vintner or retail trader. 4 *Comm. c.* 13.

It would contribute much to the health of his Majeſty's Subjects, if theſe ſtatutes were enforced, with all the rigor of the Law. See title *Victuals.*

PROVISO, A condition inſerted in any deed, on the performance whereof the validity of the deed depends; ſometimes it is only a covenant, *ſecundum ſubjectam materiam.* 2 *Rep.* 70.

Proviſo, in the moſt common acceptation, is that clauſe in a mortgage, whereby the deed is declared to be void, on payment of principal and intereſt. See title *Mortgage.*

The word *Proviſo* is generally taken for a condition; but it differs from it in ſeveral reſpects; for a condition is uſually created by the grantor or leſſor, but a *Proviſo* by the grantee or leſſee; there is likewiſe a difference in placing the *Proviſo*; as if, immediately after the *Habendum*, the next covenant is that the leſſee ſhall repair, provided always that the leſſor ſhall find timber, this is no condition; nor is it a condition, if it comes among other covenants after the *Habendum*, and is created by the words of the leſſee; as if the leſſee covenants to ſcour the ditches, *Proviſo*, that the leſſor carry away the ſoil, &c. 3 *Nelſ. Abr.* 21.

It hath been held, that the Law hath not appointed any proper place in a deed to inſert a *Proviſo*; but that when it doth not depend on any other ſentence, but ſtands originally by itſelf, and when it is created by the words of the grantor, &c. and is reſtrictive or compulſory, to enforce the grantee to do ſome act, in ſuch caſe the word *Proviſo* makes a condition, though it is intermixed with other covenants, and doth not immediately follow the *Habendum.* 2 *Rep.* 70. See title *Deed.*

A *Proviſo* always implies a condition, if there be no words ſubſequent which may change it into a covenant: Alſo it is a rule in *Proviſoes*, that where the *Proviſo* is, that the leſſee, &c. ſhall do, or not do a thing, and no penalty is added to it; this is a condition; or it is void; but if a penalty be annexed, it is otherwiſe. *Cro. Eliz.* 242: 1 *Lev.* 155. And where a *Proviſo* is a condition, it ought to do the office of a condition, *i. e.* make the eſtate conditional, and ſhall have reference to the eſtate, and be annexed to it; but ſhall not make it void without entry, as a limitation will. See title *Condition.*

A leaſe was made for years, rendering rent at ſuch a day, *Proviſo*, if the rent be in arrear for one month after, the leaſe to be void: the queſtion was, whether this was a condition or limitation; for if it was a condition, then the leaſe is not determined without entry; adjudged, that it was a limitation, though the words were conditional; becauſe it appeared by the leaſe itſelf, that it was the expreſs agreement of the parties that the leaſe ſhall be void on non-payment of the rent; and it ſhall be void without entry. *Moor* 291. See titles *Leaſe*; *Ejectment*; *Rent.*

If a *Proviſo* be the mutual words of both parties to the deed, it amounts to a covenant: and a *Proviſo* by way of agreement to pay, is a covenant, and an action well lies upon it. 2 *Rep.* 72. See title *Covenant* I.

Plaintiff conveyed an office to defendant, *Proviſo* that out of the firſt profits he pay plaintiff 500*l.* And it was reſolved, that an action of covenant lay on this *Proviſo*; for it is not by way of condition or defeaſance, but in nature of a covenant to pay the money. 1 *Lev.* 155. But where defendant in conſideration of 400*l.* granted his lands to plaintiff for ninety-nine years, *Proviſo* if he pay ſo much yearly during the life of *S. T.* &c. or 400*l.* within two years after his death, then the grant to be void, and there was a bond for performance of covenants; in action of debt brought on this bond, it was adjudged, that there being no expreſs covenant to pay the money, there could be no breach aſſigned on this *Proviſo.* 2 *Mod.* 36. *Sed qu.* and ſee *ante.*

In articles of agreement to make a leaſe, *Proviſo* that the leſſee ſhould pay ſo much rent, &c. although there be no ſpecial words of reſervation of rent, the *Proviſo* is a good reſervation. *Cro. Eliz.* 486. And *Proviſo* with words of grant added to it, may make a grant and not a condition. *Moor* 174: See 1 *And.* 19.

When uſes are raiſed by covenant, in conſideration of paternal love to children, &c. and after, in the ſame indenture, there is a *Proviſo* to make leaſes, without any particular conſideration, it is void; though ſuch a *Proviſo* might be good, if the uſes were created by fine, recovery, &c. becauſe of the tranſmutation of the eſtate: and for that, in this caſe, uſes ariſe without conſideration. 1 *Rep.* 176: *Moor* 144: 1 *Lev.* 30. See title *Uſe.*

In a deed, a *Proviſo*, that if the ſon diſturb the other uſes, &c. that then a term granted to him, and the uſes to the heirs of his body, ſhall be void; this *Proviſo* is ſufficient to ceaſe the other uſes, on diſturbance. 8 *Rep.* 90. 91. But a *Proviſo* to make an eſtate, limited to one and the heirs male of his body, to ceaſe as if he was naturally dead, on his attempting any act by which the limitation of the land, or any the eſtate in tail, ſhould be undone, barred, &c. hath been adjudged not good; becauſe the eſtate tail is not determined by the death of tenant in tail, but by his dying without iſſue male. *Dyer* 351: 1 *Rep.* 83. See title *Limitation of Lands.*

A teſtator deviſed lands to one and the heirs male of his body, *Proviſo*, that if he attempt to alien, then his eſtate to ceaſe, and remain to another; the *Proviſo* is void. 1 *Vent.* 321.

A *Proviſo* that would take away the whole effect of a grant, as not to receive the profits of lands granted, &c. is void; and ſo is a *Proviſo* which is repugnant to the expreſs words of the grant: in a will, teſtator made another his executor, provided he did not adminiſter his eſtate, adjudged this *Proviſo* is void for repugnancy. *Cro. Eliz.* 107: *Dyer* 3.

And if a *Proviſo* is good at firſt, and afterwards it happens that there is no other remedy but that which was reſtrained: the remedy ſhall be had notwithſtanding the reſtraint. *Wood's Inſt.* 231. Where a *Proviſo* is parcel of, or abridgeth a covenant, it makes an exception; when

when it is annexed to an exception in a deed, it is an explanation; and where added at the end of any covenant, there it extends only to defeat that covenant. 4 *Leon.* 72, 73: *Moor* 105, 471. See *Deed*; *Condition*; *Covenant*.

Proviso, Trial by; is where the plaintiff in an action desists in prosecuting his suit, and doth not bring it to trial in convenient time, the defendant in such case may take out the *venire facias* to the Sheriff, which hath in it these words, *Proviso, quod, &c.* i. e. *provided that*, if plaintiff take out any writ to that purpose, the Sheriff shall summon but one Jury on them both, and this is called going to *trial by Proviso*. *Old Nat. Br.* 159. See title *Trial*.

Process may be taken out by a defendant in criminal cases by *Proviso* in appeals, in the same manner as in other actions, on default of the appellant; but not in indictments, nor in actions where the King is sole party; and it hath been questioned, whether there can be any such process in informations *qui tam*. 2 *Hawk. c.* 41. § 10. See *stat.* 7 & 8 *W.* 3. *c.* 32; and this Dictionary, title *Trial*.

PROVISOR, One who sued to the Court of *Rome* for a provision. See title *Præmunire*. It is sometimes also taken for him who hath the care of providing things necessary; a Purveyor. *Cowell*.

Provisor Monasterii, The treasurer or steward of a Religious House, who had the custody of goods and money, and supervised all accounts. *Cowell*.

Provisor Victualium, The King's Purveyor, who provided for the accommodation of his Court, is so called in our historians. *Cowell*.

PROVOCATION, To make killing a person manslaughter, &c. See title *Homicide* III. 2.

PROVOST MARSHAL, Is an officer of the King's Navy, who hath the charge of prisoners taken at sea: and is sometimes used for like purpose at land. See *stat.* 13 *Car.* 2. *c.* 9.

PROXIES, Persons appointed instead of others, to represent them.

Every Peer of the Realm, called to Parliament, hath the privilege of constituting a Proxy to vote for him in his absence on a lawful occasion; but such Proxies are by licence of the King, and sometimes Proxies have been denied by the King; particularly *annis* 6, 27, & 39 *Ed.* 3. See title *Parliament* V. 1.

Proxies are also annual payments made by Parochial Clergy to the Bishop, &c. on visitations. See *Procurations*.

PRYK, A kind of service or tenure; according to *Blount*, it signifies an old-fashioned spur, with one point only, which the tenant, holding land by this tenure, was to find for the King.

In the time of *Hen.* VIII. light horsemen in war were called *Prickers*; because they used such spurs or Pryks, to make their horses go with speed.

PUBERTY, *Pubertas*.] The age of fourteen in men, and twelve in women; when they are held fit for, and capable of contracting, marriage. See titles *Age*; *Infant*.

PUBLICATION, Is used of depositions of witnesses in a cause in Chancery, in order to the hearing; it signifies the shewing the depositions openly, and giving out copies of them, &c. pursuant to the rules of the Court. See titles *Chancery*; *Depositions*.—As to the publication of *Libels* and *Wills*, see those titles.

PUBLIC ACCOUNTS; See title *Accounts, Public*.

All the lands, tenements, and hereditaments, which an accountant hath, shall, for the payment of debts to the Crown, be liable and put in execution, in like manner as if he had stood bound by writing obligatory, having the effect of a statute staple, &c. *Stat.* 13 *Eliz. c.* 4.

PUBLIC ACT *of Parliament*; See *Statute*.

PUBLIC FAITH, *Fides Publica*.] In the reign of *Charles* I. there was a pretence or cheat, to raise money of the seduced people, upon what was termed the *Public Faith* of the nation, to make war against the King, about the year 1642. *Stat.* 17 *C.* 1. *c.* 18.

PUBLIC WORSHIP; See *Nonconformists*; *Papists*; *Recusants*; *Service and Sacraments*.

PUERITIA; See *Puberty*.

PUIS DARREIN CONTINUANCE, Is a plea of new matter, pending an action, *post ultimam continuationem*. See title *Pleading*.

PUISNE, Fr. *Puisné*.] Younger, puny, born after, junior. See *Mulier*. The several Judges and Barons, not chiefs, are called Puisne Judges, Puisne Barons.

PULSATOR, The plaintiff or actor; from *pulsare*, to accuse any one. *Leg. Hen.* 1. *c.* 26.

PUNISHMENT, *Pœna*.] The penalty for transgressing the Law: and as debts are discharged to private persons by payment, so obligations to the public, for disturbing society, are discharged when the offender undergoes the Punishment inflicted for his offence. See title Judgment, *Criminal*.

PUR AUTER VIE. Where lands, &c. are held *for another's life*. See title *Occupant*.

PURCHASE.

Acquisitum, Perquisitum, Perquisitio.] The buying or other *acquisition* of lands, or tenements, with money, or by gift, deed, or agreement; as distinct from the obtaining them by descent or hereditary right; *conjunctum perquisitum* is where two or more persons join in the Purchase. *Litt.* § 2: *Reg. Orig.* 143.

Purchase, taken in its largest and most extensive sense, is thus defined: The possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood; and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person not by his own act or agreement, but by the single operation of Law. *Lit.* § 12: 1 *Inst.* 18. What is termed in the Common Law *Purchase*, was by the feudists called *Conquest*, *conquæstus* or *conquisitio*: and in this sense it was that *William* the First was called *Conquæstor*, or the *Conqueror*, signifying, that he was the first of his family who *acquired* the Crown and Realm of *England*. See 2 *Comm. c.* 15.

This is the legal signification of the word *perquisitio*, or Purchase; and in this sense it includes the five following methods of acquiring a title to estates: *Escheat*, *Occupancy*, *Prescription*, *Forfeiture*, *Alienation*. See this Dictionary, under those and other titles connected therewith: and further, titles *Remainder*; *Executory Devise*; *Limitation of Estate*, &c.

Mr. *Hargrave*, after some remarks on the peculiar nature of *Escheats*, observes, that instead of distributing all the several titles to land under *Purchase* and *Descent*, it would be more accurate to say, that the title to land is either by *Purchase*, to which the act or agreement of the party is essential, or by *mere act of Law*: and under the latter to consider, first, *Descent*; and then *Escheat*, and such

ſuch other titles, not being by deſcent, as yet like them accrue by mere act of Law. 1 *Inſt.* 18. *b.*

One cometh in by Purchaſe when he comes to lands by legal conveyance, and hath a lawful eſtate: and a Purchaſe is always intended by title, either from ſome conſideration, or by gift; (for a gift is in Law a Purchaſe;) whereas deſcent from an anceſtor cometh of courſe by act of Law; alſo all contracts are comprehended under this word Purchaſe. *Co. Litt.* 18: *Doct. and Stud. cap.* 24.

Purchaſe in oppoſition to Deſcent is taken largely; if an eſtate comes to a man from his anceſtors without writing, that is a Deſcent: but where a perſon takes any thing from an anceſtor, or others, by deed, will, or gift, and not as heir at law; that is a Purchaſe. 2 *Lil. Abr.* 403.

When an eſtate doth originally veſt in the heir, and never was nor could be in the anceſtor; ſuch heir ſhall take by way of Purchaſe: but when the thing might have veſted in his anceſtor, though it be firſt in the heir, and not in him at all, the heir ſhall have it in nature of Deſcent. 1 *Rep.* 95, 106.

Conſiſtent with the above rule is Mr. *Fearne*'s explanation of the much-conteſted point, in what caſe an heir ſhall be ſaid to take by limitation, and in what by Purchaſe: or, in the language of conveyancers, what are words of limitation, and what are words of Purchaſe. See fully this Dictionary, title *Remainder*; and *poſt. Div.* I. of this title.

I. *In what Caſes Heirs ſhall be deemed Purchaſers; and of the Effect of their taking by Purchaſe.*

II. *Of Purchaſers for a valuable Conſideration; and how protected or made anſwerable in Equity.* See alſo this Dictionary, under titles *Fraud*; *Conſideration*, &c.

I. Purchase, in its vulgar and confined acceptation, is applied only to ſuch acquiſitions of land as are obtained by way of bargain and ſale, for money, or ſome other valuable conſideration. But this falls far ſhort of the legal idea of Purchaſe: for if I give land freely to another, he is in the eye of Law a Purchaſer; and falls within *Littleton*'s definition, for he comes to the eſtate by his own agreement, that is, he conſents to the gift. 1 *Inſt.* 18. A man who has his father's eſtate ſettled upon him in tail, before he was born, is alſo a Purchaſer; for he takes quite another eſtate than the law of deſcents would have given him. Nay, even if the anceſtor deviſes his eſtate to his heir at law by will, with other limitations, or in any other ſhape than the courſe of deſcents would direct, ſuch heir ſhall take by Purchaſe. *Ld. Raym* 728. Thus if a man, having two daughters, his heirs, deviſes his land to *them and their heirs*; they ſhall take by Purchaſe as joint-tenants; for the eſtate of joint tenants, and tenants in common, is different in its nature and quality from that of co-parceners. *Cro. Eliz.* 431. But if a man, ſeiſed in fee, deviſes his whole eſtate to his heir at law, ſo that the heir takes neither a greater nor a leſs eſtate by the deviſe than he would have done without it, he ſhall be adjudged to take by deſcent, even though it be charged with incumbrances; this being for the benefit of creditors, and others, who have demands on the eſtate of the anceſtor. 1 *Rol. Abr.* 626: *Salk.* 241: *Ld. Raym.* 728. If a remainder be limited to the heirs of *A.* here *A.* himſelf takes nothing; but, if he dies during the continuance of the particular eſtate, his heirs ſhall take as Purchaſers. 1 *Roll. Abr.* 627. But if an eſtate be made to *A.* for life, remainder to his right heirs in fee, his heirs ſhall take by deſcent: for it is an ancient rule of Law, that wherever the anceſtor takes an eſtate for life, the heir cannot by the ſame conveyance take an eſtate in fee by Purchaſe, but only by deſcent. 1 *Rep.* 104: 2 *Lev.* 60: *Raym.* 334. And, if *A.* dies before entry, ſtill his heir ſhall take by deſcent, and not by Purchaſe; for where the heir takes any thing that might have veſted in the anceſtor, he takes by way of deſcent. 1 *Rep.* 98. The anceſtor, during his life, beareth in himſelf all his heirs; and therefore, when once he is, or might have been, ſeiſed of the lands, the inheritance ſo limited to his heirs veſts in the anceſtor himſelf: and the word "heirs" in this caſe is not eſteemed a word of Purchaſe, but a word of limitation, enuring ſo as to increaſe the eſtate of the anceſtor, from a tenancy for life to a fee-ſimple. *Co. Litt.* 22. And, had it been otherwiſe, had the heir (who is uncertain till the death of the anceſtor) been allowed to take as a Purchaſer originally nominated in the deed, as muſt have been the caſe if the remainder had been expreſsly limited to him by name; then, in the times of ſtrict feodal tenure, the lord would have been defrauded, by ſuch a limitation, of the fruits of his ſigniory, ariſing from a deſcent to the heir. 2 *Comm. c.* 15. *p.* 242. See further, this Dictionary, titles *Remainder*; *Heir* II.

The difference in effect, between the acquiſition of an eſtate, by deſcent and by Purchaſe, conſiſts principally in theſe two points: *Firſt*, That by Purchaſe the eſtate acquires a new inheritable quality, and is deſcendible to the owner's blood in general, and not to the blood only of ſome particular anceſtor. See title *Deſcent*. *Secondly*, That an eſtate taken by Purchaſe will not make the heir anſwerable for the acts of the anceſtor, as an eſtate by deſcent will. For, if the anceſtor by any deed, obligation, covenant, or the like, bindeth himſelf and his heirs, and dieth; this deed, obligation, or covenant, ſhall be binding upon the heir, ſo far forth only as he (or any other in truſt for him, *ſtat.* 29 *Car.* 2. *c.* 3. § 10;) had any eſtate of inheritance, veſted in him by deſcent from, (or any eſtate *pur auter vie*, coming to him by ſpecial occupancy, as heir to, [§ 12, of the ſame ſtatute,]) that anceſtor, ſufficient to anſwer the charge; whether he remains in poſſeſſion, or hath aliened it before action brought. See 1 *P. Wms.* 777: *ſtat.* 3 & 4 *W.* & *M. c.* 14: Therefore if a man covenants, for himſelf and his heirs, to keep my houſe in repair, I can then (and then only) compel his heir to perform this covenant, when he has an eſtate ſufficient for this purpoſe, or aſſets, by deſcent from the covenantor: for though the covenant deſcends to the heir, whether he inherits any eſtate or no, it lies dormant, and is not compulſory, until he has aſſets by deſcent. *Finch Rep.* 86. See title *Aſſets*.

II. *A.* enters into partnerſhip in 5ths, with three others, for 21 years, for digging mines in *A.*'s lands, *A.* to have two 5ths, and alſo, in conſideration of his ownerſhip of the land, to have a tenth more out of the ſhare of the other partners. Purſuant to the articles, they ſearched for the mines, and after two years' time, and the expence of about 120*l.*, they diſcovered a valuable mine, and worked it for about three months; and then *A.* dies, and his widow ſets up a voluntary ſettlement, made

made after marriage. The Court inclined that the partners were *as* Purchasers, and that the voluntary settlement should not stand against them. 2 *Vern.* 326.

The wife joins with the husband in letting in an incumbrance on her jointure, and barring the estate-tail, and then limits the uses to the husband for life, remainder to the wife for life, remainder to their daughter. *Per* Lord Keeper *Wright*, the daughters are not Purchasers, so as to shut out a judgment-creditor of the husband's, antecedent to barring the estate-tail; it might have been a good consideration for both, but it was not expressed in the deed, to be any consideration for settling the estate on the daughters, but was a voluntary gift of the wife to her husband, therefore the daughter's estate must be taken to be voluntary; and so a judgment-creditor ought to have the assistance of this Court before them. *Canc. Prec.* 114.

Every lessee is a Purchaser. 9 *Mod.* 59. See 2 *Vern.* 327.

A. seised in fee, settled his estate in 1712, to the use of himself for life, remainder to *B.* in tail, but with power of revocation, by any writing signed, &c. and attested by three, &c. credible witnesses. In 1715, *A.* by deed, attested by two witnesses only, reciting that he was indebted, as in a schedule annexed, conveyed his estate to *W. R.* and *W. S.* and their heirs, in trust to pay his said debts by profits, mortgage, or sale; and after payment thereof, to pay the overplus, and reconvey such part as should be unsold, to *A.* or such other person, &c. and for such uses, &c. as he, by any writing, signed and sealed, and attested, &c. should direct. *A.* died without issue, but left the said *B.* and *C.* the daughters of two sisters, his heirs at law. The deed of 1715 was kept private till after the death of *W. S.* the surviving trustee in 1724; and was then laid before counsel, who directed, that the heir of *W. S.* should assign the legal estate to the trustees in the deed of 1712, which was done. Afterwards, in 1726, on a treaty of marriage between Lord *Fauconbridge* and *B.* a marriage settlement was prepared by the same counsel, as counsel for Lord *Fauconbridge*, who made a settlement on *B.* in consideration of the great estate in land which he was to have with her. The surviving trustee in the deed of 1712, joined in this marriage settlement. *C.* brought a bill claiming a moiety of this estate of *A.* as coheiress with *B.*, for that the deed in 1715 was a revocation of the deed in 1712. Lord *F.* pleaded that he was a Purchaser under the deed of 1712, without notice of that in 1715, and that the settlement made by him on *B.* was in contemplation of that settlement in 1712, and that the surviving trustee in that settlement was party to the marriage settlement; and that though the Purchase was not of the legal estate, but the trust only, that it would make no difference, according to *Wilker* and *Bodington*'s case, 2 *Vern.* 599; and that neither would it differ the case, though there was no actual conveyance; for as the trustees in the deed of 1712 always acted under that deed for *B.* that trust should subsist as to himself, who was a fair Purchaser; and that he should not be affected by constructive notice to his counsel, as having been advised with on these two deeds in 1724; for it must be intended, that at the time of the counsel's being concerned for him, which was in 1726, he had forgot that he had ever seen this deed of 1715, there being an interval of two years between his first seeing it, and his being counsel for defendant. And for these reasons the Court held, that this could not be notice to his Lordship. Ld. Ch. B. *Reynolds*, who assisted the Lord Chancellor, held, that the Lord *F.* could be a Purchaser of no more than *B.* had, as no actual conveyance was made to him. The Master of the Rolls said, that to be a Purchaser in the notion of equity, there must be an actual contract, and a consideration paid; therefore, if at the time of marriage the deed of 1712 stood revoked, the trustees could be seised only of a moiety for the use of *B.*, consequently Lord *F.* can be a Purchaser of no more. Lord Chancellor decreed a moiety of the estate, and an account of the rents and profits to *C.* since the death of *A.* See *Gilb.* 207; and *Lilly's Pract. Conv.* 391 to 402.

A. having a long lease of a house, in which his wife had some interest, by her consent renews it for eighty-one years, and in consideration of 400*l.* assigns it to *B.* who assigns it to *C.* his son, who married *M.* and died, leaving *M.* his executrix; *M.* on a second marriage, conveys it to trustees, &c. *A.* by bill sets forth this assignment, and that it was a mortgage, and that *B.* agreed to execute a reconveyance thereof, &c. and prayed a redemption. The executrix pleads she was a Purchaser, without notice of such agreement; and in consideration of a marriage with *J. S.* and of his undertaking to pay her debts, she assigned the original lease, &c. such a day to trustees, to the use of her intended husband, not having any notice of the agreement, prior to the executing the said deed on marriage. It was decreed, that defendants were in nature of Purchasers; and the plea was allowed. *Finch. Rep.* 9.

It is the rule of Equity, that where a man is Purchaser for valuable consideration, without notice, he shall not be annoyed in equity; not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate, than the other. *Treat. Eq. lib.* 2. *c.* 6. § 2, cites 2 *Vern.* 599: 2 *P. Wms.* 678, &c.

This rule is founded on an obvious principle of equity. It seems, however, to have been broken in upon by the decisions in *Burgh* v. *Burgh*; [*Burgh* v. *Francis*;] *Finch* 28: and *Williams* v. *Lambe*, 3 *Bro. C. R.* 264. In the former of which cases the Court appears to have interposed to the prejudice of a judgment-creditor, without notice of the plaintiff's equity; and in the latter to the prejudice of a Purchaser, without notice of the plaintiff's title as Dowress. With respect to those instances in which a *bonâ fide* Purchaser has in equity been postponed, in respect of his conniving at the subsequent fraud of him under whom he derived his title, they are evidently exceptions to the general rule, which is confined to the claim of the Purchaser at the time of completing his Purchase; a claim which he may forfeit, as to third persons, by subsequent misconduct. *Fonblanque's Note on Treat. Eq. ubi sup.*: and see *Treat. Eq.* 1. *c.* 3. § 4, *in n.*; and this Dictionary, title *Mortgage* III.

It has been said, that by taking a conveyance with notice of a trust, the Purchaser himself becomes the trustee; and must not, to serve himself, be guilty of a breach of trust, notwithstanding any consideration paid. 2 *Vern.* 271. But this proposition seems to be stated too generally; for though an immediate or first Purchaser, with notice of an equitable claim in another, shall certainly not be allowed, though a Purchaser for valuable consideration, to protect himself against such equitable claim; yet if a person, having notice of an equitable claim

claim in another, purchase from one who had not notice of such claim, he may protect himself by want of notice in his vendor; such protection being necessary to secure to the *bona fide* Purchaser, without notice, the full benefit of his Purchase. *Pre. Ch.* 51: 1 *Atk.* 571: 2 *Bro. C. R.* 66. Neither shall a Purchaser without notice, from a Purchaser with notice, be considered in equity as bound by the trust. 2 *Vern.* 384: *Ambl.* 313. See *post.*—It may be material to remark, that notice is not confined to the time of the contract; for if a person who has a lien in equity on the premises, give notice thereof before actual payment of the Purchase-money, it is sufficient. 3 *P. Wms.* 307: 2 *Atk.* 630: 3 *Atk.* 304: Or before the execution of the conveyance, though the Purchase-money be actually paid. 1 *Atk.* 384: *Cases in C.* 34.

A Purchaser who comes in without notice of a rent-charge shall not be chargeable therewith, although given to a charitable use. *Toth.* 258.

A Purchaser shall not be affected by a judgment in equity, without express notice of it before the Purchase, otherwise it is at law. *Chan. Cas.* 37.

A. indebted by bond, devised a debt to be paid out of his personal estate; but if it was not sufficient, then to sell his real estate, and pay it: the estate was sold, and by several mesne conveyances came to defendant, who was sued for the debt, as charged on the lands which he had bought. The defendant pleaded, that he had no notice of the demand, and was a Purchaser for a valuable consideration, and that the personal estate, was first liable, and that the Purchase-money, which was paid to two other of the defendants, was liable in the next place; and that there were other lands, which descended to one of them on the death of *A.* which ought to come in aid of him, and decreed accordingly. *Finch. Rep.* 137.

A Purchaser for a valuable consideration, without notice, was decreed to pay arrears of an annuity charged on the lands purchased; though the same were due thirty years before, and no demand in all that time. *Finch* 252.

A Purchaser from *T. S.* who has a decree against him in Chancery for land, shall be bound by the decree, though he had no notice of it. 2 *Chan. Cas.* 48.

A bill was brought to prove a will, and perpetuate the testimony of witnesses; the defendant pleaded himself a Purchaser, without notice of such will; and insisted, that as there had been a verdict in affirmance of such will, (nothing hindering the plaintiff, but if he had a title he might recover at Law,) the plaintiff ought not to be admitted to examine his witnesses, thereby to hang a cloud over the Purchaser's estate; and on debate the Court allowed the plea. *Vern.* 354.

A. mortgaged land to *B.* and afterwards by his will (having sons *D.* and *E.*) devised the equity of redemption to *E.*—*B.* and *D.* join in an assignment of the mortgage to *F.*; though *F.* pleaded want of notice of the will, and that *D.* was the visible heir, yet decreed, that *E.* should have the equity of redemption on the foot of the first mortgage. *N. Ch. R.* 153.

A. purchases, having notice of a settlement whereby *B.* the vendor was but tenant for life, remainder to his first, &c. son in tail. Afterwards *A.* sells to *D.* who had no notice; *B.* dies, leaving a son; it was decreed that the last Purchaser should hold the land, but the first should account for the consideration-money, for which he sold the estate, with interest from the decease of *B.*, thereout discounting what was due on a mortgage prior to the settlement which he had bought in. 2 *Vern.* 384.

Where there is a general trust, as to pay debts, though the Purchaser has notice of them, it seems that he is not obliged to see the Purchase-money applied: otherwise if the debts be particular, as for payment of debts in a schedule. *Treat. Eq.* ii. c. 6. § 2. But though the Purchaser be bound to see to the application of the money, as to the schedule debts, he is not bound to see that only so much real estate is sold or mortgaged, as will discharge such debts; unless there be a collusion between the heir and trustee. 1 *Vern.* 301: 2 *Ch. Ca.* 115; 221.—Neither is he bound to see to the payment of legacies, if the estate be charged generally with debts and legacies; for not being in such case bound to see to the discharge of debts, he cannot be expected to see to the discharge of the legacies, which cannot be paid till after the debts. *Fonblanque's Note on Tr. Eq. ubi sup.* cites *Jebb.* v. *Abbott*, 2 *Bro. C. R.*

As a Purchaser for valuable consideration has an equal claim to the protection of a Court of Equity, to defend his possession, as the plaintiff has to the assistance of the Court to assert his right, a Court of Equity will not, in general, compel a Purchaser for valuable consideration, without notice of the plaintiff's title, to make any discovery which may affect his own title; but such discovery will be enforced in favour of a Dowress. See 1 *Vern.* 179: 3 *Bro. C. R.* 264.

Thus an assignee of a lease shall not be forced to discover whether the lease is expired: but lessee for years of conusor of a statute has been compelled to discover what estate he had from the conusor, to the end that he might be liable to the statute. 8 *Vin.* 554. *pl.* 2; cited *Treat. Eq. lib.* 6. c. 3. § 3.

A Purchaser of lands from *A.* which *B.* makes title to, getting the deeds which make out *B.*'s title, is not bound to discover them. *Chan. Cas.* 69. So there is no reason to compel one whose land lies contiguous to mine, to discover the boundaries in his deeds; for that would be to help a man to evidence, to evict another of his possession. 2 *Vern.* 38. And a Court of Equity will not help the Issue against a Purchaser. 1 *Vern.* 212, 273: 2 *Vern.* 35, 50.

PURGATION, *Purgatio.*] The clearing a man's self of a crime, whereof he is publicly suspected, and accused before a Judge: of which there was formerly great use in *England.*

Purgation is either *canonica* or *vulgaris.*

Canonical Purgation is, that which is prescribed by the Canon Law, the form whereof, used in the Spiritual Court, is that the person suspected take his oath, that he is clear of the fact objected against him; and bring his honest neighbours with him to make oath, that they believe he swears truly.

The Vulgar Purgation, according to the ancient manner, was by fire or water ordeal, or by combat, abolished by canon. *Staundf. P. C. lib.* 2. c. 48. See tit. *Ordeal.*

The canonical doctrine of Purgation, whereby the parties were obliged to answer upon oath to any matter, however criminal, that might be objected against them, (though long ago over-ruled in the Court of Chancery,) continued till the middle of the last century to be upheld by the Spiritual Courts; when the Legislature was obliged to interpose, to teach them a lesson of moderation, similar to

to that of the *English* Law. By *stat.* 13 *Car.* 2. *c.* 12, it is enacted, that it shall not be lawful for any Bishop or Ecclesiastical Judge, to tender or administer to any person whatsoever, the oath usually called the oath *ex officio*, or any other oath whereby he may be compelled to confess, accuse, or purge himself of any criminal matter or thing, whereby he may be liable to any censure or punishment, 3 *Comm.* 100. See further, titles *Wager of Law*; *Chancery*; *Clergy, Benefit of*.

The *stat.* 13 *Car.* 2. *c.* 12, having thus taken away the oath *ex officio*, of persons accusing or purging themselves, &c. some maintain that all the proceedings of Purgation on common fame fall too; others say, there is still a legal Purgation left, but not canonical. *Wood's Inst.* 506, 507.

PURIFICATIO BEATÆ MARIÆ VIRGINIS. Mentioned in *stat.* 32 *Hen.* 8 *c* 21; see *Candlemas*.

The Purification of the Blessed Virgin *Mary*, is one of the general returns of writs, still in use, *viz.* the third in *Hilary* term.

PURLIEU, or PURLUE, from Fr. *pur*, *purus*, & *lieu*, *locus*.] All that ground near a forest, which, being added to the ancient forests by King *Hen* II., *Rich.* I., and King *John*, was afterwards disafforested and severed by the *Charta de Foresta*, and the perambulations and grants thereon, by *Hen.* III. So that it becomes *Purlue*, *viz.* pure and free from the laws and ordinances of the forest. *Manw For' Laws*, *par.* 2. *c.* 20

Our ancestors called this ground *Purlieu*, *puram locum*, because it was exempted from that servitude which was formerly laid on it: As *Manwood* and *Crompton* call it *Pourallee*, we may derive it from *pur*, *purus*, & *allee*, *ambulatio*; because he who walketh or courseth within that circuit is not liable to the laws or penalties incurred by those who hunt within the forest precincts; but *Pourallee* is said to be properly the perambulation whereby the Purlieu is deafforested. *Stat.* 33 *Ed.* 1. *st.* 5: 4 *Inst.* 304

Owners of grounds within the Purlieu by disafforestation, may fell timber, convert pastures into arable, &c. inclose them with any kind of inclosure; erect edifices, and dispose of them as if they had never been afforested; and a Purlieu-man may as lawfully hunt, to all intents, within the Purlieu, as any man may in his own grounds which were never afforested: he may keep his dogs within the Purlieu unexpeditated; and the wild beasts belong to the Purlieu-man *ratione soli*, so long as they remain in his grounds, and he may kill them. 4 *Inst.* 303.

If the Purlieu-man chase the beast with grey-hounds, and they fly towards the forest for safety, he may pursue them to the bounds of the forest; and if he then do his endeavour to call back and take off his dogs from the pursuit, although the dogs follow the chase in the forest, and kill the King's deer there, this is no offence, so as he enter not into the forest nor meddle with the deer so killed: and if the dogs fasten on the deer before he recover the forest, and the deer drag the dogs into the forest, in such case the Purlieu-man may follow his dogs and take the deer. 4 *Inst.* 303, 304.

But in the case of Sir *Richard Weston*, it was said, that there was no Purlieu in law to hunt; that it cannot be by prescription, and there is nothing in statutes as to hunting; therefore Purlieu-men may only keep out the deer, but cannot kill them, though they be in their ground. 1 *Jones's Rep.* 278. See *Moor* 706, 987.

And notwithstanding Purlieus are absolutely deafforested, it hath been permitted, that the ranger of the forest shall, as often as the wild beasts of the forest range into the Purlieu, with his hounds rechase them back to the forest. 4 *Inst.*

PURLIEU MEN, These who have ground within the Purlieu, and being able to dispend forty shillings a-year freehold; who, on these two points, are licensed to hunt in their own Purlieus, observing what is required. *Manw For. Laws* 151, 157, 180, 186. See *Purlieu*.

PURPARTY; See *Pourparty*.

PURPRESTURE; See *Pourpresture*.

PURSE. A certain quantity of money, amounting to 500 dollars, or 125*l.* in *Turkey*. *Merch. Dict.*

PURSUIVANT; See *Poursuivant*.

PURVEYANCE. As well before as after the Conquest, the King, on his ancient demesnes of the Crown of *England*, had houses of husbandry, and stocks for the furnishing necessary provision for his household; and the tenants of those manors did, by their tenures, manure, till, &c. and reap the corn on the King's demesnes, mowed his meadows, &c. repaired the fences, and performed all necessary things belonging to husbandry on the King's demesnes: in respect of which services, and to the end they might apply the same the better, they had many liberties and privileges; as, that they should not be sued out of the Court of that manor, nor impanelled on any Jury or Inquest, nor appear at any other Court, but only at the Court of the manor, nor be contributory to the expences of the Knights of the Shire which served at Parliament, nor pay any toll, &c. which liberties and immunities continue to this day, although the original cause is ceased. 2 *Inst.* 542, 543. *c.* 2. See further *Pourveyance*.

PURVIEW, Fr. *pourveu*, a patent or grant.] The body, or that part of an act of Parliament which begins with, *Be it enacted*, &c. The statute 3 *Hen.* 7, stands upon a preamble and *Purview*. 2 *Inst.* 403: 12 *Rep.* 20. See title *Statute*.

PUTAGE, *Putagium*, from the Fr. *putaine*, Italian *putta*, *meretrix*] Fornication.

By the feudal laws, if any heir female under guardianship were guilty of this crime she forfeited her part to her coheirs; or if she were an only heiress, the lord of the fee took it by escheat. *Spelman*: *Cowell*.

PUTATIVUS, Putative, reputed, or commonly esteemed; in opposition to notorious and unquestionable.—*Pater pueri putativus*, the reputed father of the child. *Jo. Brompton* 909.

When a single woman, with child, swears that such a man is the father, he is called the Putative father. See title *Bastard*.

PUTTING IN FEAR; See title *Robbery*.

PUTURA, *q. Potura*.] A custom claimed by keepers in forests, and sometimes by bailiffs of hundreds, to take man's meat, horse meat, and dog's meat, of the tenants and inhabitants within the perambulation of the forest, hundred, &c.; and in the liberty of *Knaresburgh* it was long since turned into the payment of 4*d.* in money by each tenant. *M. S. de Temp. Ed.* 3: 4 *Inst.* 307. The land subject to this custom is called *Terra Putura*. *Plac. apud Cestr.* 31 *Ed.* 3.

PYKER, or PYCAR, A small ship or herring boat. See *stat.* 31 *Ed.* 3. *c.* 2.

Q.

QUADRAGESIMA, The fortieth part; also the time of *Lent*, from our Saviour's *Forty Days' Fast*. *Lit. Dict.* *Quadragesima Sunday*, Is the first *Sunday* in *Lent*; so called, because about the fortieth day before *Easter*. *Blount*.

QUADRAGESIMALIA. In former days it was the custom for people to visit their mother church on *Mid-lent-Sunday*, and to make their offerings at the High Altar; as the like devotion was again observed in *Whitsun Week*: But as the procession and oblations at *Whitsuntide* were sometimes commuted into a rated payment of *Pentecostals*; so the *Lent* or *Easter* offerings were changed into a customary rate called *Quadragesimalia*, and *Denarii Quadragesimales*, also *Lætare Jerusalem*, from those words in the Hymn for the Day. *Dict.*

QUADRANS, a fourth part of a penny: Before the reign of *Ed.* 1. the smallest coin was a sterling or penny, marked with a cross, by the guidance whereof a penny might be cut into halves for a half-penny, or into quarters or four parts for farthings; till, to avoid the fraud of unequal cutting, that King coined half-pence and farthings in round distinct pieces. *Mat. Westm. anno* 1279.

QUADRANTATA TERRÆ, *Quadrarium*; The fourth part of an acre. See *Fardingdeal*.

QUADRIVIUM, The center of four ways, where four roads meet and cross each other. By statute, posts with inscriptions are to be set up at such cross ways, as a direction to travellers, &c. See title *Highways*.

QUÆ EST EADEM, *Which is the same, trespass*, &c.] Words used in pleading to supply the want of a traverse; 2 *Lil. Abr.* 405. As where a plaintiff brings an action of trespass, and the defendant pleads, that the plaintiff gave him leave to enter on the land, and that he entered accordingly; *Quæ est eadem Transgressio*, "which is the same trespass, of which the plaintiff complains."

In a *Clausum fregit* such a day, defendant pleads plaintiff's licence to him to enter on the same day, and that *virtute inde* he entered; he need not say *Quæ est eadem Transgressio*: So in trespass for taking goods; if defendant justifies the same day and place: And in trespass and battery, if defendant justifies that, the same day and place, the plaintiff assaulted him, and that what damages happened to him was of his own wrong; this is good without *Quæ est eadem Transgressio*, &c. though he doth not directly answer the assault laid by plaintiff; but where he justifies at another day, or at another place, then he ought to say, *Quæ est eadem*. 21 *Hen.* 7. *pl.* 2.

A fact laid *Nov.* 1, and a justification *Nov.* 2, *Quæ est eadem*, is well enough without a traverse, the day not being material; but it had been naught, if the day had been material. 1 *Lev.* 241.

If a trespass is alleged *Nov.* 10, and a justification *Nov.* 11, and there be an averment of *Quæ est eadem*, it is here held good without making any traverse. *Lutw.* 1457.

Where defendant justifies *dicto tempore* in the plaintiff's declaration, he hath no occasion to say *Quæ est eadem Transgressio*; because he agrees with plaintiff in the time and place mentioned in his declaration, and gives an answer to it. But in all these cases, pleading thus, *which is the said breaking and entering*, &c. whereof the plaintiff hath complained against the defendant, is the safest way. *Dict.* See title *Pleading*.

Quæ Plura, A writ which lay where an inquisition had been taken by an *Eschcator* of lands, &c. of which a man died seised, and all the land was supposed not to be found by the office or inquisition; this writ was therefore to inquire of *what more* lands or tenements the party died seised, *Reg. Orig.* 293: But it is now useless, since the taking away the Court of Wards and Offices *post mortem*, by *stat.* 12 *Car.* 2. *c.* 24.

QUÆRE, or *Querie*; A note for the reader to make further inquiry, where any point of Law, or matter of debate, is doubted, as not having sufficient authority to maintain it. 2 *Lil. Abr.* 406.

QUÆRENS NON INVENIT PLEGIUM; A return made by the Sheriff, on a writ directed to him with this clause, *viz. Si A. fecerit* B. *securum de clamore suo prosequendo*, &c. *F. N. B.* 38. See title *Original*.

QUÆ SERVITIA, See *Per quæ Servitia*.

QUÆSTA, An indulgence or remission of penance, exposed to sale by the *Pope*: The retailers thereof were called *Quæstionarii*, and desired charity for themselves or others. *Mat. Westm. anno* 1240.

QUÆSTUS, That which a man hath by purchase; as *hæreditas* is what he hath by descent. *Glanv. lib.* 7. *c.* 1. See *Purchase*; *Questus*.

QUAKERS, *Tremuli*.] From their pretending to tremble or *quake*, in the exercise of their religion. The *stat.* 7 & 8 *W.* 3. *c.* 27, enacts, That Quakers making and subscribing the declaration of fidelity mentioned in 1 *W.* & *M.* (now according to the *stat.* 8 *Geo.* 1. *c.* 6,) should not be liable to the penalties against others refusing to take the oaths; and not subscribing the declaration of fidelity, &c. they are disabled to vote at election of Members of Parliament.

Quakers, where an oath is required, are permitted to make a solemn affirmation or declaration, declaring, in the presence of God, the witness of the truth, &c. *stat.* 7 & 8 *W.* 3. *c.* 34, made perpetual by *stat.* 1 *Geo.* 1. *c.* 6. But they are not capable of being witnesses in a criminal cause, serving on Juries, or bearing any office in the Government, unless they are sworn like other Protestants.

On

On the affirmation of a Quaker, the Court will not grant an attachment for non-performance of an award. 1 *Strange* 441. Nor security for the peace. *Ibid.* 527 Nor a rule for an information. 2 *Strange* 856, 872, 946. But a rule to shew cause why an appointment of overseers should not be quashed, being served by a Quaker, was made absolute on his affirmation; this not being looked on as a criminal prosecution, though on the Crown side, and the rule in the King's name. 2 *Strange* 1219.

The *stat.* 8 *Geo.* 1. *c.* 6, authorizes the affirmation of Quakers with the words, *I do solemnly, sincerely, and truly declare and affirm*, &c. without saying in *the presence of Almighty God*; and by this statute, false and corrupt affirming incurs the penalties of wilful perjury.

By *stat.* 22 *Geo.* 2. *c.* 46. § 36, an affirmation shall be allowed in all cases (except criminal) where by any act of Parliament an oath is required, though no provision be therein for admitting a Quaker to make his affirmation. Quakers refusing to pay tithes, or church rates, Justices of Peace are to determine them, and order costs, *&c. Stats.* 7 *&* 8 *W.* 3. *c.* 34. § 4: 1 *Geo.* 1. *c.* 6. Quakers may be committed to prison for non-payment of tithes, on *stat.* 27 *H.* 8. *c.* 20, which is not repealed by 7 *&* 8 *W.* 3 which gives another remedy. 1 *Ld. Raym.* 323. See title *Tithes*.

A Quaker, who has served an apprenticeship of seven years, is entitled to be admitted to the freedom of a Corporation, as well as any other person: And his solemn affirmation is equivalent to taking the usual oaths: The clause of the *stat.* 7 *&* 8 *W.* 3. *c.* 34, which provides, that no Quaker, by virtue of that act, shall have any office or place of profit in the Government, does not extend to the freedom of a Corporation. *Carth.* 448: 1 *Ld. Raym.* 337: 3 *Mod.* 402.

QUALE JUS, A judicial writ, which was brought where a man of religion had judgment to recover land, before execution was made of the judgment; it went forth to the Escheator between judgment and execution, to inquire *what right* the religious person had to recover, or whether the judgment were obtained by collusion between the parties, to the intent that the lord might not be defrauded. *Reg. Judic.* 8, 16, 46. *Stats. Westm.* 2: 13 *C.* 1. *st.* 1. *c.* 32.

QUALIFIED, Is applied to a person enabled to hold two benefices. See *Plurality*.

QUALIFIED (or *Base*) FEE; Is such a one as hath a qualification subjoined thereto. See title *Estate*.

QUALIFIED PROPERTY; See *Possession*; *Property*.

QUAMDIU SE BENE GESSERIT, *As long as he shall behave himself well* in his office. A clause often inserted in letters patent of the grant of offices, as in those to the Barons of the Exchequer, *&c.* which must be intended in matters concerning their office; and is nothing but what the Law would have implied, if the office had been granted for life. 4 *Inst.* 117. See title *Judges*.

QUANTUM MERUIT, *So much as he deserved.*] An action on the case, express or implied, grounded on a promise to pay the plaintiff for doing any thing so much as he should deserve or merit.

If a man retains any person to do work or other thing for him; as a taylor to make a garment, a carrier to carry goods, *&c.* without any certain agreement; in such case, the Law implies that he shall pay for the same, as much as they are worth, and shall be reasonably demanded; for which *Quantum Meruit* may be brought: And if one sue another on a promise to satisfy him for work done, *&c.* he must shew and aver in his declaration how much he deserved for his work. See title *Pleading* I. 1.

QUANTUM VALEBAT, *So much as it was worth.*] Where goods and wares sold are delivered by a tradesman at no certain price, or to be paid for them as much as they are worth in general: then *Quantum valebat* lies, and the plaintiff is to aver them to be worth so much: so where the Law obliges one to furnish another with goods or provisions; as an innkeeper his guests, *&c.* See titles *Assumpsit*; *Pleading* I. 1.

QUARE CLAUSUM FREGIT. See titles *Capias*; *Common Pleas*.

QUARE CUM, Are general words used in original writs, *&c.* See *Original*.

QUARE EJECIT INFRA TERMINUM; A Writ which lieth by the ancient Law where the wrongdoer or ejector is not himself in possession of the lands, but another who claims under him. As where a man leaseth lands to another for years, and after, the lessor or reversioner entereth, and maketh a feoffment in fee or for life of the same lands to a stranger: Now the lessee cannot bring a writ of *Ejectione firmæ*, or ejectment, against the feoffee; because he did not eject him, but the reversioner: neither can he have any such action to recover his term against the reversioner who did oust him, because he is not now in possession. And upon that account this writ was devised upon the equity of *stat. Westm.* 2. *c.* 24, as in a case where no adequate remedy was already provided. *F. N. B.* 198. And the action is brought against the feoffee, for deforcing or keeping out the original lessee, during the continuance of his term; and herein, as in the ejectment, the plaintiff shall recover so much of the term as remains; and also shall have actual damages for that portion of it, whereof he has been unjustly deprived. 3 *Comm. c.* 11. *p.* 207.

Since the introduction of fictitious ousters, whereby the title may be tried against any tenant in possession, (by what means soever he acquired it,) and the subsequent recovery of damages, by action of trespass for mesne profits, this writ is fallen into disuse. See title *Ejectment*.

It is in the election of lessee, or, if he grants over his term, the second lessee, to sue a writ of *Ejectione firmæ*, or a *Quare ejecit infra Terminum* against the lessor, or his heir, or against the lord by escheat, *&c.* if they put the termor out of his term. 19 *Hen.* 6.

QUARE IMPEDIT.

A Writ lying for him who hath purchased an *advowson*, against a person who *hinders* or disturbs him in his right of advowson by presenting a Clerk thereto, when the church is void. *F N. B.* 32: *Stat. Westm.* 2. *c.* 5.

It differs from assise of *darrein presentment* (*ultimæ præsentationis*), because that lies where a man or his ancestors, under whom he claims, have formerly presented to the church; and this for him who is purchaser himself; but in both the plaintiff recovers the presentation and damages; though in the writ of *darrein presentment*, &c. he recovers only the presentation, not the title, to the advowson, as he doth in a *Quare impedit*; for which reason the remedy by that assise is discontinued: And where

a man

a man may have assise of *darrein presentment*, he may have *Quare impedit*. 2 *Inst*. 356. See title *Darrein Presentment*.

Upon the vacancy of a living, the Patron is bound to present within six calendar months, otherwise it will lapse to the Bishop. See title *Advowson* II. But if the presentation be made within that time, the Bishop is bound to admit and institute the Clerk, if found sufficient; unless the church be full, or there be notice of any litigation. For if any opposition be intended, it is usual for each party to enter a *caveat* with the Bishop, to prevent his institution of his antagonist's Clerk. An institution after a *caveat* entered is void by the Ecclesiastical Law; but this the Temporal Courts pay no regard to, and look upon a *caveat* as a mere nullity. But if two presentations be offered to the Bishop upon the same avoidance, the church is then said to become litigious; and, if nothing farther be done, the Bishop may suspend the admission of either, and suffer a lapse to incur. Yet if the Patron or Clerk on either side request him to award a *jus patronatûs*, he is bound to do it. This *jus patronatûs* is a commission from the Bishop, directed usually to his Chancellor, and others of competent learning; who are to summon a Jury of six Clergymen and six Laymen, to inquire into and examine who is the rightful Patron; (see title *Jus patronatûs*;) and if, upon such inquiry made and certificate thereof returned by the Commissioners, he admits and institutes the Clerk of that Patron whom they return as the true one, the Bishop secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the Temporal Courts. 3 *Comm. c*. 16.

The Clerk refused by the Bishop may also have a remedy against him in the Spiritual Court, denominated a *duplex querela*: which is a complaint in the nature of an appeal from the Ordinary to his next immediate superior; as from a Bishop to the Archbishop, or from an Archbishop to the Delegates; and if the Superior Court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant.

Thus far matters may go on in the mere ecclesiastical course: but in contested presentations they seldom go so far; for upon the first delay or refusal of the Bishop, to admit his Clerk, the Patron usually brings his writ of *Quare impedit* against the Bishop; for the temporal injury done to his property, in disturbing him in his presentation. And, if the delay arises from the Bishop alone, as upon pretence of incapacity, or the like, then he only is named in the writ; but if there be another presentation set up, then the pretended Patron and his Clerk are also joined in the action; or it may be brought against the Patron and Clerk, leaving out the Bishop; or against the Patron only. But it is most advisable to bring it against all three: for if the Bishop be left out, and the suit be not determined till the six months are past, the Bishop is entitled to present by lapse; for he is not party to the suit; but, if he be named, no lapse can possibly accrue till the right is determined. *Cro. Jac*. 93. If the Patron be left out, and the writ be brought only against the Bishop and the Clerk, the suit is of no effect, and the writ shall abate; for the right of the Patron is the principal question in the cause. *Hob*. 316: 7 *Rep*. 25. If the Clerk be left out, and has received institution before the action brought (as is sometimes the case), the Patron by this suit may recover his right of patronage, but not the present turn; for he cannot have judgment to remove the Clerk, unless he be made a defendant, and party to the suit, to hear what he can allege against it. For which reason it is the safer, and now usual, way to insert all three in the writ. See *Hob*. 320: *Jenk. Cent*. 200.

Quare impedit will not lie against the Ordinary and Incumbent, without naming the Patron; because at Common Law the Incumbent could not plead any thing which concerned the right of patronage, therefore it is unreasonable that he alone should be named in the writ who could not defend the patronage; but *stat*. 25 *Ed*. 3. *st*. 3. *c*. 7, enables him to plead against the King, and to defend his incumbency, although he claims nothing in the patronage; and by that statute he shall plead against any common person; though with this difference that when the inheritance of the Patron is to be divested by judgment in a *Quare impedit*, there he must be named in the writ; but where the next presentation only is to be recovered, he need not be named: yet where the King presents without a title, and his Clerk is inducted, the *Quare impedit* is to be against the Ordinary and Incumbent; for it will not lie against the King; but, if he is plaintiff, the writ may be brought against the Patron alone, without naming the Incumbent. 7 *Rep*. 25: *Cro. Jac*. 650: *Palm*. 306.

By the writ of *Quare impedit* a Patron may be relieved, not only on his presentation to a church, but to a chapel, prebend, vicarage, &c. And this writ lies of a donative; and the special matter is to be set forth in the declaration: It also lieth for a deanery by the King, although it be elective; and for an archdeaconry; but not for a mere office of the church. *Co. Litt*. 344: 1 *Leon*. 205. And the chapter may have a *Quare impedit* against the Dean, of their several possessions. 40 *Ed*. 3. 48.

If the *Quare impedit* be for a donative; the writ shall be *Quare impedit* to present to the donative; if of a parsonage, then *Quare impedit præsentare ad Ecclesiam*; if to a vicarage, *ad Vicariam*; if to a Prebend, *ad Prebendam*, &c. 3 *Nels. Abr*. 35.

If a Bishop be disturbed to collate, where he ought to make collation, he may have a writ *Quare impedit*, and the writ shall be *quod permittat ipsum præsentare*, &c. and he shall count on the collation; and if the King be disturbed in his collation by letters patent, he shall have *Quare impedit*, &c. *New Nat. Br*. 73.

Grantee of a next avoidance may bring this writ against the patron who granted the avoidance. 39 *Hen*. 6.

It may be brought by Executors, for a disturbance in *vitâ testatoris*; and executors, being disturbed in their presentation, may bring *Quare impedit* as well as their testator might. *Owen* 99: *Lutw*. 1.

Husband and wife jointly, or the husband alone without his wife, may have the writ *Quare impedit*; and if a man who hath an advowson in right of his wife be disturbed in his presentation, and dies, the wife shall bring it on that disturbance. 14 *Hen*. 4: 5 *Rep*. 97.

The heir shall not have *Quare impedit*, for a disturbance *tempore patris*; nor can he have execution on a recovery by the ancestor. *Br. Q. Imp. pl*. 7, 9. But by *stat*. 13 *Ed*. 1. *c*. 5, usurpation of churches during wardship, particular estates of vacancy, &c. shall not bar an heir at full age, reversioner in possession, or a spiritual person in succession, from having a writ possessory of *Quare impedit*, &c. as the ancestor or predecessor might have

have had, if such usurpation had been in their time: and the same form of pleading shall be had in *darrein presentment*, and *Quare impedit*.

Where partition is made on record, to present by turns, the coparcener who is disturbed shall not be put to a *Quare impedit*; but may have remedy on the roll, by *scire facias*: it is otherwise on an agreement to present. *Stat.* 22 *E.* 4. 8: See *stat.* 13 *E.* 1. *c.* 5. § 5.

If tenant in tail suffer an usurpation, and die, and six months pass, the issue in tail cannot bring *Quare impedit*: but at the next avoidance he may have it within the six months. 46 *Assise* 4.

As this writ is all in the possession; the presentment of a grantee of the next avoidance is a good title for the grantor and patron in fee to bring it; and likewise for his heir, and other grantees. 9 *Hen.* 7. 23: 5 *Rep.* 97.

The King cannot remove an Incumbent, presented, instituted, and inducted, although on a usurpation, but by *Quare impedit* in a judicial way. *Cro. Jac.* 385. See title *Advowson* III.

He who claims by a recovery, shall maintain a *Quare impedit*. *Stat.* 7 *H.* 8. *c.* 4.

The writ of *Quare impedit* must be brought in the county where the church is: It commands the disturbers, the Bishop, the Pseudo-patron, and his Clerk, to permit the plaintiff to present a proper person (without specifying the particular Clerk) to such a vacant church, which pertains to his patronage; and which the defendants, as he alleges, do obstruct; and unless they so do, then that they appear in Court to shew the reason why they hinder him. *F. N. B.* 32.

Immediately on the suing out of the *Quare impedit*, if the plaintiff suspects that the Bishop will admit the defendant's or any other Clerk, pending the suit, he may have a prohibitory writ, called a *Ne admittas*; which recites the contention begun in the King's Courts, and forbids the Bishop to admit any Clerk whatsoever till such contention be determined. See title *Ne admittas*.

In the proceedings upon a *Quare impedit*, the plaintiff must set out his title at length, and prove at least one presentation in himself, his ancestors, or those under whom he claims; (except in case of a church created by himself; see *post.*;) for he must recover by the strength of his own right, and not by the weakness of the defendant's. *Vaugh.* 7, 8: and he must also shew a disturbance before the action brought. *Hob.* 199: Upon this the Bishop and the Clerk usually disclaim all title, save only, the one as Ordinary, to admit and institute; and the other as presentee of the Patron, who is left to defend his own right. And, upon failure of the plaintiff in making out his own title, the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if the right be found for the plaintiff, on the trial, three farther points are also to be inquired: *First*, If the church be full; and, if full, then of whose presentation: for if it be of the defendant's presentation, then the clerk is removable by writ brought in due time. *Secondly*, Of what value the living is: and this in order to assess the damages which are directed to be given by the statute of *Westminster* 2, 13 *E.* 1. *c.* 5: see *post.* *Thirdly*, In case of plenarty upon an usurpation, whether six calendar months have passed between the avoidance and the time of bringing the action: for then it would not be within the statute, which permits an usurpation to be devested by a *Quare impedit*, brought *infra tempus semestre*. So that plenarty is still a sufficient bar in an action of *Quare impedit*, brought above six months after the vacancy happens; as it was universally by the Common Law, however early the action was commenced. 2 *Inst.* 361. See title *Advowson* III.

In the declaration of the plaintiff, it is not sufficient for him to allege, that he, or such a person from whom he claims, were seised of the advowson of the church, but he must allege a presentation made by one of them; for, if he doth not, the defendant may demur to the declaration: and the reason is, that the plaintiff, by joining the last presentation to his own title, is to make it appear, that he hath a right to present now as well as then. *Cro. Eliz.* 518: 5 *Rep.* 97: *Vaugh.* 57. But the want of such allegation may be cured by verdict. 2 *Stra.* 1006.

And if a man, by the King's licence, creates a church which shall be presentable, if he be disturbed to present to it, he may have a *Quare impedit* without alleging a presentation in any person: but anciently it was held he might not, because he could not allege a presentation. 20 *Ed.* 4. 14: *Mallory's Q. Imped.* 153.

The only plea the Bishop hath by the Common Law on a *Quare impedit* is, that he claimeth nothing but as Ordinary; he could not counterplead the Patron's title, or any thing to the right of patronage, nor could the Incumbent counterplead such title, till the *stat.* 25 *Ed.* 3. *st.* 3. *c.* 7; by which both Bishop and Incumbent may counterplead the title of the Patron; the one, when he collates by lapse, or makes title himself to the patronage; the other, being *persona impersonata*, may plead his Patron's title, and counterplead the title of the plaintiff. And it has been adjudged, that an Incumbent cannot plead to the title of the parsonage, without shewing that he is *persona impersonata* on the presentation of the Patron. *W. Jones* 4: *March.* 159.

Several were plaintiffs in a *Quare impedit*, the defendant pleaded the release of one of them pending the writ; and it was resolved, that this release shall only bar him who made it, and that the writ shall stand good for the rest. 5 *Rep.* 97.

In all *Quare impedits*, a defendant may traverse the presentation alleged by the plaintiff, if the matter of fact will bear it; but the defendant must not deny the presentation alleged, where there was a presentation. *Vaugh.* 16, 17. And if a presentation is alleged in the grantor and grantee, the presentation in the grantor is only traversable; for that is the principal. *Cro. Eliz.* 518.

Quare impedit was brought against two, one of them cast an essoin, and *idem dies datus est* to the other, &c. Then an attachment issued against them for not appearing at the day, and process continued to the *Grand Cape*; which being returned, and the parties not appearing, it was ruled that final judgment should be entered according to the *stat* 52 *H.* 3. *c.* 12. But on motion to discharge this rule, because the defendants were not summoned either on the attachment or grand distress, the summoners being only the feigned names of *John Doe* and *Richard Roe*, the judgment was set aside; for the design of the statute was to have process duly executed, and that must be with notice, &c. And where the right is for ever concluded, this being so fatal, the process must never be suffered to be a thing of course. 1 *Mod.* 248.

Where two defendants in a *Quare impedit* plead several bars, and one of them is found against the plaintiff, and the other with him; he shall not have his writ to the Bishop. And if there are many defendants pleading several pleas, the plaintiff shall not have judgment before all the pleas are tried: for though some be for the plaintiff, others may be found against him, and he cannot have judgment without a good title. *F. N. B.* 30: *Hob.* 70.

If it be found that the plaintiff hath the right, and hath commenced his action in due time, then he shall have judgment to recover the presentation; and, if the church be full by institution of any clerk, to remove him: unless it were filled, *pendente lite*, by lapse to the Ordinary, he not being party to the suit; in which case the plaintiff loses his presentation *pro hac vice*, but shall recover two years' full value of the church from the defendant, the pretended Patron, as a satisfaction for the turn lost by his disturbance; or in case of insolvency, the defendant shall be imprisoned for two years: and in other cases half a year's value, and half a year's imprisonment. *Stat. Westm.* 2. 13 *Ed.* 1. *c.* 5. § 3. But if the church remains still void at the end of the suit, then whichever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the Bishop *ad admittendum clericum*, reciting the judgment of the Court, and ordering him *to admit* and institute *the Clerk* of the prevailing party; and, if upon this order he does not admit him, the patron may sue the Bishop in a writ of *Quare non admisit*, and recover ample satisfaction in damages. *F. N. B.* 38, 47: 1 *Mod.* 254. See title *Quare non admisit*.

In a *Quare impedit*, though it was found that the church was full of another, who was a stranger to the writ, and it did not appear whether he came in by a better title than that which was found for the plaintiff; it was held, that the plaintiff might have a general writ to the Bishop, which he is bound by law to execute, or shall be amerced, &c. and he cannot return that the church is full of another; for no issue can be joined between the Bishop and the plaintiff, because he has no day in Court. 6 *Rep.* 51: 3 *Leon.* 136: See *ante* and *post*.

But where the plaintiff recovered an advowson in ejectment, and thereupon had a writ to the Bishop, there being another Incumbent in the church, who was not a party to the action; adjudged, that this writ would not lie without a *scire facias* to the Incumbent. *Sid.* 93.

If it appears in *Quare impedit*, either in pleading, or by confession of the parties, that neither of them have a title, but that it is in the King; the Court may award a writ to the Bishop for the King, to remove the Incumbent, and admit *idoneam personam ad præsentationem regis*; but this must be when his title is very plain. *Hob.* 126, 163: 1 *Leon.* 323.

In *Quare impedit*, the plaintiff and defendant are both actors; so that the defendant may have a writ to the Bishop, as well as the plaintiff; but not without a title appearing to the Court; wherefore, if the defendant never appears, the plaintiff must make out a title for form sake, and so must the defendant, if the plaintiff be nonsuited. *Hob.* 163.

If the plaintiff, after appearance, in a *Quare impedit* be nonsuited, it is peremptory; because the defendant on title made, whereby he becomes actor, shall have a writ to the Bishop: and it is the same in case of a Discontinuance. 7 *Rep.* 27.

It is the nature of a *Quare impedit* to be final, either on a discontinuance or nonsuit; and a man cannot have two suits for the same thing in this case against one person, though he may have several *Quare impedits* against several persons. 7 *Rep.* 27: *Hob.* 137.

The Parson, Patron, and Ordinary are sued; the Ordinary disclaims, and the Parson loseth by default; the plaintiff shall have judgment to recover his presentation, and a writ shall issue to the Bishop, &c. with a *cesset executio*, until the plea is determined between the plaintiff and Patron. *Vaughan* 6.

In a *Quare impedit* against the Archbishop, the Bishop, and three defendants: the Archbishop pleaded that he claimed nothing but as Metropolitan; and the Bishop pleaded that he claimed nothing but as Ordinary; and the defendants made title; but there was a verdict against them: It was a question, whether the writ of execution should be awarded to the Archbishop, or the Bishop; and it was held, that where neither of them are parties in interest, it may be directed to either; but if the Bishop is party in interest, it must be directed to the Archbishop. 6 *Rep.* 48: 3 *Bulst.* 174. And if the Archbishop of *Canterbury* be plaintiff in a *Quare impedit*, the writ must be directed to the Archbishop of *York*. *Show.* 329.

If a defendant pleads *Ne disturba*, (that he did not disturb,) which is, in effect, the general issue in a *Quare impedit*, this will be only a defence of the wrong with which he stands charged, and is so far from controverting the plaintiff's title, that the plea, as it were, confesses it; and the plaintiff may presently pray a writ to the Bishop, or maintain the disturbance in order to recover damages. *Hob.* 163.

There must be a disturbance to maintain this action: In a *Quare impedit*, the Patron declared on a disturbance of him to present 1 *November*; the Incumbent pleaded, that 1 *May* next after, the presentation devolved on the Queen by lapse, and she presented him to the church, &c. And on demurrer the plea was held ill; because the defendant had not confessed and avoided, nor traversed the disturbance set forth in the declaration: and though by the demurrer the Queen's title was confessed, it appearing that it was already executed, and the defendant having lost his incumbency by ill pleading, the writ shall not be awarded to the Bishop for the Queen to present again, but for the Patron. 1 *Leon.* 194.

The Courts at *Westminster* are very cautious not to abate the writ of *Quare impedit*, for any want of form, &c. yet if the Bishop against whom the writ is brought, or any of the defendants are misnamed, it is good cause of abatement: if the Patron be not named in the writ, it may be pleaded in abatement; though death of the Patron, pending the writ, doth not abate it, if the *Quare impedit* is brought against the Bishop, Patron, and Incumbent: and if the Incumbent dies, pending the writ, and a disturber present again, and die, *Quare impedit* would lie on the first disturbance by Journies Accounts; but the first writ is abated by the plaintiff's death; also if the plaintiff bring a new writ within fifteen days after the abatement, that shall be a continuance of the first writ, and prevent the defendant taking any advantage: but if the writ abate for any fault in the declaration, the defendant shall have a writ to the Bishop to admit his Clerk; so, if judgment is given on demurrer, &c. *Cro. Eliz.* 324: *Cro. Car.* 651: 7 *Rep.* 57: *Dyer* 240.

In a plea of *Quare impedit*, days are given from 15 to 16, or from three weeks to three weeks, according to the distance of place: and if the disturber come not in on the great distress, a writ is to be sent to the Bishop, that he claim not, to the prejudice of the plaintiff, for that time; and, on recovery, judgment is to be given to the party to recover the presentation and advowson. *Stat.* 52 *Hen.* 3. *c.* 12: 2 *Roll. Abr.* 377.

Though damages are given by *stat. Westm.* 2. *c.* 5, they shall not be had against the Bishop, where he claims nothing but as Ordinary, and is no disturber. 3 *Lev.* 59. Before this statute no damages were allowed on a *Quare impedit*; and the King hath none at this day; for although he declares *ad damnum*, &c. he is not within that statute; because by his prerogative he cannot lose his presentation. 6 *Rep.* 52. If the plaintiff hath a verdict, and the church is found vacant, the patron may have the fruits of his presentation, and so not be entitled to damages; in which case, a *remittitur de damnis* is entered. 3 *Lev.* 59.

The points to be inquired of, where the Jury find for the plaintiff, &c. are, of whom, and on whose presentation, the church is full; how long since it was void; the yearly value of the church, &c. which being found, damages are to be given accordingly. 6 *Rep.* 51. See *ante*.

No costs are recoverable in *Quare impedit*, because of the great damages given by the statute of *Westm.* 2. *c.* 5.

Where judgment is given to have a writ to the Bishop in *Quare impedit*; it shall not be reversed on writ of error brought on the whole judgment, though the judgment by the statute for damages be erroneous and reversed. 5 *Rep.* 58, 59.

When one recovers in a *Quare impedit* against an Incumbent, the Incumbent is so removed by judgment, that the recoverer may present without any thing farther; but the Incumbent continues Incumbent *de facto*, till such presentation is made: and if the plaintiff in this suit be instituted on a writ to the Bishop, the defendant cannot appeal; if he doth, a Prohibition lies; because in this case, the Bishop acts as the King's Minister, not as a Judge. 2 *Roll. Abr.* 365: 1 *Roll. Rep.* 62.

In a writ of *Quare impedit*, which is almost the only real action that remains in common use, and also in the assise of *darrein presentment*, and writ of right of advowson, (see title *Writ of Right*,) the Patron only, and not the Clerk, is allowed to sue the disturber. But, by virtue of several acts of Parliament, there is one species of presentations, in which a remedy, to be sued in the Temporal Courts, is put into the hands of the clerks presented, as well as of the owners of the advowson; *viz.* the presentation to such benefices as belong to Roman-Catholic Patrons; which, according to their several counties, are vested in and secured to the two Universities of this kingdom. See *stats.* 3 *Jac.* 1. *c.* 5: 1 *W.* & *M. st.* 1. *c.* 26: 12 *Ann. st.* 2. *c.* 14: 11 *Geo.* 2. *c.* 17. By the statute of 12 *Ann. st.* 2. *c.* 14. § 4, particularly, a new method of proceeding is provided; *viz.* that, besides the writs of *Quare impedit*, which the Universities as Patrons are entitled to bring, they, or their Clerks, may be at liberty to file a bill in equity against any person presenting to such living, and disturbing their right of Patronage, or his *cestuy que trust*, or any other person whom they have cause to suspect: in order to compel a discovery of any secret trusts, for the benefit of Papists, in evasion of those laws whereby this right of advowson is vested in those learned bodies. And also (by *stat.* 11 *Geo* 2. *c.* 17.) to compel a discovery whether any grant or conveyance, said to be made of such advowson, were made *bona fide* to a Protestant purchaser, for the benefit of Protestants, and for a full consideration; without which requisites every such grant and conveyance of any advowson or avoidance is absolutely null and void. This is a particular law, and calculated for a particular purpose: but in no instance except this does the Common Law permit the Clerk himself to interfere in recovering a presentation, of which he is afterwards to have the advantage. For, besides that he has no temporal right in him till after institution and induction, this exclusion of the Clerk from being plaintiff seems also to arise from the very great honour and regard which the Law pays to his sacred function. See 3 *Comm. c.* 16; and further, titles *Advowson*; *Juris Utrum*; *Papists*, &c.

QUARE INCUMBRAVIT; A Writ which lieth against the Bishop, who, within six months after the vacation of a benefice, confers it on his Clerk, whilst two others are contending at law, for the right of presentation; to shew *why he hath incumbered* the church. *Reg. Orig.* 32. See title *Quare impedit*.

Or it is a writ brought, after a recovery in *Quare impedit*, or assise of *darrein presentment*, against the Bishop who thus admits a Clerk, notwithstanding the writ *Ne admittas* served on him: for if the Bishop incumber the church before a *Ne admittas* issued, then, the party shall have a *Quare impedit*; as the Ordinary can have no notice till the *Ne admittas. F. N. B.* 32, 33. See *Ne admittas*.

If a man hath a writ of right of advowson depending between him and another, and the church is void pendant the writ, the plaintiff shall not have a *Quare incumbravit* or *Ne admittas*, although the Bishop incumber the church; because the plaintiff shall not recover the presentation on this writ, but the advowson: and where he hath title to present he may do it; and have *Quare impedit*, if he be disturbed. *New Nat. Br.* 108, 109.

If the Bishop delay the true Patron in his presentation, and the Patron sue a *Quare impedit*, he may thereupon have a *Ne admittas*; and if the Bishop, after receipt of such writ, admit the Clerk of any other person without a verdict in a *jus patronatûs*, the true Patron shall have a *Quare incumbravit* against the Bishop, and thereby recover the presentation with damages. See title *Quare impedit*.

Also a writ is to be directed to the Bishop to disincumber the church. *F. N. B.* 37.

This writ may be brought after the six months; and if a plaintiff be nonsuit in a *Quare incumbravit*, he may have another writ, and vary from his first declaration, &c. *F. N. B.* 48.

After a *Ne admittas* delivered, if the six months pass, the Bishop may present his Clerk for lapse, and shall not be charged by the writ of *Quare incumbravit* for the presentation; but he cannot admit the Clerk of the other man, for that would be against the writ *Ne admittas* delivered to him. *F. N. B.* 48. But to prevent this he is usually made a defendant in the *Quare impedit*.

If the Bishop incumber the church, where there is no dispute about it, yet this writ *Quare incumbravit* lies; but according to the best opinions there ought to be a suit depending, though there is no actual recovery. 18 *E.* 3. 17: *Fitz. Q. Imped.* 3.

QUARE NON ADMISIT, A writ which lies against a Bishop where a man hath recovered his advowson, or presentation, in a writ of right of advowson, or in *Quare impedit*, or other action, and the Bishop refuses to admit his Clerk, on pretence of lapse, &c. See title *Quare impedit*.

It is requisite in the writ to mention the recovery; and it is to be brought in the county where the refusal was. *F. N. B.* 47: 7 *Rep.*: *Dyer* 40.

In a *Quare non admisit* the plaintiff shall recover damages: and if the plaintiff have judgment in a *Quare impedit* and a writ is awarded to the Bishop; if on this writ the Bishop makes a false return, the plaintiff may have *Quare non admisit* against him, and have his damages. *Dyer* 260.

King *Edw.* I. presented his Clerk to a benefice in *Yorkshire*, and the Archbishop of that province refused to admit him; on which the King brought a *Quare non admisit*, and the Archbishop pleaded that the Pope had a long time before provided for that church, as one having supreme authority; in that case, therefore he could not admit the King's Clerk. It was adjudged, that for his contempt to execute the King's writ, the Archbishopric should be seised, &c. 5 *Rep.* 12 See title *Præmunire*.

If the Bishop refuse the King's presentee, and afterwards admit him, yet the King shall have *Quare non admisit* for the refusal; and so it is presumed may a common person. *New Nat. Br.* 106.

QUARE NON PERMITTIT, An antient Writ which lay for one who had a right to present to a church for a turn, against the proprietary. *Fleta*, *l.* 5. *c.* 6.

QUARENTINE; QUARENTAINE; *Quarentina*.] A benefit allowed by Law to the widow of a man dying seised of lands, whereby she may challenge to continue in his capital messuage or chief mansion-house, (not being a castle,) by the space of *forty days* after his decease in order to the assignment of her dower, &c. And if the heir, or any other, eject her, she may bring the writ *de quarentinâ habendâ*; but the widow shall not have meat, drink, &c. though if there be no provision in the house, according to *Fitzherbert*, she may kill things for her provision. See *Magna Charta*, *cap.* 7: *Bract. lib.* 2. *cap.* 40: *F. N. B.* 161: and this Dictionary, title *Dower* III.

QUARENTINE. The term of forty days, during which, the persons coming from foreign parts, infected with the plague, are not permitted to land or come on shore.

To this Head may be referred the provisions of our Laws against the *Plague*: an evil which, by the blessing of Providence, has not been inflicted on this kingdom for more than a century past. The *stat.* 1 *Jac.* 1. *c.* 31, still remains in force; and enables the Mayor, Justices, and Head-officers of the place infected, to make a rate for the relief of the unhappy sufferers, and to effect such regulations as shall be necessary to prevent the infection from spreading: and by that statute it is enacted, that if any person infected with the plague, or dwelling in any infected house, be commanded by the officer to keep his house, and shall disobey, he may be enforced, by the watchmen appointed, to obey such necessary command; and if any hurt ensue by such enforcement, the watchmen are indemnified. And if such person, so commanded to confine himself, goes abroad and converses in company, if he has no plague-sore upon him, he shall be punished as a vagabond, by whipping, and be bound to his good behaviour; but if he has any infectious sore upon him uncured, he shall be guilty of Felony.

To prevent the introduction of this dreadful malady from foreign parts, ships coming from infected countries are to perform a Quarentine; according to the directions of *stat.* 26 *Geo.* 2. *c.* 6, explained by *stat.* 29 *Geo.* 2. *c.* 8, and further enforced by *stat.* 28 *Geo.* 3. *c.* 34 See also *stat.* 12 *Geo.* 3 *c.* 57, as to building Lazarettos. It seems that the provisions of *stat.* 9 *Ann.* *c.* 2, are not now in force; but it is remarkable that neither *Burn's Justice*, nor any similar publication, are sufficiently accurate in their statements on this subject.

By the general provisions of these acts, the method of performing Quarentine, or 40 days' probation, by ships from foreign parts, is put in a much more regular and effectual order than formerly: and masters of ships arriving from infected places, and disobeying the directions given, having the plague on board and concealing it, and in certain other circumstances, are guilty of felony without clergy Penalties, (even to felony in some cases,) are imposed on persons escaping from the lazarettos or places wherein Quarentine is to be performed: on officers and watchmen neglecting their duty; and persons conveying goods or letters from ships performing Quarentine. A penalty of 50*l.* is imposed on the Captain quitting the ship, or permitting any person to quit it; and 200*l.* and six months' imprisonment on any other person quitting it.

If a pilot quits the ship, contrary to an order of the King in Council, though perhaps he is liable to the last-mentioned penalty, yet under the first clause of *stat.* 26 *Geo.* 2. *c.* 6, which contains a general prohibition, without any particular penalty, he may be indicted for a misdemeanor, and punished at the discretion of the Court. 4 *Term Rep.* 206.

QUARENTINE, likewise signifies a quantity of ground, containing forty perches. *Leg Hen.* 1. *c.* 16.

QUARE OBSTRUXIT. A Writ which lay for him who, having a liberty to pass through his neighbour's ground, could not enjoy his right, because the owner had so obstructed it. *Fleta*, *lib.* 4. *c.* 26.

QUARREL, *Querela*; *à querendo*.] Extends not only to actions personal, but also to mixt; and the plaintiff in them is called *Querens*, and in most of the writs it is said *Queritur*; so that, if a man release all Quarrels, (a man's deed being taken most strongly against himself,) yet it is as beneficial as all *actions*, for by it all actions real and personal are released. 8 *Co.* 153: 1 *Inst.* *c.* 8. § 511. See title *Release*.

QUARRELLING IN CHURCH OR CHURCHYARD. All affrays in a church, or churchyard, are esteemed very heinous offences, as being indignities to Him to whose service those places are consecrated; therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by *stat.* 5 & 6 *Ed.* 6. *c.* 4, that if any person shall, by words only, quarrel, chide, or brawl in a church or churchyard, the Ordinary shall suspend him, if a Layman, *ab ingressu ecclesiæ*; and, if a Clerk in orders, from the ministration of his office during pleasure. And, if

any person in such church or churchyard proceed to smite or lay violent hands on another, he shall be excommunicated *ipso facto*; or if he strike him with a weapon, or draw any weapon with intent to strike, he shall, besides excommunication, (being convicted by a Jury,) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. 4 *Comm.*

QUARTELOIS. Upper garments with coats of arms quartered on them, the old habit of *English* knights. *Walsing. in vit. Ed.* 2.

QUARTERISARI. To be *quartered*, or cut into four *quarters* in execution. *Artic. Richardi Scrope Archiep. Ebor. apud Angl. Sacr. par* 2. 266: *Quarterization* is part of the punishment and execution of a *traitor*, by dividing his body into four quarters. See title *Treason.*

QUARTER SESSIONS, *Of the Peace.* A general Court held by two Justices of the Peace, one of which must be of the *Quorum*, in every county, once every quarter of a year; originally erected only for matters touching the breach of the Peace, but now its power is greatly increased, and extends much farther by many statutes.

The holding these Sessions quarterly was first ordained by *stat.* 25 *Ed.* 3. *stat.* 1. *c.* 8; and the particular times appointed by *stat.* 36 *Ed.* 3. *c* 12.

By *stat.* 12 *R.* 2. *c* 10, Justices are to hold their Sessions every quarter of the year at least: And by *stat.* 2 *Hen.* 5 *c* 4, this Court is appointed to be in the first week after *Michaelmas* day; the first week after the *Epiphany*; the first week after the close of *Easter*; and in the week after the translation of Saint *Thomas à Becket*, or the seventh of *July* See title *Sessions of the Peace.*

QUARTO DIE POST, The *fourth day* inclusive *after* the return of the writ; and if the defendant makes his appearance on this day, it is sufficient. See titles *Practice*; *Term.*

QUASH, *Quassare*: Fr. *quasser*; Lat. *cassum facere*] To overthrow or annul. *Bracton, lib* 5. *tract.* 2 *c* 3. *nu.* 4. If the Bailiff of a liberty return any out of his franchise, the array shall be quashed. An array returned by one who hath no franchise shall be quashed. 1 *Inst.* 156.

The Court of *B R.* hath power to quash orders of Sessions, Presentments, Indictments, &c. Though this quashing is by favour of the Court, and the Court may leave the party to take advantage of the insufficiency by pleading; as they generally do where an indictment is for an offence very prejudicial to the Commonwealth; as for perjury, &c. 2 *Lil. Abr.* 410. See further, titles *Indictment*; *Information*, &c.

QUAYS; See *Ports.*

QUEEN, Lat. *Regina*; Sax. *Cwen*, i. e. *Uxor*, a wife; *propter excellentiam*, the *wife* of the *King.*] The Queen of *England* is either Queen *Regent*, Queen *Consort*, or Queen *Dowager*. The Queen *Regent*, *Regnant*, or *Sovereign*, is she who holds the Crown in her own right; as the first (and perhaps the second) Queen *Mary*, Queen *Elizabeth*, and Queen *Anne*; and such a one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a King. This is expressly declared by *stat.* 1 *Mar. st.* 3. *c* 1; See title *King.* But the Queen *Consort* is the wife of the reigning King; and she, by virtue of her marriage, is participant of divers prerogatives above other women. *Finch. L.* 86.

She is a public person, exempt and distinct from the King; and not, like other married women, so closely connected as to have lost all legal or separate existence, so long as the marriage continues. For the Queen is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and do other acts of ownership, without the concurrence of her lord; which no other married woman can do. 4 *Rep.* 23. She is also capable of taking a grant from the King, which no other wife is from her husband. The Queen of *England* hath separate Courts and Officers, distinct from the King's, not only in matters of ceremony, but even of law; and her Attorney and Solicitor-General are entitled to a place within the bar of his Majesty's Courts, together with the King's Counsel. See title *Precedence.* She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short, she is in all legal proceedings looked upon as a feme sole, and not as a feme covert; as a single, not as a married woman. *Finch L.* 86: *Co. Lit.* 133. For which the reason given is this: Because the wisdom of the Common Law would not have the King (whose continual care and study is for the public, and *circa ardua regni*) to be troubled and disquieted on account of his wife's domestic affairs; and therefore it vests in the Queen a power of transacting her own concerns, without the intervention of the King, as if she was an unmarried woman. 1 *Comm. c.* 4.

The Queen *Consort* is of ability, without the King, to purchase, grant, and make leases; and may sue and be sued alone, in her own name only, by *præcipe*, not by petition: She may have in herself the possession of personal things during her life, &c. But both her real and personal estate goes to the King after her death: If she doth not in her lifetime dispose of them, or devise them by will. *Co. Lit.* 3, 31, 133: *Finch.* 86: 1 *Roll. Abr.* 912.

Acts of Parliament relating to her, need not be pleaded; for the Court must take notice of them, because she is a public person. 8 *Rep.* 28.

If a tenant of the Queen aliens a part of his tenancy to one, and another part to another; the Queen may distrain in any one part for the whole, as the King may do. *Wood's Inst* 22. And in a *Quare impedit* brought by the Queen, some say that plenarty is no plea; but see 2 *Inst.* 361.

By *stat.* 2 *Geo.* 2. *c.* 27, the Queen was constituted Regent of the kingdom, during the King's absence abroad; to be capable of the office, without taking the oaths, or doing any act required by Law to qualify any other.

The Queen hath also many exemptions, and minute prerogatives. For instance: she pays no toll; *Co. Lit.* 133; nor is she liable to any amercement in any Court. *Finch. L.* 185. But in general, unless where the Law has expressly declared her exempted, she is upon the same footing with other Subjects; being to all intents and purposes the King's Subject, and not his equal.

The Queen hath also some pecuniary advantages, which heretofore formed her a distinct revenue: As, in the first place she is entitled to an ancient perquisite called *Queen-gold*; (*aurum reginæ*;) which is a Royal revenue, belonging to every Queen *Consort* during her marriage with the King, and due from every person who hath

hath made a voluntary offering or fine to the King, amounting to ten marks or upwards, for and in consideration of any privileges, grants, licences, pardons, or other matter of Royal favour conferred upon him by the King: And it is due in the proportion of one tenth part more, over and above the entire offering or fine made to the King; and becomes an actual debt of record to the Queen's Majesty by the mere recording of the fine. *Pryn. Aur. Reg.* 2. As, if an hundred marks of silver be given to the King for liberty to take in mortmain, or to have a fair, market, park, chase, or free-warren: There the Queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of Queen-gold, or *aurum reginæ*. 12 *Rep.* 21: 4 *Inst.* 358. But no such payment is due for any aids or subsidies granted to the King in Parliament or convocation; nor for fines imposed by Courts on offenders, against their will; nor for voluntary presents to the King, without any consideration moving from him to the Subject; nor for any sale or contract whereby the present revenues or possessions of the Crown are granted away or diminished. *Pryn.* 6.

The original revenue of our ancient Queens, before and soon after the Conquest, seems to have consisted in certain reservations or rents, out of the demesne lands of the Crown, which were expressly appropriated to her Majesty, distinct from the King. It is frequent in Domesday-book, after specifying the rent due to the Crown, to add likewise the quantity of gold or other renders reserved to the Queen. These were frequently appropriated to particular purposes; to buy wool for her Majesty's use, to purchase oil for her lamps, or to furnish her attire from head to foot, which was frequently very costly, as one single robe in the fifth year of *Henry* II. stood the city of *London* in upwards of fourscore pounds. And, for a farther addition to her income, this duty of *Queen-gold* is supposed to have been originally granted; those matters of grace and favour, out of which it arose, being frequently obtained from the Crown by the powerful intercession of the Queen. There are traces of its payment, though obscure ones, in the book of Domesday, and in the great Pipe-roll of *Henry* I. In the reign of *Henry* II. the manner of collecting it appears to have been well understood; and it forms a distinct head in the antient dialogue of the Exchequer written in the time of that Prince, and usually attributed to *Gervase* of *Tilbury*. From that time downwards it was regularly claimed and enjoyed by all the Queen *Consorts* of *England* till the death of *Henry* VIII; though after the accession of the *Tudor* family the collecting of it seems to have been much neglected: And, there being no Queen *Consort* afterwards till the accession of *James* I., a period of near sixty years, its very nature and quantity became then a matter of doubt; and, being referred by the King to the Chief Justices and Chief Baron, their report of it was so very unfavourable, that his *consort* Queen *Anne* (though she claimed it) yet never thought proper to exact it. In 1635, 11 *Car.* I., a time fertile of expedients for raising money upon dormant precedents in our old records, the King, at the petition of his Queen *Henrietta Maria*, issued out his writ for levying it; but afterwards purchased it of his *Consort* at the price of ten thousand pounds; finding it, perhaps, too trifling and troublesome to levy. 19 *Rym. Fæd.* 721. And when afterwards, at the Restoration, by the abolition of the military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Mr. *Prynne*, by a treatise which does honour to his abilities as an antiquary, endeavour to excite Queen *Catherine* to revive this claim.

Another antient perquisite belonging to the Queen *Consort*, mentioned by all our old writers, and therefore only worthy notice, is this; that on the taking of a whale on the coasts, which is a Royal fish, it shall be divided between the King and Queen; the head only being the King's property, and the tail of it the Queen's. The reason of this whimsical division, as assigned by our antient records, was to furnish the Queen's wardrobe with whalebone. *Bracton, l.* 3. *c.* 3: *Britton, c.* 17: *Flet. l.* 1. *c.* 45 & 46: *Pryn. Aur. Reg.* 127. It is remarked by Mr. *Christian*, that the reason is more whimsical than the division, as the whalebone lies entirely in the *head*; which is the King's property.

The Revenue of our Queens, after the death of the King, is settled from time to time by statute: at present it is 100,000*l.* And by various statutes the King is enabled to make grants for her benefit. See *stats.* 2 *Geo.* 3. *c.* 1; 15 *Geo.* 3. *c.* 53, as to *Buckingham House*, now called *The Queen's Palace*, and settled on her in lieu of *Somerset House*.

Though the Queen is in all respects a Subject, yet, in point of the security of her life and person, she is put on the same footing with the King. It is equally treason (by the *stat.* 25 *Edw.* 3,) to compass or imagine the death of our Lady the King's companion, as of the King himself: And to violate, or defile the Queen *Consort*, amounts to the same high crime; as well in the person committing the fact, as in the Queen herself, if consenting. If however the Queen be accused of any species of treason, she shall (whether *Consort* or *Dowager*) be tried by the Peers of Parliament, as Queen *Ann Boleyn* was in 28 *Hen.* 8.

The husband of a Queen *Regnant*, as Prince *George* of *Denmark* was to Queen *Anne*, is her Subject; and may be guilty of High Treason against her: But, in the instance of conjugal infidelity, he is not subjected to the same penal restrictions.

A *Queen Dowager* is the widow of the King, and as such enjoys most of the privileges belonging to her as Queen *Consort*. But it is not High Treason to conspire her death; or to violate her chastity, because the succession to the Crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a Queen *Dowager* without special licence from the King, on pain of forfeiting his lands and goods. This, *Coke* says, was enacted in Parliament in 6 *Hen.* VI., though the statute be not in print. See 2 *Inst.* 18: *Riley's Plac. Parl.* 72: 1 *Inst.* 133. *in n.* The statute is variously cited in these places, as, 8 *H.* 6. *No.* 7: 6 *H.* 6. *No.* 41: and 2 *H.* 6. The Queen *Dowager*, though an alien born, shall still be entitled to dower after the King's demise, which no other alien is. *Co. Lit.* 31. A Queen *Dowager*, when married again to a Subject, doth not lose her regal dignity, as Peeresses *dowager* do their Peerage when they marry Commoners. For *Catherine*, Queen *Dowager* of *Henry* V, though she married a private gentleman, *Owen ap Meredith ap Theodore*, commonly called *Owen Tudor*, yet, by the name of *Catherine* Queen of *England*, maintained an action

action against the Bishop of *Carlisle*: And so the Queen *Dowager* of *Navarre*, marrying with *Edmond* Earl of *Lancaster*, brother to King *Edward* I., maintained an action of dower after the death of her second husband, by the name of Queen of *Navarre* 2 *Inst.* 50.

QUEEN-GOLD, *Aurum Reginæ.*] See title *Queen.*

QUE ESTATE, *Which Estate.*] A plea, where a man entitling another to land, *&c.* saith that the same estate such other had, he has from him: As, for example, in a *Quare impedit*, the plaintiff alleges that two persons were seised of lands, whereunto the advowson in question was appendant in fee, and did present to the church, and afterwards the church was void: *Which Estate* of the two persons he hath now, by virtue whereof he presented, *&c.* *Broke* 175: *Co. Lit* 121.

A man cannot plead a *Que Estate* in an estate tail, nor can it be pleaded in estates for life, or for years; a *Que Estate* of a term may not be pleaded, by reason a term cannot be gained by disseisin, as a fee may; but one may plead a *Que Estate* in a term in another person, under whom he doth not claim, and be good; for he is not privy to the estate of the stranger, to know his title. 1 *Rep.* 46: 1 *Lev* 190: 3 *Lev.* 19: *Lutw.* 81.

A thing which lies in grant, cannot be claimed by a *Que Estate*, directly by itself; yet it may be claimed as appurtenant to a manor, by *Que Estate* in the manor. 1 *Mod.* 232.

A man may not prescribe by a *Que Estate* of a rent, advowson, or toll; but he may of a manor, *&c.* to which these are appendant. 2 *Mod.* 144: 3 *Mod.* 52.

A person cannot plead a *Que Estate*, without shewing the deed how he came by it. *Cro. Jac.* 673. This is in case of a rent in gross, or lands, which cannot pass from one man to another without deed. *Jenk. Cent.* 26. See this Dictionary, title *Prescription.*

QUE EST EADEM; } See *Quæ est eadem*, &c.
QUE EST LE MESME; }

QUEM REDDITUM REDDAT. A judicial Writ which lies for him to whom a rent-seck or rent-charge is granted, by fine levied in the King's Court, against the tenant of the land who refuseth to attorn to him, thereby to cause him to attorn. *Old Nat. Brev* 126: *West. Symbol. par.* 2. tit. *Fines*, § 156.

QUERELA. An action preferred in any Court of Justice, in which the plaintiff was *querens* or complainant, and his brief complaint or declaration was called *Querela*, whence our *Quarrel* against any person.

Quietus esse à Querelis was to be exempted from the customary fees paid to the King or Lord of a Court, for the purchase of liberty to prefer such an action. But more usually to be exempted from fines and amercements imposed for common trespasses and faults. *Paroch An tiquit.* 123. See *Kennet's Glossary*; and *ante*, tit. *Quarrel.*

QUERELA, CORAM REGE ET CONSILIO DISCUTIENDA ET TERMINANDA; A Writ whereby one is called to justify a complaint of trespass made to the King himself, before the King and Council. *Reg. Orig.* 124.

QUERELA FRESCÆ FORTIÆ; See *Fresh Force.*

QUEST, *Questa.*] Inquest; inquisition or inquiry on the oaths of an impannelled Jury. *Cowel.* See *Inquest.*

QUESTION, or *Torture*; See title *Mute.*

QUESTMEN; See title *Churchwardens.*

QUESTUS EST NOBIS, The form of a writ of *Nusance*, which by the equity of the *stat.* 13 *Ed.* 1. *c.* 24. lay against him to whom the house or other thing which occasions the nusance, is alienated; whereas, before the statute, this action lay only against him who first levied the thing to the annoyance of his neighbour *Cowell.*

QUIA DOMINUS REMISIT CURIAM; See title *Writ of Right.*

QUIA EMPTORES, Statute of; The *stat. Westm.* 3. 18 *E.* 1. *st.* 1, is so called from the introductory words. See titles *Statute*; *Tenures*; *Manor*, &c.

QUIA IMPROVIDE, A *Supersedeas* granted in behalf of a Clerk of the Chancery, sued against the privilege of that Court in the Common Pleas, and pursued to the *exigent.* So in many other cases where a writ is erroneously or *improvidently* sued. See *Dyer* 33. *n.* 18.

QUICK WITH CHILD; See *Execution of Criminals.*

QUICK-SETS, Damage sustained by destroying, burning, or defacing them, shall be compensated for by the inhabitants of the place, in the same manner as for dikes, *&c.* overthrown in the night. *Stat.* 13 *Ed.* 1. *st.* 1. *c.* 46. See title MISCHIEF, *Malicious.*

QUID JURIS CLAMAT, A judicial Writ issuing out of the record of the *fine*, which remaineth with the *Custos Brevium* of the Common Pleas, before it be engrossed; and it lies for the grantee of a reversion or remainder, when the particular tenant will not attorn. *West. Symbol part* 2. tit *Fines*, § 118: *Reg. Judic.* 36, 571 See 18 *Vin Abr.* 143.

After the fine is engrossed, the cognisee shall not have a *Quid juris clamat* against tenant for life: But the course is, when he in reversion, on the writ of covenant sued against him, maketh recognisance of the reversion by fine, *&c.* then on that the cognisee may have this writ against tenant for life; and if he be sick or not able to travel, a *dedimus potestatem* shall be granted to take his cognisance, and to certify the same into *C B.* When, after plea pleaded, the tenant may make Attorney; and if he be adjudged to attorn, a *distringas ad atternandum* shall be awarded against him, *&c.* *New Nat. Br.* 328. This writ seems to be obsolete and disused, since the *stat.* 4 *&* 5 *Ann. c.* 16. § 9, 10. See title *Attornment.*

QUID PRO QUO, The mutual consideration and performance of both parties to a contract. *Kitch.* 184 And as this is the consideration of a good and binding contract or bargain, so that which is contrary to it, is what the Law calleth *Nudum pactum.* 5 *Rep.* 83: *Dyer* 98. See titles *Consideration*; *Agreement*

QUIETANTIA, *Acquietantia.*] See *Acquittance.*

QUIETARE, To quit, acquit or discharge, or save harmless

QUIETE CLAMARE, To quit-claim, or renounce all pretensions of right and title. *Bract lib.* 5.

QUIETUS; Freed or acquitted; A word made use of by the Clerk of the Pipe and Auditors in the Exchequer, in their discharge given to Accountants; usually concluding with *abinde recessat quietus*, which is called a *Quietus est*: A *Quietus est* granted to the Sheriff, will discharge him of all accounts due to the King. *Stat.* 21 *Jac.* 1. *c.* 5. See title *Sheriff.* And these *Quietus's* are mentioned in the Acts of general pardon.

QUIETUS REDDITUS; See *Quit-Rent.*

QUINQUAGESIMA SUNDAY, *Shrove-Sunday*; so named, because it is about the fiftieth day before *Easter.*

QUINQUE PORTUS; See title *Cinque Ports.*

QUINSIEME, or QUINZIME; See title *Fifteenths.*

Sometimes

Sometimes this word *Quinsime*, or *Quinzime*, is used for the fifteenth day after any feast, as the *Quinzime* of *St. John Baptist*. *Stat.* 13 *Ed.* 1, in the preamble

QUINTAL, or KINTAL, *Quintulus.*] A weight of lead, iron, *&c.* usually 100lbs. at six score *per cent. Cowell. Plowden* mentions 2000 *Kintals* of wood.

QUINTANE, *Quintena.*] A *Roman* military sport or exercise, by men on horseback, formerly practised in this kingdom to try the agility of the country youth: It was tilting at a mark made in the shape of a man to the navel, in his left hand having a shield, in his right a wooden sword; the whole made to turn round, so that if it was struck with the lance in any other part but full in the breast, it turned with the force of the stroke, and struck the horseman with the sword which it held in its right hand: This sport is recorded by *Matt. Paris, anno* 1253.

QUINTO EXACT' *Quintus exactus*, mentioned in *stat.* 31 *Eliz. c.* 3.] The fifth and last call of the defendant, who is sued to outlawry; when, if he appear not, he is by the judgment of the coroners returned outlawed; if a woman, waived. See titles *Exigent*; *Outlawry.*

QUI TAM, See titles *Action-Popular*; *Information.*

QUIT-CLAIM, *Quieta clamantia*.] A release or acquitting of a man, from any action which the releaser hath, might, or may have against him. Also a quitting of one's claim or title. *Bracton, lib.* 5. *tract.* 5. *c.* 9. *num.* 6; *lib.* 4. *tract.* 6. *c.* 13. *num.* 1. See title *Release.*

Quit-Rent, *Quietus Redditus.*] A certain small rent, payable by the tenants of manors, in token of subjection, by which the tenant goes quiet and free: In antient records, it is called *White-rent*; because paid in silver money, to distinguish it from rent-corn, *&c.* 2 *Inst.* 19. See titles *Alba firma*; *Chief-Rents*; *Rents.*

QUOAD HOC, A term often used in Law Reports, to signify, *as to the thing named* the Law is so, *&c.*

QUOD CLERICI, *Beneficiati de Cancellaria.*] A Writ to exempt a Clerk of the Chancery from the contribution towards the Proctors of the Clergy in Parliament. *Reg. Orig.* 261.

Quod Clerici non eligantur in Officio Ballivi, *&c.* A Writ which lies for a Clerk, who, by reason of some land he hath, is made, or about to be made bailiff, beadle, reeve, or some such officer. See *Clerico infra sacros*, &c. *Reg. Orig.* 117: *F. N. B.* 261.

Quod Cum, *That Whereas.*] This being by way of recital, and not positively, is not good in indictments. 3 *Salk.* 188. See title *Indictment.*

Quod ei deforceat, A Writ for tenant in tail, tenant in dower, by the curtesy, or for term of life, having lost their lands by default, against him who recovers, or his heir. *Reg. Orig.* 171: *Stat. Westm.* 2. *c.* 4.

Quod ei deforceat may be brought against a stranger to the recovery; as if a man recover by default, and maketh a feoffment, this writ may be had against the *feoffee.*

If a woman lose by default, and taketh husband, she and her husband shall have the *Quod ei deforceat*, but where tenant in tail loseth by default, and dieth, his heirs shall not have a writ of *Quod ei deforceat*, but a *Formedon*: And if husband and wife lose by default the land of the wife, which she holdeth for term of life, and the husband dieth, she may not have this writ, for *cui in vita* is her remedy; and when one bringeth *Quod ei deforceat*, he counts that he was seised of the land in his demesne, as of freehold, or in tail, *&c.* without shewing of whose gift he was seised; also he ought to allege *esplees* in himself, and then the defendant is to deny the right of the plaintiff, *&c.* and shew how that at another time he recovered the land against the plaintiff, by *Formedon*, or other action; and shall say in the end of his plea, *Quod ipse paratus est ad manutendum jus & titulum suum prædict. per donum*, &c. *unde petit judic.* &c. *New Nat. Br.* 347, 349.

If tenant in tail, or such other tenant, who hath a particular estate, lose by default, where he is not summoned, *&c.* he may have either a Writ of *Disceit*, or *Quod ei deforceat. Ibid*; See 16 *Vin. Abr.* 145, 1483 and this Dict. titles *Writ of Right*; *Recovery.*

Quod permittat; A Writ which lies for the heir of him who is disseised of his common of pasture, against the heir of the disseisor, being dead. *Terms de Ley.*

And according to *Broke*, this writ may be brought by him whose ancestor died seised of common of pasture, or other like thing annexed to his inheritance, against the deforceant: If a man is disturbed by any person in his common of pasture, so that he cannot use it, he shall have a *Quod permittat*; so of a turbary, piscary, fair, market, *&c. New Nat. Br.* 272, 273, 275, 276. And a person may have a *Quod permittat* against a disseisor, *&c.* in the time of his predecessor.

The writ *Quod permittat*, on a disseisin of common of pasture directed to the Sheriff, *Commands* A. that *justly*, &c. he permit B. *to have common of pasture in*, &c. *which he ought to have, as it is said*; *and unless he shall do it*, &c. *then summon*, &c. *Reg. Orig.* 155. See further, 18 *Vin. Abr.* and this Dictionary, title *Common* III.

Quod permittat prosternere; A Writ which lieth against any person who erects a building, though on his own ground, so near to the house of another, that it hangs over, or becomes a nusance to it. 2 *Lill. Abr.* 413.

Formerly where a man built a wall, a house, or any thing which was a nusance to the freehold of his neighbour, and afterwards died; in such case he who received any damage thereby, sued a *Quod permittat* against the heir of him who did the nusance; and the form of it was *Quod permittat prosternere murum*, &c. 3. *Nels. Abr.* 44.

At the Common Law, *an assise of nusance* did not lie against the alienee of a wrong-doer, for the purchaser was to take the land in the same condition it was conveyed to him; but by the statute of *West.* 2. *c.* 24, damages may be recovered against the person who sold the land, if the nusance be not abated on request made to him; or against the person to whom he sold it; though this doth not extend to the alienee of the alienee. 3 *Nels.* 45. *Lutw.* 1588. This writ is seldom brought, being turned into action on the case. See title *Nusance* III. 3.

Quod Persona nec Prebendarii, *&c.* A writ which lay for spiritual persons who were distrained in their spiritual possessions, for payment of a *fifteenth* with the rest of the parish. *F. N. B.* 176.

QUO JURE, A Writ which lies for him who has land, wherein another challengeth common of pasture time out of mind: And is to compel him to shew by what title he challenges it. *F. N. B.* 128; and *Britton*, more largely, *c.* 59: *Reg. Orig.* 156.

This is now out of use, as, on the claimant's putting his cattle in, the owner may bring trespass, when the claimant must plead and prove his title See title *Common of Pasture.*

Quo

QUO MINUS, A Writ which lies for him who hath a grant of *house bote*, and *hay bote* in another man's woods, against the grantor, making such waste *whereby* the grantee can *the less* enjoy his grant. *Old Nat. Br.* 148.

This writ also lies for the King's farmer in the Exchequer, against him to whom he selleth any thing by way of bargain touching his farm, or against whom he hath any cause of personal action. *Perkins, Grants*, 5. For he supposeth, by the vendee's detaining any due from him, he is made *less able* to pay the King's rent.

Formerly it was allowed only to such persons as were tenants or debtors to the King; as this day the practice is become general for the plaintiff to surmise, that, for the wrong which the defendant doth him, he is less able to satisfy his debt to his Majesty; which surmise gives jurisdiction to the Court of Exchequer, to hear and determine the cause. *Finch.* 66: *Old N. B.* 148. See titles *Exchequer*; *Process*.

QUORUM, *Lat.*] Often occurs in our statutes, and commissions both of the peace and others, but particularly in commissions to Justices of the Peace; and a Justice of the Quorum is so called, from the words in the commission, *Quorum* A. B. *unum esse volumus*: As where a commission is directed to five persons, *of whom A. B.* and *C. D.* to be two: In this case *A. B.* and *C. D.* are said to be of the Quorum, and the rest cannot proceed without them. See title *Justices of the Peace* II.

Quorum Nomina. In the reign of *Hen.* VI. the King's Collectors, and other Accountants, were much perplexed in passing their accounts, by new extorted fees, and forced to procure a then late-invented writ of *Quorum Nomina*, for the allowing and suing out their *quictus* at their own charge, without allowance of the King. *Chron. Angl.*

QUOTA, A tax to be levied in an equal manner.

QUO WARRANTO,

A Writ which lies against any person, or Corporation, that usurps any franchise or liberty against the King, without good title; and is brought against the usurpers, to shew by what right and title they hold or claim such franchise or liberty: It also lies for misuser, or nonuser of privileges granted; and, by *Bracton*, it may be brought against one who intrudes himself as heir into land, &c. *Old Nat. Br.* 149.

A Writ of *Quo Warranto* is in the nature of a Writ of Right for the King, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. *Finch. L.* 322: 2 *Inst* 282. It lies also in case of nonuser or long neglect of a franchise, or misuser or abuse of it; being a writ commanding the defendant to shew *by what Warrant* he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This was originally returnable before the King's Justices at *Westminster*; but afterwards only before the Justices in *Eyre*, by virtue of the statutes of *Quo Warranto*, 6 *Ed.* 1: 18 *Ed.* 1. *stat.* 2: but since those Justices have given place to the King's temporary Commissioners of Assise, the Judges on the several circuits, this branch of the statutes hath lost its effect; and writs of *Quo Warranto* (if brought at all) must now be prosecuted and determined before the King's Justices at *Westminster*. See 2 *Comm. c.* 17; and *Kyd's Law of Corporations*, ii. *c.* 4. § 3.

The judgment on a writ of *Quo Warranto* (being in the nature of a writ of right) is final and conclusive even against the Crown. 1 *Sid.* 86: 2 *Show.* 47: 12 *Mod.* 225: *Kel.* 139. This, together with the length of its process, probably occasioned that disuse into which it is now fallen; and introduced a more modern method of prosecution, by information filed in the Court of King's Bench by the Attorney-General, in the nature of a writ of *Quo Warranto*; wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seise it for the Crown: but hath long been applied to the mere purposes of trying the civil right, seising the franchise, or ousting the wrongful possessor; the fine being nominal only. 2 *Comm. c.* 17.

This proceeding is now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, by virtue of the *stat.* 9 *Ann. c.* 20; which permits an information in nature of a *Quo Warranto* to be brought, with leave of the Court, at the relation of any person desiring to prosecute the same, (who is then styled the *Relator*,) against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides for its speedy determination; and directs that, if the defendant be convicted, judgment of ouster (as well as a fine) may be given against him, and that the relator shall pay or receive costs according to the event of the suit.

The Form of this Information is thus:

" A. B. *Attorney-General of the Lord the King, who sues for the Lord the King in this behalf, comes here into the Court of our said Lord the King, before the King himself, at* Westminster, *on* ——— *in this same term; and for the said Lord the King gives the Court here to understand and be informed, that* ——— *for the space of* ——— *now last past, and more, have used, and still do use, without any warrant or royal grant, the following liberties and franchises, to wit,* ———: *Of all which liberties, privileges, and franchises aforesaid, the said* ———, *during all the time aforesaid, have usurped, and still do usurp, upon the said Lord the King, to the great damage and prejudice of his royal prerogative: Whereupon the said Attorney of the said Lord the King, for the said Lord the King, prays the advice of the Court in the premises, and due process of Law against the said* ——— *in this behalf to be made, to answer to the said Lord the King,* BY WHAT WARRANT *he claims to have, use, and enjoy the liberties, privileges, and franchises aforesaid.*"

This is the form, whether the information be brought for an usurpation without any original title, or for a subsequent forfeiture, where the original title is not disputed. See *Co. Ent.* 527—564.

An information, in the nature of a *Quo Warranto*, lies for acting as a trustee, under an act of Parliament, without due appointment. 1 *Strange* 299. Against one for usurping the office of Steward of a Court-Leet. *Ibid* 621. For erecting a new office. 2 *Strange* 736. For the office of Constable. *Ibid.* 1213. For a Ferry. *Ibid.* 1161. But not for erecting a Warren. 1 *Strange* 637. Nor for the office of Churchwarden. *Ibid.* 1196.

The process usually awarded on the roll against individuals, whether claiming to act as a Corporation, or claiming any other franchise, is a *venire facias*, sometimes

with a clause of *non omittas*, and sometimes without.—The entry, immediately after the conclusion of the information, is thus: "*Whereupon the Sheriff is commanded, that he cause to come*;" or, "*that he omit not*, &c. *but that he cause to come*, &c. *to answer*," &c.

If the defendants do not appear at the day, the next process awarded is a *distringas*. Against a Corporation, not prosecuted for acting as a Corporation, but for usurping other liberties, the first process awarded is a *distringas*, and the entry on the roll in this form: "*Whereupon it is agreed, that the aforesaid Mayor and Commonalty, and Citizens of* *be distrained by all their lands*, &c. *so that*, &c. *to answer to our Lord the King in the premises; and the Sheriff is commanded, that he distrain them in form aforesaid, so that*, &c. *at such a day*." Co. Ent. 536. *a*.

Though a *venire facias* and *distringas* are the process usually awarded on the roll, yet it seems that against *individuals* who cannot be personally served with the *venire*, process of outlawry lies. See *Cro. Jac.* 528, 531.

When the defendant appears, he may either disclaim or plead as to all the franchises mentioned in the information; or he may plead as to part, and disclaim as to part.

If he disclaim as to all, the entry is in this form:

"*The said* ———, *protesting that the information aforesaid is not sufficient in Law, and that he is not under any necessity by the Law of the land to answer thereto, for plea nevertheless, saith, that he never used the aforesaid liberties, privileges, and franchises, nor any of them, nor in the same, or any of them, ever usurped upon the said Lord the King, in manner and form as by the said information is supposed, but the same, and every of them, disclaims and disavows; whereupon he prays judgment, and that he may be dismissed by the Court*." Co. Ent. 527, *b*.

If he plead as to part, and disclaim as to part, the entry of the disclaimer, after the plea, is in this form:

"*And as to the residue of the liberties, privileges, and franchises in the said information above specified, upon the said Lord the King supposed to be usurped by the said* ———, *the said* ——— *says, that he nev r used, nor does he now use the residue*," &c. Co. Ent. 529, *b*.

Where the defendant pleads, the entry is in this form:

"*The said* ———, *as to the aforesaid liberty*, &c. *of* ———, *says*, &c. ———. Here he sets out his title to the particular franchise; and so of every other claimed by a distinct title, and concludes his plea as to each, in this manner: *And* BY THIS WARRANT *the said* ——— *has used, during all the time aforesaid, in the said information mentioned, and still uses the liberties, privileges, and franchises of* ——— *as he well might and still may*: WITHOUT THIS *that the said* ——— *has usurped, or now does usurp the said liberties*, &c. *on the said Lord the King, in manner and form as by the information aforesaid, for the said Lord the King, is above supposed: All which the said* ——— *is ready to verify, as the Court*, &c. *Whereupon he prays judgment, and that all and singular the liberties*, &c. *above by him as aforesaid claimed, may be allowed and adjudged to him, and that he may thereupon be dismissed from this Court*." See Co. Ent.

The Attorney-General then demurs or replies, and the subsequent proceedings are in the same manner as in civil actions.

In a *Quo Warranto* to shew by what authority a person claimed to have a *Court-Leet*, and alleging farther *quod usurpavit libertatem sine aliquâ concessione*, &c. defendant pleaded *Non usurpavit*; and it was objected that this was no good plea, for the answer to *Quo Warranto* is either to claim or disclaim; but the better opinion was, that by this plea defendant had answered the usurpation, though it did not shew by what title he claimed. *Godb.* 91.

In *Quo Warranto* for using a *fair* and *market*, and taking *toll*, issue was taken, whether they had toll by prescription, or not; and it was found they had; it was moved in arrest of judgment, that here was a discontinuance, because there was no issue as to the other liberties claimed: But it was held, they were too soon to make this objection, and that there can be no discontinuance against the King before judgment; for, by virtue of his prerogative, the Attorney-General may proceed to take issue on the rest, or may enter a *nolle prosequi*; but if he will not proceed, the Court may make a rule on him *ad replicandum*, and then there may be a special entry made of it. *Hardres* 504.

The judgment seems to be the same, and subject to the same varieties as on the writ of *Quo Warranto*.

If it be given in favour of the defendant, the entry is in this form: "*It is considered, that the liberties*, &c. *be allowed to the said* ———;" or thus: "*The said* ——— *may use, have, and enjoy all the said*, &c. *and that the said* ——— *as to the said premises may be dismissed from this Court*: SAVING *always the right of the said Lord the King, if hereafter*," &c.

This *salvo jure* for the King, says *Coke*, serveth for any other title than that which was adjudged; and therefore *William de Penrugge*, the King's Attorney, for prosecuting a *Quo Warranto* against the Abbot of *Fischamp* for franchises within the manor of *Steyning*, *sine praecepto*, was committed to gaol. 1 *Inst.* 282.

On disclaimer, by the defendant, the Attorney-General prays, "*That whereas the said* ———, *by his plea, has disavowed and disclaimed all and singular the liberties*, &c. *above specified, judgment may be given for the King; and that the said* ———, *with the said liberties and franchises, or any of them, may no way intermeddle, but may hereafter be altogether excluded from the same*;" and judgment is accordingly given in that form. Co. Ent. 27, *b*.

With respect to the form of the judgment for the King, when it is given on the defendant's pleading, there has been much difficulty and dispute.

In the Year-book of the 15 *Ed.* 4. this rule is laid down, "That where it clearly appears to the Court, that a liberty is usurped by wrong, and exercised on no title, either by the King's grant or otherwise, judgment only of ouster shall be entered: But that where it appears, that the King or his ancestors have once granted a liberty, and the liberty is forfeited by misuser or nonuser, the judgment shall be, that it be seised into the King's hands." And the reason given for the distinction is, that where the liberty or franchise has been usurped, the King cannot have that which never legally existed; but, in cases of an abuser or nonuser of a franchise once lawfully granted, the King resumes that which originally flowed from his bounty; and this course in the latter case, it has been said, is most beneficial for the Subject, who, though by forfeiture, mispleading, or default, he may lose his liberty, may have recourse to the King's mercy for restitution. See 15 *E.* 4. 7, *b*: *Sawyer's Arg. Quo Warranto* 17: 5 *Term Rep.* 551.

From this it would seem, that the only cases in which judgment of *ouster only* ought to be given, is where there

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is no *colour* of title in the defendant; or where a franchise is claimed by prescription, but it is such, that by Law it cannot be so claimed; or where it is not such a franchise as may subsist in the hands of the Crown. See 3 *Comm. c.* 17. cites *Cro. Jac.* 259: 1 *Show.* 280.

So, if a man claim to hold a Court-Baron in virtue of a manor held by copy of another manor; there, judgment of ouster *only* shall be given, because a copyholder, being only tenant at will, cannot hold a Court-Baron to have forfeitures, and hold pleas in a writ of right. *Cro. Jac.* 259.

But where there is a *colour* of title, but the pleading of the defendant is defective, there is only judgment of *seisure*, and not of *ouster*. See 9 *Co.* 24, *a*: *Co. Ent.* 43, *a*: *Sawyer's Arg.* 17.

Where grants appear, but either the parties are not capable of taking, or the liberty or privilege granted, is not allowable by Law, the course has been to enter a mixt judgment both of seisure and ouster. *Sawyer's Arg.* 17: *Co. Ent.* 537, 539, *a*: *Palm.* 1: 2 *Rol. Rep.* 113.

In addition to the judgment of seisure or of ouster, or of seisure *and* ouster, except only in the case of ouster on disclaimer, there is also judgment, that the defendants be taken to make fine to the King for the usurpation. And in this respect, it seems the judgment in the information, differs from that in the writ of *Quo Warranto*; for in the latter, it is apprehended, there could be no judgment of *capias pro fine*: The defendant was in the nature of a plaintiff; he made his claim; if he failed in making it good, the judgment was not *capias pro fine*, but *quod sit in misericordiâ*. *Rast. Ent.* 540, *a. pl.* 1.

Upon *Quo Warranto*, when liberties are seised *quousque*, &c. and they are not replevied, the course is, that judgment final be given, *nisi* the defendants plead within such a time. *Comberbach* 18, 19.

Wherever judgment is given for the King on a *Quo Warranto*, for liberties usurped, the judgment is *Quod extinguantur*, and that the usurpers *libertates*, &c. *nullatenus intromittant*; and in such case the writ must be brought against particular persons: But where the *Quo Warranto* is for a liberty claimed by a Corporation, there it is to be brought against the body politic; and the liberties may be seised, but the Corporation still subsists, and is not dissolved without cause of forfeiture. 4 *Mod.* 52, 58.

A judgment of seisure cannot be proper where a thing is dissolved: And the judgment in the *Quo Warranto* against the city of *London*, seems contradictory, for the first part of it is, *quod libertates & franchisiæ capiantur & seisantur in manus Regis*; and the latter part of it is, *quod capiantur ad satisfaciend' Domino Regi de fine suo pro usurpatione libertat'*, &c. And the Corporation was not thereby dissolved, for it implied that they were not extinguished. 4 *Mod.* 52, 58. See title *London*; and under that title particularly as to the abuses of the Information by *Quo Warranto*.

After judgment, the regular course is to issue a writ of seisure to the Sheriff, which, after reciting the proceedings in the *Quo Warranto*, commands him to seise the liberties into the King's hands. But this writ in point of fact, has not always issued. See *Co. Ent.* 539, *b*.

Where several franchises are granted by the same charter, and one is subordinate and inseparably incident to the other, the forfeiture of the principal is the forfeiture of the subordinate and incident; but when the franchises are independent, and the one may stand without the other, the forfeiture of the one is not the forfeiture of the other. *Palm.* 82.

Where a *Quo Warranto*, or an information in the nature of it, is brought for several franchises, it is as several writs or several informations, to which there may be several pleas and several judgments; because the defendant may claim one franchise by one title, and another by another. *Palm.* 7, 8.

It has been adjudged, that the *stat.* 4 & 5 *W. & M. c.* 18, by which informations in the Crown-Office are not to be filed without express orders in open Court, &c. being a remedial Law, extends to informations in the nature of a *Quo Warranto*, which always suppose the usurpation of some franchise. See *Kyd's Law of Corporations*, ii. 410, &c. 415, &c.; and this Dictionary, title *Information* I. IV.

This statute, and the *stat.* 9 *Ann. c.* 20, leave the power of the Attorney-General with respect to filing informations, whether in the nature of *Quo Warranto*, or not, exactly as it was at Common Law; for *stat.* 4 & 5 *W. & M. c.* 18, expresly provides, that it shall not be construed to extend to any other information than such as shall be exhibited in the name of their Majesties' Coroner or Attorney in the Court of King's Bench for the time being, commonly called the Master of the Crown-Office: And *stat.* 9 *Ann. c.* 20, only introduces some provisions with respect to informations in cases within the meaning of it, filed in the name of the latter officer. In point of fact there are several Records in the Crown-Office, of informations in the nature of *Quo Warranto*, filed in the name of the Attorney-General, in the intermediate time between the two statutes, and since the passing of the last, as well in cases within the *meaning* of the last, as in other cases. 2 *Kyd's Corp.* 415, &c.

The distinction between the power of the Attorney-General and the Master of the Crown-Office, seems to be this; that the power of the latter is confined to cases which concern the Public Government; whereas that of the former extends, also, to cases which only concern the private rights of the Crown. 2 *Ld. Raym.* 1409: *Hardw.* 261: *Stra.* 637: 3 *Burr.* 1814, 1817. See 2 *Kyd's Corp.* 417, &c.

The *stat.* 9 *Ann. c.* 20, gives full costs, on verdict or judgment, to the successful party, whether relator or defendant; but it is only in case of verdict or judgment that, under this statute, the defendant can have costs for a groundless prosecution; but it has been decided, that, if the prosecutor do not, at his own costs, procure the information to be tried within a year after issue joined, the defendant is entitled to the benefit of the recognizance under the statute of *William* and *Mary*. See further, title *Information* I.

What cases are within the meaning of the statute has been the subject of some controversy, as the successful party is entitled to his costs only in such cases.

The words of the statute are, the "offices of Mayors, Bailiffs, Portreeves, and other offices within cities, towns-corporate, boroughs, and places:" one question has been, whether these words express only corporation-offices, or whether they extend to offices in boroughs and other places not corporate. And it seems on the whole decided, that the word *places* in the act only extends to offices in places of the same kind with those before enumerated.

It has likewise been urged, that there is a material difference between the case of a person who is compellable to take upon himself a burdensome office, which he could not refuse without being liable to an indictment, and that of a person who voluntarily undertakes an office from which he expects personal importance or some other advantage; and that it is unreasonable that a person, supposed to be elected into an office of the first description, should be liable to pay the costs of a prosecution for ousting him, on account of some defect in his election. 5 *Term Rep.* 375.

The cases in which informations in the nature of *Quo Warranto* are granted under this act are, where a man exercises a corporate franchise, or acts as a corporate officer, without having been duly elected and sworn or admitted, and where the office of a corporate officer becomes void by something subsequent, as amotion, *&c.* *Kyd's Corp.* 424.

As this statute, 9 *Ann. c.* 20, extends only, as regards costs, to cases where the title of a person to be a corporate officer, as mayor, bailiff, or freeman, is in question; an information to try the right of holding a Court, is therefore not within it; but stands upon the Common Law only: and, being a prosecution in the name of the King, no costs are given. 1 *Burr.* 402.

To subject a man to an information in nature of a *Quo Warranto*, it is necessary that there should be not only a claim, but an user of the franchise. See *Sayer* 245: 5 *Term Rep.* 85.

Where the only act done by the party, against whom an application is made for leave to file an information in the nature of *Quo Warranto*, is voting in an election for Members of Parliament, under any claim of right, the Court will refuse it; on the ground that an inquiry into the right of voting belongs, more properly, to the House of Commons. 1 *Stra.* 547.

But an information, in the nature of *Quo Warranto*, will lie against a person claiming to have a right of voting, by virtue of a burgage tenement. 3 *Term Rep.* 599, *n.*

The Court of King's Bench, having a discretionary power of granting informations in the nature of *Quo Warranto*, had long ago established a general rule to guide their discretion, as to the time for applications of this nature; *viz.* not to allow in any case such information against a person who had been twenty years in the possession of his franchise; but having reason to consider this time as too extensive, they by degrees restrained it, by analogy to the Statute of Limitations; and resolved not to allow such information against any person who had been *six* years in possession. See 4 *Burr.* 1962; 2022; 2120; 2523: *Cowp.* 75: 1 *Term Rep.* 1, 4: 2 *Term Rep.* 767: 4 *Term Rep.* 282, 4. And at length the Legislature confirmed this regulation, and extended it to informations filed by the Attorney-General. By *stat.* 32 *Geo.* 3. *c.* 58, it is enacted, that to any information in the nature of *Quo Warranto*, for the exercise of any corporate office or franchise, the defendant may plead that he has been in possession of, or has executed the office, for six years or more. And it is by the same act provided, that no defendant shall be affected by any defect in the title of the person, from whom he derives his right and title, if that person has been in the undisturbed exercise of his office, or franchise, six years previous to the filing of the information.

This latter provision must be considered as applying only to cases, where issue is taken on the title of the person through whom the defendant claims; for no inquiry can be made into such title, where no issue has been taken upon it. *Kyd. Corp.* ii. 444; and see *Id.* 435, *&c.*

To obtain leave to file an information, the party applying must lay a proper case before the Court, verified by affidavit; on which the Court will grant a rule on the defendant to shew cause. It was formerly, indeed, so much the practice of the Court to grant *Quo Warranto* informations, as of course, that it was held prudent never to shew cause against the rule; for fear of disclosing the grounds on which the defendant rested his defence. But since these matters have come more under consideration, it is no longer a matter of course; and the Court have, on several occasions, declared, that it was the intention of the Legislature, that they should exercise a sound discretion, according to the particular circumstances of the respective cases that came before them; and should not, without good reason, disturb the quiet of any corporation. See 1 *Term Rep.* 2: 4 *Burr.* 1964; 2022.

Where the right, or the fact on which the right depends, is disputed; that is a sufficient reason for granting an information, if the application be made within the proper time. So, where the right depends on a point of new or doubtful law. See 3 *Burr.* 1485: *Cowp.* 58: *Doug.* 397, (382).

The conduct of the parties, on whose behalf the application is made, will weigh much with the Court, in some instances, in granting or refusing an information. See 4 *Burr.* 1963; 2024; 2120: 3 *Term Rep.* 300; 573: *Cowp.* 75: 4 *Term Rep.* 223.

It is no reason for refusing an information, that informations formerly granted, for the same cause, have been abandoned; as that may have been by collusion. But it is a good reason, that the prosecutor stands exactly in the same circumstances with the defendant. 2 *Term Rep.* 770, 1.

In cases where there has been a long acquiescence, and where the objection, if it prevailed, might tend to dissolve the Corporation, the Court may refuse the application. *Cowp.* 59. But though a great number of derivative titles may be affected, by judgment of ouster against the defendant, yet, if it be confessed that elections may still be made, the Court will not refuse it on that ground alone. 2 *Term Rep.* 767.

Where the application is made in the names of persons unconnected with the Corporation, that will in general be a strong reason for refusing it. 1 *Term Rep.* 23. But where the objection to the defendant's title is, that he had not received the Sacrament within a year before his election, an information will be granted on the application of a stranger; because such an omission is against a general law, which affects all the Corporations in the kingdom. 3 *Term Rep.* 574, *n.*

It was formerly a subject of much discussion, whether a new trial could be granted in a *Quo Warranto* information, when the verdict was in favour of the defendant. This depended chiefly on the question, whether such an information was a criminal prosecution; but, since it has been held that it is merely a civil proceeding, there is no doubt but that a new trial may be granted, where a verdict has been given in favour of the defendant, as well as where it has been given in favour of the Crown. 2 *Term Rep.* 484.

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RACHETUM, from the Fr. *racheter*, i. e. *redimere.*] The compensation or redemption of a thief. 1 *Stat. Rob. K. Scot. c.* 9.

RACK, An engine to extort confession from delinquents, but utterly unknown to the Law of *England*. See title *Mute*.

RACK RENT, The full yearly value of the land let by lease, payable by tenant for life or years, *&c. Wood's Inst.* 185. See title *Rent*.

RACK-VINTAGE, A second Vintage; or voyage made by our merchants for racked wines, *i. e.* wines drawn from the lees. See *stat antiq.* 32 *H.* 8. *c.* 14.

RAGEMAN, A statute of justices assigned by *Ed.* I. and his Counsel, to hear and determine all complaints of injuries done throughout the realm, within the five years next before *Michaelmas*, in the fourth year of his reign.

RAGLORIA, A word mentioned in the charter of *Edw.* III. whereby he created his eldest son *Edward*, Prince of *Wales*, in Parliament at *Westminster*, the seventeenth year of his reign, recited by *Selden* in his *Titles of Honour*, 597 ——*Cum forestis, parcis, chaseis, boscis, warenniis, hundredis, comotis*, Ragloriis, *ringelaiis, wodewardis, constabulariis, ballivis*, &c. *Davis* in his Dictionary says, that *rhaglaw* among the *Welsh* signifies *seneschallus, surrogatus, præpositus*.

RAGLORIUS, A steward. *Seld. Tit. of Honour* 597.

RAGMAN's ROLL; *Rectius*, Ragimund's Roll: so called from one *Ragimund*, a legate in *Scotland*, who, calling before him all the beneficed clergymen in that kingdom, caused them on oath to give in the true value of their benefices; according to which they were afterwards taxed by the Court of *Rome*: and this Roll, among other records, being taken from the *Scots* by *Edward* I. was redelivered to them in the beginning of the reign of *Edward* III.

Sir *Richard Baker* saith, that *Ed* III. surrendered, by charter, all his right of sovereignty to the kingdom of *Scotland*, and restored divers instruments of their former homages and fealties, with the famous evidence called *Ragman's Roll*.

RAN, *Sax.*] *Aperta rapina*, open or public theft. *Lamb. Archai.* 125: *Ll. Canuti, c.* 58: *Hoveden*.

The term, all that a man can *rap* and *ran*, or still more corruptly *rap* and *rend*, is by some derived hence; *rap* from *rapio*, to take by force.

RANGE, from Fr. *ranger*, to order, dispose of] It is used in the *Forest Laws*, both as a verb, as, to range; and a substantive, as, to make range. *Charta de Foresta, c* 6.

RANGER, A sworn officer of the forest, of which there are twelve. *Charta de Foresta.* His authority is in part described by his oath set down by *Manwood, part.* 1. *c.* 50:—but more particularly *part.* 2. *cap.* 20. *num.* 15, 16, 17. His office chiefly consists in three points, to walk daily through his charge, to see, hear, and inquire, of trespasses in his bailiwick; to drive the beasts of the forest, both of venary and chase, out of the deafforested into the forested lands: and to present all trespasses of the forest at the next Court holden for the forest. See title *Forest*.

This Ranger is made by the King's letters patent, and hath a fee paid yearly out of the Exchequer, and certain fee-deer. *Rangeator Forestæ de Whittlewood. Pat.* 14 *R.* 2. *m.* 3.

RANSOM, Fr. *Rançon, Redemptio.*] Is properly the sum paid for redeeming a captive or prisoner of war; and sometimes taken in our Law for a sum of money paid for pardoning some great offence, and setting the offender at liberty who was under imprisonment. See *stats.* 1 *H.* 4. *c.* 7: 11 *H.* 6. *c.* 11.

Fine and Ransom go together, and some writers tell us, that they are the same; but others say, that the offender ought to be first imprisoned, and then redelivered or ransomed in consideration of a fine. *Co. Litt.* 127: *Dalt* 703.

Ransom differs from amercement, being a redemption of a corporal punishment due to any crime. *Lamb. Eiren.* 556. See title *Fines for Offences*.

A ship was taken by the *French*; the master (having a share in her) ransomed her for 1800*l.* and was taken to *France* as an hostage for this money. The Ransom-money must be raised out of the profits, notwithstanding any former mortgage of the ship; for if there was a precedent mortgage, what would become of that security, if the ship had not been redeemed? After the ship was redeemed, she performed her intended voyage, and the freight-money received after redemption was the first profits arising, and out of them the Ransom-money is to be satisfied; the insurers always pay a part of the Ransom-money. 2 *Eq. Abr.* 690. See further, title *Insurance* II. 2.

RAPE, *Raptus* vel *Rapa.*] A division of a county, similar to that of a hundred; but oftentimes containing in it more hundreds than one.

Sussex is divided into six *Rapes* only, *viz. Chichester, Arundel, Bramber, Lewis, Pevensey*, and *Hastings*; every of which, besides hundreds, hath a castle, river, and forest belonging to it. *Camd. Britann.* 225, 229. These Rapes are incident to the county of *Sussex*; as *Lathes* are to *Kent*; and *Wapentakes* to *Yorkshire*, &c.

These *Rapes* and *Lathes* are considered by *Blackstone* as an intermediate division between the *Shire* and the *Hundreds*; each of them containing about three or four hundreds a-piece. These had formerly their *Rape-reeves* and *Lathe-reeves*, acting in subordination to the Shire reeve (*Sheriff*);

(*Sheriff*): Where a county is divided into *three* of these intermediate jurisdictions, they are called *Trithings*, which were anciently governed by a *Trithing-reeve*. These Trithings still subsist in the large county of *York*, where, by an easy corruption, they are denominated *Ridings*; the North, East, and West Riding. 1 *Comm. Introd.* § 4. *p.* 116. See the several titles.

RAPE OF THE FOREST, *Raptus Forestæ.*] Trespass committed in the Forest by violence; it is reckoned among those crimes, whose cognisance belonged only to the King. *Leg. Hen.* 1. *c.* 10. See title *Forest*.

RAPE OF WOMEN, *Raptus*; from *rapio.*] An unlawful and carnal knowledge of a woman, by force, and against her will: a ravishment of the body, and violent deflowering her: which is Felony by the Common and Statute Law. *Co. Litt.* 190. The word *Rapuit* (ravished) is so appropriated by Law to this offence, that it cannot be expressed by any other; even the words *Carnaliter Cognovit*, &c. without it, will not be sufficient. *Co. Litt.* 124: 2 *Inst.* 180.

Rape was punished by the *Saxon* laws, particularly those of King *Athelstan*, with death, *Bracton*, *l.* 3. *c.* 28. But this was afterwards thought too hard: and in its stead another severe, but not capital, punishment, was inflicted by *William* the Conqueror: *viz.* castration and loss of eyes; which continued till after *Bracton* wrote, in the reign of *Henry* the Third. *Ll Guil. Conq. c.* 19.

But, in order to prevent malicious accusations, it was then the Law, (and, it seems, still continues to be so in appeals of Rape,) that the woman should, immediately after, "*dum recens fuerit maleficium,*" go to the next town, and there make discovery to some credible persons of the injury she has suffered: and afterwards should acquaint the High Constable of the hundred, the Coroners, and the Sheriff, with the outrage. *Glanv. l.* 14. *c.* 6: *Bract. l.* 3. *c.* 28. See 1 *Hale P. C.* 632. Afterwards, by statute *Westm. c.* 13, the time of limitation was extended to forty days. At present there is no time of limitation fixed: for, as it is usually now punished by indictment at the suit of the King, the maxim of Law takes place, that *nullum tempus occurrit Regi*: but the Jury will rarely give credit to a stale complaint. During the former period also it was held for Law, that the woman (by consent of the Judge and her parents) might redeem the offender from the execution of his sentence, by accepting him for her husband; if he also was willing to agree to the exchange, not otherwise. *Glanv. l.* 14. *c.* 6: *Bract. l.* 3. *c.* 28.—But this is now not held for Law; and it is said, that the election of the woman is taken away by virtue of *stat. Westm.* 2, making the Rape felony, *although she consent afterwards*. See *post*.

By *stat. Westm.* 1. 3 *Ed.* 1. *c.* 13, the punishment of Rape was much mitigated: the offence itself, of ravishing a damsel within age, (that is, under twelve years old,) either with her consent or without, or of any other woman against her will, being reduced to a trespass, *if not prosecuted by appeal within forty days*, and subjecting the offender only to two years' imprisonment, and a fine at the King's will. But, this lenity being productive of the most terrible consequences, it was soon found necessary to make the offence of forcible Rape felony, which was accordingly done by *stat. Westm.* 2. 13 *Ed.* 3. *c.* 34. And by *stat.* 18 *Eliz. c.* 7, it is made Felony without benefit of Clergy: as is also the abominable wickedness of carnally knowing and abusing any woman-child under the age of ten years; in which case the consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion.

Before this statute it was a question, whether a Rape could be committed on the body of a child of the age of six or seven years; and a person being indicted for the Rape of a girl of seven years old, although he was found guilty, the Court doubted, whether a child of that age could be ravished; and it was said, if she had been nine years old she might, for at that age she may be endowed. *Dyer* 304.

Hale is indeed of opinion, that such profligate actions committed on an infant under the age of twelve years, the age of female discretion by the Common Law, either with or without consent, amount to Rape and Felony; as well since as before the statute of Queen *Elizabeth*. 1 *Hal. P. C.* 631.

That Law, however, has in general been held only to extend to infants under ten; though it should seem that damsels between ten and twelve are still under the protection of the *stat. Westm.* 1, the Law with respect to their seduction not having been altered by either of the subsequent statutes. 4 *Comm. c.* 15.

A male infant, under the age of fourteen years, is presumed by Law incapable to commit a Rape, and therefore, it seems, cannot be found guilty of it. For though in other felonies *malitia supplet ætatem*, yet, as to this particular species of felony, the Law supposes an imbecillity of body as well as mind. 1 *Hal. P. C.* 631.

It is no excuse or mitigation of the crime, that the woman *at last* yielded to the violence, and consented either after the fact or before, if such consent was forced by fear of death or duress; or that she was a common strumpet, for she is still under the protection of the Law, and may be forced: but it was antiently held to be no Rape to force a man's own concubine; and it is said by some to be evidence of a woman's consent, that she was a common whore. 1 *Hawk. P. C. c.* 41. § 2: *Co. Litt.* 123: See 1 *Hal. P. C.* 629.

Also, formerly, it was adjudged not to be a Rape to force a woman, who conceived at the time; because it was imagined, that if she had not consented, she could not have conceived: though this opinion hath been since questioned, by reason the previous violence is no way extenuated by such a subsequent consent; and if it were necessary to shew the woman did not conceive, to make the crime, the offender could not be tried till such time as it might appear whether she did or not. 2 *Inst.* 190: 1 *Hawk. P. C. c.* 41. § 2.

As to the material facts requisite to be given in evidence and proved upon an indictment of Rape, they are of such a nature, that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore are to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a Court of Justice. The following remarks, with regard to the competency and credibility of the witnesses, may, *salvo pudore*, be considered.

And, first, the party ravished may give evidence upon oath, and is, in Law a competent witness; but the credibility of her testimony, and how far forth she is to be believed,

believed, must be left to the Jury upon the circumstances of fact that concur in that testimony. For instance; if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned. 1 *Hal. P. C.* 634, 5, 6.

Moreover, if the Rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by Sir *Matthew Hale*, that she ought to be heard without oath, to give the Court information; and others have held, that what the child told her mother, or other relations, may be given in evidence; since the nature of the case admits frequently of no better proof. But it is now settled, by a solemn determination of the twelve Judges, that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in Court without oath: and that there is no determinate age, at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony, of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or such as the Jury is bound to believe. 4 *Comm. c.* 15.

Aiders and abettors in committing a Rape, may be indicted as principal felons, whether men or women. 1 *Hawk. P. C. c.* 41. § 6. Lord *Audley* was indicted and executed as a principal, for assisting his servant to ravish his own wife, who was admitted a witness against him. *Dalt.* 107: 1 *St. Trials* 265.

Hale observes, that though a Rape is a most detestable crime, it is an accusation easily made, and hard to be proved, but harder to be defended by the man accused, although ever so innocent: and he mentions several instances of Rapes, which at the time were apparently fully proved, but were afterwards discovered to have been malicious contrivances. 1 *Hale's Hist. P. C.* 635, 636. See further, title *Appeal of Rape.*

RAPINE, *Rapina*.] To take a thing in private, against the owner's will, is properly theft; but to take it openly, or by violence, is Rapine. See title *Robbery*: And as to *Rapine on the Northern borders*, see titles *Mischief, Malicious*; *Northumberland.*

RAPTU HEREDIS, A Writ for taking away an Heir holding in socage; of which there are two sorts, one when the Heir is married, the other when he is not; see *Reg. Orig.* 163; and this Dict. title *Guardian.*

RASE, *Raseria.*] Seems to have been a measure of corn now disused. Toll shall be taken by the *Rase*, and not by the heap or cantel. *Ordinance for Bakers*, &c. *c.* 4.

RASURE of a Deed, so as to alter it in a material part, without consent of the party bound by it, *&c.* will make the same void, and if it be rased in the date, after delivery, it is said it goes through the whole. 5 *Rep.* 23. 119.

Rasure, *&c.* is most suspicious, when it is in a Deed-poll, that there is but one part of the Deed, and it makes to the advantage of him to whom made. And where a Deed, by Rasure, addition, or alteration, becomes no Deed, the defendant may plead *non est factum.* 5 *Rep.* 23, 119. See titles *Deed*; *Pleading.*

RATE, A valuation of every man's estate; or the appointing and setting down how much every one shall pay, or be charged with, to any tax.

RATE-TITHE, Is when any sheep or other cattle are kept in a parish for less time than a year, the owner must pay Tithe for them *pro Rata*, according to the custom of the place. *F. N. B.* 51. See title *Tithes.*

RATIFICATION, *Ratificatio.*] A ratifying or confirming: it is particularly used for the confirmation of a Clerk in a prebend, *&c.* formerly conferred on him by the Bishop, where the right of patronage is doubted, or supposed to be in the King. *Reg. Orig.* 304.

RATIHABITIO, Confirmation, agreement, consent. See 18 *Vin. Abr.* 156.

RATIO, An account; as *reddere rationem*, to give an account, and so it is frequently used. According to some it is a cause, or giving judgment therein; and *ponere ad rationem*, is to cite one to appear in judgment. *Wals.* 88.

RATIONABILIBUS DIVISIS, A Writ which lies where two lords, in divers towns, have seigniories joining together, for him who findeth his waste by little and little to have been encroached on, against the other who hath encroached, thereby to rectify their bounds; in which respect *Fitzherbert* calls it in its own nature a Writ of Right. The *Old Nat. Brev.* says, that this is a kind of *Justicies*, and may be removed by a *pone* out of the county to the Common Bench. See the form and use in *F. N. B.* 128: and *Reg. Orig.* 157: and this Dictionary, title *Perambulation.*

RATIONABILE ESTOVERIUM, Alimony was heretofore so called. *Rot.* 7 *H.* 3. See *Baron and Feme* XI.

RATIONABILI PARTE, A Writ of Right for Lands, *&c.* See *Right, Writ of*; *Recto de Rationabili Parte.*

RATIONABILI PARTE BONORUM, A writ which lay for a wife, after the death of her husband, against the executors of the husband, denying her the third part of his goods after debts and funeral charges paid. *F. N. B.* 222.

It appears by *Glanville*, that by the Common Law of *England*, the goods of the deceased (his debts first paid) shall be divided into three parts; one for the wife, another for his children, and the third to the executors: and this writ may be brought by the children, as well as the wife. *Reg. Orig.* 142.

But it seems to be used only where the custom of the county serves for it; and the writs in the register rehearse the customs of the counties, *&c.* *New Nat. Br.* 270, 271.

As to children bringing this writ, their marriage is no advancement, if the father's goods be not given in his lifetime; but where a child is advanced by the father, this writ will not lie. *New N. B.* 270. See this Dict. titles *Executor* V. 8; *Will*; and 18 *Vin. Abr.* 158.

RAVISHMENT, Fr. *Raviſſement*, i. e. *Direptio, raptio.*] An unlawful taking away either a woman, or an heir in ward; ſometimes it is uſed in the ſame ſenſe with Rape.

RAVISHMENT DE GARD, *Raviſhment of Ward.*] A Writ which lay for the guardian by knights-ſervice, or in ſocage, againſt a perſon who took from him the body of his Ward. *F. N. B.* 140.

By *ſtat.* 12 *Car.* 2 *c.* 24, this writ is taken away, as to lands, held by knights-ſervice, &c. but not where there is guardian in ſocage, or appointed by will. See title *Guardian.*

The Mayor and Aldermen and Chamberlain of *London*, who have the cuſtody of orphans, if they commit any orphan to another, he ſhall have a writ of Raviſhment of Ward againſt him who taketh the Ward out of his poſſeſſion. *New Nat. Br.* 317. See titles *London*; *Orphans.*

RAY, Cloth never coloured or dyed. See *ſtats.* 17 *R.* 2. *c.* 3: 11 *H.* 4. *c* 6: 1 *R* 3. *c.* 8.

REAFFORESTED, Is where a foreſt which had been deafforeſted is again made foreſt; as the foreſt of *Dean* is by *ſtat.* 20 *Car.* 2. *c* 3.

REALTY, Is an abſtract of real, as diſtinguiſhed from Perſonalty.

REASON, is the very life of Law; and what is contrary to it is unlawful.

When the Reaſon of the Law once ceaſes, the Law itſelf generally ceaſes; becauſe Reaſon is the foundation of all our Laws. *Co. Litt.* 97, 183.

If maxims of Law admit of any difference, thoſe are to be preferred which carry with them the more perfect and excellent Reaſon. *Ibid.* See 1 *Comm.* 70.

REASONABLE AID, A duty claimed, by the lord of the fee, of his tenants holding by knights ſervice, to marry his daughter, &c. *Stat. Weſtm* 2. *c.* 24. See title *Tenures.*

REASONABLE PART; See *Rationabili Parte.*

REATTACHMENT, *Reattachiamentum.*] A ſecond Attachment of him who was formerly attached and diſmiſſed the Court without day, by the not coming of the Juſtices, or ſome ſuch caſualty. *Broke Reg. Orig.* 35.

A cauſe diſcontinued, or put without day, cannot be revived without Reattachment or Reſummons; which, if they are ſpecial, may revive the whole proceedings; but, if general, the original record only. 2 *Hawk. P. C.* *c.* 27. § 105. And on a Reattachment, the defendant is to plead *de novo*, &c. See *Day.*

REBATE; Diſcount; The abating what the intereſt of money comes to, in conſideration of prompt payment. *Merch. Dict.* See title *Uſury.*

REBELLION, *Rebellio.*] Among the *Romans*, was where theſe who had been formerly overcome in battle, and yielded to their ſubjection, made a ſecond reſiſtance: but with us it is generally uſed for the taking up of arms traiterouſly againſt the King, whether by natural Subjects, or others when once ſubdued; and the word Rebel is ſometimes applied to him who wilfully breaks a Law: ſo to a villein diſobeying his lord. See *ſtats.* 25 *Ed.* 3. *c.* 6: 1 *R.* 2. *c.* 6.

There is a difference between Enemies and Rebels: Enemies are thoſe who are out of the King's allegiance; therefore Subjects of the King, either in open War, or Rebellion, are not the King's Enemies, but Traitors. Thus *David*, Prince of *Wales*, who levied war againſt *Edw.* I. becauſe he was within the allegiance of the King, had ſentence pronounced againſt him as a Traitor and Rebel. *Fleta, lib.* 1. *c.* 16 Private perſons may arm themſelves to ſuppreſs Rebels, Enemies, &c. 1 *Hawk. P. C.* *c.* 63. § 10.

REBELLIOUS ASSEMBLY; See title *Riot.*

REBUTTER, from the Fr. *bouter*, i. e. *repellere*, to put back or bar.] The anſwer of a defendant to a plaintiff's ſurrejoinder. See title *Pleading.*

Rebutter is alſo where a man by deed or fine grants to warranty any land or hereditament to another; and the perſon making the warranty, or his heir, ſues him to whom the warranty is made, or his heir or aſſignee, for the ſame thing; if he who is ſo ſued, plead the deed or fine with warranty, and pray judgment if the plaintiff ſhall be received to demand the thing which he ought to warrant to the party, againſt the warranty in the deed, &c. this is called a Rebutter. *Terms de Ley.* And if I grant to a tenant to hold without impeachment of waſte, and afterwards implead him for waſte done, he may debar me of this action, by ſhewing my grant; which is Rebutter. *Co. Entr.* 284: *Co. Litt.* 365.

RECAPTION, *Recaptio.*] The taking a ſecond diſtreſs of one formerly diſtrained, during the plea grounded on the former diſtreſs: and it is a writ to recover damages for him whoſe goods being diſtrained for rent, or ſervice, &c. are diſtrained again for the ſame cauſe, pending the plea in the County-Court, or before the Juſtices. *F. N. B.* 71, 72. See *ſtat. antiq.* 47 *Ed.* 3. *c.* 7.

A Recaption lies where the lord diſtrains other cattle of the tenant than he firſt diſtrained, as well as if he had diſtrained the ſame cattle again, if it be for one and the ſame cauſe; but *anno* 19 *Ed.* III, iſſue was taken whether the cattle were other cattle of the plaintiff, &c. *New Nat. Br* 161. See title *Replevin.*

If the lord diſtrain the cattle of a ſtranger for the ſame rent, and not his cattle who was firſt diſtrained; neither the ſtranger, nor the party firſt diſtrained, ſhall have the writ of Recaption: And if the lord diſtrain for rent or ſervice, and afterwards the lord's bailiff takes a diſtreſs on the ſame tenant for the ſame rent or ſervice, pending the plea: the tenant ſhall not have a Recaption againſt the lord, nor againſt the bailiff, although the bailiff maketh cogniſance in right of the lord, &c. for it may be the lord had no notice of that diſtreſs, or the bailiff had no notice of the diſtreſs taken by the lord; though in ſuch caſe action of treſpaſs lies; and if the lord agree to the diſtreſs taken by his ſervant or bailiff, the tenant may have this writ againſt the lord. *New Nat. Br.* 159.

A man is diſtrained within a liberty, and ſues a replevin there by plaint or writ, and pending that plaint in the liberty he is diſtrained again for the ſame cauſe by the perſon who diſtrained before; he ſhall not on that diſtreſs bring a writ of Recaption, becauſe the plaint is not pendant in the County-Court before the Sheriff, nor in *C. B.* before the Juſtices: but if the plaint be removed by *pone* or *recordare* out of the liberty before the Juſtices, then the party diſtrained may have a Recaption,

Reception, &c. And if a person be convicted before the Sheriff in a writ of Reception, he shall not only render damages to the party, but be amerced for the contempt; and be fined. 39 *Ed.* 3. See further, title *Replevin.*

For damage-feasant, beasts may be distrained as often as they be found on the land; because every time is for a new trespass and a new wrong, and no Reception lies.

RECAPTION is also a species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace. 3 *Inst.* 134. *Hal. Annal.* § 46.

The reason for this is obvious; since it may frequently happen that the owner may have this *only* opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of Law. If therefore he can so contrive it as to gain possession of his property again, without force or terror, the Law favours, and will justify, his proceeding. But, as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of Recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use: but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law. 2 *Roll. Rep.* 55, 56, 208. 2 *Roll. Abr.* 565, 566. 3 *Comm.* 4. As to the recovery of stolen goods on conviction, see title *Restitution.*

RECEIPT; See *Rescept.*

All Receipts in writing are subjected to certain stamp-duties, from 2*d.* to 2*s.*, by various acts of Parliament.

RECEIVER, *Receptor*] Is by us, as with the *Civilians*, commonly used in the evil part, for such as receive stolen goods, &c. The receiving a felon, and concealing him and his offence, makes a person accessary to the felony. 2 *Inst.* 183. See title *Accessary* II. 3.

By the Common Law, THE RECEIVING OF STOLEN GOODS was a misdemeanor: but by *stat.* 3 & 4 *W.* & *M.* c. 9, it is enacted, "that Receivers of stolen goods, knowing them to be stolen, shall be deemed accessaries after the fact."

But this offence being dependent on the fate of the principal, a Receiver thus circumstanced could not be tried till after the conviction of such principal; so that however strong and conclusive the evidence might be, the Receiver was still safe, unless the thief could be apprehended; and even if apprehended, and put upon his trial, if acquitted through any defect of evidence, the Receiver, although he had actually confessed the crime, and the goods in his possession could be proved to be stolen, must be acquitted also; and this offence, even if completely proved, applied only to capital felonies, and *not to petit larceny.*

These defects were afterwards foreseen, and partly remedied by *stats.* 1 *Ann st.* 2 c 9. 5 *Ann* c. 31; which enact, "that Buyers and Receivers of stolen goods, knowing them to be stolen, may be prosecuted for a misdemeanor, and punished by fine and imprisonment; though the principal be not previously convicted of felony: or though he cannot be taken so as to be prosecuted and convicted."

This act also greatly improved the laws applicable to this species of offence; by empowering the Court to substitute a corporal punishment instead of fine and imprisonment; and by declaring, that if the felony shall be proved against the thief, then the accessary should receive judgment of death; but the benefit of clergy was reserved.

The mischief still increasing, and these laws being found insufficient, the *stat* 4 *Geo* 1. c. 11, enacted, "that Receivers of stolen goods, knowing them to be stolen, should, on conviction, be transported for fourteen years; and that, buying at an undervalue should be presumptive evidence of such knowledge." And the same statute makes it felony, without benefit of clergy, "for any person, directly or indirectly, to take a reward for helping any person to stolen goods; unless such person bring the felon to his trial, and give evidence against him." See title *Advertisement.*

But still these amendments proved ineffectual; and not being found to apply immediately to persons receiving stolen *lead, iron, copper, brass, bell metal,* or *solder,* taken from buildings, or from ships, vessels, wharfs, or quays: It was enacted by *stat.* 29 *Geo.* 2. c. 30, "that the Receivers of such articles, knowing the same to be stolen, or who shall privately purchase these respective metals, by suffering any door, window, or shutter to be left open between *sun-setting* and *sun rising*, or shall buy or receive any of the said metals in a clandestine manner, shall, on conviction, be transported for fourteen years; although the principal felon has not been apprehended or punished." § 1.

The same statute empowers one Justice to grant a warrant to search in the day-time for such metals suspected to be stolen, as by the oath of one witness may appear to be deposited or concealed in any house or place; and if goods are found, the statute empowers two Justices to adjudge the person having the custody of the same, guilty of a misdemeanor, if he does not produce the party from whom he purchased, or give a satisfactory account how they came into his possession; and the *offender shall* forfeit 40*s.* for the first offence: 4*l.* for the second: and 6*l.* for every subsequent offence. §§ 2, 6.

This statute also empowers officers of justice (and watchmen while on duty) to apprehend all persons suspected of conveying any stolen metals, as already described, after sun-set or before sun rise; and if such persons cannot give a good account of the manner by which they were obtained, two Magistrates are in like manner authorised to adjudge them guilty of a misdemeanor, and they to forfeit 40*s.* &c. § 3, 6.

The persons also to whom such articles are offered for sale, or to be pawned, where there is reasonable ground to suppose they were stolen, are empowered to apprehend and secure the parties, and the materials, to be dealt

dealt with according to Law. And if it shall appear, even on the evidence of the thief, corroborated by other testimony, that there was cause to suspect the goods were stolen, and that the person, to whom they were offered, did not do his duty in apprehending the person offering the same, he shall be adjudged guilty of a misdemeanor, and forfeit 20s. for the first offence: 40s. for the second; and 4l. for every offence subsequent. § 5. And so anxious has the Legislature been to suppress the evil of stealing and receiving metals, that § 8, of the said *stat.* 29 *Geo.* 2. *c.* 30, entitles the actual thief to a pardon, on the discovery and conviction of two or more of the Receivers: And § 9, screens from prosecution any person stealing such metals, who shall discover the Receiver to whom the same were delivered, so as a conviction might follow.

Under these *stats.* 3 & 4 *W.* & *M. c.* 9: 5 *Ann. c.* 31: 29 *Geo.* 2. *c.* 30, the prosecutor has two methods in his choice; either to punish the Receivers for the misdemeanor, immediately, before the thief is taken; or to wait till the felon is convicted, and then punish them as accessaries to the felony. But it is provided by the statutes, that he shall only make use of one, and not both, of these methods of punishment. *Foster* 374.

By *stat.* 30 *Geo.* 2. *c.* 24, it shall be lawful for any pawnbroker, or any other dealer, their servants, or agents, to whom any goods shall be offered to be pawned, exchanged, or sold, which shall be suspected to be stolen, to seize and detain the persons offering the same, for the purpose of being examined by a Justice; who is empowered, if he sees any grounds to apprehend that the goods have been illegally obtained, to commit the persons offering the same, to prison, for a period not exceeding six days; and if on the farther examination, the Justice shall be satisfied that the goods were stolen, he shall commit the offender to prison, to be dealt with according to Law; and although it may afterwards appear that the goods in question were fairly obtained, yet the parties who seized the supposed offender shall be indemnified.

It has been determined, that money and bank notes are not goods within the meaning of these statutes. [illegible] 68. Upon the trial of the Receiver, the principal felon may be admitted a witness. *Leach* 325.

It is well observed, by the ingenious author of the [illegible] the *Police of the Metropolis*, that it would have [illegible] to the principles of the first of these statutes [illegible] to every kind of goods and chattels, [illegible] *money*, and *bank notes*, as well as to the [illegible] therein described; but it is to be lamented, that [illegible] has not been to look at great features of [illegible] to meet every existing pressure [illegible] another partial statute was made, [illegible] the provisions of *stat.* 29 [illegible] goods, [illegible] or materials taken from [illegible] by enacting, "that all persons [illegible] knowing them to be stolen, [illegible] the same in a concealed or clandestine manner [illegible] sun-setting and sun-rising, shall be transported [illegible] fourteen years, although the principal felon [illegible]." But, by the wording of this act, it is [illegible] to receiving stolen goods from [illegible] of the River.

[illegible] applicable to the Receivers of stolen [illegible] 10 *Geo.* 3. *c.* 48, whereby it is enacted, "that the Buyers and Receivers of jewels, gold, silver, plate, or watches, knowing the same to be stolen, where such stealing was accompanied by a burglary or highway robbery, may be tried, as well before as after the principal felon is convicted; and whether he be in or out of custody; and, if found guilty, shall be transported for fourteen years."

Eleven years after the passing of the above-mentioned statute, the Legislature, appearing to be impressed with the great extent of the depredations committed by persons stealing *pewter pots*, and desirous of punishing the Receivers, the *stat.* 21 *Geo.* 3. *c.* 69, was passed; which enacts, "that any person who shall buy or receive any pewter pot or other vessel, or any pewter in any form or shape whatsoever, knowing the same to be stolen, or who shall privately buy or receive stolen pewter in a clandestine manner, between sun setting and sun-rising, shall, on conviction, be transported for seven years, or detained in the House of Correction, at hard labour, for a term not exceeding three years, nor less than one year, and may be whipped not more than three times; although the principal felon has not been convicted."

In the following Session of Parliament, the *stat.* 22 *Geo* 3. *c.* 58, (said to have been framed by an able and experienced Lawyer and Magistrate, Mr. *Serjeant Adair*, then Recorder of *London*,) removed many of the imperfections of former statutes, and particularly that which respected Petty Larceny; by enacting, "That where any goods (*except lead, iron, copper, brass, bell metal, or solder, the Receivers of which, it has been already stated, are punishable, under stat* 29 Geo. 2. c 30, *by transportation for fourteen years*,) have been stolen, whether the offence amount to Grand Larceny, or some greater offence, or to Petty Larceny only; (*except where the offender has been convicted of Grand Larceny, or some greater offence; when the Receiver must be prosecuted as an accessary to the felony, and under* stat. 24 Geo 2. c. 11, *already noticed, may be transported for fourteen years*;) every person who shall buy or receive the same, knowing them to be stolen, shall be guilty of a misdemeanor, and punished by fine, imprisonment, or whipping, as the Quarter Sessions who are empowered to try such offender, or any other Court, before whom he shall be tried, shall think fit, although the principal be not convicted; and if the felony amounts to Grand Larceny, or some greater offence, and the person committing such felony has not been before convicted, such offender shall be exempted from being punished as accessary, if the principal sha' be afterwards convicted." § 1.

This statute also empowers one Justice to grant a warrant to search for stolen goods in the day-time, on oath being made, that there are just grounds of suspicion; and the person concealing the said goods, or in whose custody they are found, shall, in like manner, be guilty of a misdemeanor, and punished, in the manner before mentioned. § 2.

The same statute extended the powers granted, by former acts relative to metals, to [illegible] of goods, by authorising peace-officers [illegible] while on duty) to apprehend all persons suspected of carrying [illegible] goods after sun-setting and before sun-rising [illegible], on conviction, be adjudged guilty of a misdemeanor, and [illegible] not exceeding [illegible], nor less than three months. § 3.

Power

Power is also given by this act to any person to whom goods suspected to be stolen, shall be offered to be sold or pawned, to apprehend the person offering the same, and to carry him before a Justice.

And as an encouragement to young thieves to discover the Receivers, the same act provides, "That if any person or persons, being out of custody, or in custody, if under the age of fifteen years, upon any charge of felony within benefit of clergy, shall have committed any felony, and shall discover two Receivers, so as that they shall be convicted, such discoverer shall have pardon for all felonies by him committed before such discovery."

When the *stat.* 3 *&* 4 *W.* *&* *M.* *c.* 9, had made the Receiver of stolen goods an accessary after the fact, his punishment in the case of Grand Larceny was the same as that of the principal, *viz.* burning in the hand, and imprisonment not exceeding a year. By *stat.* 4 *Geo.* 1. *c.* 11, the punishment of the principal might be changed, at the discretion of the Court, into transportation for *seven* years; but it seems to be understood, that the clause respecting the Receiver is peremptory, and that the Court is obliged to sentence him to transportation for *fourteen* years. *Fost.* 73. The words of the statute, however, it has been remarked, are, *that it shall and may be lawful* for the Court to order Receivers to be transported for fourteen years; which seem to leave it still to the discretion of the Judge, whether he will inflict this, or the former punishment of burning in the hand, upon the offender. 4 *Comm.* *c.* 10, *in n.*

RECEIVER. Annexed to other words, as Receiver of rents, signifies an officer belonging to the King, or other personage. *Crompt. Jurisd.* 18. See *Account*.

RECEIVER OF THE FINES; An officer who receives the money of all such as compound with the King, on original writs sued out of Chancery. *West. Symb. par.* 2. *sect.* 106: *Stat.* 1 *Ed.* 4. *c.* 1.

RECEIVER-GENERAL OF THE DUCHY OF LANCASTER; An Officer of the Duchy Court, who collects all the revenues, fines, forfeitures, and assessments, within the Duchy, or what is there to be received, arising from the profits of the Duchy Lands, *&c.* *Stat.* 39 *E.* 1. 7.

RECEIVER OF THE KING'S RENTS AND TENTHS; What he shall take for acquittances, see *stat.* 33 *H.* 8. *c* 39, § 65.

How the King's Receivers and Collectors shall be charged. See *stat.* 34 *&* 35 *H.* 8. *c.* 2.

Officers accountant to the Crown shall find sureties, and make their accounts duly. *Stat.* 7 *Ed* 6. *c.* 1.

Receivers to pay 12*l.* *per cent.* in case they neglect to account for two months. 20 *Car.* 2. *c.* 2.

The Treasury empowered to make allowances to Receivers. *Stat.* 5 *G.* 1. *c.* 4. § 5: 7 *G.* 1. *st.* 1. *c.* 20. § 36.

See *stat.* 25 *Geo.* 3. *c.* 35, enabling the Court of Exchequer to sell the estate of a debtor to the Crown; and to apply the same in liquidation of the King's demand, under an *extent*, or *diem clausit extremum*.

RECITAL, *Recitatio.*] Is the rehearsal or making mention, in a deed or writing, of something which has been done before. 1 *Lill. Abr.* 416.

A Recital is not conclusive, because it is no direct affirmation; otherwise, by feigned Recitals in a true deed, men might make what titles they pleased, since false Recitals are not punishable. *Co. Litt.* 352: 2 *Lev.* 108.

If a person by deed of assignment recite that he is possessed of an interest in certain lands, and assign it over by the deed, and become bound by bond to perform all the agreements in the deed; if he is not possessed of such interest, the condition is broken; and though a Recital of itself is nothing, yet, being joined and considered with the rest of the deed, it is material. 1 *Leon.* 112. A Recital, that before the indenture the parties were agreed to do such a thing, is a covenant; and the deed itself confirms it. 3 *Keb.* 466.

The Recital of one lease in another, is not a sufficient proof that there was such a lease as is recited *Vaugh* 74. But the Recital of a lease in a deed of release, is good evidence of a lease against the releassor, and those who claim under him. *Mod. Ca.* 44.

A new reversionary lease shall commence from the delivery, where an old lease is recited, and there is none, *&c.* *Dyer* 93: 6 *Rep.* 36.

A. recites that he hath nothing in such lands, and in truth he hath an estate there, and makes a lease to *B.* for years: the Recital is void, and the lease good. *Jenk. Cent.* 255. In this case, if the Recital were true, the lease would not bind. See title *Deeds*.

RECOGNITION, *Recognitio.*] An acknowledgment: it is the title of the first chapter of the *stat.* 1 *Jac.* 1. whereby the Parliament acknowledged the Crown of *England*, on the death of Queen *Elizabeth*, rightfully to have descended to King *James*

RECOGNITIONE ADNULLANDA *per Vim et Duritiem factâ*, A Writ to the Justices of *C. B.* for sending a record touching a Recognizance, which the Recognizor suggests was acknowledged *by force and duress*; that, if it so appear, the Recognizance may be disannulled. *Reg. Orig.* 183.

RECOGNITORS, *Recognitores.*] The Jury impannelled on an Assise; so called, because they acknowledge a disseisin by their verdict. *Bract. lib.* 5. See titles *Assise*; *Jury*.

RECOGNIZANCE, Fr. *Reconoissance*; Lat. *Recognitio*; *Obligatio.*] An Obligation of Record, which a man enters into, before some Court of Record, or Magistrate duly authorised, with condition to do some particular act; as to appear at the Assises, to keep the peace, to pay a debt, or the like. It is, in most respects, like another bond; the difference being chiefly this; that the bond is the creation of a fresh debt, or Obligation *de novo*; the Recognizance is an acknowledgment of a former debt upon record; the form whereof is, "That *A. B.* doth acknowledge to owe to our Lord the King, to the plaintiff, to *C. D.* or the like, the sum of 10*l* " with condition to be void on performance of the thing stipulated; in which case the King, the plaintiff, *C. D.* &c. is called the Cognizee, *is cui cognoscitur*; as he that enters into the Recognizance is called the *Cognizor, is qui cognoscit.* This being either certified to, or taken by, the officer of some Court, is witnessed only by the record of that Court, and not by the party's seal: so that it is not, in strict propriety, a deed, though the effects of it are greater than a common Obligation, being allowed a priority in point of payment, and binding the lands of the Cognizor from the time of enrolment on record. *Stat.* 29 *Car.* 2. *c.* 3. See *Bail*.

As to Recognizances of a private kind, in nature of a *Statute-Staple*, by virtue of *stat.* 23 *H.* 8. *c.* 6, and which

are a charge on real estate, the following observations will serve at present: and see further, title *Statute-Staple*.

For debt, or bail, they are taken or acknowledged before the Judges, a Master in Chancery, *&c.* See title *Bail*. And to appear at the Assises, or Sessions, they may be taken by Justices of Peace; which Recognizances are to be returned by the Justices to the Sessions, or an information lies against them. 2 *Lil Abr*. 417. See *Justices*.

By the statute, 23 *H*. 8. *c*. 6, the Chief Justices of the King's Bench and Common Pleas in term time, or, in their absence out of term, the Mayor of the Staple at *Westminster*, and the Recorder of *London*, jointly, have power to take Recognizances for the payment of debts, in this form, *Noverint universi per præsentes Nos* A. B. *&* C. D. *teneri & firmiter obligari* E. F. *in centum libris*, &c. They are to be sealed with the seal of the Cognizor, and of the King appointed for that purpose, and the seal of one of the Chief Justices, *&c.* And the Recognizees, their executors and administrators, have the like process and execution against the Recognizors, as on Obligations of Statute-Staple. 2 *Inst*. 678.

The execution on a Recognizance or statute, pursuant to *stat*. 23 *H*. 8. *c*. 6, is called an extent; and the body of the Cognizor, (if a layman,) and all his lands, *&c.* into whose hands soever they come, are liable to the extent; goods (not of other persons in his possession) and chattels, as leases for years, cattle, *&c.* which are in his own hands, and not sold *bonâ fide*, and for valuable consideration, are also subject to the extent. 3 *Rep*. 13.

But the land is not the debtor, but the body; and land is liable only in respect that it was in the hands of the Cognizor at the time of the acknowledgment of the Recognizance, or after: and the person is charged, but the lands chargeable only. *Plowd*. 72.

Lands held in tail are chargeable only during life, and do not affect the issue in tail; unless a recovery be passed, when it is as fee-simple land: Copyhold lands are subject to the extent, only during the life of the Cognizor. The lands a man hath in right of his wife, shall be chargeable, only during the lives of husband and wife together; and lands which the Cognizor hath in joint-tenancy with another, are liable to execution during the life of the Cognizor, and no longer; for after his death, if no execution was sued in his life, the surviving joint-tenant shall have all; but if the Cognizor survive, all is liable. 2 *Inst*. 673.

If two or more join in the Recognizance, *&c.* the lands of all ought equally to be charged: and where a Cognizor, after he hath entered into a Recognizance or statute, conveys his lands to divers persons, and the Cognizee sues execution on the lands of some of them, and not all; in this case he or they, whose lands are taken in execution, may, by *auditâ querelâ* or *scire facias*, have contribution from the rest, and have all the lands equally and proportionably extended. But the Cognizor, or his heirs, when he sells part of his lands, and keeps the remainder, shall not have any contribution from a purchaser, if his land is put in execution. 3 *Rep*. 14: *Plowd*. 72.

If there be a Recognizance, and after a statute entered into by one man to two others; his lands may be extended *pro rata*, and so taken in execution. *Yelv*. 12.

This kind of Recognizance may be used for payment of debts; or to strengthen other assurance. *Wood* 288.

If a Recognizance is to pay 100*l*. at five several days, *viz*. 20*l*. on each day, immediately after the first failure of payment, the Cognizee may have execution by *elegit* on the Recognizance for the 20*l*. and shall not stay till the last day of payment is past, for this is in nature of several judgments. *Co Litt*. 292: 2 *Inst*. 395, 471. When no time is limited in a statute or Recognizance for payment of the money, it is due presently. See title *Bond*.

A Recognizance for money lent, though it is not a perfect record till entered on the roll; yet, when entered, it is a Recognizance from the first acknowledgment, and binds persons and lands from that time. *Hob*. 196. By *stat*. 29 *Car*. 2. *c*. 3, no Recognizance shall bind lands in the hands of purchasers for valuable consideration, but from the time of enrolment; which is to be set down in the margin of the roll: and Recognizances, *&c.* in the counties of *York* and *Middlesex*, shall not bind lands, unless registered, pursuant to *stats*. 2 *Ann*. *c*. 4: 5 *Ann*. *c*. 18: 6 *Ann*. *c*. 35: 7 *Ann*. *c*. 20. See tit. *Registry of Deeds*. The Clerk of the Recognizances is to keep three several rolls of the entering Recognizances taken by the Chief Justices, *&c.* and the persons before whom the Recognizances are taken; and the parties acknowledging, are to sign their names to the roll, as well as to the Recognizance. *Stat* 8 *Geo*. 1. *c*. 25.

To make a good Recognizance or obligation of record, the form prescribed must be pursued; therefore they may not be acknowledged before any others, besides the persons appointed by the statutes; and the substantial forms of the statute are to be observed herein. But a Recognizance may be taken by the Judges in any part of *England*. *Dyer* 221: *Hob*. 195.

Recognizances and statutes are like judgments; and the Cognizee shall have the same things in execution, as after judgment. The body of the Cognizor himself, but not of his heir, or executor, *&c.* may be taken, though there be lands, goods, and chattels to satisfy the debt: and if a Cognizor is taken by the Sheriff, and he let him go; yet his lands and goods are liable. 12 *Rep*. 1, 2: *Plowd*. 62: 1 *And*. 273.

By Recognizances of debt, and bail, the body and lands are bound; though some opinions are, that the lands of bail are bound from the time of Recognizance entered into; and some that they are not bound but from the recovery of the judgment against the principal. 2 *Leon*. 84: *Cro*. *Jac*. 272, 449. See title *Bail*.

In *B*. *R*. all Recognizances are entered as taken in Court; but in *C*. *B*. they enter them specially where taken, and their Recognizances bind from the caption; but those in *B*. *R*. from the time of entry; in *C*. *B*. a *scire facias* may be brought on their Recognizances either in *London* or *Middlesex*; on those in *B*. *R*. in the county of *Middlesex* only. 2 *Salk*. 659.

A Recognizance of bail in *C*. *B*. is entered specially; the bail are bound to pay a certain sum of money, if the party condemned doth not pay the condemnation, or render his body to prison: and in *B*. *R*. Recognizances are entered generally; that if the party be condemned in the suit or action, he shall render his body to prison, or pay the condemnation-money, or the bail shall do it for him. 2 *Lil*. *Abr*. 417. See title *Bail*.

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It was formerly a question, whether a *ca. sa.* would lie on a Recognizance taken in Chancery; but adjudged, that immediately after the Recognizance is acknowledged, it is a judgment on record; and then by *stat.* 25 *Ed.* 3. *c.* 17. a *ca. sa.* will lie, it being a debt on record. 2 *Bulst.* 62.

If a Recognizance be made before a Master in Chancery, for a debt, or to perform an order or decree of the Court; if the condition be not performed, an extent shall issue; or a *scire facias* is the proper process, for the Recognizor to shew what he can say, why execution should not be had against him; upon which, and a *scire facias* or two *nihils* returned, and judgment thereupon, the proper execution is an *elegit*, &c. *Cro. Jac.* 3.

Where a man is bound by Recognizance in Chancery, and the Cognizor hath certain indentures of defeasance; if the Recognizee will sue execution on the Recognizance, the Recognizor may come into Chancery, and shew the indentures of defeasance, and that he is ready to perform them; and thereon he shall have a *scire facias* against the Recognizee, returnable at a certain day; and in the same writ, he shall have a *supersedeas* to the Sheriff not to make execution in the mean time. *New Nat. Br.* 589.

If a person is bound in a Recognizance in Ch[illegible]ry, or other Court of Record, and afterwards the [illegible]gnizee dieth; his executors may sue for an [illegible] to have execution of the lands of the Recogn[illegible]or; and if the Sheriff return that the Recognizor is de[illegible] [illegible] a special *scire facias* shall go against the heir of the Recognizor, and those who are tenants [illegible] the lands which he had at the day of the Recogniz[illegible] entered into. *New Nat. Br.* 590.

One of the best securities we have for a debt is the Recognizance in Ch[illegible]ery, acknowle[illegible]ed before a Master of that Court; which is to be signed by such Master, [illegible] and the King may, by his commission, giv[illegible] to receive a Recognizance of another man, [illegible] return the same into Chancery; and on such a Recognizance, if the Recognizor do not pay the debt at the day, the Reco[illegible] shall have an *elegit* on the Cognizance so taken, as [illegible] were taken in the Chancery. *New Nat. Br.* 589.

In case lands are mortgaged, without giving notice of a Recognizance formerly had, if the Recognizance be not paid off and vacated in six months, the mortgagor shall forfeit his equity of redemption, *&c. Stat.* 4 & 5 *W. & M. c.* 16. See title *Mortgage* III.

When a statute has been shewn in Court, and the plea discontinued, the Conusee, on a resummons, may have execution without producing it again. *Stat.* 5 *H.* 4. *c.* 12.

On a *scire facias* to defeat a Recognizance, the Conusor shall find surety to the party, as well as to the King. *Stat.* 11 *H.* 6. *c.* 10.

Recognizances for keeping the peace shall be returned to the Sessions. *Stat.* 3 *H.* 7. *c.* 1.

Recognizances for debt may be taken before the chief Justices, *&c.* 23 *H.* 8. *c.* 6.

See further, titles *Statute Merchant*; *Statute-staple*; *Surety of the Peace*; and 18 *Vin. Abr.* 163—170.

RECOGNIZEE, He to whom one is bound in a Recognizance, mentioned in *stat.* 11 *H.* 6. *c.* 10.

RECOGNIZOR, He who enters into the Recognizance.

RECORD, *Recordum*, from the Lat. *Recordari*, to remember.] A Memorial or Remembrance; An authentic Testimony in writing, contained in rolls of parchment, and preserved in a Court of Record, *Britton, c.* 27. In these rolls are contained the judgment of the Court on each case, and all the proceedings previous thereto; carefully registered, and preserved in public repositories, set apart for that purpose. The term *Record* is applied to such proceedings of superior Courts only, and does not extend to the rolls of inferior Courts; the registries of proceedings whereof are not properly called Records. *Co. Litt.* 260: See title *Courts*.

All Courts of Record are the King's Courts in right of his Crown and royal dignity: and therefore no other Court hath authority to fine or imprison. A Court not of Record, is the Court of a private man; whom the Law will not intrust with any discretionary power over the fortune or liberty of his fellow-subjects. Such are the Courts-Barons incident to every manor, and other inferior jurisdictions; where the proceedings are not enrolled or recorded: but as well their existence, as the truth of the matter contained therein, shall, if disputed, be tried and determined by a Jury. 3 *Comm. c.* 3. *p.* 24.

There are three kinds of Records, *viz.* A *judicial Record*, as an attainder, *&c.* a *ministerial Record* on oath, being an office or inquisition found; and a *Record* made by conveyance and consent, as a *Fine, Recovery*, or a *Deed inrolled*. 4 *Rep.* 54. But it has been held, that a deed inrolled, or a decree in Chancery inrolled, are not *Records*, but a deed and a decree recorded; and there is a difference between a Record and a thing recorded. 2 *Lil.* 421.

Records, being the rolls or memorials of the Judges, import in themselves such incontrollable verity, that they admit of no proof or averment to the contrary, insomuch that they are to be tried only by themselves; for otherwise there would be no end of controversies; but during the term wherein any judicial act is done, the roll is alterable in that term, as the Judges shall direct; when the term is past, then the Record admitteth of no alteration, or proof that it is false in any instance. *Co. Lit.* 260: 4 *Rep.* 52.

Matter of Record is to be proved by the Record itself, and not by evidence, because no issue can be joined on it to be tried by a Jury like matters of fact; and the credit of a Record is greater than the testimony of witnesses. 21 *Car. B R.* Though where matter of Record is mixed with matter of fact, it shall be tried by Jury. *Hob.* 124.

A man cannot regularly aver against a Record; yet a jury shall not be estopped by a Record to find the truth of the fact: And it was adjudged, that on evidence, it is at the discretion of the Court to permit any matter to be shewn to prove a Record. 1 *Vent.* 362: *Allen* 18.

A Record may be contradictory in appearance, and yet be good: And though it hath apparent falsehood in it, it is not to be denied; but a Record may in some cases be avoided by matter in fact. *Style's Reg.* 281: *Co. Lit.*: *Cro. Car.* 329: *Hutt.* 20.

The Judges cannot judge of a Record given in evidence, if the Record be not exemplified under seal: But a Jury may find a Record although it be not so, if they have a copy proved to them, or other matter given in evidence sufficient to induce them to believe that there was such a Record. 2 *Lill. Abr.* 421: See *post*, *Trial by Record*.

Judges

Judges may reform defects in any Record, or Process, or variance between Records, &c. And a Record exemplified or inrolled may be amended for variation from the exemplification. *Stat.* 8 *H.* 6. *cc.* 12, 15. See *Amendment.*

If the transcript of a Record be false, the Court of *B.R.* will, on motion, order a *Certiorari* to an inferior Court, to certify *how the Record is below*; and if it be on a writ of error on a judgment of the Common Pleas, they will grant a rule to bring the Record out of *C. B.* into this Court, and then order the transcript to be amended in Court, according to the roll in *C. B.* And a Record cannot be amended without a rule of the Court, grounded on motion. 2 *Lill. Abr.* 421, 2.

Where a Record is so drawn, that the words may receive a double construction, one to make the Record good, and another to make it erroneous, the Court will interpret the words that way which will make the Record good, as being most for the advancement of justice: So if a letter of a word in a Record be doubtful, that it may be taken for one letter or another, the Court will construe it to be that letter which is for upholding the Record. See *Cro. Eliz.* 161: *Cro. Jac.* 119, 153, 244, &c.

The Court will not supply a blank left in a Record, to make it perfect, when before it was defective; as this would be to make a Record, which is not the office of the Court to do, but to judge of them. 2 *Lil. Abr.* 420. If a subsequent Record hath any relation to one that is precedent; in such case it must appear in pleading, &c. to be the same without any variation. 3 *Lutw.* 905.

Records certified out of inferior Courts, on writs of error, and the judgments on such Records are to be entered in *B. R.*; for until then the Records are not perfected: And if a Record once comes into *B. R.* by writ of error, it never goes out again; but a transcript of it may go to the House of Lords, on a writ of error there. 2 *Lil.* 422. Writ of error removes the Record; but the original is no part of it. *Jenk. Cent.* 164. A Record cannot be removed by writ of error, until the judgment in that Record is entered: And when and how a Record may be removed, and where and how remanded, see *Cro. Jac.* 206: 2 *Brownl.* 145; and this Dict. tit. *Error.*

Justices of Assise, Gaol-delivery, &c. are to send all their Records and processes determined, to the Exchequer at *Michaelmas* in every year; and the Treasurer and Chamberlains, on sight of the commissions of such Justices, are to receive the same Records, &c. under their seals, and keep them in the Treasury. *Stat.* 9 *Ed. stat.* 3. 1. *c.* 5.

Imbezzling *or vacating* Records, (or falsifying certain other proceedings in a Court of Judicature,) is a felonious offence against public justice. It is enacted by *stat.* 8 *H.* 6. *c.* 12, that if any clerk, or other person, shall wilfully take away, withdraw, or avoid, (vacate,) any Record or Process, in the superior Courts of Justice in *Westminster-Hall*; by reason whereof the judgment shall be reversed, or not take effect: It shall be felony, not only in the principal actors, but also in their procurers and abettors: And this may be tried, either in the King's Bench or Common Pleas, by a Jury *de medietate*, half Officers of any of the superior Courts, and the other half common Jurors. So by *stat.* 21 *Jac.* 1. *c.* 26, to acknowledge any *Fine, Recovery, Deed-inrolled, Statute, Recognizance, Bail,* or *Judgment*, in the name of another not privy to the same, is felony without clergy. This Law extended only to proceedings in the Courts themselves; but by *stat.* 4 *W. & M. c.* 4, to personate any other as bail before Judges of Assise, or the Commissioners in the country, is also felony. See titles *Bail: Fine: Recovery*, &c.

A Record that is rased, if legible, remains a good Record notwithstanding the rasure; but he who rased it is not to go unpunished for his offence. And in case of a rasure in a judgment, done by fraud to hinder execution, the Record hath been ordered to be amended, and a special entry thereof to be made; but though the Record by this means be made perfect, the offender may be indicted for the felony. 2 *Rol. Rep.* 81.

Trial by Record, Is used where a matter of Record is pleaded in any action, as a *Fine*, a *Judgment*, or the like; and the opposite party pleads *nul tiel Record*, "that there is no such matter of Record existing."—Upon this issue is tendered, and joined in the following form: "And this he prays may be inquired of *by the Record*; and the other doth the like." And hereupon the party pleading the Record has a day given him to bring it in; and proclamation is made at the rising of the Court on that day, for him "to bring forth the Record by him in pleading alleged, or else he shall be condemned;" and, on his failure, his antagonist shall have judgment to recover, by rule of the Court, according to the circumstances of the case. The trial of this issue is merely by the Record, on the principle already stated.

Titles of Nobility, as whether Earl or no Earl, Baron or no Baron, shall be tried by the King's writ or patent only, which is matter of Record. 6 *Rep.* 53. Also in case of an alien, whether alien friend or enemy, shall be tried by the league or treaty between his Sovereign and ours, for every league or treaty is of Record. 9 *Rep.* 31: And, also, whether a manor be to be held in ancient demesne, or not, shall be tried by the Record of *Domesday* in the King's Exchequer. 3 *Comm. c.* 22. *p.* 330. See title *Ancient Demesne.*

Thus, also, upon the plea of a former judgment recovered by the plaintiff against the defendant for the same cause of action; or of another action depending on the same cause; or of outlawry; or of *comperuit ad diem* to a bail-bond; or of any act of Parliament; or, in short, of any other matter of Record, the general replication is *nul tiel Record*; upon which the parties join issue, and the truth or falsehood of such issue is determined by the party producing or failing to produce, the Record in question, on a day given him for that purpose. *Sellon's Pract. c.* 13.

Where the Record pleaded is the Record of another Court, the only way of producing it is by suing out a *Certiorari* from the Court of Chancery, for the Court where the Record is to certify the Record: and upon the return of the *Certiorari*, but not till then, the Record will be sent by *mittimus* to the Court where it is to be produced: and thus a Record of *K. B.* may be removed into *C. B.* contrary to the general rule, that they are not removable out of that Court. *Cro. Car.* 297: 2 *Saund.* 344.

Where Records are pleaded, they must be shewn; and one may not plead any Record, if it be not in the same Court where it remaineth, unless he shew it under the

the Great Seal of *England*, if denied: Acts of Record must be specially pleaded. *Bro. c.* 20: *Cro. Jac.* 560: 9 *Rep.* 218: 10 *Rep.* 92: *Styk* 22. Records are to be pleaded intire, and not part of them, with an *inter alia* referring to the Record; and so should a special verdict find a Record, unless a judgment be pleaded, or the declaration is on a judgment in a superior Court, when the plaintiff may say *recuperavit* generally; but not in an inferior Court, for there all the proceedings must be set forth particularly. *Mich.* 22 *Car. B. R.*

Though writs are matter of Record, they need not be so pleaded. 1 *Salk.* 1: 1 *Lev.* 211.

As to making up the Record of a cause for trial, see titles *Pleading*; *Record*

RECORDARI FACIAS LOQUELAM; (frequently abbreviated *Re. fa lo.*) A Writ directed to the Sheriff to remove a cause, depending in an inferior Court, to the King's Bench or Common Pleas; and it is called a *Recordari*, because it commands the Sheriff *to make a Record* of the *plaint* and other proceedings in the County-Court, and then to send up the cause: *F. N. B.* 71: 2 *Inst.* 339.

This Writ is in the nature of a *Certiorari*; on which the plaintiff may remove the plaint, from the County-Court, without cause; but a defendant cannot remove it without cause shewn in the writ, as on a plea of freehold, &c. If the plaint is in another Court, neither plaintiff nor defendant can remove it without cause. *Wood's Inst.* 572.

If a plea is discontinued in the county, the plaintiff or defendant may remove the plaint into the Common Pleas or King's Bench by *Recordari*, and it shall be good; and the plaintiff may declare on the same, and the Court hold plea thereof. *New. Nat. Br.* 158.

The form of this Writ in the Register is, *Et Recordum illud habeas*, &c. But in a *Recordari* to remove a Record out of the Court of ancient demesne, the writ shall say, *Loquelam & processum*, &c. And there is a writ to call a Record, &c to an higher Court at *Westminster*, called *Recordo & processu mittendis. Tab. Reg. Orig.* By the usual writ *Recordari*,—*The Sheriff is commanded, in his full Court*, to cause to be recorded *the plaint which is in the said Court between* A. *and* B. *of*, &c. *And have that Record before the Justices at* Westminster, *the day*, &c. *under the seals*, &c. *And to the said parties appoint the same day, that they be then there to proceed in that plea, as shall be just*, &c.

RECORDER, *Recordator*.] A person whom the Mayor and other Magistrates of any city or town corporate, having jurisdiction, and the Court of Record within their precincts by the King's grant, associate unto them for their better direction in matters of justice, and proceedings according to Law: therefore he is generally a Counsellor, or other person experienced in the Law.

The Recorder of *London*, is one of the Justices of *Oyer* and *Terminer*; and a Justice of Peace of the *Quorum*, for putting the Laws in execution for preservation of the Peace and Government of the city: And being the mouth of the City, he delivers the sentences and judgments of the Courts therein; and also certifies and records the City-Customs, &c. *Chart.* K. *Charles* II: *Co. Litt.* 288. He is chosen by the Lord Mayor and Aldermen; and attends the business of the City, on any warning by the Lord Mayor, &c. See titles *London*; *Customs of London*; *Certificate*.

RECOVERY,

RECUPERATIO, from Fr. *recouvrer*, *recuperare*.] In a general sense, the obtaining any thing by judgment or trial of Law.

There is a *true Recovery* and a *feigned one*.

A *true Recovery* is an actual or real Recovery of any thing, or the value thereof, by judgment; as if a man sue for any land, or other thing moveable or immoveable, and have a verdict or judgment for him.

A *feigned Recovery* is a certain form or course set down by Law to be observed, for the better assuring lands or tenements: And the effect thereof is to discontinue and destroy estates-tail, remainders and reversions, and to bar the entails thereof. *West. Sym. part.* 2. title *Recoveries*, § 1. See this Dict. title *Fine of Lands*.

The power of suffering a Common Recovery is a privilege inseparably incident to an estate-tail: and cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. See 1 *Burr.* 84. But the tenant in tail, in order to be entitled to such privilege, must be tenant in tail *in possession*, or he must have the concurrence of the prior freeholder, who claims under the same settlement. 2 *Burr.* 1072. See more fully *post*; and this Dict. title *Tail and Fee tail*.

A true Recovery is as well of the value as of the thing: For example, If I buy land of another with warranty, which land a third person afterwards by suit of law recovereth against me, I have my remedy against him who sold it me, to recover in value, that is, to recover so much in money as the land is worth, or other lands of equal value by way of exchange. *F. N. B.* 134: *Cowell*. And this rule will be found to pervade the whole of the present doctrine of *Recoveries*.

A Common Recovery is so far like a Fine, that it is a suit or action, either actual or fictitious: and in it the lands are recovered against the Tenant of the Freehold; which Recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror.

Fines and *Recoveries* are now considered as mere forms of Conveyances, or Common Assurances, the theory and original principles of them being little regarded. See 1 *Wils.* 73. Common Recoveries were invented by the Ecclesiastics, to elude the statutes of *Mortmain*; and afterwards encouraged by the finesse of the Courts of Law in 12 *E.* 4, in order to put an end to all fettered inheritances; and bar not only *Estates-tail*, but also all remainders and reversions expectant thereon. See further this Dict. titles *Mortmain*; *Tail and Fee-tail*, &c. In addition to what is said under those titles, and title *Fine of Lands*, the following will serve to develope the original principle of these conveyances. And see *Cruise on Recoveries*.

A Recovery, in a large sense, is a restitution to a former right by solemn judgment; at Common Law, judgments, whether obtained after a real defence made by the tenant to the writ, or whether pronounced on his default or feint plea, had the same efficacy to bind the right of the land in question; and from hence men took an opportunity of making use of the decisions of the Court to their own advantage, and to the prejudice of others, who, though in some cases strangers to the action, yet were interested in the land for which it was brought. 2 *Inst.* 75, 429.

 For,

For, whilst these Recoveries were governed by the strict rules of Common Law, particular tenants, as tenant in dower, courtesy, in tail after possibility of issue extinct, and for life only, all those who had made leases for years, and those, whose wives were entitled to dower, often took advantage of them; and by selling the lands, and suffering their purchasers to recover them, thereby defeated the right of those in remainder or reversion, &c.; which were inconveniencies so great, that it was thought necessary to provide against them by positive laws: Thus the *stat. Westm.* 2. 13 *E.* 1. *c.* 3, makes provision for him in reversion, against the Recoveries suffered either by the tenant in dower, by the courtesy, or in tail after possibility of issue extinct, or for life; and by the 4th chapter of this statute, the wife is secured as to her dower; and the statute of *Gloucester*, 6 *Ed.* 1. *c.* 11; and *stats.* 7 *Hen.* 8. *c.* 4: 21 *Hen.* 8. *c.* 15, have established the rights of termors, and enabled them to falsify such Recoveries. See *Co. Litt.* 104: *Kel.* 109: *F. N. B.* 468: *Plowd.* 57: *Doct. & Stud.* 45.

But there is no express provision made by any statute to preserve the interest of the issue in tail, or of him in reversion, against a Recovery suffered by the donee; yet it seems, that for two hundred years after the making the statute *De donis*, they were protected by that statute; therefore we find no express resolution, where such Recovery was allowed to bar the issue in tail, or those in remainder or reversion, till the reigns of *Ed.* IV. and *Hen.* VII. though in some cases the donee in tail was allowed to change the entail, and even to bar it. See 1 *Roll. Abr.* 342: *Co. Litt.* 343: 10 *Co.* 37: *Plowd.* 436: 2 *Inst.* 335: *Co. Litt.* 374: 4 *Leon.* 132, 133.

When these Recoveries were established as a common conveyance, and the best way of barring the issue in tail, and those in reversion or remainder, the tenant for life began to apply them once more to the prejudice of those who had the inheritance; and though the former statutes gave those who had the inheritance a remedy, yet the provision made by them being tedious and expensive, it was thought proper to make the *stat.* 32 *H.* 8. *c.* 31; which declared all such covinous Recoveries against the particular tenants to be void, in respect to him in reversion or remainder; and though the Judges very reasonably determined Recoveries against that act to be not only void, but a forfeiture of the particular estate, because it was a manner of conveyance as much known at that time as a fine or feoffment, therefore, by parity of reason, ought to have the same operation, yet that statute did not fully answer the end for which it was made. *Co. Litt.* 356, *a*; 1 *Co.* 15: *Vaughan* 51.

For if *A.* had been tenant for life, and made a lease for years to *B.* and *B.* had made a feoffment in fee, if the feoffee had suffered a Recovery, and vouched the tenant for life, this was no void Recovery within the statute; because *A.* the tenant for life was not seised at the time of the Recovery, for the feoffment of the termor was a disseisin to *A.* and him in reversion; and the statute makes Recoveries of tenants for life in possession only void against them *to whom the reversion then belongs.* 10 *Co.* 45, *a*: *Co. Lit.* 362.

Yet where tenant for life bargained and sold his land in fee by indenture enrolled, and the bargainee suffered a Recovery, and vouched the bargainor, this was a void Recovery, and a forfeiture within the *stat.* 32 *H.* 8. *c.* 31; for though the bargain and sale was of the inheritance, yet it passed only an estate for life of the bargainor, which was the greatest estate he could lawfully pass, consequently the reversioner was not devested; therefore the bargainee being a legal tenant for life in possession, the Recovery against him, though with a voucher of the bargainor, was void within that act against him in reversion, whose reversion was not turned to a right as in the former case of a disseisin. 1 *Co.* 15: 1 *Leon.* 123.

But the former defect was cured by *stat.* 14 *Eliz. c.* 8; which repeals the said *stat.* 32 *H.* 8. *c.* 31, and declares all Recoveries (had by agreement of the parties, or *by covin*) against *tenant for life*, of any lands whereof he is so seised, or against any other with voucher over of him, *to be void*, as against the *reversioners* and their heirs.

These statutes made no provision for reversions or remainders *expectant* on estates tail; therefore, if there be tenant for life, remainder in tail, remainder in fee; and tenant for life suffers a Recovery, and vouches the remainder-man in tail, who vouches the common vouchee; this is so far from being a void Recovery within those statutes, that the reversion in fee is actually barred by it; for the intended recompence, which the remainder-man in tail is to have against the common vouchee, is to go in succession, as the estate-tail would have done; and it cannot be a covinous Recovery within the act, because the remainder-man in tail joined in it, who may at any time suffer such a Recovery to destroy the remainder in fee. 10 *Co.* 39, 43, 45: *Co. Litt.* 362, *a*: 3 *Co.* 60. *b*: *Cro. Eliz.* 562: *Moor* 690: *Cro. Eliz.* 570.

These common Recoveries were no sooner allowed by the Judges to bar estates-tail, but men began to improve them into a common way of conveyance, and to declare uses on them, as on fines and feoffments. Hence it is, that the statutes, which provide against any alienations or discontinuances of particular tenants, provide at the same time against their Recoveries; thus *stat.* 11 *H.* 7. *c.* 20, declares *all Recoveries*, as well as other discontinuances by fine or feoffment of women tenants in tail, of the gift of their husbands, or their ancestors, to be void; so, a Recovery against husband and wife of the inheritance of the wife, without any voucher, is declared to be void within *stat.* 32 *H.* 8. *c.* 28; though the statute says, "suffered or done by the husband;" for this, like a feoffment by baron and feme is, in substance, the act of the baron only, and so within the statute; but a Common Recovery suffered by a feme covert, where her husband joins with her, is good to bar her and her heirs. *Doct. and Stu.* 54: *Co. Lit.* 326, *a*: 8 *Co.* 72: 10 *Co.* 43: 2 *Inst.* 342: 2 *Rol. Abr.* 205. See title *Baron and Feme*; and *post.* II: and *Cruise on Rec.*

I. *The Nature of a Common Recovery; who may suffer it; of what Things it may be suffered.*

II. *The Effect of a Recovery.* 1. *What Estates and Interests may be barred by a Common Recovery.* 2. *Of single and double Voucher, and Tenant to the Præcipe.* And, 3. *Of Deeds to lead or declare the Uses of a Recovery; (or Fine).*

III. *Of covinous and void Recoveries; who may avoid them, and by what Methods; and see* Div. I.

I. In order to explain the nature of a Common Recovery, *Blackstone* gives the following account of its progress: Premising, that it is in the nature of an action at Law, not immediately compromised like a Fine, but carried on through every regular stage of proceeding. See 2 *Comm.* c 21.

Let us, in the first place, suppose one *David Edwards* to be tenant of the freehold, and desirous to suffer a Common Recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to *Francis Golding*. To effect this, *Golding* is to bring an action against him for the lands; and he accordingly sues out a writ, called a *Præcipe quod reddat*, because those were its initial or most operative words, when the Law proceedings were in Latin. In this writ the demandant *Golding* alleges, that the defendant *Edwards* (here called the tenant) has no legal title to the land; but that he came into possession of it after one *Hugh Hunt* had turned the demandant out of it. The subsequent proceedings are made up into a Record or Recovery roll, in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one *Jacob Morland*, who is supposed, at the original purchase, to have warranted the title to the tenant; and thereupon he prays, that the said *Jacob Morland* may be called in to defend the title which he so warranted. This is called the *Voucher, vocatio*, or calling of *Jacob Morland* to warranty; and *Morland* is called the *Vouchee* Upon this, *Jacob Morland*, the vouchee, appears, is impleaded, and defends the title. Whereupon *Golding*, the demandant, desires leave of the Court to *imparl*, or confer with the vouchee in private; which is (as usual) allowed him: and soon afterwards the demandant, *Golding*, returns to Court, but *Morland*, the vouchee, disappears, or makes default. Whereupon judgment is given for the demandant, *Golding*, now called the Recoveror, to recover the lands in question against the tenant, *Edwards*, who is now the Recoveree: and *Edwards* has judgment to recover of *Jacob Morland* lands of equal value, in recompence for the lands so warranted by him, and now lost by his default; which is agreeable to the ancient doctrine of *Warranty*. See that title. This is called the Recompence, or *Recovery in value*. But *Jacob Morland* having no lands of his own, being usually the cryer of the Court, (who, from being frequently thus vouched, is called the *common vouchee*,) it is plain that *Edwards* has only a nominal recompence, for the lands so recovered against him by *Golding*; which lands are now absolutely vested in the said Recoveror by judgment of Law; and seisin thereof is delivered by the Sheriff of the county. So that this collusive Recovery operates merely in the nature of a conveyance in fee-simple, from *Edwards* the tenant in tail, to *Golding* the purchaser.

The Recovery, here described, is with a *single* voucher only; but sometimes it is with *double*, *treble*, or farther voucher, as the exigency of the case may require. And indeed it is now usual always to have a Recovery with double voucher at the least; by first conveying an estate of freehold to any indifferent person, against whom the *præcipe* is brought; and then he vouches the tenant in tail, who vouches over the common vouchee. For, if a Recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised; whereas, if the Recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered. *Bro. Abr.* tit. *Taile.* 32. *Plowd* 8. If *Edwards* therefore be tenant of the freehold in possession, and *John Barker* be tenant in tail in remainder, here *Edwards* doth first vouch *Barker*, and then *Barker* vouches *Jacob Morland* the common vouchee; who is always the last person vouched, and always makes default: whereby the demandant *Golding* recovers the land against the tenant *Edwards*, and *Edwards* recovers a recompence of equal value against *Barker* the first vouchee; who recovers the like against *Morland* the common vouchee, against whom such ideal Recovery in value is always ultimately awarded. See *post*. II.

This supposed recompence in value is the reason why the issue in tail is held to be barred by a Common Recovery. For, if the Recoveree should obtain a recompence in lands from the common vouchee, (which there is a possibility in contemplation of Law, though a very improbable one, of his doing,) these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail *Doct. and Stud. b.* 1. *Dial.* 26. This reason will also hold with equal force, as to *most* remainder-men and reversioners; to whom the possibility will remain and revert, as a full recompence for the realty, which they were otherwise entitled to: but it will not *always* hold; and therefore the Judges have been even *astuti*, in inventing other reasons to maintain the authority of Recoveries. And, in particular, it hath been said, that, though the estate-tail is gone from the Recoveree, yet it is not *destroyed*, but only *transferred*; and still subsists, and will ever continue to subsist, (by construction of Law,) in the Recoveror, his heirs, and assigns: and, as the estate-tail so continues to subsist for ever, the remainders or reversions, expectant on the determination of such estate-tail, can never take place. 2 *Comm.* c. 21.

To such awkward shifts, such subtile refinements, and such strange reasoning, remarks the learned Commentator, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *De donis*. The design, for which these contrivances were set on foot, was certainly laudable; the unriveting the fetters of estates-tail. Our modern Courts of Justice have therefore adopted a more manly way of treating the subject; by considering Common Recoveries in no other light, than as the formal mode of conveyance, by which tenant in tail is enabled to aliene his lands. And it has therefore been avowed by the Judges, that the true reason of Common Recoveries being bars, is not the recompence in value, though that is the foundation of almost all the arguments on the subject, but that they are common conveyances. See 2 *Lev.* 28: *Pig. Rec.* 14: *Vin Abr. Recovery* (A): *Plowd.* 514: *Bac. Law Tr.* 149; *Com. Dig. Estates* (B. 27).

Since, however, the ill consequences of fettered inheritances are now generally seen and allowed, and of course the utility and expedience of setting them at liberty are apparent; it hath often been wished, that the process of this conveyance was shortened, and rendered less subject to niceties; by either totally repealing the statute *De donis*, which, perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations:

litigations: See title *Tail and Fee-tail*: Or by vesting in every tenant in tail of full age the same absolute fee-simple, at once, which now he may obtain whenever he pleases, by the collusive fiction of a Common Recovery, though this might possibly bear hard upon those in remainder or reversion, by abridging the chances they would otherwise frequently have; as no Recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together. Or, lastly, by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term-time, and enrolled in some Court of Record; see 1 *P. Wms.* 91; which is liable to neither of the other objections; and is warranted not only by the usage of our *American* Colonies, and the decisions of our own Courts of Justice, which allow a tenant in tail (without Fine or Recovery) to appoint his estate to any *charitable* use; see title *Will*; but also by the precedent of the *stat* 21 *Jac.* 1. *c.* 19, which, in case of a bankrupt tenant in tail, empowers his Commissioners to sell the estate at any time, by deed indented and enrolled. See title *Bankrupts* III. 2. And if, in so national a concern, the emoluments of the Officers, concerned in passing Recoveries, are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrolment. 2 *Comm* 361.

Infants are not capable of suffering Common Recoveries, on account of their want of understanding: although, if an Infant is permitted to suffer a Common Recovery in person, he must, as in the case of a Fine, and for the same reason, reverse it during his minority; which must be tried by inspection of the Judges; otherwise the Recovery will bind him for ever afterwards. But if an Infant suffers a Common Recovery, in which he appears *by Attorney*, he may reverse it at any time after he has attained his full age; as it may be tried by a Jury, whether he was an Infant or not when he appointed an Attorney, and which, by Law, an Infant is capable of performing. *Cruise on Rec.*

It was formerly doubted, whether a Common Recovery bound an Infant who appeared by his Guardian: and the practice therefore was, when an Infant intended to suffer a Common Recovery, that he and his Guardian should petition the King to grant letters, under the Privy Seal to the Judges, of the Court of *C. B.*, directing them to permit such Infant to suffer a Recovery: But it was still in the discretion of the Judges to permit the Infant to suffer it or not, according to the circumstances of his case; and if the Judges, upon examination, found it necessary, or that it would be advantageous to the Infant, that he should suffer a Recovery, they then admitted persons of known integrity and fortune to appear as his Guardians, and to suffer a Recovery for him in Court; But these sort of Recoveries, suffered by Privy Seal, are now disused; and private Acts of Parliament are universally substituted in their stead *Cruise on Rec*

An Infant Trustee may join in a Common Recovery, if he is directed so to do by the Court of Chancery. *Stat.* 7 *Ann. c.* 19. See further, title *Infant* V.

A Recovery, as well as a Fine, by a Feme-covert, is good to bar her; because the *præcipe* in the Recovery answers the writ of covenant in the Fine to bring her into Court; where the examination of the Judges destroys the presumption of Law, that this is done by the coercion of her husband, for then it is presumed they would have refused her. 10 *Co.* 43, *a*: 2 *Rol. Abr.* 395.

Whenever a husband and wife appear in the Court of *C. B.* to suffer a Common Recovery, the wife is always privately examined as to her consent. And where a Warrant of Attorney is acknowledged before Commissioners appointed by a writ of *dedimus potestatem de Attornato faciendo*, by a husband and wife, the Commissioners are positively directed by a rule of Court (*Hil* 14 *Geo* 3.) to examine the wife, separately and apart from her husband, as to her free and voluntary consent to the suffering such Recovery. *Cruise on Rec.*

The King cannot suffer a Common Recovery; for if he does, he must be either tenant or vouchee. and, in both cases, the demandant must count against him, which the Law does not allow. *Pig* 74 · *Plowd.* 244

Idiots, *Lunatics*, and generally all persons of Nonsane Memory, are disabled from suffering Common Recoveries, as well as from levying Fines; though, if an Idiot or Lunatic does suffer a Common Recovery, and appears in person, no averment can afterwards be made that he was an Idiot or Lunatic. But, if he appears by Attorney, it seems that such averment would be admitted upon the same principle, that an averment of *Infancy* may be made against a Warrant of Attorney, acknowledged by an Infant, for the purpose of suffering a Common Recovery; since the fact of Idiocy may be tried by a Jury, with as much propriety as the fact of Infancy. *Cruise on Rec.*

In a celebrated case (*Hume* v. *Burton*) determined by the House of Lords in *Ireland*, since the independence of that jurisdiction, the majority of the Judges were of opinion, that the caption of a Warrant of Attorney, taken by the Chief Justice of the Court of Common Pleas, for the purpose of suffering a Common Recovery, was not conclusive evidence of the capacity of the person acknowledging such Warrant of Attorney. See *Cruise on Rec*, and *Appendix to Vol* 2.

Although no averment of Idiocy or Lunacy can be made against a Recovery, where the parties appear in person, yet evidence of weakness of understanding has been admitted, on a trial in ejectment, to invalidate a deed to make a tenant to the *præcipe* for suffering a Recovery, and the Recovery has in that manner been set aside. *Cruise on Rec* See further this Dict. titles *Fine of Lands* IV, *Idiots and Lunatics* IV.

As to persons restrained by statute from suffering Common Recoveries, see *ante*, the Introduction to the present title.

Recoveries, being now settled as common assurances to establish men in their purchases, are very much favoured by the Judges, and not compared to judgments in other real actions or adversary suits. 2 *Inst.* 353. *Poph.* 21, 23: 2 *Vent.* 32.

If a man be seised of a reputed manor, which really is no manor, and he suffers a Common Recovery of this *by the name of a manor*, this is a good Recovery of the lands which constituted the reputed manor, though strictly speaking there is no manor recovered; because the Law supports this, as all other conveyances, according to the intention of the parties; for it would be severe to vacate this conveyance, when the purchaser recovered them by the assent of the vendor under such a denomination.

nation. 2 *Rol. Abr.* 396: 6 *Co.* 64: 2 *Rol. Rep.* 67: 2 *Vent.* 321 S. P. See *Cro. Eliz.* 524, 707; and 1 *Keb.* 591, 691. *cont.*

So, if a Recovery be suffered of a manor with its appurtenances, lands which have been reputed parcel of the manor shall pass; for it is but equitable, *quod voluntas Domini volentis rem suam in alium transferre rata habeatur*; and though the Recovery does not mention the lands reputed parcel of the manor, but only the manor itself, yet this was supplied by the indenture, which was of the manor, and all lands reputed parcel thereof, and though occupied together but two years. 1 *Sid.* 190: 1 *Lev.* 27: 1 *Keb.* 591, 691: 2 *Mod.* 235. In all the books which report this case, (*Thynn* v. *Thynn*,) it is said, that as to Sir *Moyle Finch's* case, (which see 6 *Co.* 33,) all the Judges of *England* gave their opinions under their hands, that the lands in reputation, belonging to that manor, should not pass; but that *Coke*, after he was made Chief Justice, got it adjudged otherwise, and so it hath been held ever since; and well it was that it was so adjudged, because many settlements depended thereon.

If a man having a third part of a manor suffers a Recovery of a moiety, this is good to pass his interest in the third part; for where the words of a conveyance (which a Recovery is agreed to be) contain more than the grantor can convey, it would be an unreasonable interpretation to make this void and entirely useless, when they are sufficient to convey so much as he might lawfully pass; so if the Recovery had been in this case, of the third part of the manor, by the name of the moiety, part and purparty of the manor, this had been good for the whole third part, and not only for a moiety of the third. *Cro. Car.* 109, 110.

In ejectment a special verdict found, that there was a *parish* of *Ribton*, and the *vill* of *Ribton*, but the *latter* not of equal extent with the *former*; and that *J. S.* was seised of land in tail in the *parish*, but not in the *vill*; and bargained and sold the land in the *parish* of *Ribton*, with covenant to levy a Fine, and suffer a Recovery to the uses in the deed; but the Fine and Recovery were only of the lands in *Ribton*; the question was, Whether this Recovery would serve for the land in the *parish* of *Ribton*? The Court, in favour of Common Recoveries, extended this Recovery to the lands in the *parish* of *Ribton*; because the verdict found, that he who suffered the Recovery had no lands in the *vill*, consequently that the Recovery must be void, if not extended to the *parish*; and though parishes are not so ancient as vills, and therefore till lately were never inserted in writs, yet now they are, and the Law takes notice of them. 2 *Vent.* 31, 32: 1 *Mod.* 250: 2 *Mod.* 235: But for this see *Hut.* 105: *Cro. Car.* 269: 2 *Rol. Abr.* 20: *Cro. Jac.* 120, 574: 1 *Mod.* 206: 2 *Mod.* 47: 1 *Vent.* 143, 170: 1 *Mod.* 78: 2 *Keb.* 802, 821, 848: *Owen* 60: and 2 *Mod.* 236, which seems against this case; but is reconcilable with this diversity, that in those cases there were lands on which the Fine might operate, *viz.* the lands in the *vill* of *Street*, without taking in the *parish* of *Street* to carry the lands in *Walton*, a *vill* of that *parish*; but here, if those in the *parish* should not pass, there were no other to pass. See *post.* III.

A Common Recovery in the Common Pleas of *Copyhold* lands will not pass them; though it is said, if lands are *Customary Freeholds*, and pass by surrender in a Borough Court, a Recovery in *C. B.* of such lands will be good. 1 *Atk.* 474; but see *contra*, 2 *Vel.* 603. For the method of suffering Recoveries of Copyholds, see *Pig.* 100: *Bac. Abr. Copyhold* (C.)

Recovery may be suffered of a *Trust estate*, by *Cestui que trust*, as effectually as it may of a legal estate. 1 *P. Wms.* 91: 9 *Mod.* 143: *Fearne.*

See further, of what things a Recovery may be suffered, *Vin. Abr. Recovery* (S): *Wilf.* 283: *Pig.* 97.

II. 1. THE FORCE and *effect* of Common Recoveries may appear, from what has been said, to be an absolute bar, not only of all estates tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the Recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders, reversions, charges, and incumbrances dependent upon it. But, though a Common Recovery bars a contingent remainder, by destroying the particular precedent estate which supported it, yet it does not bar a springing *use*, nor an *Executory Devise*. *Pig.* 127. And it is a rule, that an *Executory Devise* cannot be prevented or destroyed, by any alteration whatsoever in the estate out of which, or after which, it is limited. *Fearne*, 3d *edit.* 306. See this Dict. titles *Executory Devise*; *Perpetuity*. If the remainder be in *abeyance*, a Common Recovery will bar it. 6 *Co.* 42, *a*. A term limited to commence, on failure of issue, may also be barred by a Recovery. 1 *Lev.* 35. So a power appendant, or in gross, is barrable by a Recovery. *Pig.* 135. But a Recovery will not bar a Mortgage, because that is to be considered as a charge upon the estate, and cannot be defeated. 2 *Atk.* 591. Tenant in tail mortgaged for years, and died, without suffering a Recovery, the mortgage was held not good; but if he had suffered a Recovery afterwards, it would have let in the mortgage. 1 *Wilf.* 276. As to the operation of a Recovery in general, by letting in all the preceding incumbrances, and rendering valid all the preceding acts of tenant in tail, see *Pig.* 120. *Cruise on Rec.* 159. And as to the mode of guarding against a Recovery's letting in the incumbrances of the remainder-man, see 1 *Inst.* 203. *b. in n.*

By *stat.* 34 & 35 *Hen.* 8. *c.* 20, no Recovery had against tenant in tail, of the King's gift, whereof the remainder or reversion is in the King, shall bar such estate-tail, or the remainder or reversion of the Crown. See title *Tail and Fee-tail.* And by *stat.* 11 *Hen.* 7. *c.* 20, no woman, after her husband's death, shall suffer a Recovery of lands settled on her by her husband; or settled on her husband and her by any of his ancestors. And by *stat.* 14 *Eliz.* *c.* 8, no tenant for life, of any sort, can suffer a Recovery, so as to bind them in remainder or reversion. For which reason, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid Recovery; either he, or the tenant to the *præcipe* by him made, must *vouch* the remainder-man in tail; otherwise the Recovery is void: but if he does vouch such remainder-man, and he appears and vouches the common vouchee, it is then good; for if a man be vouched and appears, and suffers the Recovery to be had against the tenant to the *præcipe*, it is as effectual to bar the estate-tail, as if he himself were the Recoveree. *Salk.* 571.

In all Recoveries it is necessary that the Recoveree, or tenant to the *præcipe*, as he is usually called, be actually seised of the freehold, else the Recovery is void. *Pigot* 28. For all actions, to recover the seisin of lands, must be brought against the actual tenant of the freehold, else the suit will lose its effect; since the freehold cannot be recovered of him who hath it not. And, though these Recoveries are in themselves fabulous and fictitious, yet it is necessary that there be *actores fabulæ*, properly qualified. But the nicety, thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the *præcipe*, is removed by the provisions of the *Stat.* 14 *Geo.* 2. *c.* 20, which enacts, with a retrospect and conformity to the ancient rule of law, that, though the legal freehold be vested in lessees, (for life,) yet those who are entitled to the next freehold estate in remainder or reversion may make a good tenant to the *præcipe*;—that, though the deed or fine which creates such tenant be subsequent to the judgment of Recovery, yet if it be in the same term, the Recovery shall be valid in law; and that, though the Recovery itself do not appear to be entered, or be not regularly entered, on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of the Recovery, shall, after a possession of twenty years, be sufficient evidence, on behalf of a purchaser for valuable consideration, that such Recovery was duly suffered. 2 *Comm.* *c.* 21.—And by this act also, Common Recoveries shall, after twenty years from the time of suffering them, be deemed valid, if it appears on the face of such Recovery, that there was a tenant to the writ; and if the persons joining in such Recovery had sufficient estate and power to suffer the same; notwithstanding the deed or deeds for making the tenant to the *præcipe*, should be lost or not appear. For the operation of this statute, see 1 *Burr.* 115: 2 *Burr.* 1074.

In respect to estates-tail, and barring them by Recovery, what is principally to be regarded is, that there must be a legal tenant to the *præcipe* at the time of the writ purchased, or at the return; for since estates-tail are only barred on account of the intended recompence, which is to follow the descent of the tail, where there happens to be no tenant to the *præcipe*, the demandant can really recover nothing; consequently the supposed tenant can have no recompence in value against the vouchee; for that is only given against the vouchee, in consideration of what the tenant lost. *Hob.* 262.

As if there be tenant for life, remainder in tail, remainder in fee, and tenant for life with the remainder in tail suffer a Recovery, with voucher over, this shall not bar the remainder in tail, nor the remainder in fee; because the remainder-man in tail was not tenant to the *præcipe*, consequently could not have the intended recompence, because that was given in lieu of the estate recovered, which was no greater than the estate for life, he only being legal tenant to the *præcipe*. 1 *Rol. Abr.* 395: *Dyer* 3 [illegible]: *Cro. Eliz.* 690: *Moor* 255, 256.

In a writ of error to reverse a Common Recovery, the tenant to the *præcipe* was made by a Fine, the Recovery was suffered, and the Fine reversed; yet it was held a good Recovery, for there was a good tenant to the *præcipe* at the time. 2 *Salk.* 568. See title *Fine of Lands*.

If a manor be given to a man and a woman, and the heirs of the body of the man begotten on the woman, and they intermarry, and then the husband suffers a Recovery of the whole manor; this is good for a moiety, because, the gift being made before marriage, they had each an undivided moiety, which they may transfer; but the Recovery can operate but for a moiety, because the husband only was tenant to the *præcipe*, consequently the demandant only could recover his interest in the manor, which was but a moiety. *Moor* 93. See this Dictionary, title *Baron and Feme*.

If lands are given to a man and his wife, and the heirs of the body of the husband, and a Recovery is had against him only, this Recovery will neither bar the reversion, nor the tail; for the recompence being to go in succession, as the estate which the tenant lost would have done, the husband could not lose all the land, because he was not a legal tenant to the whole, his wife being joint tenant with him who was no party to the writ; nor could the Recovery be good for a moiety, because there are no moieties between baron and feme, but both are considered as one person in Law; but if the husband had levied a fine, and the conusee suffered a Recovery, and vouched the husband, who vouched the common vouchee, this had been a good bar of the entail; for there the husband came in to defend the estate-tail, which the wife was a stranger to; and the assets which he recovered over is a recompence for the estate-tail, which he only had a right to, without the feme, and which the Law gives him a power to dispose of. *Moor* 210: 3 *Co.* 5: 2 *Rol. Abr.* 395: 4 *Leon* 93: 1 *And.* 162: 2 *Salk.* 568.

In ejectment, on special verdict, the case was, *A.* seised in fee of the lands in question, hath issue *B.* his eldest son, *C.* his second, and *D.* his third son; on a marriage intended between *D.* his youngest son, and one *E.* he (*A.*) before the marriage, covenants to stand seised to the use of himself for life, remainder to *D.* and *E.* and the heirs male of their two bodies, remainder to *D.* and the heirs male of his body, remainder to *C* and the heirs male of his body, remainder to *B.* and the heirs male of his body, the remainder to his own right heirs; *A.* dies, a *præcipe* is brought against one *Upton* as tenant of the freehold, and after, before the return of the writ, *D.* by bargain and sale conveys the land to *Upton* and his heirs, and the deed was enrolled after the return of the writ, and within six months: *Upton* vouches *D.* only, without his wife, and a common Recovery was suffered to the use of *D.* and his heirs; then *E* dies, and after *D.* dies without issue male, having issue four daughters; and between them and *C.* in remainder was the question, what was barred by this Recovery? 1st, It was agreed on both sides, that here was a good tenant to the *præcipe*, the bargain and sale being made to *Upton* before the return, yet, it being enrolled in due time, the freehold was in *Upton*, *ab initio*. 2dly, That this settlement being made before marriage, when the husband and wife took by moieties and not by intireties, the husband had absolute power over his own moiety; therefore, for that, the Recovery was an absolute bar; wherein this differs from the case of *Owen* and *Morgan*, (the preceding case,) 3 *Co.* 5, where they took by intireties. 3dly, That this Recovery was no bar to the other moiety of *E.* because she was not party; but her estate-tail in that continued untouched, though it was urged also to be a bar for her moiety, she dying first, and so her husband is as sole tenant of the whole *ab initio*, and this during the coverture.

covenants, the husband had power to make a good tenant of the whole; but the Court held otherwise. 4thly, It was held, that the estate-tail to *D.* and *E.* being determined, the remainder to *D.* in tail-male-general, and all the other remainders depending thereon, were barred absolutely by this Recovery; for *D.* coming in as vouchee, comes in privity and representation of all the estates he hath or had, consequently he comes in representation of the remainder to himself in tail-male general, and then the recompence in value goes to that, and also to all the other remainders depending thereupon, and by consequence all are barred by the Recovery. 3 *Lev.* 407.

Tenant in tail, in consideration of his son's marriage, covenants to stand seised to the use of himself and his heirs till the marriage, and then to the use of himself for life, and after to the use of his son and to the heirs of his body, and suffers a common Recovery with single voucher to this purpose, and then dies without issue: This Recovery did not bar the remainder expectant on the estate-tail, for the covenant had changed the estate-tail into a fee, consequently the recompence could not be in lieu of the entail; since the tenant to the *præcipe* was not seised of the estate-tail at the time of the Recovery suffered. *Yelv.* 51. But see 2 *Salk.* 619, which seems contrary.

A tenant for life, remainder to *B.* in tail, the remainder to *C.* in fee, *A.* and *B.* join in a *Fine come ceo*, &c. to a stranger, who renders it to *A.* for life, remainder to *B.* and his heirs; afterwards *A.* and *B.* suffer a Recovery with single voucher to the use of *B.* and his heirs: This Recovery did not bar the remainder in fee, because by the render they were seised of a new estate, and *B.* was not either tenant in possession, or seised in right of the entail, consequently, the recompence being given in lieu of the estate recovered, the tail could not be docked, nor the remainder-man barred by this Recovery, because the tenants to the *præcipe* were not seised of it at the time of the Recovery suffered. *Cro. Eliz.* 807: *Moor* 634.

If the tenant in tail, to whom the estate has descended *ex parte maternâ*, suffers a Recovery, and declares the uses to himself in fee, the estate will descend to an heir on the part of the mother, even if he had the reversion in fee from his father: and *vice versâ*; but if he took the estate tail by purchase, the new fee will descend to the heirs general. 5 *Term Rep* 104. If then a person who has inherited an estate tail from his mother, wishes to cut off the entail, and to make the estate descendible to his heirs on the part of the father; after the Recovery, he ought to make a common conveyance to trustees; and to have the estate reconveyed back by them; by which means he will take the estate by purchase, which will then descend to his heirs general. 2 *Comm.* 362, *in n.*

2. As to the use of the single and double voucher, it has been already observed, that the tenant who loses the land has on his vouching over, a recompence in value adjudged against his vouchee, which is to go in the same succession as the land recovered would have done: Now, a Recovery with single voucher is sufficient to bar an estate-tail, where the tenant in tail is tenant to the *præcipe*, and seised of the lands in tail at the time of the *præcipe* brought against him; for the recompence in value shall ... descent of the land which he loses; and when that proves to be the estate-tail, then the issue is supposed to have an equivalent for it, consequently not prejudiced by the Recovery; but because a single voucher can bar only the estate which the tenant is seised of at the time of the *præcipe* brought, and not any right which he hath, it was found necessary to admit the use of a double voucher; for if such tenant in tail discontinue the tail, and take back an estate or disseise the discontinuee, a Recovery against him with a voucher over could not bar the estate-tail; for the recompence comes in lieu of the land recovered, which was the defeasible estate, consequently the issue has nothing in value for the estate-tail, without which he cannot be barred. *Bro.* title *Recovery. Yelv.* 51: 3 *Co.* 5: *Moor* 256.

But if in this case tenant in tail after disseisin had, either by fine, or release, made a tenant to the *præcipe*, and came in himself as vouchee, and then vouched over the common vouchee; this double voucher had been sufficient to bar the tenant in tail, and his heirs, of every estate of which he was at any time seised; for when the tenant in tail comes in as vouchee, it is presumed he will, and he has an opportunity to, set up every title he had, to defeat the demandant; and since what he offered was not sufficient to bar the demandant, the Court takes it for granted, he had no other title than what he set up; therefore will give him but one recompence for all. 3 *Co* 6, *b*. *Plowd.* 8: *Cro. Eliz.* 562: *Poph.* 100. *Moor* 365: *Hob* 263.

Thus, if *A.* be tenant for life, remainder to *B.* in tail, and a stranger disseises *A.* and enfeoffs *B.* if a *præcipe* be brought against *B.* and a recovery suffered as usual, this shall not affect the estate-tail; because *B.* had only a right to that, and was not seised of it; and the recompence was not given in lieu of the tail, because the estate-tail was not in question, on the Recovery, for *B* could not lose the estate he had not; but if in this case *B.* had made another tenant to the *præcipe*, and came in himself as vouchee, this had barred the entail. 3 *Co.* 58, *b*: 2 *Rol. Abr.* 395.

If *A.* be tenant for life, remainder to *B.* in tail, and *B* disseises *A.* and suffers a common Recovery, himself being tenant to the *præcipe*; this Recovery with a single voucher is sufficient to bar the estate-tail in *B.* because he was actually seised of that, at the time of the *præcipe* brought against him; for his disseisin did not divest his own estate, but only gave him a defeasible estate for life, which was immediately merged in his remainder; because the estate for life, and his inheritance, could not subsist together at the same time in him. 2 *Rol. Abr.* 395.

Thus we see how estates-tail are barred by Recoveries, and the uses of the single and double voucher; and in this respect the operation of a Recovery is correspondent to that of a Fine, for they are but different ways of transfering estates-tail for security of purchasers; but the operation of a Fine differs from a Recovery in respect to strangers who have reversions or remainders expectant on estates-tail; for a Fine does not bar them, unless they omit to make their claim within five years after the estate-tail is spent, and their reversion or remainder becomes executed; but a Recovery reaches them immediately, and at the same time bars the estate-tail and all reversions and remainders on account of this supposed and imaginary recompence. *Co. Lit.* 372, *a*: 2 *Rol. Abr.* 396: *Moor* 156: *Bro.* title *Recovery*, 28, 55.

And

And as a Common Recovery suffered by tenant in tail bars all reversions and remainders expectant, so it avoids all charges, leases, and incumbrances made by those in reversion or remainder, and the Recoveror shall enjoy the land, free from any charge, for ever; as where he in remainder on an estate-tail, granted a rent-charge, and the tenant in tail suffered a Recovery; it was adjudged, that the grantee could not distrain the Recoveror; for, since the rent was only at the first good, because of the possibility of the grantor's remainder coming in possession, when that possibility ceases, by the Recovery of tenant in tail, such grant must then become void. *Moor* 118: *Cro. Eliz.* 718: 1 *Co.* 62: 2 *Rol. Abr.* 396: *Moor* 152: 4 *Leon.* 150, &c.: *Poph.* 516. See *ante* II. 1.

Tenant to the *præcipe* may be made either by fine, feoffment, lease, and release, or by bargain and sale enrolled. *Wilf.* 281. See further, *Vin. Abr. Recovery* (U): *Com. Dig. Recovery* (B. 5.): *Pig.* 65, 72. As to the doctrine of tenant to the *præcipe* by *disseisin*, see 1 *Burr.* 60: 2 *Burr.* 1065. Tenant to the *præcipe* made by Fine, Recovery suffered, Fine reversed; yet held a good Recovery, for there was a tenant at the time. 2 *Salk.* 568. For if the person against whom the *præcipe* is brought, be, at the time when the *præcipe* is sued, or at any time before judgment, a tenant of the freehold, it is immaterial what becomes of it afterwards. 1 *Inst.* 201, *b. in n.*

Though there is no tenant to the *præcipe*, the Recovery is good against the party who suffered it, by way of estoppel; though not against remainder-men or strangers. 10 *Mod.* 45. And though the tenant for life keeps the possession, yet the Recovery will be good. *Pig.* 41. And a surrender by tenant for life shall be presumed on a Recovery of 40 years standing. 2 *Stra.* 1129; 1267; see 2 *Burr.* 1069.

3. If Fines or Recoveries be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, enure only to the use of him who levies or suffers them. *Dyer* 18. And if a consideration appears, yet as the most usual fine, "*sur cognizance de droit come ceo, &c.*" conveys an absolute estate, without any limitations, to the cognizee; (see title *Fine*;) and as Common Recoveries do the same to the Recoveror; these assurances could not be made to answer the purpose of family settlements, (wherein a variety of uses and designations is very often expedient,) unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. The Fine or Recovery itself, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements, in the vast and intricate machine of a voluminous family settlement. And, if these deeds are made previous to the Fine or Recovery, they are called deeds *to lead* the uses; if subsequent, deeds to *declare* them. As if *A.* tenant in tail, with reversion to himself in fee, would settle his estate on *B.* for life, remainder to *C.* in tail, remainder to *D.* in fee; this is what, by Law, he has no power of doing effectually, while his own estate tail is in being. He therefore usually, after making the settlement proposed, covenants to levy a Fine, (or, if there be any intermediate remainders, to suffer a Recovery,) to *B.*, and directs that the same shall enure to the uses in such settlement mentioned. This is now a deed to lead the uses of the Fine or Recovery; and the Fine when levied, or Recovery when suffered, shall enure to the uses so specified, and no other: For, though *B.* the Cognizee or Recoveror, hath a fee simple vested in himself by the Fine or Recovery; yet, by the operation of this deed, he becomes a mere instrument or conduit-pipe, seised only to the use of *B.*, *C.*, and *D.* in successive order: which use is executed immediately, by force of the Statute of Uses. Or, if a Fine or Recovery be had without any previous settlement, and a deed be afterwards made between the parties, declaring the uses to which the same shall be applied, this will be equally good, as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For by *stat.* 4 & 5 *Ann. c.* 16, indentures to declare the uses of Fines and Recoveries, made after the Fines and Recoveries had and suffered, shall be good and effectual in Law, and the Fine and Recovery shall enure to such uses, and be esteemed to be only in trust; notwithstanding any doubts that had arisen on the Statute of Frauds, 29 *Car.* 2. *c.* 3, to the contrary. See 2 *Comm. c.* 21, and the Appendix in that volume; and this Dictionary, title *Uses*.

III. THE JUDGMENT obtained in a Common Recovery being a matter of record, and similar in almost every respect to a judgment in an adversary suit, can only be reversed by a writ of error: but no person has a right to bring such writ of error, unless he has an immediate interest in the lands whereof the Recovery was suffered; though the right of bringing such writ is not forfeited to the Crown on an attainder for High Treason. *Cruise on Rec.*

A Recovery ought not to be reversed unless writs of *scire facias* are issued against the *terre-tenants* and the heir: because the errors in a Recovery ought not to be examined until all the parties interested in supporting it be before the Court: but this circumstance is discretionary, and not *stricti juris*. 3 *Mod.* 119; 274: *Holt* 614.

Nothing can be assigned for error in a Common Recovery, which contradicts the record; and therefore no incapacity in a vouchee can be assigned for error, where he appeared in person: but if a vouchee appears by attorney, an averment may then be made, either that such vouchee died before the day on which judgment was given; or that he laboured under some personal disability, which rendered him incapable of suffering a Recovery. See 1 *Wilf.* 42: 4 *Rep.* 7: *Cro. Eliz.* 719, and *ante* I.

By *stat.* 23 *Eliz. c.* 3, it is enacted, that no Recovery (Fine, &c.) shall be reversed for false or incongruous *Latin*; rasure, interlining, misentring of a Warrant of Attorney, or not returning of the Sheriff, or other want of form in words, and not in matter of substance. And by *stat.* 10 & 11 *W.* 3. *c.* 14, that no Recovery (Fine, or Judgment in a real action, &c.) shall be reversed or avoided, for any error or defect therein, unless the writ of error, or suit for reversing such Recovery, &c. be brought and prosecuted with effect within twenty years after such Recovery suffered, &c. Saving the right of infants, femes coverts, &c. so that they bring their writ of error within five years after their disabilities removed. By this latter statute, a writ of error must be brought within twenty years after the Recovery has been suffered; and not within [illegible] years after the title [illegible] accrued. *Cruise on Rec.* And by *stat.* 2 [illegible] persons

persons suffering Recoveries in the name of others are guilty of felony without benefit of clergy. See title *Fine of Lands* VII.

Where a Recovery is suffered of lands held in ancient demesne, it must be reversed by writ of deceit. See title *Ancient Demesne.*

A Common Recovery suffered in a copyhold Court can only be reversed by petition to the lord, in the nature of a writ of false judgment. But it seems that the lord of a manor is not, in all cases, bound to allow of any proceedings on such a petition. See *Show. P.C.* 67 : 1 *Vern.* 367.

As a Common Recovery can only be reversed by writ of error, or some proceeding of a similar nature, to which none are entitled but those who have an immediate interest in the lands, the Law allows all *strangers*, whose interests are affected by a Recovery to falsify it, by entry, action, or plea. Thus, where a Recovery is suffered by tenant in tail, although the issue in tail cannot enter, because the Recovery operates as a discontinuance, yet he may bring a *formedon*, and if the Recovery is pleaded against him, he may falsify by pleading matter to avoid it; but in cases of this kind he is restrained, in the same manner as in a writ of error, from pleading any thing contrary to the record. *Cruise on Rec.* cites *Booth* 77. As to the remedies for termors affected by Recoveries, see *ante*; the introduction to this title.

A Common Recovery may also be invalidated, circuitously, by evidence on a trial in ejectment. See *ante* I.

Although a Common Recovery can only be reversed by the Court of Common Pleas in the first instance, and by the Court of King's Bench upon a writ of error from the Court of Common Pleas, yet the Court of Chancery can, in fact, invalidate a Common Recovery, where it appears to have been obtained by fraud or imposition; by compelling the Recoveror to convey the estate to the person who is entitled in equity to have it, or by declaring the Recoveror to be a trustee for such person. And a Court of Equity will also restrain the operation of a Common Recovery to those purposes for which it was intended, and will not allow it to have a more extensive effect. 2 *Eq. Ab.* 695 : *Pre. Ch* 435; and this Dictionary, title *Fine of Lands* VII.

It has been already observed, (see *ante* I.) that a Recovery suffered by an infant in person shall not bind him; but though he may avoid it, yet it cannot be done by any entry *in pais*, but by writ of error, and this too during his minority; for the judgment of the Court being on record must be set aside by an act of equal notoriety; but an infant may avoid a Recovery by writ of error, as well where he comes in as vouchee, as where he is tenant to the *præcipe*; for though (strictly speaking) the Recovery is not against him where he is not tenant to the *præcipe*, yet for the greater security of the purchaser, and to strengthen the Recovery by the use of the double voucher, the person, who really has the right to the land in demand, comes in as vouchee; and then, by vouching over the common vouchee, has one recompence for all his titles; consequently, if he be the person who really loses the land, he ought in reason to reverse the Recovery, as well where he comes in as vouchee, as where he is seised of the land and is tenant to the *præcipe*. 1 *Rol. Abr.* 742 : 1 *Lev.* 142.

If tenant in tail within age comes in as vouchee *by attorney* in a Common Recovery, he in remainder may assign this for error, for he is party in interest to the Recovery; and where a man's interest is bound by another's act, it is but reasonable he should be allowed to free himself from the mischief by taking advantage of any error in it. 1 *Rol. Abr.* 755, 796.

If *A.* be tenant in tail, remainder to *B.* and *A.* suffers an erroneous Recovery, and the common vouchee releases to the Recoveror; yet if *A.* dies without issue, *B.* may, notwithstanding the release, reverse it by writ of error; for the common vouchee is only called in for form, and as he has really no interest in or title to the land, so really neither does he make any recompence to the person who loses the land; therefore it were unreasonable to carry the notion of the imaginary recompence so far as to suppose him a real sufferer, and thereby give him the privilege of setting aside the conveyance, by which he is no way affected. *Cro. Eliz.* 2, 3.

In a writ of error to reverse a Recovery, suffered by an infant who appeared by guardian, the error assigned was in the entry of his admission by guardian, *viz. quod* A. B. *sequatur pro* J. S.; whereas it was objected, that since the infant was tenant to the writ, it ought to have been entered, that the guardian was admitted *to defend* for the infant; but this exception was disallowed, because the words *ad sequend.* for the infant, signify the same with *ad defendend.*; for *ad sequend.* is to follow and attend the business and suit of the infant; and the guardian being assigned to do that, must likewise have been assigned to take care of, or take upon him the defence of the infant's suit. 2 *Saund.* 94, 95 : 1 *Mod.* 48.

In error to reverse a Recovery, the errors assigned were: 1. That the writ of entry was brought of an advowson of a rectory, and of a rent issuing out of the rectory, which was a *bis petitum*, therefore the writ vicious; but this was disallowed, because the advowson and rectory are different things; for he who has the advowson has only the right of presentation; but he who has the rectory has the profits of the church, out of which the rent issues; consequently there can be no *bis petitum* in this case, because by the demand of the advowson of the rectory, and of the rent issuing out of the rectory, the demandant recovers more than by a demand of the rectory only: Another error assigned was in the demand of a rent or pension of four marks issuing out of the rectory, which is so uncertain a demand, a pension being a different thing from a rent, and recoverable in the Spiritual Court; but this was disallowed; because it is plain there is but one sum of four marks demanded, and the pension or rent must be synonymous here, because they are demanded as issuing out of the rectory; therefore the pension cannot be in nature of an annuity, which charges the person only, because it is expresly to issue out of the rectory. *Poph.* 23 : 5 *Co.* 41. *a.*

In a writ of error to reverse a Common Recovery, the error insisted on was, that the warrant of attorney of the vouchee bore date before the *Summoneas ad warrantizand.* issued, yet the judgment was affirmed, because the vouchee may come in, if he will, before the *Summoneas ad warrantizand.* and make his attorney; therefore, to support the Common Recovery, it shall be presumed the vouchee was present in Court, and appointed his attorney; and so the *dedimus* for the warrant and the *Summoneas ad warrantizand.* void. 1 *Sid.* 313 : 1 *Lev.* 130 : *Raym.* 70.

RECOUPE.

RECOUPE, from the Fr. *recouper*.] The keeping back or stopping something which is due; and in our Law, we use it for, to defalk, or discount; as if a person hath a rent of ten pounds out of certain lands, and he disseises the tenant of the land; in an assise brought by the disseissee, if he recover the land and damages, the disseisor shall *recoupe* the rent due, in the damages; so of a rent-charge issuing out of land, paid by the tenant to another, &c. he may *recoupe* the same. *Terms de Ley*: *Dyer* 2. See title *Set off*.

RECREANT, Fr.] Cowardly, faint hearted. See title *Champion*.

RECTA PRISA REGIS, The King's right to Prisage or taking of one butt or pipe of wine before, and another behind the mast, as a custom for every ship laden with wines. *Edw.* I. in a charter of many privileges to the Barons of the Cinque-Ports, discharged them of this duty. *Cowell.* See titles *Prisage*, *Customs on Merchandise*.

RECTITUDO, Right, or Justice; sometimes it signifies legal dues, a tribute or payment. *Leg. Ed. Confess.* c. 30: *Leg. Hen* 1. c. 6.

RECTO, Right; *Breve de Recto*; A *Writ of Right*, which is of so high a nature, that as other writs in real actions are only to recover the possession of the land, &c. in question: this aims to recover the seisin, and the property, and thereby both the Rights of possession and property are tried together. *Co. Litt.* 158. See title *Writ of Right*.

It hath two species: Writ of Right patent, and Writ of Right close: the first is so called, because it is sent *open*, and is the highest writ of all others; lying for him who hath a fee-simple in the lands or tenements sued for, against tenant of the freehold at least, and in no other case. *F. N. B.* 1, 2, &c. But this Writ of Right patent seems to be extended farther than originally intended; for a Writ of Right of Dower, which lies for tenant in dower is patent, as appears by *F. N. B.* 7. And the like may be said in some other cases. *Table Reg. Orig.* Also there is a special Writ of Right patent in *London*, otherwise termed a Writ of Right according to the custom, which lieth of lands or tenements within the city, &c. The Writ of Right patent is likewise called *breve magnum de Recto*. *Reg. Orig.* 9: *Fleta*, *lib.* 5. c. 34.

A Writ of Right close is brought where one holds lands and tenements by charter in ancient demesne, in fee-simple, fee tail, or for term of life, or in dower, and is disseised; it is directed to the bailiff of the King's manors, or to the lord of ancient demesne, if the manor is in the hands of a Subject, commanding him to do Right in his Court: this writ is also called *breve parvum de Recto*. *F. N. B.* 11: *Reg. Orig.* 9: *Britton*, c. 120.

If a person seised in fee-simple dies seised of such estate, and a stranger doth abate and enter into the land, and deforce the heir; the heir may sue a Writ of Right patent against the tenant of the freehold of the same land, or an assise of *Mort d'ancestor*. 11 *Ass.* 17.

In a Writ of Right patent, the demandant is to count of his own seisin, or of the seisin of his ancestor; if one bring the writ as heir to an ancestor, he may lay the seisin and esplees as in pernancy of the profits of the lands in his ancestors; and where it is brought by a Bishop or Body-politic, seisin of the esplees is to be laid in themselves, or in their predecessors. *New Nat. Br.* 10.

Where a Writ of Right close is directed to the lord of whom the lands are holden, and he will not hold his Court to proceed on it; a writ shall issue requiring him to hold his Court, &c. And if the lord hold his Court, but will not do the demandant right, or delay it, the plea may be removed by the writ called *Tolt* into the County-Court of the Sheriff; and from thence by *Recordari* into the Common Pleas. *New Nat. Br.* 6, 7. See title *Writ of Right*.

Glanvil seems to make every writ, whereby a man sues for any thing due unto him, a Writ of Right. c 10—12.

RECTO DE ADVOCATIONE ECCLESIÆ, A Writ which lay at Common Law, where a man had right of advowson, and the parson of the church dying, a stranger presented his clerk to the church; the party who had the right not having brought his action of *quare impedit* nor *darrein presentment*, but having suffered the stranger to usurp on him, and it lay only where an advowson was claimed in fee to him and his heirs. *F. N. B.* 30. See title *Advowson* III: 3 *Comm* c 16.

RECTO DE CUSTODIA TERRÆ ET HÆREDIS. A Writ of *Right of Ward*.] A Writ which lay for him whose tenant, holding of him in chivalry, died in nonage, against a stranger who entered on the land, and took the body of the heir. By the *stat.* 12 *Car.* 2. c. 24, it is become useless as to lands holden *in capite*, or by knights-service; but not where there is guardian in socage, or appointed by the last will and testament of the ancestor. For the form, see in *F. N. B.* 139: *Reg Orig* 161.

Guardian in socage was always, and still is, entitled to an action of *Ravishment of Ward*, (*Ravishment de Gard*; see that title;) if his ward or pupil be taken from him; but then he must account to his pupil for the damages he so recovers. *Hale on F. N B.* 139. And as he was entitled at Common Law to this *Writ of Right of Ward*, so it seems that he is still entitled to this antiquated remedy. 3 *Comm.* 141. But a more speedy and summary method of redressing all complaints relative to Wards and Guardians hath of late obtained, by an application to the Court of Chancery: which is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom. See title *Guardian* I. 3. 4; and *passim*.

RECTO DE DOTE; A Writ of Right of Dower, which lies for a woman who has received part of her Dower, and demands the residue against the heir of the husband, or his guardian. *F. N. B.* 7, 8, 147: *Co Litt.* 32, 38. See title *Dower*.

RECTO DE DOTE UNDE NIHIL HABET; A Writ of Right which lies in case where the husband, having divers lands or tenements, hath assured no Dower to his wife, and she thereby is driven to sue for her thirds against the heir, or his guardian. *Old Nat. Br.* 6: *Reg. Orig.* 170. See title *Dower*.

RECTO QUANDO (or QUIA) DOMINUS REMISIT; A Writ which lieth where lands or tenements, in the seigniory of any lord, are in demand by a Writ of Right; if the lord in such case holdeth no Court (or hath waived his right) at the prayer of demandant or tenant, but sends to the King's Court his writ to put the cause thither for that time, (saving to him at other times the right of his seigniory,) then this writ shall issue out for the other party, and hath its name from the words therein contained. *F. N. B.* 16. See title *Writ of Right*.

RECTO DE RATIONABILI PARTE, A Writ of Right lying between privies in blood, as brothers in *Gavelkind*, sisters, and other coparceners, for land in fee-simple. If there be two sisters, and the ancestor dieth seised of land in fee, and one of the sisters enters into the whole, and deforces the other, she who is deforced shall have the Writ of Right *de rationabili Parte*; to have her *reasonable* or proportionable *Part*: And if, where there are two sisters, after the death of the ancestor they enter and occupy in common as coparceners, and then one of them deforce the other to occupy that which is appendant or appurtenant to the messuage, &c. which they have in coparcenary; she who is deforced shall have this writ. Also, if the ancestor were disseised of lands, and dieth, and one sister entereth into the whole land, and deforceth her sister, she shall have the writ against her other sister: For it lieth as well on a dying seised of the ancestor, if one sister enter on all, as where the ancestor doth not die seised; and it is a writ of right-patent, &c. *F. N. B.* 9: *New Nat. Br.* 19, 26.

In this writ the demand shall be of a certain portion of land, to hold in severalty; and voucher and view do not lie in it, because of the privity of blood; but in *a rationabili Parte* the view was granted, *an.* 15 *H.* 5; for that the ancestor did not die seised, &c. The process on the writ, after removing into *C. B.* is Summons, Grand Cape, and *Petit Cape*, &c. *F. N. B.* 9. See *Booth on real actions*.

RECTO SUR DISCLAIMER, A Writ which lies where the lord, in the Court of Common Pleas, avows on his tenant, and the tenant disclaims to hold of him; on which Disclaimer the lord shall have this writ; and if he avers and proves that the land is holden of him, he shall recover back the land from the tenant for ever: this writ is grounded on the statute of *Westm.* 2. *c.* 2. *Old. Nat. Br.* 150. See title *Disclaimer*.

RECTOR, *Lat.*] A Governor; *Rector Ecclesiæ Parochialis*, Is he who hath the charge and cure of a parish church. It has been held, that *Rector Ecclesiæ* is one who hath a parsonage where there is a vicarage endowed. And when dioceses were divided into parishes, the Clergy who had the charge in those places were called Rectors; afterwards, when their Rectories were appropriated to monasteries, &c. the Monks kept the great tithes; but the Bishops were to take care that the Rector's place should be supplied by another, to whom he was to allow the small tithes for his maintenance; and this was the Vicar. See titles *Parson*; *Vicar*.

RECTORIAL TITHES; See title *Tithes*.

RECTORY, *Rectoria.*] Is taken *pro integrâ Ecclesiâ Parochiali, cum omnibus suis juribus, prædiis, decimis, alisque proventuum speciebus.* Spelm. Also the word *Rectoria* hath been often applied to the Rector's mansion, or parsonage-house. *Paroch. Antiq.* 549. See titles *Parson*; *Parsonage*.

RECTUM, Right; anciently used for a trial or accusation. *Bract. lib.* 3.

RECTUM ESSE; See *Rectus in Curiâ*.

RECTUM ROGARE, To petition the Judge to do Right. *Leg. Inæ. c.* 9.

RECTUM, *Stare ad* Rectum, To stand trial at Law, or abide by the justice of the Court. *Hoved.* 655.

RECTUS IN CURIA, *i. e.* Right in Court; one who stands at the bar, and no man objects any offence against him. *Smith de Repub. Angl. lib.* 2. *c.* 3. When a person outlawed hath reversed the outlawry, so that he can participate of the benefit of the Law, he is said to be *Rectus in Curia*.

RECUSANTS; See title *Papists* I. 2. and also titles *Oaths*; *Nonconformists*.

The following determinations may perhaps be useful by analogy; and are therefore here preserved as supplementary to what is said upon the subject under the titles referred to.

As to licensing a Recusant to travel, the Bishop, Lieutenant, or Deputy-lieutenant, who gives his assent to it, must be a distinct person from the Justice of Peace who gave the licence; therefore, if one and the same person be a Justice of Peace, and Deputy-lieutenant, he cannot act in both capacities; but if he sign and seal the licence as a Justice of Peace, the assent of some other Deputy-lieutenant, &c. must be had: And it is a good exception to a licence by four Justices, that no particular cause of the Recusant's travelling is expressed in it. *Cro. Jac.* 352: *Cowley* 210.

A person was indicted for Recusancy, but conformed before conviction; and so again the second time, and was indicted a third time for a relapse: And on motion, that it might be certified into the Exchequer, because, by the statute 35 *Eliz. c.* 2, he is to lose all the benefit which he was to have by his former conformity, the relapse was certified accordingly. 1 *Bulst.* 133.

It hath been adjudged, that a writ of error will not lie on a conviction of a Recusant, for not rendering himself to the Sheriff, &c. because the conviction is no judgment, but the statute gives process on it for the forfeiture: So that if there be any faults in it, the same is to be quashed in the Exchequer, the party first conforming. *Raym.* 433.

An information *qui tam* was brought against a defendant, setting forth, that before and on such a day he was a Recusant convict, and that afterwards he conformed, &c. and for three years after had not received the Sacrament, and so demanded 60*l.* for every year: On not guilty pleaded, the plaintiff had verdict; and thereupon it was moved that the information was incertain, because neither the time was alleged, nor how, or in what Court, nor before whom the conviction was; and the informer demands the penalty for three years, when by statute no informer can demand a penalty upon the penal Law, but by an information exhibited within a year after the offence: But it was resolved, that the first exception had been good on demurrer; but the defendant having pleaded Not guilty, all the circumstances of his conviction were admitted, and nothing remained to be tried but the fact: and as for the second exception it was good against the informer for his part, but should not prejudice the King. *Cro. Jac.* 365.

The *stat.* 23 *Eliz. c.* 1, gives several remedies against Recusants; one for the King alone, and there the prosecution must be by indictment in *B. R.*; the other for a common person, and that is to be by action of debt, bill, plaint, or information. And the *stat.* 29 *Eliz. c.* 6, was made for the benefit of the Crown on indictments, and doth not extend to informations; therefore such informations may be brought in any Court of Record. *Hob.* 204.

Where the defendant is indicted on the statute of Recusancy, conformity is a good plea; but not if an action of debt be brought. 1 *Mod.* 213: but *vide* 2 *Show.* 332.

A Recusant certified into the Court of King's Bench, according to *stat.* 23 *Eliz. c.* 1, shall give security for his good behaviour, &c. 2 *Bulst.* 155. The judgment in Recusancy is *quod convictus est.* 2 *Strange* 1048.

RED, Sax. *raed.*] Advice; and *redbana* is one who advised the death of another. See *Dedbana.*

RED BOOK OF THE EXCHEQUER, *Liber Rubeus Scaccarii.*] An ancient record, wherein are registered, the names of those who held lands *per Baroniam* in the time of *Hen.* II. *Ryley* 667. It is a manuscript volume of several miscellaneous treatises, in the keeping of the *King's Remembrancer*, in his office in the Exchequer; and hath some things (as the number of the hides of lands in many of our counties, &c.) relating to the times before the Conquest. There is likewise an exact collection of the escuages under King *Hen.* I., *Rich.* II., and King *John*; and the ceremonies used at the coronation of Queen *Eleanor*, wife to King *Henry* III., &c.

REDDENDUM, Is used substantively for the clause in a lease, whereby the rent is reserved to the lessor; which anciently consisted of corn, flesh, fish, and other victuals. 2 *Rep.* 72.

In debt for rent, the plaintiff declared on a lease made 25 *August* 11 *W.* 3. of a messuage, &c. for seven years, to commence from the 24th day of *June* before; *Reddendum* quarterly at *Michaelmas*, St. *Thomas*'s day, *Lady-day* and *Midsummer*, three pounds ten shillings, the first payment to be made at *Michaelmas* then next; and assigned for breach that fourteen pounds of the rent was in arrear for one year, ending 24 *December anno* 13 *Wil.* And on demurrer to this declaration, it was objected that on this lease there was no year could be ended on the 24th of *December*, but on St. *Thomas*'s day, according to the *Reddendum*; which was held to be true, because where special days are limited in the *Reddendum*, the rent must be computed from those days, not according to the *habendum*; and that the rent is never computed from the *habendum*, but when the *Reddendum* is general, *i. e.* paying quarterly so much. 1 *Salk.* 141. See titles *Deed* II.; *Rent*; *Lease.*

REDDIDIT SE, *Hath rendered himself.*] Where a man procures bail for himself to an action in any Court at Law; if the party bailed at any time before the return of the second *scire facias* against the bail, renders himself in discharge of his bail, they are thereby discharged. 2 *Lill. Abr.* 430. See titles *Bail*; *Scire facias against Bail.*

REDDITARIUS, A Renter; *Redditarium*, a Rental of a manor, or other estate. *Cartular. Abbat. Glaston. MS.* 92.

REDDITION, *Redditio.*] A surrendering or restoring; being also a judicial acknowledgment that the thing in demand belongs to the demandant, and not to the person so surrendering. See *stat. antiq.* 34 & 35 *H.* 8. *c.* 24.

REDDITUS ASSISUS, A set or standing Rent. See *Assisus.*

RE-DELIVERY, A yielding and delivery back of a thing: if a person has committed a robbery, and stolen the goods of another, he cannot afterwards purge the offence by any Re-delivery, &c. *Co. Litt.* 69: *H. P. C.* 72. See titles *Robbery*; *Larceny.*

RE-DEMISE, A re-granting of lands demised or leased. See *Demise and Re demise.*

REDEMPTION, *Redemptio.*] A Ransom or Commutation: By the old *Saxon* Laws, a man convicted of a crime paid such a fine according to the estimation of his head, *pro redemptione sua.*

RE-DISSEISIN, *Re-disseisina*] A Disseisin made by him, who once before was found and adjudged to have disseised the same man of his lands or tenements; for which there lies a special writ called a Writ of Re-disseisin. *Old Nat. Br.* 106: *F. N. B.* 188. See this Dict. titles *Disseisin*; *Assise of Novel Disseisin.*

REDRESS OF INJURIES. The more effectually to accomplish the Redress of Injuries, Courts of Justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger; by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited: This remedy is therefore principally to be sought by application to these Courts of Justice; that is by civil suit or action. 3 *Comm.* 2.

REDUBBERS, Those that buy stolen cloth, and turn it into some other colour or fashion, that it may not be known again. *Britton, c.* 29: 3 *Inst.* 134.

RE-ENTRY, from the Fr. *rentrer, rursus intrare.*] The resuming or retaking a possession lately had; as if a man makes a lease of lands, &c. to another, he thereby quits the possession; and if he covenants with the lessee, that, for non-payment of rent at the day, it shall be lawful for him to re-enter; this is as much as if he conditioned to take again the land into his own hands, and to recover the possession by his own act, without assistance of the Law. But words in a deed give no Re-entry, if a clause of Re-entry be not added. *Wood's Inst.* 140.

One may reserve a rent on condition, in a feoffment, lease, &c. that if the rent is behind he shall re-enter, and hold the lands till he is satisfied, or paid the rent in arrear; and in this case if the rent is behind, he may re-enter; though when the feoffee, &c. pays or tenders on the land all the arrears, he may enter again. And the feoffor, &c. by his Re-entry, gaineth no estate of freehold, but an interest, by the agreement of the parties, to take the profits in the nature of a distress: Here the profits shall not go in part of satisfaction of the rent; but it is otherwise if the feoffor was to hold the land till he was paid by the profits thereof. *Litt.* 327: *Co. Litt.* 203.

The distinction, when the profits taken by the lessor after entry are, and when they are not, to be in satisfaction of the rent, is not admitted in equity; for the Courts of Equity will always make the lessor account to the lessee for the profits of the estate, during the time of his being in possession of it: and decree him, after he is satisfied the rent in arrear, and the costs, charges, and expences attending his entry, and detention of the lands, to give up the possession to the lessee; and deliver and pay him the surplus of the profits of the estate, and the money arising thereby. 1 *Inst.* 283. (*a*) *in n.*

All persons who would re-enter on their tenants for non-payment of rent, are to make a demand of the rent; and, to prevent the Re-entry, tenants are to tender their

rent,

rent, &c. 1 *Inst.* 201. If there is a lease for years, rendering rent, with condition, that, if the lessee assigns his term, the lessor may re-enter; and the lessee assigneth, and the lessor receiveth the rent of the assignee, not knowing or hearing of the assignment, he may re-enter notwithstanding the acceptance of the rent, 3 *Rep.* 65: *Cro. Eliz.* 553. See further, title *Rent*.

A feoffment may be made upon condition, that if the feoffor pay to the feoffee, &c. a certain sum of money at a day to come, then the feoffor to re-enter, &c. *Litt.* § 322. See titles *Use*; *Entry*.

REEVE-LAND; See *Reveland*.

RE-EXCHANGE, The like sum of money, payable by the drawer of a Bill of Exchange, which is returned protested, as the Exchange of the sum mentioned in the bill, is, back again to the place whence it was drawn. *Lex Mercat.* 98. See title *Bill of Exchange*.

RE-EXTENT, A second extent on lands or tenements, on complaint, that the former was partially made, &c. *Broke* 313. See title *Extent*.

RE-FA-LO, The abbreviation of *Recordari facias loquelam*; See that title.

REFARE, from Sax. *reaf*, or *ræfan*.] To bereave, take away, or rob. *Leg. Hen.* 1. c. 83.

REFERENCE, The sending any matter by the Court of Chancery to a Master; and by the Courts at Law to a Prothonotary, or Secondary, to examine and report to the Court. 2 *Lil. Abr.* 432.

In Chancery, by order of Court, irregularities, exceptions, matters of account, &c. are referred to the examination of a Master of that Court. In the Court of *B. R.* matters concerning the proceedings in a cause, by either of the parties, are proper matters of Reference under the Secondary, and for him in some ordinary cases to compose the differences betwixt them; and in others to make his report how the matters stand, that the Court may settle the differences according to their rules and orders. *Pasch.* 1650.

If a matter in difference be referred to the Secondary, and one of the parties will not attend at the time appointed, after notice thereof given, to hear the business referred; the other party may proceed in the Reference alone, and get the Secondary to make his report without hearing of the party not attending. 2 *Lill.* 342.

If a question of mere law arises in the course of a cause in Chancery, as whether, by the words of a will, an estate for life or in tail is created; or whether a future interest devised by a testator shall operate as a remainder on an executory devise; it is the practice of that Court to refer it to the opinion of the Judges of the Court of *K. B.* or *C. P.* upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law is submitted to their decision; who thereupon have it solemnly argued by counsel on both sides, and certify their opinion to the Chancellor: and on such a certificate the decree is usually founded. It seems that the Master of the Rolls, sitting for the Chancellor, may make such Reference; but not when sitting at the Rolls. 2 *Bro. C. C.* 88. The Court of Exchequer is both a Court of Law and Equity; therefore, if a question of mere Law arises in the course of the exercise of its equitable jurisdiction, the Barons will decide upon it in that suit, without referring it to another jurisdiction. 3 *Comm.* 452, 3, *and n.*

REFERENCE TO WORDS. The King granted to *A.* and *D.*, and their heirs, all those messuages, &c. late in the tenure of *J. S.*, situate, &c. in the city of *W.* and in the suburbs thereof, and out of the city, within the jurisdiction and liberties thereof, belonging to the late priory of, &c. which messuage, &c. in the city and suburbs, belonging to the late priory, were of the clear yearly value of 40*l.* Resolved, that the words (all those messuages, &c.) make a necessary Reference, by reason of the word (those), as well to the vill, as to the tenure of *J. S.*; so if the one or the other fails, the general grant is void: for (those) is not satisfied till the sentence be ended. *Doddington*'s case. See 18 *Vin. Abr.* 272.

REFERENDARY, *Referendarius*.] An officer abroad, of the same nature as Masters of Request were to the King among us: The Referendaries being those who exhibit the petitions of the people to the King, and acquaint the Judges with his commands. And there was such an officer in the time of the *English Saxons* here. *Spelman*.

REFORMATION OF RELIGION; The change from the Catholic to the Protestant Religion, and the destruction of the power of the Pope in these kingdoms; which commenced in the reign of *Hen.* VIII., and was established, after some interruption, in the reign of Queen *Elizabeth*; and finally sanctioned at the Revolution, on the abdication of *James* II.

REFUNDING. *A.* an attorney being ill, takes *B.* for his clerk, and receives 120*l.*, and by articles agrees with the father of *B.* to return 60*l.* of the money if he died within a year. *A.* died within three weeks. The executor of *A.* was decreed to pay back 100 guineas. *Vern.* 466. See title *Attorney*.

A. was indebted to *B.* by mortgage in 400*l.* principal monies, and died. *B.* died, leaving *J. S.* executor. On a bill in Chancery, for payment of debts of *A.* out of lands charged with the same, the Master reported 700*l.* due on the mortgage, and the executor received the whole 700*l.*; but afterwards it appeared that 353*l.* 13*s.* 1*d.* had been paid to *B.* the testator, by *A.* in his lifetime; whereupon the trustees and *cestui que trust*, an infant, brought a bill to be relieved against this over-payment; the executor (defendant) pleaded all the former proceedings; and also that he, before any notice of the over-payment, as executor of *B.*, had paid away the 700*l.* in the debts of *B.* The Master of the Rolls decreed the executor to repay the surplus, and he to be at liberty to sue such creditors, as through mistake he had paid, to refund; and this decree was affirmed by Lord Chancellor *Cowper*, who compared it to the case of a judgment obtained by an executor, and after reversed in error; and to that of a decree which is afterwards reversed by appeal; though he said, that, in the last case of an appeal, if the defendant had delayed the appeal, and willingly stood by whilst the executor paid away money to the testator's creditors, it would be otherwise; for this would be drawing the executor into a snare. 1 *P. Wms.* 355. See title *Executor*.

A. for 600*l.* purchases *B.*'s interest and possibility in such an estate, to him and his heirs; the land is evicted. *A.* is not entitled to have his 600*l.* back; but his bill was dismissed. *Finch. Rep.* 288.

REFUSAL, Is where one hath by Law a right and power of having or doing something of advantage to him, and he declines it. An executor may refuse an executorship; but the Refusal ought to be before the Ordinary: If an executor be summoned to accept or refuse the executorship, and he doth not appear on the summons, and prove the will, the Court may grant administration, *&c.* which shall be good in Law till such executor hath proved the will; but no man can be compelled to take on him the executorship, unless he hath intermeddled with the estate. 1 *Leon.* 154: *Cro. Eliz.* 858. Where there are several executors, and they all refuse, none of them shall administer afterwards; but if there is a Refusal by one, and the other proves the will, the refusing executor may administer when he will, during the life of his co-executor. 1 *Rep.* 28. If there is but one executor, and he administer, he cannot refuse afterwards; and if once he refuse, he cannot administer afterwards: Thus, where a testator being possessed of lands, *&c.* for a term of years, devised the same to the Chief Justice *Catline*, and made him executor, and died; afterwards the executor wrote a letter to the Judge of the Prerogative Court, intimating, that he could not attend the executorship, and desiring him to grant administration to the next of kin to the deceased, which was done accordingly; and after this the executor entered on the lands, and granted the term to another; it was adjudged void, because the letter which he wrote was a sufficient Refusal; and he may not once refuse, and afterwards take upon him the executorship. *Moor* 272.

An executor, after a *caveat* entered against the will, took the usual oath of an executor, and afterwards refused to prove the will; and it was held, that having taken the oath of executor, the Court could not admit him to refuse afterwards, but ought to grant probate to him, notwithstanding the *caveat*, on another's contesting for the administration, *&c.* 1 *Vent.* 335. See tit. *Executor.*

There is a Refusal of a clerk presented to a church, for illiterature, *&c*; in which case, if a Bishop once refuses a clerk for insufficiency, he cannot accept of him afterwards, if a new clerk is presented. 5 *Rep.* 58: *Cro. Eliz.* 27. See title *Parson.*

In trover, a demand of the goods, and Refusal to deliver them, must be proved, *&c.* 10 *Rep.* 56. See title *Trover.*

REGALE EPISCOPORUM, The temporal rights and privileges of a Bishop. *Brady.*

REGALES, The King's servants or officers. *Walsingham, anno* 1291.

REGAL FISHES, Whales and sturgeons, some add porpuses. See *stat. antiq.* 1 *Eliz. c.* 5; and this Dictionary, titles *King*; *Queen.*

REGALIA, *Jura omnia ad Fiscum spectantia*; *Spelman.*] The Royal Rights of a King, which the *Civilians* reckon to be six; *viz.* Power of judicature; of life and death; of war and peace; masterless goods, as waifs, estrays, *&c.*; assessments; and minting of money. See title *King.*

The Crown, sceptre with the cross, sceptre with the dove, St. *Edward*'s staff, four several swords, the globe, the orb with the cross, and other articles used at the Coronation of our Kings, are commonly called the Regalia. See the relation of the Coronation of King *Charles* II, in *Baker's Chronicle.*

Regalia is sometimes taken for the dignity and prerogative of the King; and these the feodal writers distinguish into the *majora* and *minora Regalia*: The former comprehending what relates to his power and dignity; the latter to his *fiscal* or pecuniary prerogatives. 1 *Comm.* 241. See title *King* V.

Regalia is also taken for those rights and privileges which the Church enjoys by the grants and other concessions of Kings, and sometimes for the patrimony of the Church; as *Regalia Sancti Petri*, &c. It signifies also those lands and hereditaments which have been given by Kings to the Church, *viz. Cepimus in manum nostram baroniam & Regalia quæ archiepiscopus Eborum de nobis tenet. Prynn, lib. Angl.* ii. 231. These, whilst in the possession of the Church, were subject to the same services as all other temporal inheritances; and after the death of the Bishop, they of right returned to the King, until he invested another with them; which, in the reign of *William* the Conqueror, and some of his immediate successors, was often neglected or delayed; and as often the Bishops complained thereof. This appears in *Ordericus Vitalis, lib.* 10, and other writers in those days. *Neubrigensis, lib.* 3. *cap.* 26, tells us they complained against *Henry* II. for the same cause.

REGALIA FACERE, To do homage or fealty when he is invested with the Regalia. *Malmsbury, de Gestis Pontificum, p.* 129, *de Anselmo.*

REGARD, *Regardum*; *rewardum*: Fr. *regard*; *aspectus, respectus.*] Signifies, generally, any care or diligent respect: yet it hath also a special acceptation, wherein it is only used in matters of the forest; either for the office of Regarder, or for the compass of the ground belonging to that office. *Crom. Jur.* 175, 199. Touching the former, see *Manwood, part* 1. 194, *&* 198. And touching the second signification, the compass of the Regarder's charge is the whole forest; that is, all the ground which is parcel of the forest, for there may be woods within the limits of the forest, that are no parcel thereof, and those are without the Regard. *Manwood, part* 2. *c.* 7. *num.* 4: And see *stat.* 20 *Car.* 2. *c.* 3. As to the Court of Regard, and the office of *Regarder*, see this Dictionary, title *Forest.*

REGARDANT, *Fr.* seeing, marking, vigilant.] As a Villein Regardant was called, Regardant to the Manor, because he had the charge to do all base services within the same, and to see the same freed of all things that might annoy it. This word is only applied to a villein, or nief, yet in old books it was sometimes attributed to services. 1 *Inst.* 120. A Villein *Regardant*, it seems, was rather so called, because *annexed* to the manor; *regarding*, or relating to it. See titles *Villein*; *Tenure.*

REGARDER, *Regardator*, Fr. *regardeur*, *spectator.*] The officer of the King's Forest, who is sworn to make the regard of it; and has been used in ancient time, to view and inquire of all offences of the forest, as well of vert as of venison; and of concealment of any offences or defaults of the foresters, and all other officers of the King's Forest, relating to the execution of their offices, *&c. Cromp. Jurisd.* 153: *Manwood.*

This officer was ordained in the beginning of the reign of *Henry* II. Regarders of the Forest must make their regard, before any General Sessions of the Forest, or Justice Seat, can be holden; when the Regarder is to go through the forest, and every bailiwick, to see and inquire

inquire of the treſpaſſes therein; *ad videndum, ad inquirendum, ad imbreviandum, ad certificandum, &c. Manw. part* 1. *p.* 194. A Regarder may be made either by the King's letters patent; or by any of the Juſtices of the foreſt, at the general *Eyre,* or ſuch times as the regard is to be made, &c. *Manw.* See title *Foreſt.*

REGE INCONSULTO, A Writ iſſued from the King to the Judges, not to proceed in a cauſe which may prejudice the King, *until he is adviſed.*

James I. granted the office of *Superſedeas* in *C. B.* to one *Mitchel,* and thereupon *Brownlow,* Chief Prothonotary, brought an aſſiſe againſt him; and the defendant *Mitchel* obtained the King's writ to the Judges, reciting the grant of this office, commanding them not to proceed *Rege inconſulto:* And it was argued againſt the writ, that the Court might proceed, becauſe the writ doth not mention that the King had a title to the thing in demand, nor any prejudice which might happen to the King, if they ſhould proceed: The cauſe was compromiſed. *Moor* 844.

A *Rege inconſulto* may be awarded, not only for the party to the plea, but on ſuggeſtion of a ſtranger; on cauſe ſhewn that the King may be prejudiced by the proceeding, &c. *Jenk. Cent.* 97.

A Writ of *Rege inconſulto* does not lie, but when it appears plainly to the Court, that the party's title is in diſaffirmance of the King's title. *Hardr.* 179.

When the defendants will not pray in aid, this writ is in nature thereof, to inform the Court how it concerns the Crown, and to inhibit their proceedings. See 9 *Rep.* 16, *a*: *Cro. Eliz.* 417. Where the tenant or defendant does not pray in aid, but a writ *de Domino Rege inconſulto* is brought, and directed to the Judges, and it appears to the Court, that the cauſe is not available or ſufficient in Law, the Court ought to diſallow the writ, and proceed in the action; and if the cauſe appears to the Court to be juſt and lawful, and not brought for delay, then the Judges ought to ſurceaſe. See 2 *Inſt.* 269: *And.* 280: *Mo.* 421. And further, *Vin. Abr.* title *Rege inconſulto.*

REGENT; See titles *King* V. 2: *Queen.*

REGIO ASSENSU, A Writ whereby the King gives his Royal Aſſent to the election of a Biſhop. *Reg. Orig.* 294.

REGISTER, more correctly *Regiſtrar*; *Regiſtrarius.*] An officer who writes and keeps a Regiſtry. See *Regiſtry.*

Regiſter is the name of a book, wherein are entered moſt of the forms of writs, original and judicial, uſed at Common Law, called the Regiſter of Writs: *Coke* affirms, that this Regiſter is one of the moſt ancient books of the Common Law. *Co. Litt.* 159.

Blackſtone terms it, the moſt ancient and highly venerable collection of legal forms, upon which *Fitzherbert's Natura Brevium* is a comment; and in which every man who is injured will be ſure to find a method of relief, exactly adapted to his own caſe, deſcribed in the compaſs of a few lines, and yet without the omiſſion of any material circumſtance. 3 *Comm.* 183.

REGISTRY, *Regiſtrum,* from the old Fr. *giſter,* i.e. *in lecto reponere.*] Properly the ſame with Repoſitory: The office books, and rolls wherein the proceedings of the Chancery, or any Spiritual Court, are recorded, &c. are called by this name.

Registry, or Register of the Pariſh Church, *Regiſtrum Eccleſiæ Parochialis.*] That wherein baptiſms, marriages, and burials are regiſtered in each Pariſh every year; which was inſtituted by Lord *Cromwell, anno* 13 *Henry* VIII., while he was Vicar-general to that King.

Theſe Pariſh Regiſters are to be ſubſcribed by the Miniſter and Churchwardens; and the names of the perſons ſhall be tranſmitted yearly to the Biſhop, &c. See title *Marriage.*

Register, or Registry of Deeds. The regiſtering of Deeds and Incumbrances is a great ſecurity of titles to purchaſers of lands, and to mortgagees; and ſome laws have been made requiring the ſame. By *ſtat.* 2 *Ann. c.* 4, A Regiſtry is to be kept of all Deeds and Conveyances affecting lands, executed in the *Weſt* Riding of *Yorkſhire*; and a public office erected for that purpoſe; and the Regiſter is to be choſen by freeholders having 100*l. per annum,* &c. The *ſtat.* 6 *Ann. c.* 35, ordains, that a Memorial and Regiſtry of all Deeds, Conveyances, Wills, &c. which affect any lands or tenements, ſhall be made in the *Eaſt* Riding of the county of *York*; and the Regiſter is to be ſworn by the Juſtices in Quarter Seſſions, and every leaf of his book ſigned by two Juſtices.

By *ſtat.* 8 *Geo.* 2. *c.* 6, A Regiſtry ſhall be of all Deeds made in the *North* Riding of the county of *York.* Memorials of Wills muſt be regiſtered within ſix months after the death of the teſtator; the Regiſter neglecting his duty, or guilty of fraudulent practices, ſhall forfeit his office, and pay treble damages; and perſons counterfeiting any Memorial, &c. be liable to the common penalties of forgery.

By *ſtat.* 7 *Ann. c.* 20, A Memorial and Regiſtry is to be made of all Deeds and Conveyances, and of all Wills, whereby lands are affected, &c. in the county of *Middleſex,* in the like manner as in the Weſt and Eaſt Ridings of *Yorkſhire.*

Deputy of the Chief Clerk of the King's Bench, appointed a Regiſter for *Middleſex,* inſtead of the Chief Clerk. 25 *Geo.* 2. *c.* 4.

It is provided, by *ſtat.* 5 *Ann. c.* 18, and ſubſequent ſtatutes, that *Bargains and Sales* may be inrolled with the Regiſter, and ſhall be as valid as if inrolled according to *ſtat.* 27 *H.* 8. *c.* 16. See titles *Bargain and Sale*; *Inrolment.*

It is obſerved, by *Blackſtone,* that however plauſible theſe proviſions as to a Regiſtry may appear, in theory, to remedy the inconvenience ariſing from the want of notoriety attendant on modern Deeds, it has been doubted by very competent Judges, whether more diſputes have not ariſen in thoſe counties, by the inattentions and omiſſions of parties, than have been prevented by the uſe of Regiſters. 2 *Comm. c.* 20.

By theſe ſtatutes, Deeds, Conveyances, and Wills, ſhall be void againſt ſubſequent purchaſers or mortgagees, unleſs regiſtered before the Conveyances under which they claim: alſo no judgment, ſtatute, or recognizance, ſhall bind any lands in thoſe counties, but from the time a Memorial thereof ſhall be entered at the Regiſter's office; but the acts do not extend to Copyhold Eſtates, Leaſes at a Rack-rent, or to any Leaſes, not exceeding twenty-one years, where the poſſeſſion goes with the leaſe; nor to any Chambers in the Inns of Court.

An annuity was granted out of lands lying in *Middleſex*; *A. B.* who had notice of the grant, purchaſes the lands:

lands; the grantee shall have the annuity against *A. B.* though the grant of the annuity was not registered; for the statute was intended to give notice of incumbrances to purchasers, that they might not be defrauded; but if a man knows of an incumbrance, and will, notwithstanding, purchase, he is bound, though the incumbrance was not registered. 2 *Strange* 664. See 1 *Vef.* 64.

A mortgage of a lease was registered, but not the lease itself; this will not bar a subsequent purchaser. 2 *Strange* 1064. See further, title *Notice*.

REGISTRY OF PAPISTS' ESTATES: See this Dict. title *Papists* II. 4.

REGIUS PROFESSOR, A Reader of Lectures in the Universities, founded by the King: King *Hen.* VIII. was the founder of five Lectures in each University of *Oxford* and *Cambridge*, viz. of Divinity, Greek, Hebrew, Law, and Physic; the Readers of which are called in the University statutes *Regii Professores*.

REGNI POPULI, A name given to the people of *Surry* and *Sussex*, and on the sea-coasts of *Hampshire*. *Blount*.

REGNUM ECCLESIASTICUM. In some countries, formerly, the Clergy held there was a double supreme power, or two kingdoms in every kingdom; the one a *Regnum Ecclesiasticum*, absolute and independent, of any but the Pope, over ecclesiastical men and causes, exempt from the Secular Magistrate; the other a *Regnum Seculare*, of the King or Civil Magistrate, which had subordination and subjection to the ecclesiastical kingdom: but these usurpations were exterminated here by *Henry* VIII. 2 *Hale's Hist. P. C.* 324.

REGRATOR, *Regratarius*.] It originally signified one who bought provisions, in order to sell them again *for gain*: and such person was considered anciently, with great justice, as an enemy to the Community. It is now confined to persons buying and selling again in the same market, or within four miles thereof. See *Spelm.* v. *Regratarius*: and this Dictionary, title *Forestaller*.

REGULARS, *Regulares*.] Such as professed to live under some certain rule; as Monks, or Canons Regular, who ought always to be under some rule of obedience. See title *Clergy*.

REGULUS, SUBREGULUS, Words often mentioned in the Councils of the *English Saxons*. The first signifies *Comes*, the other *Vicecomes*. But in many places they signify the same dignitary; as in the old book in the archives of *Worcester* cathedral. *Cowell*. See *Subregulus*.

REHABERE FACIAS SEISINAM, *Quando Vicecomes liberavit seisinam de majore parte, quam deberet*.] A Writ judicial; of which there is another of the same name and nature. *Reg. Judic.* 13, 51, 54. It lay when the Sheriff in the *Habere facias seisinam* had delivered more than he ought.

REHABILITATION, *Rehabilitatio*.] A restoring to former ability: It was one of those exactions claimed by the Pope heretofore in *England*, by his bull or brief, for re-enabling a spiritual person to exercise his function, who had been disabled. See *Stat.* 25 *H.* 8. c. 21; and titles *Papists*; *Rome*; *Pope*.

REIF, Sax. *reafan*; *spoliare*.] In old Law Latin signified robbery. *Cowell*.

REJOINDER, *Rejunctio*.] The answer or exception of a defendant in any action to the plaintiff's replication. It ought to be a sufficient answer to the replication, and follow and inforce the matter of the bar pleaded. 2 *Lil. Abr.* 433.

Defendant is not to rejoin on such words as are not contained in the declaration, or replication: and if defendant do in his Rejoinder depart from his plea pleaded in bar, the Rejoinder is not good, because this is uncertain, and to say and unsay, which the Law doth not allow. *Mich.* 22 *Car. B. R.*

It is observed, that in many cases, if the plaintiff in his replication alleges any new matter, the defendant may there make a new answer in the Rejoinder; though if the defendant pleads a general plea, he shall not commonly make that good afterwards, by a particular thing in his Rejoinder. 5 *Hen.* 7. 19: *Raym.* 22. See titles *Departure*; *Pleading*.

RELATION, *Relatio*.] Is, where, in consideration of Law, two different times or other things are accounted as one; and by some act done, the thing subsequent is said to take effect by Relation from the time preceding: as if one deliver a writing to another, to be delivered to a third person as the deed of him who made it, when such third person hath paid a sum of money; now, when the money is paid, and the writing delivered, this shall be taken as the deed of him who made and delivered it, at the time of its first delivery, to which it has Relation; (see titles *Deed* III. 7; *Escrow*;) and so things relating to a time long before, shall be as if they were done at that time. *Terms de Ley*: *Shep. Epit.* 837.

This device is most commonly to help acts in Law, and make a thing take effect: and shall relate to the same thing, the same intent, and between the same parties only; and it shall never do a wrong, or lay a charge upon a person that is no party. *Co. Lit.* 190: 1 *Rep.* 99: *Plowd.* 188: 2 *Vent.* 200.

When the execution of a thing is done, it hath Relation to the thing executory, and makes all but one act to record, although performed at several times. 1 *Rep.* 199. Judgment shall have Relation to the first day of the term, as if given on that very day, unless there is a memorandum to the contrary; as where there is a continuance till another day in the same term. 3 *Salk.* 212. A verdict was given in a cause for a plaintiff, and there was a motion in arrest of judgment within four days; the court took time to advise, and in four days afterwards the plaintiff died; it was adjudged, that the favour of the Court shall not prejudice the party, for the judgment ought to have been given after the first four days; and though it is given after the death of the party, it shall have Relation to the time when it ought to have been given. 1 *Leon.* 187.

Rule was had for judgment, and two days after the plaintiff died; yet the judgment was entered, because it shall have Relation to the day, when the rule was given, which was when the plaintiff was alive. *Poph.* 132. Judgment against an heir of the obligation of his ancestor, shall have Relation to the time of the writ *first* purchased; and from that time it will avoid all alienations made by the heir. *Cro. Car.* 102. If one be bail for a defendant, and before judgment he leases his lands; they shall be liable to the bail, and judgment by Relation. *Poph.* 132. See titles *Judgment*; *Bail*.

It was formerly holden, that where the defendant in a suit after the *teste* of the *fieri facias*, but before the Sheriff

riff had executed it, fold the goods, and delivered them to the buyer; the Sheriff might take them in execution in the hands of the buyer; for when fuch execution is made, it fhould have Relation to the *tefte* of the *Fi. Fa.* 1 *Leon.* 304: But by *ftat.* 29 *Car.* 2. *c.* 3. § 16, Writs of Execution fhall bind the property of the goods, only from the time of their delivery to the officer. See title *Execution* IV. 1.

Sale of goods of a bankrupt, by Commiffioners, fhall have Relation to the firft act of bankruptcy; and be good, notwithftanding the bankrupt fells them afterwards. *Stat.* 1 *Jac.* 1. *c.* 15. See title *Bankrupt.*

If a man buys cattle in a market, which are ftolen, and felleth them out of the market, though the cattle are afterwards brought into the market, and the fecond bargain confirmed, and money paid, &c. this bargain will not be good; for it fhall have Relation to the beginning, which was unlawful. *Dyer* 99. See title *Market.*

Fines, being but common affurances, fhall be guided by the indentures precedent; and the execution thereof have Relation to the original act. *Cro. Jac.* 110. A bargain and fale was made to *A. B.* and before it was inrolled, the fame bargainor levied a fine to the bargainee, and afterwards, and within the fix months, the deed was inrolled; adjudged, that the bargainee was in by the fine, and not by the deed inrolled; becaufe, though the inrolment fhall have Relation to the delivery of the deed, that is only to protect the lands from all incumbrances to be made by the bargainor to others after the deed, and before the inrolment, but not to deveft any lawful eftate made by him before. 4 *Rep.* 70. After an indenture of bargain and fale is inrolled, according to the ftatute, it relates to the delivery; nothing paffes till inrolment, but *then* it relates. See titles *Bargain and Sale*; *Fine of Lands.*

If an infant or feme covert difagree to a feoffment to them made, when they are of age, or difcovert; it fhall relate as to this purpofe, to difcharge them of damages from the time. 3 *Rep.* 29: *Co. Lit.* 310. See *Infant*, &c.

Letters of adminiftration relate to the death of the inteftate, and not to the time when they were granted. *Style* 341. See title *Executor.* When the wife is endowed of lands by the heir, fhe fhall be in immediately from the hufband by Relation. 36 *H.* 6, 7. See *Dower.*

It is a rule in pleadings, grants, &c. *Ad proximum antecedens fiat relatio*; but that rule has an exception, (*viz.*) *nifi impediat fententia*: And it hath been held, that this rule hath many reftrictions, i. e. *Fiat relatio*, fo, as there is no abfurdity or incongruity; therefore it is always *fecundum fubjectam materiam. Hard.* 77: 3 *Salk.* 199.

A perfon granted *totam illam portionem decimarum* in *B.* with all other his tithes in *B.* then or late in *occupatione* J. C.; here the words *in occupatione* J. C. have Relation to the whole fentence, and not only to the precedent words, with all other his tithes, becaufe the pronoun *illam* relates as well to the tenures of the tithes, as to the place where they arife. 4 *Rep.* 34.

In debt upon bond, conditioned that if *J. M.* died before *Midfummer* day, without iffue male of her body *then* living, that in fuch cafe the bond fhould be void: Defendant pleaded, that, before *Midfummer* day, *fhe did die without iffue male* THEN living; and the queftion was, Whether the adverb *then* fhould relate to *Midfummer* day, or to the death of *J. M.* And it was agreed, that it might relate to either; but becaufe it happened in fact, that fhe had a fon living at her death, which fon died before *Midfummer* day, therefore the words *then living* fhall relate to that day, and not her death; becaufe it is moft beneficial to the obligor, that it fhould be fo. *Dyer* 17. *Qu.?* See title *Bond.*

RELATOR, *Lat.*] A rehearfer, or teller; applied to an informer. See titles *Information*; *Quo Warranto.*

RELEASE,

RELAXATIO.] An inftrument whereby eftates, or other things, are extinguifhed, transferred, abridged, or enlarged. *Weft. Symbol. part.* 1. *l.* 2. § 509. And whereby a man quits and renounces, that which he before had. *Com. Dig.* title *Releafe.*

A RELEASE OF LAND, is claffed by *Blackftone* among the fecondary or derivative fort of Conveyances: and is by him defined to be, A Difcharge or Conveyance of a man's right in lands or tenements, to another that hath fome former eftate, in poffeffion. See further this Dict. titles *Conveyance*; *Deed*; *Leafe and Releafe.*

The words generally ufed in fuch Releafes are, *remifed, releafed, and for ever quit claimed.* See *poft.* II.

I. *Of Releafes, generally.*

II. *Of the Words and Ceremony required in a Releafe; and how far a Covenant, Agreement, or a Difpofition by Will, may operate as a Releafe.*

III. *What fhall be releafed, by a Releafe of all Claims and Demands.*

IV. *What fhall be releafed, by a Releafe of all Actions and Suits; and of all Right and Title in Land.*

V. *How far a Poffibility, or contingent Intereft, may be releafed.*

I. THERE is a Releafe in Fact, and a Releafe in Law. *Perkins' Grants* 71. A Releafe in Fact, is that which the very words exprefly declare. A Releafe in Law, is that which doth acquit by way of confequence or intendment of Law. How thefe are available, and how not, fee *Littleton* at large, *l.* 3. *c.* 8. *Cowell.*

A Releafe is the giving or difcharging of a right of action which a man hath claimed, or may claim, againft another, or that which is his; or it is the conveyance of a man's intereft or right which he hath to a thing, to another who hath poffeffion thereof, or fome eftate therein. 4 *New Abr.*

According to *Coke*, Releafes are diftinguifhed into *exprefs* Releafes in Deed, and thofe arifing by operation of Law; and are made of lands and tenements, goods and chattels; or of actions real, perfonal, and mixt. 1 *Inft.* 264, *a.*

Releafes of Land, may enure or take effect in various ways: Either, *Firft*, by way of *enlarging an eftate*; (*enlarger l'eftate*;) where the poffeffion and inheritance are feparated for a particular time; and he who hath the reverfion or inheritance, releafes to the tenant in poffeffion all his right and intereft. Such Releafe is faid to enlarge his eftate; and to be equal to an entry and feoffment, and to amount to a grant and attornment. 1 *Inft.* 267, *a.* Thus, if there be tenant for life or years, remainder to another

in fee, and he in remainder releases all his right to the particular tenant and his heirs; this gives him the estate in fee. *Litt.* § 465. But in this case the Releſſee muſt be in *poſſeſſion* of ſome eſtate, for the Releaſe to work upon; for if there be a Leſſee for years, and before he enters and is in poſſeſſion, the Leſſor releaſes to him all his right in the reverſion, ſuch Releaſe is void, for want of poſſeſſion in the Releſſee. *Litt.* § 459.

When it is ſaid, however, that a Releaſe, which enures by enlargement, cannot work without a poſſeſſion, it muſt be underſtood to mean, not that an actual eſtate in poſſeſſion is neceſſary, but that a *veſted intereſt* ſuffices for ſuch a Releaſe to operate upon. By comparing this with the operation of a *Leaſe and Releaſe*, (ſee that title,) it will be ſeen, that not only eſtates in poſſeſſion, but eſtates in remainder and reverſion, and all other incorporeal hereditaments, may be effectually granted and conveyed by Leaſe and Releaſe: but it is an inaccuracy to ſay, that the Releaſe, in theſe caſes, is in the *actual poſſeſſion* of the hereditaments: the right expreſſion is, that they are *actually veſted* in him, by virtue of the Leaſe of poſſeſſion and the ſtatute. 1 *Inſt.* 270, (*a*) *n.* 3.

To make Releaſes operate by enlargement; it is generally neceſſary, that the Releſſee, at the time the Releaſe is made, ſhould be in actual poſſeſſion of, or have a veſted intereſt in, the lands intended to be releaſed; that there ſhould be a privity between him and the Releſſor; and that the poſſeſſion of the Releſſee ſhould be notorious. To this latter circumſtance, however, the Statute of Uſes furniſhes an exception, exemplified in the operation of a Leaſe and Releaſe: where the Bargainee has a veſted intereſt, immediately after the execution of the bargain and ſale, without any entry, attornment, or other act of notoriety whatſoever: though, at Common Law, till entry or attornment, the Leſſee was not capable of a Releaſe. But, from the general principles above noticed, tenant by *elegit* or *ſtatute-merchant* is *not* capable of a Releaſe that is to operate by enlargement; while tenants in dower, or by the curteſy, *are*; as they have the notoriety of poſſeſſion and privity of eſtate with reſpect to the Releaſor. See 1 *Inſt.* 273, (*a*) *in n.*

Secondly; By way of *paſſing an eſtate*; (*mitter l'eſtate*;) as when one of two coparceners releaſeth all her right to the other, this paſſeth the fee-ſimple of the whole. 1 *Inſt.* 273.

In both theſe caſes there muſt be a privity of eſtate between the Releſſor and Releſſee; that is, one of their eſtates muſt be ſo related to the other, as to make but one and the ſame eſtate in Law. 1 *Inſt.* 272, 3: 2 *Comm.* c. 20.

3dly; By way of *paſſing a right*; (*mitter le droit*;) as if a man be diſſeiſed, and releaſeth to his diſſeiſor all his right; hereby the diſſeiſor acquires a new right, which changes the quality of his eſtate, and renders that lawful which before was tortious or wrongful. *Litt.* § 466.

Releaſes of this kind muſt be made either to the diſſeiſor, his feoffee, or his heir. In all theſe caſes, the poſſeſſion is in the Releſſee; the right in the Releſſor; and the uniting the right to the poſſeſſion, completes the title of the Releſſee: But the different degrees of title in the diſſeiſor, his feoffee, or his heir, give the Releaſes made to them different operations. They all agree in this reſpect, that no privity is required, or indeed can, from the nature of the caſe, exiſt between them and the Releſſor. 1 *Inſt.* 274, (*a*) *in n.*

At Common Law, lands could not be transferred from one to another, but by feoffment with livery of the ſeiſin. This produced a notoriety of the tranſmutation of the poſſeſſion. This notoriety was, in ſome meaſure, effected by a diſſeiſin; but that was only a tortious poſſeſſion, liable to be defeated by the diſſeiſee. Thus the diſſeiſor had the poſſeſſion, the diſſeiſee the right. To complete the title of the diſſeiſor, it was neceſſary he ſhould acquire the right: This could not be done by a feoffment, as that was a transfer of the poſſeſſion; but it was effected by a Releaſe, which, in this caſe, operated as an actual transfer of the right. 1 *Inſt.* 264, (*a*) *in n.*

Thus, in the caſe of a Releaſe, *per mitter le droit*, when made to the *feoffee* of the diſſeiſor; the feoffee is in by title, his eſtate cannot be deveſted or diſaffirmed, but by an act equal to that which created it: A Releaſe does not affect his poſſeſſion or title, but diſcharges it from the right of the Releſſor; ſo that, whether the whole fee is in the feoffee, or carved out into particular eſtates, it remains unaltered by the Releaſe, except as it is diſcharged by it from the right of the Releſſor. 1 *Inſt.* 275, (*a*) *in n.*—In the caſe of a Releaſe to the *heir* of the diſſeiſor, it is to be obſerved, that a diſſeiſor has a mere naked poſſeſſion, unſupported by any right; and that the diſſeiſee may reſtore his poſſeſſion, and put a total end to the poſſeſſion of the diſſeiſor by entry. But though the feoffee of the diſſeiſor comes in by title, ſtill the right of poſſeſſion remains in the diſſeiſee, and he may equally enter on the feoffee as on the diſſeiſor; ſo that a Releaſe, *per mitter le droit*, gives both to the diſſeiſor and his feoffee the right of poſſeſſion, and the right of property: But if the diſſeiſor dies, the entry of the diſſeiſee is taken away, and a preſumptive right of poſſeſſion is in the heir; ſo that the Releaſe of the diſſeiſee only paſſes the right of property. 1 *Inſt.* 277, (*a*) *in n.*

4thly; By way of extinguiſhment; as if my tenant for life makes a leaſe to *A.* for life, remainder to *B.* and his heirs, and I releaſe to *A.*: this extinguiſhes my right to the reverſion, and ſhall enure to the advantage of *B.*'s remainder as well as of *A.*'s particular eſtate. *Litt.* § 470. See title *Extinguiſhment.* Where the Releſſee cannot have the thing *per mitter le droit*, yet the Releaſe ſhall enure, by way of extinguiſhment, againſt all manner of perſons; as when the lord grants the ſeignory to his tenant, ſuch Releaſes abſolutely extinguiſh the rent, &c. although the Releſſee be only tenant for life. See 1 *Inſt.* 267, (*a*) *in n.*: 193, (*b*): 273, (*b*).

5thly; By way of entry and feoffment; as if there be two joint diſſeiſors, and the diſſeiſee releaſes to one of them, he ſhall be ſole ſeiſed, and ſhall keep out his former companion; which is the ſame in effect as if the diſſeiſee had entered, and thereby put an end to the diſſeiſin, and afterwards had enfeoffed one of the diſſeiſors in fee. 1 *Inſt.* 278. It has been already obſerved, that when a man has in himſelf the poſſeſſion of lands, he muſt, at the Common Law, convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future intereſt, he may convey that right or intereſt by a mere Releaſe, to him that is in poſſeſſion of the land: for the occupancy of the Releſſee is conſidered as a matter of ſufficient notoriety already. 2 *Comm.* c. 20; and ſee 1 *Inſt.* 275, (*b*) *in n.*

A Releaſe is to be adapted to the nature of the caſe, and the purpoſes for which the Releaſe is intended; ſo

that

that if a man be disseised of lands, or dispossessed of goods, and release all actions, he may, notwithstanding, enter into his lands, or retake his goods, the right and property being still in him, though he has devested himself of his remedy. *Hob.* 163: 4 *Co.* 63.

So, where a man has divers means to come to his right, he may release one, and yet take advantage of the other; but if a man has not any means to come to his right but by way of action, there, by a Release of all actions, his right by judgment of Law is gone, because by his own act he has barred himself of all means to come at it. 8 *Co.* 152: *Co. Lit.* 286.

Heretofore, Releases were construed with much nicety and great strictness; and, being considered as the deed or grant of the party, were, according to the rule of Law, taken strongest against the Releasor: They now receive such interpretation as these grants and agreements do, and are favoured by the Judges as tending to repose and quietness. *Dyer* 56: *Plowd.* 289: *Hetl.* 15: 8 *Co.* 148.

Hence it hath been established as a general rule in the construction of Releases, that where there are general words only in a Release, they shall be taken most strongly against the Releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words. 1 *Mod.* 99: 1 *Ld. Raym.* 235.

It is necessary, in all cases where a Release of lands is made, that the estate be turned to a right; as in a disseisin, *&c.* where there are two rights, a right of possession in the disseisor, and a right to the estate in the disseisee; now when the disseisee hath released to the disseisor, here the disseisor hath both the rights in him, *viz.* The right to the estate, and also to the possession: or else it is requisite that there be privity of estate between the Tenant in possession and the Releasor; for a Release will not operate without privity. 2 *Lil.* 435. A Release, made by one that at the time of the making thereof had no right, is void; and a Release made to one that at the time of making thereof hath nothing in the lands, is also void, because he ought to have a freehold, or possession, or privity. *Noy's Max.* 74.

He that makes a Release must have an estate in himself, out of which the estate may be derived to the Releessee; the Releessee is to have an estate in possession in deed, or in Law, in the land whereof the Release is made, as a foundation for the Release; there must be privity of estate between the Releassor and Releessee; and sufficient words in Law, not only to make the Release, but also to create and raise a new estate, or the Release will not be good. 1 *Inst.* 22. A Release to a man and his heirs will pass a fee-simple; and if made to a man, and the heirs of his body, by this the Releessee hath an estate-tail: But a Release of a man's right in fee-simple, is not sufficient to pass a fee simple. 1 *Inst.* 273.

A Release made by deed-poll, of right to lands, *&c.* needs no other execution than sealing and delivery; and will operate without consideration: But it is convenient to put a valuable consideration therein; lest it should be judged fraudulent by statute. *Lit.* § 445. *Lil. Convey.* 230, 248: *Cro. Jac.* 270. See title *Consideration.*

II. A RELEASE which operates by *mitter l'estate* is, where two persons come in by the same feudal contract, as joint-tenants or coparceners, and one of them releases to the other the benefit of it. In Releases which operate by this mode, the Releessee being supposed to be already seised of the inheritance, by virtue of the former feudal contract, and the Release only operating as a discharge from the right or pretension of another, seised under the same contract, *words of inheritance*, in the Release, are useless. So, in cases of Releases *per mitter le droit*, words of inheritance are not necessary; as the disseisor, to whom or to whose feoffee or heir that Release is made, (see *ante* I.) acquires the fee by the disseisin, and therefore cannot take it under the Release: But where the Release operates by enlargement, the Releessee having no such previous inheritance, and possession being either for life or in fee, (as originally granted,) the Release gives the estate to the Releessee for his life only, unless it is expressly made to him and his heirs. 1 *Inst.* 273, (*b*); 274, (*a*); *in n.*

Littleton says, that the proper words of a Release are *remisisse, relaxasse, & quietum clamasse*, which have all the same signification. Lord *Coke* adds, *Renunciare, acquietare*; and says, that there are other words which will amount to a Release; as, if the Lessor grants to the Lessee for life, that he shall be discharged of the rent; this is a good Release. *Lit.* § 445: 1 *Inst.* 264: *Plowd.* 140.

So, a pardon, by act of Parliament, of all debts and judgments, amounts to a Release of the debt; the word Pardon including a Release. 1 *Sid.* 261.

An express Release must regularly be in writing and by deed, according to the common rule, *eodem modo oritur, eodem modo dissolvitur*; so that a duty arising by record must be discharged by matter of as high a nature; so of a bond or other deed. *Co. Lit.* 264, *b*: 1 *Rol. Rep.* 43: 2 *Leon.* 76, 213: 2 *Rol. Abr.* 408: 2 *Sand.* 48: *Moor* 573. *pl.* 787.

But a promise by words may, before breach, be discharged or released, by word of mouth only. 1 *Sid.* 177: 2 *Sid.* 78: *Cro. Jac.* 483, 620: Vide *Cro. Car.* 383: 1 *Mod.* 262: 2 *Mod.* 259: 1 *Sid.* 293.

A Release of a right in chattels cannot be without deed. 1 *Leon.* 283.

A Covenant perpetual, as that the Covenantor will not sue beyond a certain limitation of time, is a Defeasance, or absolute Release; and this construction has been made to avoid circuity of action; for if in such case the party should, contrary to his covenant, sue, the other party would recover precisely the same damages which he sustained by the other's suing; but if the covenant be, that he will not sue *till* such a time, this does not amount to a Release, nor is it pleadable in bar as such, but the party hath remedy only on his covenant. *Moor* 23. *pl.* 80, 811: 1 *Rol. Abr.* 939: *Bridg.* 118: 2 *Bulst.* 95, 290: *Hard.* 113: 3 *Lev.* 41: 2 *Salk.* 573, 5: *Carth.* 210: 1 *Ld. Raym.* 419, 691: See *Cro. Eliz.* 352: 1 *And.* 307: 1 *Rol. Abr.* 939: *Carth* 63: *Salk.* 373: 1 *Show.* 46.

If two are jointly and severally bound in an obligation, and the obligee, by deed, covenants and agrees not to sue one of them; this is no Release, and he may notwithstanding sue the other. *Cro. Car.* 551: *March* 95: 2 *Salk.* 575.

But if two are jointly and severally bound, a Release to one discharges the other. 1 *Ld. Raym.* 420. See 2 *Vent.* 217: 1 *Ld. Raym.* 691: 1 *Lev.* 152: and further, this Dict. titles *Bond*; *Covenant*; *Agreement.*

It seems agreed, that a will, though sealed and delivered, cannot amount to a Release, because it is ambulatory and revocable during the testator's life; and by reason of the executor's consent, requisite to every disposition of a personal thing by will, and the injury that might accrue to the testator's creditors, were a will allowed to operate as a Release. *Stil.* 285: 1 *Vent.* 39.

Therefore, where in debt on an obligation, by the representative of a testator, a defendant pleaded, that the testator by his last will in writing released to the defendant; this was adjudged ill, and that no advantage could be taken by plea. 1 *Sid.* 421.

But it hath been held in equity, that though a will cannot enure as a Release, yet provided it were expressed to be the intention of the testator that the debt should be discharged, the will would operate accordingly; and that in such case it would be plainly an absolute discharge of the debt, though the testator had survived the legatee. 1 *P. Wms.* 85: 2 *Vern.* 521.

So, in another case, it was held, that a Release by will can only operate as a legacy, and must be assets to pay the testator's debts; and if a debt so released by will be afterwards received by the testator himself in his lifetime, the legacy is extinct; and such Release by will intimates no more than that the executors should not, after the testator's death, trouble or molest the debtor. 2 *P. Wms.* 332.

If a debt is mentioned to be devised to the debtor, without words of Release or discharge of the debt, and the debtor die before the testator; this will not operate as a Release, but will be considered as a lapsed legacy, and the debt will subsist. 2 *Vern.* 522.

A debt is only a right to recover the amount of the debt by way of action: and as an executor cannot maintain an action against himself, or against a co-executor, the testator, by appointing the debtor an executor of his will, discharges the action, and consequently discharges the debt. Still, however, when the creditor makes the debtor his executor, it is to be considered but as a specific bequest or legacy, devised to the debtor to pay the debt; and therefore, like other legacies, it is not to be paid or retained, till the debts are satisfied; and if there are not assets for the payment of the debts, the executor is answerable for it to the creditors. In this case, it is the same whether the executor accepts or refuses the executorship. On the other hand, if the debtor makes the creditor his executor, and the creditor accepts the executorship, if there are assets, he may retain his debt out of the assets, against the creditors in equal degree with himself; but if there are not assets, he may sue the heir, where the heir is bound. 1 *Inst.* 264. (*b*) *in n.* See this Dictionary, titles *Executor*; *Legacy*; *Will.*

In the case of *Smith* v. *Stafford* (*Hob.* 216), the husband promised the wife, before marriage, that he would leave her worth 100*l.* The marriage took effect, and the question was, whether the marriage was a Release of the promise. All the Judges but *Hobart* were of opinion, that as the action could not arise during the marriage, the marriage could not be a Release of it. The doctrine of this case was admitted in that of *Gage* v. *Acton*; which arose upon a bond executed by the husband to the wife, before marriage, with a condition making it void if she survived him, and he left her 1000*l.* Two of the Judges were of opinion, that the debt was only suspended, as it was on a contingency which could not, by any possibility, happen during the marriage. But *Holt*, Chief Justice, differed from them; he admitted, that a covenant or promise by the husband to the wife, to leave her so much in case she survives him, is good; because it is only a future debt on a contingency, which cannot happen during the marriage, and that is precedent to the debt: but that a bond debt was a present debt, and the condition was not precedent, but subsequent; that made it a present duty, and the marriage was consequently a Release of it. The case afterwards went into Chancery. The bond was taken there to be the agreement of the parties, and relief accordingly decreed. See 1 *Salk.* 325: 12 *Mod.* 290: 2 *Vern.* 481. A like decree was made in the case of *Camel* v. *Buckle*, 2 *P. Wms.* 243. See further, this Dictionary, title *Baron and Feme.*

III. Littleton says, that a Release of all Demands is the best Release to him to whom it is made; and *Coke* says, that the word Demand is the largest word in Law, except Claim; and that a Release of all Demands discharges all sorts of actions, rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons, &c. *Litt.* § 508: *Co. Litt.* 291.

But notwithstanding the large import of the word Demands, yet there are several instances where the generality of the word hath been restrained to the particular occasion for which the Release was made.

By a Release of all Demands, all actions real, personal, and mixed, and all actions of appeal, are extinct. *Litt.* § 509: 8 *Co.* 154.

So a Release of all Demands extends to inheritances, and takes away rights of entry, seizures, &c. *Co. Litt.* 291. But if the King releaseth all Demands, yet as to him the inheritance shall not be included. *Bro. Prerogative*, *pl.* 62: *Bridg.* 124.

By a Release of all Demands made to the tenant of the land, a common of pasture shall be extinct. *Co. Litt.* 291.

A Release of all Demands will bar a demand of a relief, because the relief is by reason of the seigniory to which it belongs. *Cro. Jac.* 170.

If *A.* being possessed of goods loses them, and they come to the hands of *B.* who being in possession, *A* by deed releases to *B.* all actions and demands personal which at any time before *habuit vel habere potuit* against *B.* for any cause, matter, or thing whatsoever; this shall bar *A.* of the property of the goods; so that *B.* has the absolute right in him by this Release. 2 *Roll. Abr.* 407.

By a Release of all Demands, all manner of executions are gone, for the recoveror cannot sue out a *fieri facias*, *capias*, or *elegit*, without a demand. *Litt.* § 508: 2 *Rol. Abr.* 407.

By a Release of all Demands to the conusor of a statute-merchant, before the day of payment, the conusee shall be barred of his action, because the duty is always in demand; yet if he releases all his right in the land, it is no bar. *Co. Litt.* 291: *Bridgm.* 124.

So, a bond conditioned to pay money at a day to come, is a debt and duty presently, and may be discharged by a Release of all actions and demands before the day of payment. *Cro. Jac.* 300.

 But

But in an action of debt for non-performance of an award made for payment of money at a day to come; there is no present debt, nor any duty before the day of payment is come, therefore it cannot be discharged before the day, by a Release of all actions and demands. *Yelv.* 214: *Cro. Jac.* 300.

So, if a man devises a legacy of 20*l.* to *J. S.* at the age of 23, though the legatee, after he attains the age of 21, and before the day of payment, may release it, yet by the word, Demands, it is not released, but there must be special words for the purpose. 10 *Co.* 51.

A Release of all Demands does not discharge a covenant not broken at the time; but a Release of all Covenants will release the Covenant. *Cro. Jac.* 173: 2 *Roll. Abr.* 407: *Noy* 123. For the difference when broken or not, see *Dyer* 217: *Litt. Rep.* 86: 3 *Leon.* 69: 5 *Co.* 71: *Hoe's* case: 10 *Co.* 51: *Co. Litt.* 292: 8 *Co.* 153: 1 *And.* 8, 64: and this Dictionary, title *Covenant.*

If a Lessee for life grants over his estate by indenture, reserving rent during the continuance of the estate, and afterwards releases to the assignee all demands; this shall discharge the rent, for he had the freehold of the rent in him at the time. 2 *Roll. Abr.* 408: *Cro. Jac.* 486: *Bridgm.* 123: 2 *Roll. Rep.* 20: *Poph.* 136.

So, if Lessee for years grants over by indenture all his estate, reserving a rent during the term, and afterwards releases to the assignee all demands, this shall release the rent; for though he cannot have an action to demand all the estate, yet this is an estate in him of the rent, and assignable over; and in an action of debt for any arrears after, he shall claim it as a duty accrued from the estate; and it shall not be said that the duty arises annually on taking the profits, but this had its commencement and creation by the reservation of the contract, which was before. 2 *Roll. Abr.* 408.

If there be Lessee for years rendering rent, and the Lessor grants over the reversion, and the Lessee attorns, and after the Lessee assigns over his estate, and after, the Assignee of the reversion releases all demands to the first Lessee, yet this shall not release the rent; for there is neither privity of the estate or contract between them after the assignment; but if the Release had been made to the Assignee, it had extinguished the rent. 2 *Roll. Abr.* 408: *Moor* 544: *Cro. Eliz.* 606.

If he who has a rent-charge in fee releases to the tenant of the land all demands from the beginning of the world till the making of the deed of Release; this shall discharge all the rent, as well that to come as what is past. 20 *Ass. pl.* 5: 2 *Roll. Abr.* 408.

It is said by *Littleton* and *Coke*, that by a Release of all demands a rent-service shall be released; but this it is said is to be intended of a rent-service in gross, as a seigniory. *Litt.* §510: *Co. Litt.* 291. Therefore, where in action of covenant on a lease for years, to pay the rent reserved, the defendant pleaded Release by the plaintiff of all demands, at a day before the rent in question became due; the plaintiff replied, that the Release was in performance of an award of all matters in controversy between the plaintiff and defendant; and on demurrer it was adjudged, that the rent was not discharged by this Release; as it became due by the perception of the profits, and was not like to a rent-charge, or a rent-parcel of a seigniory; and that this rent being incident to the reversion, and part thereof, was no more released than the reversion itself; and this construction should the rather prevail, as it was not the intention of the party to release this rent; but *Twisden* said, that in Releases and Deeds, when words are heaped up, the party who is to take advantage may take the strongest word, and the strongest sense, and that is the reason they are put in; and as to the intent, that must be gathered from the words, and men must take care what words they use: And he said, he could see no difference between this rent, and a rent in fee, both are rent-services, and neither demandable before they become due; otherwise than as in 40 *Ed.* 3. 47, it is said, there is a continual demand betwixt lord and tenant; and in this case there is a tenure between the Lessee and him in reversion; and the reason why the reversion is not touched by this Release is, because it can work only by way of extinguishment, and not by way of passing an interest; but it was adjudged against the Release. 1 *Lev.* 99, 100: 1 *Sid.* 141: 1 *Keb.* 499, 510: See 2 *Salk.* 578.

IV. A Release of all Actions discharges a bond to pay money on a day to come; for it is *debitum in præsenti, quamvis sit solvendum in futuro*; and it is a thing merely in action, and the right of action is in him who releases, though no action will lie when the Release is made. *Co. Litt.* 292. See title *Bond.*

But a Release of Actions does not discharge a *rent* before the day of payment, for it is neither *debitum* nor *solvendum* at the time of the Release; nor is it merely a thing in action, for it is grantable over. *Co. Litt.* 292.

So, if a man has an annuity for a term of years, for life, or in fee, and he, before it be in arrear, releases all Actions; this shall not release the annuity, for it is not merely in action, because it may be granted over. *Co. Litt.* 292: 1 *Bulst.* 178: *Cro. Eliz.* 897: *Moor* 113. But such Release shall release the arrears incurred before. 39 *H.* 6. 43: 2 *Roll. Abr.* 404.

By a Release of all manner of Actions, all Actions, as well criminal as real, personal, and mixed, are released. *Co. Litt.* 287.

A Release of Actions real is a good bar in actions mixed; as, Assise of novel disseisin, Waste, *Quare impedit*, Annuity; and so is a Release of Actions personal. *Co. Litt.* 284. But not after the grantee has made his election. 1 *Jones* 215.

In an appeal of robbery or felony, a Release of all Actions personal will not bar; because an appeal, in which the appellee is to have judgment of death, is higher than a personal action; but a Release of all manner of Actions, or of all Actions criminal, or of all Actions mortal, or of all Actions concerning the Pleas of the Crown, or of all Appeals, or of all Demands, will be a good bar of any such appeal. *Co. Litt.* 287.

And in appeal of maihem a Release of all Actions personal may be pleaded, because damages only are recovered. *Co. Litt.* 288.

A Release of all Actions is regularly no bar to an execution; for execution is no action, but begins when the action ends *Co. Litt.* 289: 8 *Co.* 153.

Also a Release of all Actions does not regularly release a Writ of Error; for it is no action, but a commission to the Justices to examine the record; but if therein the plaintiff may recover, or be restored to any thing, it

may be released by the name of Action. 2 *Inst*. 40: *Yelv*. 209: *Co. Litt*. 288. But, by a Release of all Suits, a man is barred of a Writ of Error. *Latch*. 110. So, by a Release of *all Suits*, a man is barred of *execution*, because it cannot be had without application to the Court, and prayer of the party, which is his suit. *Co. Litt*. 291: 8 *Co*. 153.

A Release of all Actions is a good bar to a *scire facias*, though it be a judicial writ, for the defendant may plead to it, and it is in nature of a new original given by the statute. *Co. Litt*. 290: *Comb*. 455.

So, in *replevin*, a Release of all Actions is a good bar, for the avowant is defendant, though in some respects he is plaintiff. 2 *Rol. Rep*. 75.

So, if a man by wrong takes away my goods; if I release to him all Actions personal, yet by Law I may take the goods out of his possession. *Co. Litt*. 286: *Skin*. 57.

If a man releases all Actions, by this he shall release as well Actions which he hath as executor, as those in his own right. 39 *Ed*. 3. 26: 2 *Roll. Abr*. 404: 2 *Ld. Raym*. 1307. *S. C*. cited by *Powel*; and said by him to be clearly so, unless there was an Action of his own for the Release to work upon.

If a man releases *all quarrels*; a man's deed being taken most strongly against himself, it is as beneficial as all Actions, for by it all Actions real, personal, and mixed, are released; and all causes of Action, though no action then depending. *Co. Litt*. 292.

If a person release to another all his right which he hath in the land, without using any more words, as, *To hold to him and his heirs*, &c. the Releffee hath only an estate for life. *Dyer* 263. A Release made to a tenant in tail, or for life, of right to land, shall extend to him in remainder or reversion. 1 *Inst*. 267. By Release of all a man's right unto lands, all actions, entries, titles of dower, rents, &c. are discharged; though it bars not a right that shall descend afterwards: And a Release of all right in such land will not discharge a judgment not executed; because such judgment doth not vest any right: but only makes the land liable to execution. 8 *Rep*. 151: 3 *Salk*. 298.

It is said a Release of all one's title to lands, is a Release of all one's right. *Lit*. § 509: 1 *Inst*. 292. By a Release of all entries, or right of entry, which a man hath into lands, without more words, the Releasor is barred of all right or power of entry into those lands; and yet if a man have a double remedy, *viz*. a right of entry, and an action to recover, and then release all entries, by this he is not barred and excluded his action; nor doth a Release of Actions bar the right of entry. *Plowd*. 484: 1 *Inst*. 345.

If a disseisee releases to the disseisor all Actions; this is no Release of his right of entry; for when a man has several means to come at his right, he may release one, and yet take benefit of the other. *Co. Litt*. 28, *b*: 8 *Co*. 141.

V. To prevent maintenance, and the multiplying of contentions and suits, it was an established maxim of the Common Law, that no possibility, right, title, or any other thing that was not in possession, could be granted or assigned to strangers: A right in action could not be transferred even by act of Law; nor was it considered as transferred to the King by the general transferring words of an Act of Attainder. See 3 *Rep*. 2, *b*. But a right or title to the freehold or inheritance of lands might be released in five manners. 1. To the tenant of the freehold, in fact, or in Law, without any privity. 2. To him in Remainder. 3. To him in reversion. 4. To him who had right only, in respect of privity; as if the tenant were disseised, the lord, notwithstanding the disseisin, might release his services to him. 5. To him who had privity only, and not the right; as, if tenant in tail made a feoffment in fee, after this feoffment, no right remained in him; yet in respect of the privity only, the donor might release to him the rent and services. So, 6. If the terretenants, and the person entitled to the right or possibility, joined in a grant of the lands, it would pass them to the grantee, discharged from the right or possibility. See 10 *Rep*. 49, (*b*). But the law is now altered, in the above instances, in many respects. As to the assignment of things in action, see title *Assignment*. A contingent remainder in real estates can only be transferred by a fine and a common recovery, in which the remainder-man comes in upon the voucher. See titles *Recovery*; *Remainder*.

On the principles of the Common Law above stated, it was held, that an heir at law cannot release to his father's disseisor in the lifetime of the father; for the heirship of the heir is a contingent thing, for he may die in the lifetime of the father, or the father may alien the lands. *Lit*. § 446: *Co. Lit*. 265, *a*: 10 *Co*. 51: *Bridgm*. 76.

So, if the conusee of a statute released to the conusor all his right to the land, yet he might afterwards sue execution, for he had no right to the land, but only a possibility. 1 *And*. 133: *Co. Lit*. 265: 2 *Roll. Abr*. 405: *Cro. Eliz*. 552.

So, if a creditor release to his debtor all the right and title which he hath to his lands, and afterwards get judgment against him, he may extend a moiety of the same land; for he had no right to the land at the time of the Release, and the land is not bound but in respect to the person. 2 *Mod*. 281: 2 *Lev*. 215.

So, if a plaintiff releases all demands to the bail in the King's Bench, and afterwards judgment be given against the principal, execution may be sued against the bail; for that, at the time of the Release, there was only a possibility of the bail becoming chargeable. 5 *Co*. 70: *Co. Lit*. 265: *Moor* 469: *Cro. Eliz*. 579: *Hut*. 17: and see *Moor* 852.

So, if *A*. recovers in trespass against *B*. in *B. R*., and *B*. brings a writ of error, pending which *A*. releases to *B*. all executions, and afterwards the judgment is affirmed, and new damages given to *A*. for the delay, (on *stat*. 3 *H*. 7. *c*. 10,) this Release shall not bar *A*. to have execution of those damages, because he had not any right to have execution, nor to any duty when the Release was made. 2 *Roll. Abr*. 404: *Cro. Jac*. 337: 1 *Roll. Rep*. 11.

If the next presentation to a church be granted to *A*. and *B*. and *living the incumbent*, *A*. releases all his estate, title, and interest to *B*., this Release is void, it being of a chose in action; otherwise, had the Release been made after the avoidance, at which time the interest would have been vested in *A*. *Cro. Eliz*. 173, 600. *Owen* 85: 1 *Leon*. 167: 3 *Leon*. 256: *Dyer* 244: 10 *Co*. 48.

A city orphan cannot at Law release her orphanage part to her father, for she hath no right in her during the life of her father; but it hath been held in equity, that such Release

Release being for a valuable consideration, as on the marriage of a daughter, and a portion given her by the father, such Release may operate as an agreement to waive the orphanage, and hath accordingly been so decreed in equity. 1 *P. Wms.* 638: 2 *P. Wms.* 527: *Preced. Chan.* 545.

If there be a devise of a term for years to *A.* for life, remainder to *B* —— *B.* may release his right to *A.*, and such Release shall extinguish his interest, though it was objected that *B.* had only a possibility at the time of the Release made. 10 *Co.* 47.

But it was held, that *B.* could not *assign* over his interest *to a stranger* in the lifetime of *A.*, the same being only a chose in action, and a mere possibility; inasmuch as an estate for life is in supposition of Law a larger estate than for any number of years. 10 *Co.* 47: 4 *Co.* 66: 1 *Sid.* 188: *Raym.* 146.

Later resolutions, however, in Courts of Equity, have made a great alteration in this doctrine. 2 *Vern.* 563. See this Dict. title *Assignment*.

A duty uncertain at first, which, on a condition precedent, is to be made certain afterwards, is but a possibility which cannot be released. 5 *Co.* 702: 2 *Mod.* 281. As a *nomine pœnæ* waiting on a rent, which cannot be released till the rent is behind, as the non-payment of the rent makes the *nomine pœnæ* a duty. *Yelv.* 215: *Brownl.* 116. So, if a man covenant to pay 10*l.* on the birth of a child, the covenantor cannot be released of the 10*l.*; it resting merely in contingency whether such child ever will be born or not. *Yelv.* 192.

So, if an award be, that on a plaintiff's delivering to defendant, *by a certain day*, a load of hay, defendant shall pay him 10*l.*; in this case the 10*l.* cannot be released *before the day*, for it rests merely in possibility and contingency, whether the money shall ever be paid, for it becomes a duty on delivery of the hay *only*, and not before. *Yelv.* 215. See title *Award*.

In debt on bond against the defendant as administrator, &c. the defendant pleaded a Release; whereby the plaintiff, reciting that there were several controversies between the defendant and him, about a legacy and the right of administration, releases to the defendant all his right, title, interest, and demand of, in, and to the personal estate of the intestate; and, on demurrer, this was held to be no plea; and a difference was taken by *Holt*, between a Release of all Demands to the person of the obligor or administrator, and a Release of all Demands to the personal estate of the obligor or intestate; that the last will not discharge the bond, as the other may, because the bond does not give any right or demand upon the personal estate, &c. until judgment and execution sued *Salk.* 575: 2 *Ld. Raym.* 786.

If *A.* promises *B.* in consideration that he will sell to his son certain merchandise, at such a price, that if his son does not pay it at the feast of St. *Michael* next ensuing, he himself will pay it; and before *Michaelmas*, *A.* releases *all actions and demands* to him who made the promise, this shall not release the *assumpsit*: For till *Michaelmas* it cannot be known whether his son will have paid it or not, and, till default by him, the other is not bound to pay it; so it is a mere contingency till *Michaelmas*, which cannot be released. 2 *Rol. Abr.* 407-8.

For more learning on this subject, see 4 *New Abr.*: 18 *Vin. Abr*: and *Com. Dig.* tit. *Release*.

RELEGATION, *Relegatio.*] A banishing, or sending away: *Abjuration* is forswearing the realm for ever; *Relegation* is banishment for a time only. *Co. Lit.* 133. See title *Transportation*.

RELICTA VERIFICATIONE. Where a judgment is confessed by *cognovit actionem* after plea pleaded, and the plea is withdrawn, it is called a Confession, or *Cognovit actionem relictâ verificatione*. See tit. *Judgments acknowledged*.

RELIEF, *Relevamen*; but in *Domesday*, *Relevatio*, *relevium.*] A *certain* sum of money which the tenant, holding by knights-service, grand serjeanty, or other tenure, (for which homage or legal service is due,) and being at full age at the death of his ancestor, paid unto his lord at his entrance. See *Bracton*, *lib.* 2. *c.* 36: *Britton*, *c.* 69: *Grand Custumary of Normandy*, *c.* 34.

Skene, de verbor. signif. verb. Relevium, saith, *Relief* is a *French* word, from the Latin *relevare*, *to relieve, or take up that which is fallen*; for it is given by the tenant or vassal, who is of perfect age, after the expiring of the wardship, to his superior lord, of whom he held his lands by knight-service, that is, by Ward and *Relief*: For, by payment thereof, he relieves, and, as it were, raiseth up again his lands, after they were fallen down into his superior's hands, by reason of wardship, &c.

Relief is otherwise thus explained, *viz.* A feudatory or beneficiary estate in lands was at first granted only for life; and after death of the vassal it returned to the chief lord, for which reason it was called *Feudum caducum*, viz. *fallen* to the lord by the death of the tenant; afterwards, these feudatory estates being turned into an inheritance, by the connivance and assent of the chief lord, when the possessor of such an estate died, it was called *Hæreditas caduca*, *i. e.* it was fallen to the chief lord; to whom the heir having paid a certain sum of money, he did then *relevare hæreditatem caducam* out of his hands; and the money thus paid was called a *Relief*.

This must be understood after the Conquest; for, in the time of the *Saxons*, there were no *Reliefs*, but *heriots* paid to the lord at the death of his tenant; which in those days were horses, arms, &c. and such tributes could not be exacted by the *English* immediately after the Conquest, for they were deprived of both by the *Normans*; and instead thereof, in many places, the payment of certain sums of money was substituted, which they called a *Relief*; and which continues to this day.

Relief reasonable, or, as it is sometimes called, *lawful* and *ancient Relief*, is such as is injoined by some law, or becomes due by custom, and doth not depend on the will of the lord. What that was, we may read in the Laws of *William* the Conqueror, *c.* 22. and of *Henry* I. *c.* 14; and, before that time, in the Laws of *Canutus*, *c.* 97; *viz.* The *Relief* of an Earl was eight war-horses, with their bridles and saddles, four *loricas*, four helmets, four shields, four pikes, four swords, four hunting horses, and a palfrey, with their bridles and saddles: the *Relief* of a Baron or *Thane* was four horses, two with furniture, and two without, two swords, four lances, four shields and an helmet, *cum lorica*, and fifty marks in gold. The *Relief* of a *Vavasor* was his father's horse, his helmet, shield, lance, and sword which he had at his death. The *Relief* of a Villein, or countryman, was his best beast, &c. *Cowell.* See title *Tenures*.

RELIGION,

RELIGION, *Religio.*] Virtue, as founded on reverence of God, and expectation of future rewards and punishments; a system of Divine Faith and Worship as opposed to others. *Johns.* That habit of reverence towards the Divine Nature, whereby we are enabled and inclined to serve and worship Him, after such a manner as we conceive most acceptable to Him, is called *Religion. Wilkins.*

All blasphemies against God, as denying his Being or Providence, all profane scoffing at the Holy Scripture, or exposing any part to contempt or ridicule; all impostures in Religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments, &c.; all *open lewdness*, and other scandalous offences of this nature, because they tend to subvert all Religion or Morality, which are the foundation of Government, are punishable by the Temporal Judges with fine and imprisonment; and also such corporal infamous punishment as to the Court in discretion shall seem meet, according to the heinousness of the crime. 1 *Hawk. P. C. c.* 5.

Blackstone enumerates the following, as the crimes against God and Religion, which are punishable by the Laws of *England*. Apostacy; as to which see this Dict. tit. *God* and *Religion*—Heresy; see this Dict. under that title—Reviling the Ordinances *of the Church*; see that title—Nonconformity; see titles *Dissenters*; *Nonconformists*; *Quakers*—Popery; see tit. *Papists*—Blasphemy; Swearing (profane); Conjuration, or Witchcraft; see those titles—Religious Impostors; see tit. *Prophesies*—Simony; Drunkenness; see those titles—Profanation of the Lord's Day, see tit. *Sunday*—Lewdness: see that title:—See also titles *Service* and *Sacraments*; *Parson*; *Clergy*, &c.

Seditious words, in derogation of the established Religion, are indictable, as tending to a breach of the peace. 1 *Hawk. P. C. c.* 5. § 6.

Repeal of the former acts relating to Religion, *stat.* 1 *Ed.* 6. *c.* 12. *s.* 3.—Images in churches, &c. to be destroyed, *stat.* 3 & 4 *Ed.* 6. *c.* 10.—Preachers, &c. to subscribe the Articles, *stat.* 13 *Eliz. c.* 12.—Articles to be subscribed by Protestant Dissenting Teachers, *stat.* 1 *W.* & *M. c.* 18. *s.* 8. 10.

RELIGIOUS HOUSES, *Religiosæ domus.*] Houses set apart for pious uses, such as *Monasteries*, *Churches*, *Hospitals*, and all other places where charity is extended to the relief of the Poor and Orphans, or for the use or exercise of Religion.

See *Notitia Monastica*, or, *A short History of the Religious Houses in* England *and* Wales, *by* Tanner, 8vo: in which, in alphabetical order of counties, is accurately given a full account of the Founders, the time of foundation, titular saints, the order, the value, and the dissolution; with reference to printed authors, and manuscripts which preserve any memoirs relating to each House; with a Preface of the institution of religious orders, &c. *Cowell.* See also this Dict. title *Abbots.*

RELIGIOUS MEN, *Religiosi.*] Such as entered into some monastery or convent, there to live devoutly: And in ancient deeds of sale of land, the purchasers were often restrained by covenant from giving or alienating it, *viris religiosis*, to the end the land might not fall into mortmain. *Cowell.* See tit. *Mortmain.*

RELIGIOUS ORDERS, For the qualification of clergy. See title *Ordination.*

RELINQUISHMENT, A forsaking, abandoning, or giving over. It hath been adjudged, that a person may *relinquish* an ill demand in a declaration, &c. and have judgment for that which is well demanded. *Style* 175. In assise, the count was of a messuage, and four acres of land in *B.*, and the jury having a view only of the land, the demandant relinquished his plaint to the house. *Dyer* 66. But on assise, where the plaint was for fifty-three shillings and four-pence rent, no part of that rent could be *relinquished*, because a rent is an entire thing. *Ibid.* 61. In a Writ of Annuity, where the Jury found the arrears, but did not assess damages or costs, which could never be supplied by a Writ of Inquiry; the plaintiff was admitted to relinquish and release the damages, and had judgment for the arrears. 11 *Rep.* 59. See title *Damages* II.

RELIQUES, *Reliquiæ.*] Remains, such as the bones, &c. of Saints who are dead, preserved by persons living, with great veneration, as sacred memorials of them: They are forbidden to be used, or brought into *England*, by several statutes; and Justices of Peace were, by *stat.* 3 *Jac.* 1. *c.* 26, empowered to search houses for Popish books and Reliques, which, when found, are to be defaced and burnt, &c. See title *Papists.*

REMAINDER.

Remanentia.] An estate limited in lands, tenements or rents, to be enjoyed after the expiration of another particular estate. And a Remainder may be either for a certain term, or in fee-simple, or fee-tail. *Broke*, title *Donee* and *Remainder*, 245: *Glanv. lib.* 7. *c.* 1. The difference between a Remainder and Reversion, according to *Spelman*, is this, That by a Reversion, after the appointed term, the estate returns to the donor, or his heirs, as the proper fountain; whereas by Remainder it goes to some third person, or a stranger. *Cowell.*

Remainder is described to be a remnant of an estate in lands or tenements, expectant on a particular estate created together with the same, and at the same time; and is so expectant on the particular estate, that unless it can take effect when the particular estate determines, it is void. *Co. Lit.* 49. 143: 2 *Co.* 51: *Moor* 344: *Vaugh.* 269.

I. *Of the Nature of Remainders, vested or contingent; and the general Rules relating thereto.*

II. *Of Contingent Remainders; and Remainders in* Abeyance.

III. *Of Cross Remainders, and those arising by Implication and Construction of Law.*

IV. *Of what Things a Remainder may be made, or limited.*

V. *What Words are sufficient to create a Remainder; and herein, in what Cases the Heir shall take by Words of Purchase, or Words of Limitation, and the Effect thereof:* And see this Dictionary, title *Purchase.*

I. An Estate *in Remainder* may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. As, if a man, seised in fee-simple, grant lands to *A.* for twenty years, and after the determination of the said term, then to *B.* and his heirs for

for ever: Here *A.* is tenant for years, *Remainder* to *B.* in fee. In the first place, an estate for years is created or carved out of the fee, and given to *A*; and the residue or Remainder of it is given to *B*. But both these interests are in fact only one estate; the present term of years and the Remainder afterwards, when added together, being equal only to one estate in fee. *Co. Lit.* 143. They are indeed different *parts*, but they constitute only one *whole*: they are carved out of one and the same inheritance: they are both created, and may both subsist, together; the one in possession, the other in expectancy. So, if land be granted to *A.* for 20 years, and after the determination of the said term to *B.* for life; and, after the determination of *B.*'s estate for life, it be limited to *C.* and his heirs for ever: This makes *A.* tenant for years, with *Remainder* to *B.* for life, *Remainder over* to *C.* in fee. Now, here the estate of inheritance undergoes a division into three portions: there is first *A.*'s estate for years carved out of it; and after that *B.*'s estate for life; and then the whole that remains is limited to *C.* and his heirs. And here also the first estate, and both the Remainders, for life, and in fee, are one estate only; being nothing but parts or portions of one entire inheritance; and if there were a hundred Remainders, it would still be the same thing; upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence, also, it is easy to collect, that no Remainder can be limited after the grant of an estate in fee-simple: because a fee-simple is the highest and largest estate that a Subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate: a Remainder therefore, which is only a portion, or residuary *part*, of the estate, cannot be reserved after the whole is disposed of. *Plowd.* 29: *Vaugh.* 269. A particular estate, with all the Remainders expectant thereon, is only one fee-simple; as 40*l.* is part of 100*l.*, and 60*l.* is the Remainder of it: wherefore, after a fee-simple once vested, there can no more be a Remainder limited thereon, than after the whole 100*l.* is appropriated there can be any residue subsisting. 2 *Comm. c.* 11.

Thus much being premised, the Student will be the better enabled to comprehend the rules that are laid down by Law to be observed in the creation of Remainders; and the reasons upon which those rules are founded.

First, There must necessarily be some particular estate, precedent to the estate in Remainder. As, an estate for years to *A.* Remainder to *B.* for life; or, an estate for life to *A.* Remainder to *B.* in tail. This precedent estate is called the *particular* estate, as being only a small part, *particula*, of the inheritance; the residue or Remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good Remainder, arises from this plain reason; that *Remainder* is a relative expression, and implies that some part of the thing is previously disposed of: for, where the whole is conveyed at once, there cannot possibly exist a Remainder; but the interest granted, whatever it be, will be an estate in possession. See *Co. Lit.* 49: *Plowd.* 25.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no Remainder: it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient Law, to be executed either now or hereafter, as the contracting parties should agree: But an estate of freehold must be created to commence immediately; for it is an ancient rule of the Common Law, that an estate of freehold cannot be created to commence *in futuro*; but it ought to take effect presently, either in possession or Remainder: 5 *Rep.* 94: Because, at Common Law, no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance, which imports an immediate possession. Therefore, though a lease to *A.* for 7 years, to commence from next *Michaelmas*, is good; yet a conveyance to *B.* of lands, to hold to him and his heirs for ever, from the end of three years next ensuing, is void. So that, when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land, to the tenant of this particular estate; which is construed to be giving possession to him in Remainder, since his estate and that of the particular tenant are one and the same estate, in Law. As, where one leases to *A.* for three years, with Remainder to *B.* in fee, and makes livery of seisin to *A.*; here, by the livery, the freehold is immediately created, and vested in *B.* during the continuance of *A.*'s term of years. The whole estate passes at once from the grantor to the grantees, and the Remainder-man is seised of his Remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is, to all intents and purposes, an estate commencing *in præsenti*, though to be occupied and enjoyed *in futuro*.

As no Remainder can be created, without such a precedent particular estate, therefore the particular estate is said to *support* the Remainder. But a lease *at will* is not held to be such a particular estate, as will support a Remainder over. 8 *Rep.* 75. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a Remainder. Besides, if it be a Freehold Remainder, livery of seisin must be given at the time of its creation; and the entry of the grantor, to do this, determines the estate at will in the very instant in which it is made. *Dyer* 18. Or, if the Remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *Remainder*: For it is a separate independent contract, distinct from the precedent estate at will; and every Remainder must be part of one and the same estate, out of which the preceding particular estate is taken. *Raym.* 151. And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the Remainder supported thereby shall be defeated also: as, where the particular estate is an estate for the life of a person not *in esse*; or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate; in either of these cases the Remainder over is void. *Co. Lit.* 298: 2 *Roll. Ab.* 415: 1 *Jon.* 58.

Secondly, The Remainder must commence, or pass out of the grantor, at the time of the creation of the particular estate. *Lit.* § 671: *Plowd.* 25. As, where there is an estate to *A.* for life, with Remainder to *B.* in fee: Here *B.*'s Remainder in fee passes from the grantor at the same time that seisin is delivered to *A.* of his life estate in possession. And it is this, which induces the necessity at Common Law of livery of seisin being made, on the particular estate, whenever a *Freehold* Remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor; otherwise the Remainder is void. *Lit.* § 60. Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in Remainder, without infringing the possession of the lessee for years, therefore, the Law allows such livery, made to the tenant of the particular estate, to relate and enure to him in Remainder, as both are but one estate in Law. *Co. Lit.* 49

Thirdly, The Remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. *Plowd.* 25: 1 *Rep.* 66. As, if *A.* be tenant for life, Remainder to *B.* in tail; here *B.*'s Remainder is vested in him, at the creation of the particular estate to *A.* for life: Or, if *A.* and *B.* be tenants for their joint lives, Remainder to the survivor in fee; here, though during their joint lives, the Remainder is vested in neither, yet, on the death of either of them, the Remainder vests instantly in the survivor: wherefore both these are good Remainders. But, if an estate be limited to *A.* for life, Remainder to the eldest son of *B.* in tail, and *A.* dies before *B.* hath any son; here the Remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate: and, even supposing that *B.* should afterwards have a son, he shall not take by this Remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever. 1 *Rep.* 138. And this depends upon the principle before laid down, that the precedent particular estate, and the Remainder, are one estate in Law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the Remainder supported thereby; 3 *Rep.* 21: the thing supported must fall to the ground, if once its support be severed from it. 2 *Comm.* c. 11.

If a man makes a lease to *A.* for life, and that after the death of *A.*, and one day after, the land shall remain to *B.* for life, &c. this is *a void Remainder*, because not to take effect *immediately* on the determination of the first estate, and so during that time there would be an interruption of the livery, and no tenant of the freehold, either to do the services, or answer to the *præcipes* of strangers: *Plowd.* 25: *Raym.* 144: that the Law is nice to an instant. 1 *Ld. Raym.* 316.

It is upon these rules, but principally the last, that the doctrine of *Contingent* Remainders depends. For Remainders are either *vested* or *contingent*. *Vested* Remainders, whereby a present interest passes to the party, though to be enjoyed *in futuro*, are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As, if *A.* be tenant for twenty years, Remainder to *B.* in fee; here *B.*'s is a vested Remainder, which nothing can defeat, or set aside. See *post.* II. and also *post.* V. as to the distinction between Remainders *vested* and *executed.*

II. CONTINGENT or *Executory* Remainders (whereby no present interest passes) are where the estate in Remainder is limited to take effect, either to a dubious and uncertain *person*; or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the Remainder never take effect. 3 *Rep.* 20.

Thus, if *A.* be tenant for life, with Remainder to *B.*'s eldest son (then unborn) in tail; this is a Contingent Remainder, for it is uncertain whether *B.* will have a son or no: but the instant that a son is born, the Remainder is no longer contingent, but vested. Though, if *A.* had died before the contingency happened, that is, before *B.*'s son was born, the Remainder would have been absolutely gone; for the particular estate was determined before the Remainder could vest. Nay, by the strict rule of Law, if *A.* were tenant for life, Remainder to his own eldest son in tail, and *A.* died without issue born, but leaving his wife *enseint*, or big with child, and after his death a posthumous son was born, this son could not take the land, by virtue of this Remainder; for the particular estate determined before there was any person *in esse*, in whom the Remainder could vest. *Salk.* 228: 4 *Mod.* 282. But, to remedy this hardship, it is enacted, by *stat.* 10 & 11 *W.* 3. *c.* 16, That posthumous children shall be capable of taking in Remainder, in the same manner as if they had been born in their father's lifetime: that is, the Remainder is allowed to vest in them, while yet in their mother's womb.

The particular case on which this statute was passed, (as many statutes have arisen from circumstances of private hardship, or injustice,) was as follows:—A father had devised an estate to his son for life, with a Remainder to the first and other sons of the son in tail; the son died, leaving his wife pregnant, who was afterwards delivered of a son: The Courts of *C. P.* and *K. B.* held clearly, that the grandson, not being born at the expiration of the estate for life, was not entitled to take it: But the Lords, moved by the hardship of the case, reversed the judgment of the Courts below, contrary to the opinions of all the Judges. *Reeve* v. *Long*, 1 *Salk.* 227, & *alibi.* But the House of Commons, in reproof of what they considered as an assumption of legislative authority in the Lords, immediately brought in an act, which passed into the above statute. The statute only mentions *marriage and other settlements*; and it is probable that devises were designedly omitted to be expressed, from delicacy, and that the authority of the judgment of the Peers might not be too openly impeached. As the statute says, that the posthumous son, in this case, shall take the estate as if born before the death of the father, he is entitled to the intermediate profits from the death of the father; 3 *Atk.* 203; which is different from the case of a descent devested by the birth of a posthumous child. See title *Descent*; *Rule* I.

This species of Contingent Remainders, to a person not in being, must however be limited to some one, that may,

may, by common possibility, or *potentia propinqua*, be *in esse* at or before the particular estate determines. 2 *Rep.* 51. As, if an estate be made to *A.* for life, Remainder to the heirs of *B.*: now, if *A.* dies before *B.* the Remainder is at an end; for during *B.*'s life he has no heir, *nemo est hæres viventis*: but if *B.* dies first, the Remainder then immediately vests in his heir, who will be entitled to the land, on the death of *A.* See *post*. This is a good Contingent Remainder, for the possibility of *B.*'s dying before *A.* is *potentia propinqua*, and therefore allowed in Law. *Co. Lit.* 378. But a Remainder to the right heirs of *B.* (if there be no such person as *B. in esse*,) is void. *Hob.* 33. For here there must two contingencies happen; first, that such a person as *B.* shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A Remainder to a man's eldest son, who hath none, (we have seen,) is good; for, by common possibility, he may have one; but if it be limited in particular to his son *John*, or *Richard*, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name. 5 *Rep.* 51. A limitation of a Remainder to a bastard, before it is born, is not good; for though the Law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. *Cro. Eliz.* 509.

Next; with respect to a Contingent Remainder, where the person to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain.—Where land is given to *A.* for life, and in case *B.* survives him, then with Remainder to *B.* in fee: here *B.* is a certain person, but the Remainder to him is a Contingent Remainder, depending upon a dubious event, the uncertainty of his surviving *A.* During the joint lives of *A.* and *B.* it is contingent; and if *B.* dies first, it never can vest in his heirs, but is for ever gone; but if *A.* dies first, the Remainder to *B.* becomes vested. 2 *Comm. c.* 11.

Contingent Remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate, less than a freehold. Thus, if land be granted to *A.* for ten years, with Remainder in fee to the right heirs of *B.*; this Remainder is void: but if granted to *A.* for life, with a like Remainder, it is good. 1 *Rep.* 130. For, unless the freehold passes out of the grantor at the time when the Remainder is created, such Freehold Remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a Contingent Remainder it must vest in the particular tenant, else it can vest no where: unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the Remainder is void. 2 *Comm. c.* 11.

A Contingent Remainder is defined, by *Fearne*, to be a Remainder limited so as to depend on an event or condition, which may never happen or be performed; *or* which may not happen or be performed, till after the determination of the preceding estate; for if the preceding estate (unless it be a mere trust estate) determine before such event or condition happens, the Remainder will never take effect. Under this definition, we may properly distinguish four sorts of Contingent Remainders, *First*, Where the Remainder depends entirely on a *contingent* determination of the preceding estate itself.—*Secondly*, Where the contingency on which the Remainder is to take effect is independent of the determination of the preceding estate.—*Thirdly*, Where the condition, upon which the Remainder is limited, is certain in event, but the determination of the particular estate may happen before it.—*Fourthly*, Where the person, to whom the Remainder is limited, is not yet ascertained, or not yet in being. *Fearne* 3, 4.

In the case of *Dormer* v. *Fortescue*; [reported in its various stages by the name of *Dormer* v. *Fortescue*: *Dormer* v. *Parkhurst*: *Barrington* d. *Dormer* v. *Parkhurst*: *Smith* v. *Packhurst*, or *Parkhurst*: *Parkhurst* v. *Smith*, &c. See *Bro. P. C.* titles *Fine*; *Remainder*;] an estate was limited (after several precedent estates) to the use of *A.* for 99 years, if he should so long live; and after his decease, or the sooner determination of the estate limited to him for 99 years, to the use of trustees, and their heirs, during his life, upon trust, to preserve the Contingent Remainders: and after the end or determination of that term, to the use of *A.*'s first and other sons successively in tail-male; Remainder to the heirs of the body of the original settler; Remainder to such settler's right heirs. All the preceding estates being determined, *A.* came into the possession of the lands limited to him for 99 years; and having a son, they joined in levying a fine, and suffering a common recovery, in which the son was vouched. If the trustees took a vested estate of freehold during the life of *A.*, the recovery was void, there not being a good tenant to the *præcipe*, the father being only tenant for years; but if they took a contingent estate, the freehold was in the son, and of course there was a good tenant to the *præcipe*. Upon this point, the case was argued in the Court of *K. B.* and afterwards on appeal before the House of Lords, where all the Judges were ordered to attend. *Lee*, C. J. when the cause was heard in *K. B.*, and *Willes*, C. J. in delivering the opinion of the Judges in the House of Lords, entered very fully into the distinction between contingent and vested Remainders. They seem to have laid down the following points:—That a Remainder is contingent, either where the person to whom it is limited is not *in esse*, or where the particular estate may determine before the Remainder can take place: but that in every case where the person to whom the Remainder is limited is *in esse*, and is actually capable, or entitled, to take, on the expiration or sooner determination of the particular estate, supposing that expiration or determination to take place at that moment, there the Remainder is vested. That the doubt arose, by not adverting to the distinction between the different nature of the contingency, in those cases where the Remainder is limited to a person *in esse*, but the title of the Remainder-man depends on a collateral or extraneous contingency, which may, or may not, take place during the continuance of the preceding estate; and those cases where the preceding estate may endure beyond the continuance of the estate in Remainder. Thus, if an estate is limited to *A.* for life, and, after the death of *A.* and *J. S.*, to *B.* for life, or in tail, there, during the life of *J. S.*, the title of *B.* depends on the contingency of *J. S.* dying in the lifetime of *A.* This being an event, which may, or may not, take place during the continuance of the preceding estate, *B.*'s estate is necessarily contingent. But then, supposing *J. S.* to die, still it remains an uncertainty

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whether *B.*'s estate will ever take place in possession: for, if the Remainder be limited to *B.* for life, there, if *B.* dies in *A.*'s life-time, *A.*'s estate would endure beyond the continuance of the estate limited in Remainder. The same would be the case if the Remainder over were limited to *B.* in tail, and *B.* was to die in *A.*'s life-time without issue. Yet, in both cases, it was agreed, that *B.* took not a contingent, but a vested Remainder. Hence they inferred, that it was not the possibility of the Remainder over never taking effect in possession, but the Remainder-man's not having a capacity or title to take, supposing the preceding estate at that instant to expire or determine, together with its being uncertain whether he ever will obtain that capacity or title, during the continuance of the preceding estate, that makes the Remainder contingent. Upon these grounds they determined, that the Trustees took a vested Remainder, and that the Recovery therefore was void.—The doctrine established in this case is laid down very precisely by *Coke*, 10 *Rep.* 85, where he, with great accuracy of expression, observes, that where it is dubious and uncertain whether the use or estate limited in future shall ever *vest in interest*, or not, then the use or estate is in contingency; because, upon a future contingent, it may either vest or never vest, as the contingent happens. See 1 *Rep.* 137, *b*: 1 *Inst.* 265, *a. in n.*: and *post.* V.

If an estate be limited, either at Common Law, or by way of use, to one for life, or in tail, Remainder to the right heirs of *J. S.* who is then dead; this is a good Remainder, and vests presently in the person who is heir at law to *J. S.* by purchase; see *post.* V. and though a daughter be then heir at law, and after a son is born, yet shall the daughter retain the land against him; for she being heir, and coming within the description at the time when the Remainder was limited, it then vested and settled in her, immediately, as a Remainder by purchase, and shall not, by any accident after, be defeated. 2 *Rol. Abr.* 415: 1 *Co.* 95, 103: *Plow.* 56.

But if *J. S.* be living at the time of the Remainder limited to his right heirs, this puts such Remainder in abeyance or contingency; that is, it is in no person, but *in nubibus*, till the contingency happens; for it is not in the feoffor, or donor, because he has limited *it out of him*, and all Remainders must *pass out of him* at the time of the limitation, though they do not presently vest in the person intended; and in the *right heirs* of *J. S.* it cannot be, because he cannot have heirs during life; so there is no person, *in rerum natura*, within the description, to take it; therefore it is, in the mean time, *in abeyance*, or *expectancy*, to vest or not vest, as the case happens; for if *J. S.* dies during the particular estate, then the Remainder presently takes place in his heirs; but if the particular estate determines, by death or otherwise, in the life of *J. S.* then such Remainder is become totally void, and can never vest; but the estate settles again in the feoffor, or donor, as if no such limitation in Remainder had been; and he becomes tenant to the *præcipe*, and is obliged to do the services; and though *J. S.* die soon after, yet his heir can have no benefit by it, not being capable of taking the Remainder when it fell. 1 *Co.* 135: *Co. Lit.* 378, *a*: 2 *Co.* 51: 2 *Rol. Abr.* 415: *Plow.* 28, 35: *Poph.* 74: *Moor* 730: 3 *Co.* 20: 10 *Co.* 50: *Raym.* 145: *Pollex.* 56. See *Fearne* 326—334, &c. where this doctrine of the Remainder being in *abeyance*, is considered as in some measure unintelligible; and another question depending thereon is stated thus: "A man [by settlement or will] makes a disposition of a Remainder, or future interest, which is to take no effect at all until a future event or contingency happens; it is admitted, that no interest passes by such a disposition, to any body, before the event referred to takes place. The question is, What becomes of the intermediate reversionary interest, from the time of the making such future disposition, until it takes effect? It was in the grantor, or testator, at the time of making such disposition, it is confessedly not included in it: The natural conclusion seems to be, that it remains where it was, *viz.* in the grantor, or the testator, and his heirs; for want of being departed with to any body else.—When the future disposition takes effect, then the reversionary or future interest passes, pursuant to the terms of it; but if such future disposition fails of effect, either by reason of the determination of the particular estate, failure of the contingency, or otherwise, what is there then to draw the estate, which was the intended subject of it, out of the grantor or his heirs, or the heirs of the testator? or who can derive title to an estate under a prospective disposition, which confessedly never takes any effect at all? *Fearne* 285, 6; 533.

But if there be no such *J. S.* at the time of the limitation, though he be after born, and dies, during the particular estate; yet his heirs shall never have the Remainder. So, if a Remainder be limited to *A.* son of *B.* in tail, &c. or to *E.* wife of *D.*, where in truth there is no such *A.* or *E.*, though *B.* has a son called *A.*, or *D.* marries one *E.*, yet they can never take the Remainder; because, if there be such persons as the words of the gift import, there the Remainder ought to vest in them presently, and they will never after be made capable of taking it; but if there be no such person then *in esse*, none who come within that description after, can lay claim to it, because the limitation was present to such persons; but a Remainder limited *primogenito filio*, or *proximo hæredi masculo* of *A.*, or *propinquioribus hæredibus de sanguine puerorum*, or *seniori puero* of *A.*, or to the right heirs of *A.*, there being then such *A. in esse*, or to the wife *A.* shall marry; these are good Remainders, and vest when such persons come *in esse* as are within the description; because here appears no present regard for any person in particular; therefore, if they answer the description at any time before the particular estate determines, it is time enough; and so there is a diversity between a Remainder limited to one, by name *in particular*, and such Remainder limited by *description* or circumlocution, or between a *general* name and a special name. *Co. Lit.* 3: 1 *Co.* 66: 2 *Co.* 51: *Hob.* 33: *Moor* 104: *Dyer* 337: 2 *Leon.* 210: 1 *Rol. Rep.* 254.

A. makes a lease to *B.* for life of *B.*, and after the death of *A.* to remain to *B.* and his heirs; this Remainder is contingent, and cannot vest presently, for if *A.* survives *B.* it is void; and because, otherwise, the operation of livery would be interrupted during the life of *A.*; for he cannot give himself any estate, his livery operating to pass estates from him, not to give any to him who had the whole before; therefore, *during his life, the operation of the livery must cease*, and by consequence no Remainder can take effect in virtue of that livery, which *pro tempore* being at an end, all that depended thereon ceases too, and can never after be revived; for the

the livery must carry out all the estates at once from the feoffor; and if he comes again into the possession before they can all take effect, this breaks the force of the livery, and brings back again to him all that such livery had taken out from him, and then they never can take effect but by a new livery: This is the reason of the common case, that one cannot give lands to another to begin after his death, because, being to make livery presently, if that cannot operate presently, it can never operate at all; for it is a contradiction to give lands to one by a solemn livery, which is an act executed, and works presently; and yet, by words, to restrain that operation to a future time: But in the principal case, where *A.* dies first, there no interruption is of the livery, for *B.* had an estate for life by virtue thereof; and before that determines, the same livery which carried the Remainder in abeyance, for the uncertainty of its taking effect, does on *A.*'s death direct and settle, or bring down the Remainder to *B.* and his heirs. 10 *Co.* 85.

If a lease be made to *A.*, *B.*, and *C.*, for their lives, and if *B.* survives *C.*, then to remain to *B.* and his heirs; *this Remainder is in abeyance*, because, though the person be certain, yet since it depends on *C.*'s dying before him, till that be known the Remainder cannot vest. So if a lease be made to *A.* for life, and after the death of *B.* who is a stranger, to remain to *C.* in fee, or to *A.* in fee; these Remainders are in abeyance or contingency, and depend on *B.*'s dying before *C.* or *A.*, for if he survives them, the Remainder cannot take effect. 3 *Co.* 20: 10 *Co.* 85: *Co. Lit.* 378.

If a lease were made to *A.* for life, Remainder to the Abbot of *D.* and his successors, though the Abbot were then dead, so as there were then no abbot at all, yet the Remainder should be good, *if* an abbot were made before the death of *A.* So, of a Remainder to a Mayor and Commonalty, Dean and Chapter, Prior and Convent, &c. though there be *then* no mayor, dean or prior. So, of a Remainder to the Bishop of *D.*, Parson of *D.*, or other sole Corporation, and his successors; these Remainders (not being limited to them by name specially, but to them generally, and *so whoever comes within the description before the determination of the particular estate, is capable of taking by virtue thereof*,) are good Remainders in abeyance, &c. But if there be no such corporations at the time of the limitation, then the Remainders are totally void; and none created after, though by the same name, can take these Remainders, not even if a patent be then passed to make such corporation. *Co. Lit.* 264: *Hob.* 33: 2 *Co.* 51: 10 *Co.* 30: *Moor* 104: 1 *Rol. Rep.* 254: 2 *Bulst.* 275.

Contingent Remainders may be defeated, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested. 1 *Rep.* 66, 135. Therefore, when there is tenant for life, with divers Remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate, before any of those Remainders vest; the consequence of which is, that he utterly defeats them all. As, if there be tenant for life, with Remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life-estate, he by that means defeats the Remainder in tail to his son: for his son not being *in esse*, when the particular estate determined, the Remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases, therefore, it is necessary to have trustees appointed to preserve the Contingent Remainders; in whom there is vested an estate in Remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the Remainders depending in contingency. See *post.* V. This method is said to have been invented by Sir *Orlando Bridgman*, Sir *Geoffrey Palmer*, and other eminent Counsel, who betook themselves to conveyancing during the time of the Civil Wars; in order thereby to secure, in family settlements, a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life: and when, after the Restoration, those gentlemen came to fill the first offices of the Law, they supported this invention, within reasonable and proper bounds, and introduced it into general use. 2 *Comm.* c. 11. See *Moor* 486: 2 *Rol. Abr.* 797. *pl.* 12: 2 *Sid.* 159: 2 *Chan. Rep.* 170.

III. When lands are given in undivided shares to two or more for particular estates, so as that, upon the determination of the particular estates in any of those shares, they remain over to the other grantees, and the Reversioner or Remainder-man is not let in, till the determination of all the particular estates, then the grantees take their original shares as tenants in common; and the Remainders limited to them, on the determination of the particular estates, are known by the appellation of *Cross Remainders.*—These Remainders may be raised both by deed and will; in deeds they can only be created by express words, but in wills they may be raised by implication. 1 *Inst.* 195, *b.* in *n.*

A. having issue five sons, his wife being ensient, devised two thirds of his lands to his four younger sons, and the child *in ventre sa mere*, if he were a son, and their heirs; and if they all died without issue male of their bodies, or any of them, that the lands revert to the right heirs of the devisor: By this devise, *the younger sons were tenants in tail in possession, with Cross Remainders in tail to each other*, and no part shall revert to the heir of the devisor, till all the younger sons be dead without issue male of their bodies. *Dyer* 303.

But where one having issue three sons, *A.*, *B.*, and *D.*, devises one house to *A.* and his heirs, another to *B.* and his heirs, and a third to *D.* and his heirs; provided, that if all his said children die without issue, that then the messuages remain and be to his wife and her heirs: It was held by three Judges, that, *on the death of one of the sons without issue, the wife might enter*, and that here there were no Cross Remainders from one son to another, because, being devised to them severally by express limitation, there shall be no greater estate to them by implication. *Gilbert* v. *Witty*, *Cro. Jac.* 655: 2 *Roll. Rep.* 281: 1 *Vent.* 224: *Raym.* 455: *Fitzg.* 97: 2 *Jon.* 82: *Carth.* 173.

In the above case it was said, by Justice *Doderidge*, that Cross Remainders should never be raised, by implication, between more than two. This doctrine received some

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countenance from what was said by the Courts in the cases of *Cole* v. *Levingstone*, 1 *Ventr*. 224: *Holmes* v. *Meynell*, *T. Raym*. 452; and some other cases. See 4 *Leon*. 14. But it seems entirely exploded by the cases of *Burden* v. *Burville*, *B. R. Pasch*. 13 *Geo*. 3 *Richmond* (*D*) v. *Cadogan* (*E*), *Chanc. May* 1773: *Wright* v. *Holford* & *al. Cowp.* 31; and some other subsequent cases. It seems, however, to be admitted in these cases, that to raise Cross Remainders between more than two, stronger implication is required, than to raise them between two only. 1 *Inst*. 195, *b* in *n*

One seised of lands in fee, by will devises *Black Acre* to *A*. his daughter, and her heirs, and *White Acre* to his daughter *B*. and her heirs; and if she die before the age of sixteen years, living *A*., then *A* to have *White Acre* to her and her heirs; and if *A* die, having no issue, living *B*., then *B*. to have the part of *A* to her and her heirs; and if both die, having no issue, then to *J S*. and his heirs; the Testator dies; *B* attains her age of sixteen years, and *then* dies, without issue in the life of *A*; and it was held by three Justices, against *Dyer*; 1st, That *the daughters had an estate-tail on the whole will*, and not a fee determinable on a contingency subsequent; 2dly, That, by the words "*if both die without issue*," no Cross Remainders in tail were created by implication, but that on *B*'s death without issue, after sixteen, *J. S.* should have her part presently without staying till the death of *A*. without issue. *Dyer* 330: 1 *Bulst*. 212: 1 *Roll. Abr*. 839: *Vaugh*. 267.

A. seised of lands in fee, by will devises all his lands in the county of, &c. to his two daughters *B*. and *D*. and their heirs, equally to be divided betwixt them; and in case they happen to die without issue, then to his nephew *J. S*. and the heirs male of his body, and dies; and it was adjudged, that on the death of *B*. one of the daughters of the other sister took her moiety as a Cross Remainder. *Raym*. 452: *Sain*. 17: 2 *Jon*. 172: 2 *Show*. 136: *Pollex*. 434; and see 2 *Vern*. 545: 3 *Mod*. 107.

Richard Holden seised in fee, and having issue a son and three grandchildren, by his will devised part of his estate to his wife for her life; and the reversion of such part, expectant on her death, and all other his freehold tenements, &c. he gave to his son *Richard Holden* for life, and after his death to his first and other sons successively *in tail male*, and *for default of such issue*, and after the determination of the said estates, he gave the premises to his grandson *Richard Holden*, and his granddaughter *Elizabeth Holden*, to be equally divided between them, and to the heirs of their respective bodies issuing; and for default of such issue, he gave the premises to his granddaughter *Anne* in fee; The testator died seised, *Richard* the son died without issue male, whereupon *Elizabeth* and the grandson entered, and *Elizabeth* died without issue generally; *Anne Holden* married *John Jervis*; and the question was, Whether there were Cross *Remainders* between *Elizabeth* and *Richard* the grandson, or whether the moiety of *Elizabeth* should go to *Anne* or to *Richard*? And it was resolved, that *there were no Cross Remainders between them*, because here are no *express* words, nor is there a necessary implication, without one of which Cross Remainders cannot be raised; that the words, *and for default of such issue*, being relative to what goes before, mean only, and for default of heirs *of their* respective bodies; and therefore it is no more than as if it had been a devise of one moiety to *Richard* and the heirs of his body, and of the other moiety to *Elizabeth* and the heirs of her body, and for default of heirs of their respective bodies, Remainder over; in which case there could be no doubt; and it was held, that this case differed from the case *suprà*, the word *respective* being in that case, and the first devisees were the testator's daughters, and the Remainder-man only a nephew; whereas, in the present case, *Anne* was as near to the testator as *Richard*. *Comber* v. *Hill*, 2 *Kely* 188: 2 *Barn. K. B* 367, 443: *Browne* v. *Williams*, *Mich*. 8 *Geo*. 2.

IV. As to estates of inheritance, there can be no doubt but that the grantor, having a perpetual and durable interest in the estate, may share and divide it, or grant as many Remainders over as he thinks proper. 4 *New Abr* 492.

But, as to personal goods and chattels, it was formerly held, that *they, in their own nature, were incapable of any limitation over*; being things *transitory*, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring a frequent circulation thereof, in which they differ from lands and tenements which are permanent; therefore, what is called an *estate* in lands, is termed *property* in personal chattels: Wherefore it was held, that a grantor's devise of a personal thing to one, though but for an hour, or minute, was *a gift for ever*; and an absolute disposition of the entire property. *Bro. Devise* 13: *Plowd*. 521: *Dyer* 74: 8 *Co* 94.

Hence it was a long time before the Courts of Justice could be prevailed upon, to have any regard for a devise over, *even of a chattel real*, or a term for years, after an estate for life limited thereon, because the estate for life being, in the eye of the Law, of greater regard and consideration than an estate for years, they thought he, who had it devised to him for life, had therein included all that the devisor had a power to dispose of; but *now such Remainders over are allowed under the name of Executory Devises*, and are established both in Courts of Law and Equity, provided they tend not to a perpetuity, so as to make estates unalienable. 4 *New Abr*. 294. See this *Dict*. title *Executory Devise*.

Also, a distinction was formerly taken between a devise of a personal chattel to one for life, with a *Remainder* over, and of the *use* only; that, in the first case, the devisee for life had the absolute property; but not so in the second, for that the first devisee had not the property of the goods, but only a special interest in them, so that there still remained a property which might be limited over: But this distinction is now exploded, and the devisee in Remainder is allowed in Equity the like remedy in both cases. *Plowd*. 521: *Cro. Car*. 346: 1 *Rol. Abr*. 610: *March* 106: *Owen* 33: 1 *Ch. Ca*. 129: 2 *Vern*. 245: 1 *P. Wms*. 1, 500, 651: 2 *Quin*. c. 25, p. 398.

But a devise of a term for years, or personal chattel, to one, for a day, or an hour, is a devise of the whole term or interest, if the limitation over is void, and it appears at the same time that the whole was intended to be disposed of from the executors. 1 *P. Wms*. 666.

A. being possessed of a term for ninety-nine years, devised it to *B*. for life, and after to six others, successively, for their lives, if the term so long continue; and all the seven

seven persons being dead, and the term continuing, it was adjudged, that it should revert to the executors of the testator, and that it did not vest in the survivor of the devisees, so as to transmit it to his representatives. 1 *Salk.* 231: 1 *Ld. Raym.* 325.

A farmer devised his stock (which consisted of corn, hay, cattle, &c.) to his wife for life, and after her death to the plaintiff. It was objected, that no Remainder can be limited over of such chattels as these, because the use of them is to spend and consume them; but the Master of the Rolls said *the devise over was good*, but added, if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of the sale; and an account was decreed to be taken accordingly. *Abr. Eq.* 361.

A. gives his sister, by will, 10*l.*, and directs, that such part of his personal estate, as his wife should leave of her substance, should go to the sister; whatever the wife has not employed in that way shall go over, and be accounted for. 1 *P. Wms.* 651.

But if a chattel real, money, goods, or other personal things, are devised to one, and the heirs of his body, or to one, and, if he dies without heirs of his body, *Remainder* over, by which the devisee has an estate-tail; this *Remainder* is totally void, and the Courts of Equity will not allow of a bill by the Remainder-man to compel security, &c., or to have the money, &c., after the death of the first devisee, but it shall go to his executors or administrators; for the first devise gives the absolute property of a personal estate, as the like devise of a real estate, before the statute *De donis*, gave the absolute fee, upon which no limitation could be made further; and as the heirs are the representatives to take the real estate, so are the executors to take the personal estate; and this is not within the statute *De donis*, but remains as at Common Law. 2 *Vent.* 349: 2 *Vern.* 600: 1 *Salk.* 156.

If *A.* devise, that his goods and furniture shall remain in his house, to be enjoyed, according to the limitations of his will, by those entitled to the house; the first, who would be tenant in tail of the house, becomes absolute owner of the goods. See further, title *Executory Devise.*

Not only lands and tenements, but also rents, commons, estovers, or any other interest or profits *in esse*, wherein the grantor hath the absolute property to him and his heirs, may be granted with Remainder over. *Plowd.* 379: 9 *Co.* 48, 97.

So, if one hath the office of park-keeper, forester, gaoler, sheriff, &c. to him and his heirs, he may grant those offices to one for life, Remainder to another for life, &c.; for *omne majus continet in se minus*; and as they are grantable over in fee, so may they be granted in succession to one for life, with Remainders over, &c. 9 *Co.* 48: 1 *And. pl.* 201.

It was formerly doubted, whether there could be a *Remainder* of a rent *de novo*; that is, whether a man, seised of lands in fee, could thereout grant a rent-charge to one for life or years, Remainder to another in fee, or in tail; and this doubt arose from *the rent not having any existence before it was created*, consequently, no reversion could be left to the grantor, out of which the Remainder was to arise. But it is now settled, that such grant in Remainder is good, the grantor having the absolute interest in the estate out of which it is to arise, and his intention gives it, being for the whole, out of which the lesser estates are carved. But if he grant such rent for life or years, to one, without going further, he cannot after grant the reversion thereof to another, because he has no reversion in him. 2 *Rol. Abr.* 415: 2 *Co.* 70, 76: 2 *Vent.* 240: 1 *Lev.* 144: 1 *Sid.* 285: 2 *Salk.* 577: 2 *Lutw.* 1225: *Moor, pl.* 100. See title *Rent.*

The King may grant an estate in an office, to commence *in futuro*, or on a contingency, for he hath no inheritance in the office, as to the execution of it, but in point of interest only to grant. And there is a diversity between offices in fee existing, and such as are granted only for life; which, being as a new thing created, may, as a rent *de novo*, be granted to commence *in futuro*. 2 *Mod.* 2[illegible]: 1 *Ld. Raym.* 52: *Carth.* 350: *Salk.* 465: *Comb.* [illegible].

If one be created Baron, Viscount, Earl, &c. by patent, and after, in the same patent, the same honour is granted to another in *Remainder*, yet *this operates as a new grant*, and not as a *Remainder*; for the King had no reversion of that honour in him, though he had still the same power of appointing one in succession to take it, as he had of granting it to the first. *Show. Par. Ca.* 5, 11.

V. The word Remainder is no term of art, nor is it necessary to create a Remainder. So that any words, sufficient to shew the intent of the party, will create a Remainder; because such estates take their denomination of Remainders, more from the nature and manner of their existence, after they are limited, than from any previous quality inherent in the word Remainder. To make them such, therefore, if a man gives land to *A.* for life, and that after his death the land shall revert, or descend, to *B.* for life, &c. this is *a good Remainder*, and may be pleaded as such. 1 *Rol. Abr.* 416: *Plowd.* 29: 1 *Rol. Rep.* 319: *Dyer* 125.

So, if lands are given to one, and the heirs male of his body, and to him, and the heirs female of his body; this limitation to the heirs female is a Remainder; because it is not to take place till the estate to the heirs male is spent. *Co. Litt.* 377, *a.*

So, if lands are given to a widow, and to the heirs of the body of her late husband, *on her begotten.* This is a Remainder to the heirs of the body of the husband; because it cannot take effect till after the widow's death, who has an estate for life. *Co. Lit.* 26, 200: 2 *Mod.* 210.

So, an estate limited to *A.* for life, or in tail, and after his decease, or for default of such issue, to *B.* and the heirs of his body, is good, though there be not the word *Remainder.* So, if a lease be made to *A.* for life, and that after his death *B.* shall have the profit; this is a good Remainder to *B.* *Plowd.* 159: *Moor, pl.* 54: *Dyer* 125: 1 *Rol. Rep.* 319: *Cro. Eliz.* 10, 742.

So, a lease to *A.* for life, and that after his death his children shall have it, is a good Remainder. 6 *Co.* 17, *b*: *Raym.* 83.

Nay, though an estate be limited expressly as a Remainder, yet, if it be not so in construction of Law, the word *Remainder* will have no force to make it such. As, if *A.* seised of lands in fee, he and *B.* levy a fine to *D.* in fee, who grants and renders to *B* in tail, rendering rent to *A.*, and if *B.* died without issue, *tenementa præd. integrè remanebunt* to *A.* and his heirs; *B.* suffers a common recovery; *A.* distrains for his rent: This was adjudged *a reversion*, and as such the rent passed with it to *A.*, and was chargeable on the land in whose hands soever it came, by virtue of the contract, which cannot be destroyed

ftroyed by the recovery, though the reverfion is thereby barred. *Cro. Eliz.* 727, 768, 792: *Moor, pl.* 795: *Co. Litt.* 299; *Raym.* 142.

If a leafe be made to *A.* for eighty years, if he fo long live, and if he die within the term, then the land to go over to another for the refidue of the eighty years; this is a good Remainder, becaufe, though the term or intereft be determined, yet the land, and part of the years, ftill remain; thefe years may be made the meafure of the fucceeding intereft, as any other number of years may be. *Cro. El.* 216: 1 *Leon.* 218: 1 *Co.* 153: 3 *Leon.* 195: 2 *Rol. Abr.* 415: *Plowd.* 198: *Moor* 347, 520. *pl.* 441: 1 *And.* 259.

X. Y. feifed of lands in fee, by indenture, demifes them to *A.* for life, *habendum* to *B.*, *D.*, and *E.*, his three fons for their lives, and the life of the furvivor of them *fucceffively*; after the death of *A.*, it was adjudged in this cafe: Firft, That if the fons could take, it muft be *by way of Remainder*, they not being parties to the deed; and then it muft be as joint-tenants, which could not be by reafon of the word "*fucceffively*." Secondly, That they could not take in fucceffion, for the uncertainty whofe eftate or intereft was to commence firft. *Hob.* 313: *Hut.* 87.

A., by indenture, makes a leafe to *B.* for forty years, if *A.* fo long live, and after his death to *D.* (who was no party to the deed,) for one thoufand years; and then *A.* levies a fine, and dies, and five years pafs after his death, and then the plaintiff claiming under *D.* enters, *&c.*: This is *no Remainder* at all to *D.*; for, Firft, Prefently it cannot veft by reafon of the leffor's life interpofing, therefore no *Remainder* is vefted. Secondly, As a Contingent *Remainder*, it cannot be good; becaufe then *it ought to have a particular eftate to fupport it*, and ought to be in abeyance, or contingency, to veft or not veft when that determines: But here the firft leafe is no fuch particular eftate; becaufe that reaches not to the commencement of the *Remainder*, nor is the *Remainder* limited with any regard to the particular eftate; becaufe it is not to commence on the determination of that, but at a future time, *viz. on the death of the leffor*; and there is no contingency in the cafe, for it is to take effect, at all events, on the death of the leffor, be it before or after the end of the term; therefore, it can be no other than a future *intereffe termini*, to begin after the death of the party who grants it, which, being but for years, it may well do; becaufe *it enures by way of contract*; and though the grantee *there* was no party to the deed, and therefore, as objected, could take nothing, yet it appears, that judgment was given for the plaintiff; which proves, Firft, That the grantee had an intereft; Secondly, That this intereft was not barred by the fine, and five years non-claim after the death of the grantor, not being touched, devefted or turned to a right; Thirdly, That though the grantee was no party to the indenture, yet he might well take by virtue thereof; if he gets the indenture to make out his title; for the grantor cannot derogate from his own grant, or avoid his own act. *Raym.* 140.

We next come to confider the queftion, what fhall be words of *limitation*, and what *words of purchafe*.

In a grant of an eftate in fee-fimple to *A.*, it is neceffary to give it to *A. and his heirs*: Of an eftate in fee-tail, to *A. and the heirs of his body*: But a grant to *A.* without any additional words, gives him only an eftate for life. Hence the word *heirs*, and the words *heirs of the body* in the fecond, are faid to be words of limitation; becaufe they limit or defcribe what intereft *A.* takes by the grant, *viz.* in one cafe a fee-fimple, in the other a fee-tail: And the heirs, in both inftances, take no intereft, any farther than as the anceftor may permit the eftate to defcend to them. But if a Remainder is granted, or an eftate devifed, to the *heirs of A.* where no eftate of freehold is at the fame time given to *A.*, the heir of *A.* cannot take by defcent from *A.*; but he takes by purchafe under the grant, in the fame manner as if the eftate had been given to him by his proper name. Here the word *heirs* is called a word of purchafe. 2 *Comm. c.* 11. *p.* 172, *in n.*

Further to elucidate this contefted queftion, it may be proper to ftate the much-talked-of rule in *Shelly's cafe*, and Mr. *Fearne*'s definition of the terms *words of limitation*, and *words of purchafe*.

The rule in *Shelly's cafe* is this:—When the anceftor, by any gift or conveyance, takes an eftate of freehold, and *in the fame gift* or conveyance an eftate is limited, either mediately or immediately, to his heirs in fee, or in tail, always in fuch cafes *the heirs* are words of limitation, and not words of purchafe. 1 *Co.* 104. And the Remainder is faid to be *executed* in the anceftor, where there is no intermediate eftate; or *vefted*, where an eftate for life or in tail intervenes. 2 *Comm. c.* 11, *in n.* Otherwife, (continues *Coke*,) it is where an eftate for years is limited to the anceftor, the Remainder to another for life, the Remainder to the right heirs of the leffee for years, then his heirs are *purchafers*, *&c.* 1 *Co.* 104.

Mr. *Fearne*, after examining the terms ufed by *Coke*, in laying down the above rule, and vindicating them from the charge of inaccuracy, to which Mr. *Douglas* had confidered them liable, feems to have fully fettled the diftinction between words of limitation and words of purchafe, in the following manner:

When the words *Heirs*, &c. operate only to expand an eftate in the anceftor, fo as to let the *heirs* defcribed into its extent, and entitle them to take derivatively through or from him, as the root of fucceffion, or perfon in whom the eftate is confidered as *commencing*, they are properly words of limitation; but when they operate only to give the eftate, imported by them, to the heirs defcribed, *originally*, and as the perfons in whom that eftate is confidered as commencing, and not derivatively from or through the anceftor, they are properly words of purchafe. Lord *Coke*, in the rule above alluded to, very properly refers the word *purchafe* to the exprefs objects of limitation, viz. *heirs*, *&c.* And when fuch heirs, *&c.* originally acquire the eftate by thofe words, he ftyles them words of purchafe; otherwife, not. In general, words of *purchafe* are thofe, by which, taken abfolutely without reference to, or connexion with, any other words, the eftate firft attaches, or is confidered as commencing in the perfon defcribed by them; whilft words of *limitation* operate by reference to, or connexion with, other words, and extend or modify the eftate given by thofe other words. This is evidently the line of diftinction adopted by Lord *Coke*, and which pervades the terms of the rule in queftion; and is in fact admitted by all who do not deny the word *heirs*, in the common limitation to a man and his heirs for ever, to be words of limitation. But it is to be remarked, that when the words *heirs male of the body*, &c. operate as words *of purchafe*, that

that is, when they do not attach in the ancestor, but vest in the person answering the description of such special heir, they appear to have a sort of equivocal or mixt effect: for though they give the estate to the special heir originally, and not through or from his ancestor, yet the estate which he so takes has such a reference to the ancestor, as to pursue the same course of succession, in the same extent of duration or continuance, through the same persons, as if it had attached in and descended from the ancestor. *Fearne's Cont. Rem.* 107—109, *&c.* edit. 1791.

If, then, an estate be given to *A.* for life, and after his death to the heirs of his body, this Remainder is *executed* in *A.*, or it unites with his estate for life; and the effect is the same as if the estate had at once been given to *A.* and the heirs of his body; which expression limits an estate-tail to *A.*, and the issue have no indefeasible interest conveyed to them, but can only take by descent from *A.* —So, also, if an estate be given to *A.* for life, with Remainder to *B.* for life, or in tail, Remainder to the heirs, or the heirs of the body of *A.*; in this case *A.* takes an estate for life, with a *vested* Remainder in fee, or in tail; and his heir, under this grant, can only take by descent at his death. *Fearne* 21. But in order that the estate for life, and the Remainder in tail or in fee, should thus unite and coalesce, and *heirs* be a word of limitation, the two estates must be created by the same instrument, and must be either both legal, or both trust estates. *Doug.* 490: 2 *Term Rep.* 444. The rule with regard to the execution or coalition of such estates seems now to be the same in equitable as in legal estates. 1 *Bro. C. R.* 206. And in all these cases where a person has an estate-tail, or a vested Remainder in tail, he can cut off the expectations or inheritance of his issue by a fine or a recovery. *Doug.* 233.

In order, therefore, to procure a certain provision for children, the method was invented of granting the estate to the father for life, and after his death to his first and other *sons* in tail; for the words *son* or *daughter* were held to be words of purchase; and the Remainder to them did not, like the Remainder to *heirs*, unite with the prior estate of freehold. But if the son was unborn, the Remainder was contingent, and might have been defeated by the alienation of the father, by feoffment, fine, or recovery; (though a conveyance of a greater estate than he has by bargain and sale, or by lease and release, is no forfeiture, and will not defeat a Contingent Remainder. 2 *Leon.* 60: 3 *Mod.* 151.) To prevent this alienation by tenant in tail, it was necessary to interpose trustees, to whom the estate is given upon such a determination of the life-estate, and in whom it rests till the contingent estate, if at all, comes into existence: and thus they are said to support and preserve the Contingent Remainders. This is called *A Strict Settlement*, and is the only mode (*Executory Devises* excepted) by which a certain and indefeasible provision can be secured to an unborn child. But, in the case of articles or covenants before marriage, for making a settlement upon the husband and wife, and their offspring, if there be a limitation to the parents for life, with a Remainder to the heirs of their bodies, the latter words are generally considered as words of purchase, and not of limitation: And a Court of Equity will decree the articles to be executed in strict settlement. See *Fearne* 124, and the examples there cited. It being the great object of such settlements to secure fortunes for the issue of the marriage, it would be useless to give the parents an estate-tail, of which they would almost immediately have the absolute disposal: And therefore the Courts of Equity will decree the estate to be settled upon the parent or parents for life; Remainder (*i. e.* upon the determination of such estate for life by forfeiture) to trustees, to support Contingent Remainders, for their lives; *Remainder* (after the decease of the parents) to the first and other sons successively in tail; with Remainder to all the daughters in tail, as tenants in common; with subsequent Remainders, or provisions, according to the occasions and intentions of the parties.

In these strict settlements, the estate is unalienable till the first son attains the age of twenty-one; who, if his father is dead, has then, as tenant in tail, full power over the estate; or, if his father is living, the son can then bar his own issue by a fine, independent of the father. *Cruise* 161. See title *Fine.* But the father, and the son at that age, can cut off all the subsequent limitations, and dispose of the estate in any manner they please, by joining in a common recovery. See title *Recovery*, and *ante* II. This is the origin of the vulgar error, that a tenant of an estate-tail must have the consent of his eldest son to enable him to cut off the intail; for that is necessary where the father has only a life-estate, and his eldest son has the Remainder in tail.

But there is no method whatever of securing an estate to the *grandchildren* of a person who is without children at the time of the settlement; for the Law will not admit of a perpetuity: which has been defined to be "any extension of an estate beyond a life in being, and twenty-one years after." 2 *Bro. C. R.* 30. See this Dict. title *Executory Devise.* Hence, where in a settlement the father has a power to appoint an estate to or amongst his children, he cannot afterwards give this to his children in strict settlement, or give any of his sons an estate for life, with a Remainder in tail to his eldest son: for if he could do this, a perpetuity would be created by the original settlement. 2 *Term Rep.* 241. See 2 *Comm. c.* 11, *in n.*

From what has been imperfectly stated under this title, the Student will observe how much nicety is required in creating and securing a Remainder; and, in some measure, see the general reasons upon which this nicety is founded. It were endless to attempt to enter upon the particular subtilties and refinements into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: It has been already hinted, (see *ante* IV.) that in devises by last will and testament, (which, being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice,) Remainders may be created, in some measure, contrary to the rules laid down: though Lawyers will not allow such dispositions to be strictly Remainders; but call them by another name, that of *Executory Devises*, or devises hereafter to be executed; as to which see further, this Dict. under that title.

For more information on this subject, see 4 *New Abr.*: *Vin. Abr.* title *Remainder*: this Dict. titles *Executory Devise*; *Recovery*: and, for a clear and comprehensive statement of this abstruse branch of legal learning, *Fearne's* valuable Essays on *Contingent Remainders* and *Executory Devises.*

REMANENTES, [illegible] *[illegible] sunt [illegible] Dominus.*

REMEDY, *Remedium.*] [illegible] means given by Law for the recovery of a [illegible]; and it is a maxim of Law, that *wherever the Law [illegible] any thing, it gives a Remedy for the same.*

REMEMBRANCERS, *Rememoratores.*] Formerly called *Clerks of the [illegible]*; Officers of the Exchequer, of which [illegible] three, distinguished by the names of the King's Remembrancer, the Lord Treasurer's Remembrancer, and the Remembrancer of First Fruits; [illegible] whose charge it lies to put the Lord Treasurer and the Justices of that Court in Remembrance of such things as are to be called on and dealt in for the King's benefit.

The King's Remembrancer enters in his office all recognizances taken before the Barons for any of the King's debts, *for appearances, &c.*; and he takes all bonds for such debts, and makes out process for breach of them; also he writes process against the Collectors of Customs, Subsidies, Excise, and other public payments for their accounts. All informations on Penal Statutes are entered and sued in his office; and he makes the bills of composition on Penal Laws, and takes the installment of debts. And all matters of *English* bills in the Exchequer-Chamber remain in the office of this Remembrancer. He hath delivered into his office the indentures, fines, and other evidences, which concern the passing any lands to or from the King. *In Crastino [illegible]*, yearly, he reads in the Court the oath of all the Officers of the Court, when they are admitted. Writs of Prerogative, or Privilege, for Officers and Ministers of the Court, are made out by him; and commissions of *Nisi Prius*, by the King's warrant, on trial of any matters within his office, at the Assises in the country, he hath the entering of judgments, [illegible] pleas, *&c.* And all differences touching irregularities in proceedings shall be determined by the King's Remembrancer, who is to settle the same, if he can, and give costs where he finds the fault; but if not, the Court is to determine it, *&c.*

By order of Court, [illegible] Remembrancer, or his deputy, are diligently to attend in Court, and to give an account touching any proceedings as they shall be required; and they enter the rules and orders of the Court.

The Treasurer's Remembrancer issues out process of *Fieri Facias* [illegible], *for debts to the King*, and against Sheriffs, Escheators, *&c.* accounting. He [illegible] the [illegible], [illegible] the record, [illegible] Sheriffs, and other Accountants, pay their [illegible] at *Easter* and *Michaelmas*; and [illegible] record, whether Sheriffs, and other Accountants, keep their days prefixed. There are also brought into his office all the accounts of customers, comptrollers, and accountants, to make entry thereof on record. All estreats of fines, issues, and amerciaments, set in any of the Courts at *Westminster*, or at the Assises, or Sessions, are certified into his office; and by him delivered to the Clerk of the Estreats, to make out process on them; and he may [illegible] for discovery of [illegible] [illegible], and all such [illegible] to the Crown by [illegible], *&c.*

The Remembrancer of the First Fruits Office is to take all compositions and bonds for payments of First Fruits and Tenths; he makes process against all such persons as do not pay the same. *Stat.* [illegible] 1 [illegible] 14; 37 *Eliz.* c. 4.

REMITTER, from the Lat. *remittere*, to restore, or send back.] An operation in Law, upon the meeting of an ancient right, remediable, and a latter (defeasible) estate, in the same persons; (the latter being cast upon him by Law;) whereby the ancient right is restored and set up again; and the new defeasible estate ceased; and thus he is in, of his first or better estate. See 1 *Inst.* 347, 4. *Litt.* § 659.

Remitter is classed (with *Retainer*) by *Blackstone*, among those remedies for private wrongs which are effected by the mere operation of Law; and is defined to be, where he who hath the true property, or *jus proprietatis*, in lands, but is out of possession thereof, and hath no right to enter, without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and, of course, defective title. In this case, he is remitted, or sent back, by operation of Law, to his ancient and more certain title. The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one; and his defeasible estate shall be utterly defeated and annulled, by the instantaneous act of Law, without his participation or consent. *Litt.* § 659. [illegible] 358. *Cro. Jac.* 489. As if *A.* disseises *B.*, that is, turns him out of possession, and dies, leaving a son *C.*; hereby the estate descends to *C.* the son of *A.*, and *B.* is barred from entering thereon till he proves his right in an action: Now, if afterwards *C.*, the heir of the disseisor, makes a lease for life to *D.*, with remainder to *B.* the disseisee for life, and *D.* dies; hereby the remainder accrues to *B.*, the disseisee; who, thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of Law *remitted*, or in, of his former and surer estate. For he hath hereby gained a new right of possession, to which the Law immediately annexes his ancient right of property. *Finch. L.* 194; *Litt.* § 683.

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase, being of full age, he shall not be remitted; for the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right. *Co. Litt.* 348, 350. Therefore, it is to be observed, that to every Remitter there are regularly these incidents; an ancient right, and a new defeasible estate of freehold, uniting in one and the same person; which defeasible estate must be *cast* upon the tenant, not gained by his own act, or folly. The reason given by *Littleton* why this remedy, which operates silently, and by the mere act of Law, was allowed, is because, otherwise, he who hath right would be deprived of all remedy. *Litt.* § 661.

The above distinctions may seem important [illegible] [illegible], who perhaps would [illegible] the [illegible] the right, [illegible] [illegible] it [illegible] be [illegible] [illegible] [illegible] [illegible] and [illegible] he [illegible] support his just [illegible]

doubly hard; because, during the time he was himself tenant, he could not establish his prior title by any possessory action. The Law, therefore, remits him to his prior title, or puts him in the same condition as if he had recovered the land by writ of entry. Without the Remitter, he would have had *jus et seisinam* separate; a good right, but a bad possession: Now, by the Remitter, he hath the most perfect of all titles, *juris et seisinæ conjunctionem*. 3 *Comm.* c. 10. p. 190.

There shall be no Remitter to a right, for which the party has no remedy by action: as if the issue in tail be barred by the fine or warranty of his ancestor, and the freehold is afterwards cast upon him; he shall not be remitted to his estate-tail: for the operation of the Remitter is exactly the same, after the union of the two rights, as that of a real action would have been, before it. As then, the issue in tail could not, by any action, have recovered his ancient estate, he shall not recover it by Remitter. See *Co. Litt.* 349: *Moor* 115: 1 *Anu.* 286: 3 *Comm.* 19: and 1 *Inst.* 347, *a. in n.*

There are different degrees of title which a person, disseising another of his lands, acquires in them, in the eye of the Law, independently of any anterior right. Thus, if *A.* is disseised by *B.*, while the possession is in *B.*, it is a mere naked possession, unsupported by any right, and *A.* may restore his possession, and put a total end to the possession of *B.*, by an entry on the land, without any previous action: but, if *B.* die, the possession descends on his heir, by act of Law: In this case, the heir comes to possession of the land by a lawful title, and acquires, in the eye of the Law, an apparent right of possession; which is so far good against the person disseised, that he has lost his right to recover the possession by entry, and can only recover it by an action at Law. The actions used in these cases are called Possessory Actions. But if *A.* permits the possession to be withheld from him, beyond a certain period of time, without claiming it; or suffers judgment in a possessory action to be given against him by default; or if, being tenant in tail, he makes a discontinuance; in all these cases *B.*'s title is strengthened, and *A.* can no longer recover by a possessory action, and his only remedy then is by an action on the right: These last actions are called *Droitural* Actions, and are the ultimate resource of the person disseised. Now if, in any of these three stages of the adverse title, the disseisee, without any fault in him, comes to the possession of the estate by a defeasible title, he is considered to be in, not as of his new right, but as of his ancient and better right; and, consequently, the right of the person, who, supposing the disseisee still to be in as of his defeasible estate, would be entitled to the lands upon the cession or determination of that estate, is gone for ever. In these circumstances, the disseisee is said to be remitted to his ancient estate: the principal reason whereof is, as has already been stated, that the person so remitted cannot sue or enter upon himself; so that in those cases where the possession is recoverable by entry, the Remitter has the effect of an entry; and in those cases where it is recoverable by action, it has the effect of a judgment at Law. But since there is no Remitter where he who comes to the defeasible estate, comes to it by his own act, or his own assent; hence the defeasible estate, to entitle the party to be remitted, must be made to him or her, during infancy or coverture, or must come to them by descent, or act of Law: Neither is there any Remitter where the ancient estate is not recoverable either by action or by entry. So that in those cases where the disseisee is beyond the three stages just alluded to, if he afterwards come to the estate by a defeasible title, he remains seised as of that estate, and is not remitted to his more ancient title. 1 *Inst.* 347, *b. in n.* See title *Release* I.

These are the doctrines of the Common Law respecting Remitter: But they are greatly altered by *stat.* 27 *H.* 8. c. 10: that statute executes the possession to the party in the same plight, manner, and form as the use was limited to him. It operates only with respect to the first taker, and therefore the issue of the issue is remitted. By *stat.* 32 *H.* 8. c. 28. § 6, it is enacted, that no fine, feoffment, or other act, by the husband alone, of the wife's lands, shall be any discontinuance; but that the wife, and her heirs, and such others to whom the right shall appertain after her decease, shall, notwithstanding such fine, or other act, lawfully enter into her lands, according to their rights and titles therein. This takes from the wife, and those claiming under her, the effect of *stat.* 27 *H.* 8; so that she has her election to take by *stat.* 27 *H.* 8; or enter by *stat.* 32 *H.* 8; upon which she shall be remitted. See *Duncombe* v. *Wingfield*, *Hob.* 254: 1 *Inst.* 347, *b. in n.*

The reason of this invention of the Law is *in favour of right*; and that title which is first, and most ancient, is always preferred. *Dyer* 68: *Finch's Law* 119.

In Remitters to restore rights, the first interest which works such Remitter, must be a right, and not a title of entry; and there can be no Remitter before an entry. *Co. Lit.* 348: 2 *Bulst.* 29.

A Remitter must be to a precedent right; for regularly to every Remitter there are two incidents, *viz. an ancient right, and a defeasible estate of freehold, coming together*. *Doct. & Stud.* c. 9: *Wood's Inst.* 528.

Tenant in tail makes a feoffment in fee, on condition, and dieth; and his issue, being within age, enters for the condition broken, by virtue of the feoffment; he shall be first in as tenant in fee-simple, and be remitted as heir to his father: But, if the heir be of age, he shall not be remitted; but is to bring his writ of *formedon* against the feoffee. *Co. Lit.* 202, 349. And if tenant in tail infeoff his son, or heir-apparent, who is within age, and after dies, that is a Remitter to the heir; though, if he were at full age at the time of such feoffment, it is no Remitter, because it was his folly, that, being of full age, would take such a feoffment. *Lit.* 655.

If a husband alien lands which he hath in right of his wife, and after take an estate again to him and his wife, for their lives, this is a Remitter to the wife; for the alienation is the act of the husband, and not of the woman: yet if the alienation be by fine in a Court of Record, such a taking again afterwards to the husband and wife shall not make the wife to be in by her Remitter, she being excluded by the fine for ever. *Terms de Ley*.

Lands are given to a man and his wife, and the heirs of their two bodies; and after, the husband aliens the land in fee, and then takes back an estate to him, and his wife, for their lives; here they will both be remitted: But, if he take an estate again to himself for life, Remitter will not be allowed against his own alienation. *Co. Lit.* 354.

When the entry of a person is lawful, and he takes an estate in the land for life, or in fee, &c. (except it be by

by matter of record, or otherwise to conclude or estop him,) he shall be remitted. *Co. Lit.* 363. And a Remitter to one in possession, may be a Remitter to another in remainder; if the remainder be not bound, which estops it. *Cro. Car.* 145.

If there be tenant in tail, remainder in fee to *A. B.*, and the tenant in tail discontinueth, and takes back an estate in fee; and then devises the lands to his wife for life, with remainder to *W. R.* for years, remainder to the same *A. B.* in fee, and dies, and his wife enters, and dies: It has been held, that he in remainder in fee may enter, and avoid the term for years to *W. R.*, because he is remitted to his first remainder in fee: and a Remitter avoids a lease for years, without entry. *Noy* 48.

A father was tenant for life, remainder to his son for life, remainder to the right heirs of the body of the father; he and his son conveyed the lands to the uncle in fee, who died without issue; so that the son, who was heir in tail to the father, was now heir at Law to the uncle, and the fee descended on him; the wife of the uncle brought dower, but the son being remitted to his former estate, no dower accrued to the wife, for the estate of which she claims dower is gone. 1 *Leon.* 37: 9 *Rep.* 136.

Lands were purchased by a man, and settled on himself and his wife in tail, and they had issue two sons; then he made a feoffment to the use of himself for life, remainder to the wife for life, remainder in fee to his second son: The wife, after his death, entered, and made a feoffment to the issue of the second son; and then the eldest son entered for a forfeiture, on the *stat.* 11 *H.* 7. *c.* 20: and it was adjudged a forfeiture, by reason the wife having two titles, one as tenant in tail, the other as tenant for life, by her entry she is remitted to her estate for life, so that the feoffment made by her is a forfeiture of her estate. *Sid.* 63: 3 *Nels. Abr.* 100.

If land be given to a woman in tail, the remainder to another and a third in tail, remainder to a fourth in fee; the feme takes husband, and he discontinues the lands in fee, and after an estate is made to the husband and wife for their lives, or other estate: This is a Remitter to all in remainder, and, if she die without issue, they may enter; and so it is of them who have the reversion after such intails. *Lit.* § 673.

Where a person lets land for term of life to another, who granteth it away in fee; if the alienee make an estate to the lessor, it will be a Remitter to him, because his entry is lawful. *Lit.* § 694.

If one be disseised, and the disseisor makes a feoffment to the disseisee; in this case, the disseisee may be remitted to his elder title, or he may choose to take by the feoffment; and if it be with warranty, he may if he will make use of the warranty. 1 *H.* 7. *c.* 20: 3 *Shep. Abr.* 237.

Tenant in tail hath two sons, and leases the land intailed to his elder son for life, remainder to his youngest son; it is no Remitter to the eldest: But, if he die without issue of his body, the youngest son shall be remitted. *Lit.* § 682.

If tenant in tail make a feoffment to the use of himself and his heirs, he shall not be remitted; but his issue shall. 3 *Nels.* 100. On Remitter of issue in tail, leases, and other charges on the lands, are avoided. *Litt.* §§ 659, 660.

For more learning on this subject, see 18 *Vin. Abr.* title *Remitter.*

REMITTITUR; In cases of appeal, the Record itself, or a transcript thereof, is sent from the Court of *B. R.* to the Exchequer-Chamber, or House of Lords: When judgment is given in the superior Court, or the Writ of Error abates, or is discontinued, the record or transcript is returned (*Remittitur*, sent back) to the Court of *K. B.*, and the entry of this circumstance is termed a *Remittitur*. See *Tidd's* and *Sellon's Pract.*

There is also a *Remittitur* or Release of *Damages*. See title *Damages* II.

REMOVAL OF THE POOR. See title *Poor* VI.

REMOVER, Is where a suit or cause is removed out of one Court into another; and for this there are divers writs and means. 11 *Rep.* 41. Remanding of a cause, is sending it back into the same Court, out of which it was called and sent for. *March* 106. See titles *Appeal*; *Habeas Corpus.*

RENANT, Or rather *reniant*, i. e. *negans*, denying; from the Fr. *renier*, *negare*, to deny or refuse. 32 *H.* 8. *c.* 2.

RENDER, Fr. *rendre*, *reddere*.] To yield, give again, or return.

This word is used in levying a fine, which is either single, where nothing is rendered back by the cognisee; or double, when it contains a grant and render back again of the land, &c. to the cognisor. *West's Symb.* See title *Fine of Lands.*

There are certain things in a manor which lie in *prender*, that is, which may be *taken* by the lord or his officers when they happen, without any offer made by the tenant, such as escheats, &c.; and certain which lie in Render, *i. e.* must be rendered or answered by the tenant, as rents, heriots, and other services: Also some services consist in seisance; and some in render. *West. Symb. par.* 2: *Perkin's Ref.* 696.

RENOVANT, From *renovo*, to renew, or make again.] A parson sued one for tithes, to be paid of things *renovant*, &c. *Cro. Jac.* 430. See title *Tithes.*

RENT,

REDDITUS.] Said to be from *redeundo*, because, *Retroit & quotannis redit. Fleta, lib.* 3 *c.* 14: Rather *à reddendo*, from its being *rendered*. See *post*; and title *Deed.*] A sum of money, or other consideration, issuing yearly out of lands or tenements. *Plowd.* 132, 138, 141.

Rents are classed, by *Blackstone*, among incorporeal hereditaments. The word Rent or Render, *reditus*, according to him, signifies a compensation or *return*, it being in the nature of an acknowledgment, given for the possession of some corporeal inheritance. See 1 *Inst.* 144. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money; for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of Rent. *Co. Lit.* 142. It may also consist in services or manual operations; as, to plough so many acres of ground, to attend the King or the lord to the wars, and the like; which services, in the eye of the Law, are profits. This profit must also be *certain*; or that which may be reduced to a certainty by either party. It must also issue *yearly*; though there is no occasion for it to issue every successive year; but it may be reserved

reserved every second, third, or fourth year: yet, as it is to be produced out of the profits of lands and tenements, as a recompence for being permitted to hold or enjoy them, it ought to be reserved yearly; because those profits do annually arise, and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted. *Plowd.* 13: 8 *Rep.* 71. It must, lastly, issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner or grantee of the Rent may have recourse to distrain. Therefore, a Rent, strictly speaking, cannot be reserved out of an advowson, a common, an office, a franchise, or the like; but a grant of such annuity or sum (*e g* by a lessee of tithes, or other incorporeal hereditament) may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt for the amount of the Rent agreed upon; though it doth not affect the inheritance, and is no legal Rent in contemplation of Law. 1 *Inst.* 47, 144. See 2 *Woodd.* 69. and *post.* II *ad fin.* And the King might always reserve a Rent out of incorporeal hereditaments: the reason of which is, that he, by his prerogative, can distrain on all the lands of his lessee. 1 *Inst.* 47, *a. in n.*

I. *Of the Nature and Properties of the several Sorts of Rent.*

II. *Statutes concerning Rent: and of the Remedies for Recovery thereof:* See also title *Distress.*

III. *In what Cases a Demand of Rent is necessary.*

IV. *Of the Time of demanding Rent, and the Place where the Demand is to be made.*

I. There are, at Common Law, three manner of Rents; Rent-service, Rent-charge, and Rent-seck. *Lit.* § 213.

Rent-service is so called, because it hath some corporal service incident to it; as, at the least, fealty, or the feodal oath of fidelity. 1 *Inst.* 142. For, if a tenant holds his land by fealty, and 10 *s.* Rent; or by the service of ploughing the Lord's land, and 5 *s.* Rent; these pecuniary Rents, being connected with personal services, are therefore called Rent service. And for these, in case they be behind, or arrere, at the day appointed, the Lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. *Lit.* § 215.

The services are of two sorts, either expressed in the lease or contract, or raised by implication of Law. When the services are expressed in the contract, the *quantum* must be either certainly mentioned, or be such as, by reference to something else, may be reduced to a certainty; for if the lessor's demands be uncertain, it is impossible to give him an adequate satisfaction or compensation for them, as the Jury cannot determine what injury he has sustained. *Co. Lit.* 96, *a*: *Stil.* 397: 2 *Ld. Raym.* 1160.

The services implied are such as the Law obliges the tenant to perform when there are none contracted for in the grant; and these are more or less, according to the duration of the gift; as at Common Law, before the statute *Quia emptores terrarum*, if the tenant made a feoffment in fee without any reservation of services, the feoffee held by the same services by which the feoffor held over; because the services being an incumbrance on the land, which the tenant could not discharge without his Lord's consent, must follow the land, into whose hands soever it comes. *Co Lit.* 22, 23.

A *Rent-charge*, is where the owner of the Rent hath no future interest, or reversion expectant, in the land; as where a man, by deed, maketh over to others his *whole* estate in fee-simple, with a certain Rent payable thereout; and adds to the deed a covenant or clause of distress, that if the Rent be arrere, or behind, it shall be lawful to distrain for the same. In this case, the land is liable to the distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a *Rent-charge*, because, in this manner, the land is charged with a distress for the payment of it. 1 *Inst.* 143.

A clear Rent-charge must be free from the land tax. *Doug.* 602.

Where a man, seised of lands, grants by deed-poll, or indenture, a yearly rent, to be issuing out of the same land, to another in fee, in tail, for life or years, with a clause of distress; this is a Rent charge, because the lands are charged with a distress by the express grant or provision of the parties, which otherwise it would not be. So, if a man make a feoffment in fee, reserving Rent, and if the Rent be behind, that it shall be lawful for him to distrain; this is a Rent-charge, the word *reserving* amounting to a grant from the feoffee. *Lit.* § 217: *Co. Lit.* 170, *a*: *Plowd.* 134.

A Rent granted for equality of partition by one coparcener to another, is a Rent-charge, and distrainable of common right, without clause of distress; and although there be no tenure of the sister who grants it; for as the Law, for the conveniency of coparceners, allows of such grants, it must consequently give a remedy to the grantee for recovery of it. *Lit.* § 252.

An *Annuity* is a thing very distinct from a Rent-charge, with which it is frequently confounded: A Rent charge being a burden imposed upon and issuing out of *lands*; whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor. Therefore, if a man by deed grant to another the sum of 20 *l. per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity: which is of so little account in the Law, that, if granted to an eleemosynary corporation, it is not within the Statutes of Mortmain; and yet a man may have a real estate in it, though his security is merely personal. 2 *Comm. c.* 3. See 1 *Inst.* 144.

Rent seck, redditus siccus, or barren Rent, is in effect nothing more than a Rent reserved by deed, but without any clause of distress.

A Rent-seck is so called, because *it is unprofitable to the grantee*; as, before seisin had, he can have no remedy for recovery of it; as where a man, seised in fee, grants a Rent in fee for life or years, or where a man makes a feoffment in fee or for life, remainder in fee, reserving Rent, *without any clause of distress*, these are Rents-seck: for which, by the policy of the ancient Law, there was no remedy, as there was no tenure between the grantor and

and grantee, or feoffor and feoffee; consequently, no fealty could be due. *Lit.* § 215, 218: *Cro. Car.* 520: *Kelw.* 104: *Cro. Eliz.* 656.

And it hath been ruled in equity, where an annuity was devised by will to *A.*, and the land, subject to the annuity, to *B.*, that *B.* should give seisin of the Rent-seck to *A.*, that he might have remedy for recovery of it at Common Law; it being the original intention of the gift, that the devisee should have some benefit from it. *Moor* 620: 3 *Chan. Ca.* 92.

So, when a bill was brought for 3 *l.*, for a Rent of 5 *s.* arrear for twelve years, the equity of the bill being that the deeds by which the Rent was created were lost, consequently no remedy for the Rent at Law; the Court, on the plaintiff's proving constant payment till the last twelve years, decreed the defendant to pay the arrears and growing Rent; for since, by payment, it was evident the plaintiff had a right to the Rent, and that he could not, without his deeds, make a title at Law; therefore the Court decreed the defendant to pay the Rent, and so *subjected his person*, which possibly might not have been liable by the deed which created the Rent. 1 *Chan. Ca.* 120. This was previous to *stat.* 4 *Geo.* 2. *c.* 28. See *post.* II.

Though a Rent is an incorporeal hereditament, it is susceptible of the same limitations as other hereditaments. Hence it may be granted or devised for life, or in tail, with remainders or limitations over. But there is this difference between an intail of lands, and an intail of Rent; that the tenant in tail of lands, with the immediate reversion in fee in the donor, may, by a common recovery, bar the intail and the reversion: See title *Recovery*. Whereas the grantee in tail of a Rent *de novo*, without a subsequent limitation of it in fee, acquires, by a common recovery, only a base fee, determinable upon his decease, and failure of the issues in tail: but if there is a limitation of it in fee, after the limitation in tail, the recovery of the tenant in tail gives him the fee-simple. This was resolved in the cases of *Smith* v. *Farnaby*, *Cart.* 52: *Sid.* 285: 2 *Keb.* 29, 55, 84: *Weeks* v. *Peach*, *Lutw.* 1224: *Chaplin* v. *Chaplin*, 3 *P. Wms.* 229: 2 *Eq. Abr.* 384, 5.

The reason of this difference is, that it would be unjust that the conveyance of a grantee of a Rent, should give a longer duration or existence to the Rent, than it had in its original creation. It is true that the barring of an estate-tail in land, is equally contrary to the intention of the grantor. But a Rent differs materially from land. The old principles of the Feudal Law looked upon every modification of landed property, which was considered to be against common right, with a very jealous eye. Now a Rent-charge was supposed to be against common right; the grantee of the Rent-charge being subject to no feudal services, and being a burden on the tenant who was to perform them. Upon this principle, the Law, in every instance, avoided giving, by implication, a continuation to the Rent, beyond the period expressly fixed for its continuance. Thus, if a tenant in tail of *land* die without issue, his wife is entitled to dower for her life out of the land, notwithstanding the failure of the issue; but the widow of a tenant in tail of *Rent* is not entitled to her dower against the donor. So, if a Rent is granted to a man and his heirs, generally, and he dies without an heir, the Rent does not escheat, but sinks into the land. It is upon this principle, that, when there is not a limitation over in fee, a tenant in tail of Rent acquires by his recovery no more than a base fee; as has been already stated: But if there is a limitation in fee, after the particular limitation in tail, the grantor has substantially limited the Rent in fee; and therefore it is doing him no injustice, that the recovery should give the donee who suffers it an estate in fee-simple. 1 *Inst.* 298, *a. in n.*

The case of *Chaplin* v. *Chaplin* was, that Lady *Hanby*, the grandmother of *Porter Chaplin*, being seised in fee, conveyed certain lands, to the use and intent that the trustees, named in the deed, should receive and enjoy a Rent-charge of 30 *l* *per annum*, and to them and their heirs, with power to distrain for it, and to enter and hold the land on non-payment for 40 days: and then the Rent was declared to be *to the use* of *Porter Chaplin* in tail; remainder *to the use* of the same person who had the land in fee. *P. C.* died, leaving issue, who married, and died without issue; and the question was, Whether the widow was entitled to dower in this Rent? and determined she was not. It is stated to have been afterwards *disclosed* to the Court, that the legal estate of the Rent in fee was in the trustees: but it is observable, that it was not necessary that any new matter should be adduced to disclose this to the Court, as it appeared on the face of the deed: for a conveyance to *A.* and his heirs, to the use and intent that *B.* and his heirs may receive a Rent out of the estate, gives *B.* the legal fee of the Rent: so that if it is afterwards declared that *B.* and his heirs are to stand seised of the Rent to uses, the intended *cestuis que use* take only trust or equitable estates. If, therefore, it is intended to limit a Rent in strict settlement, it is necessary to do it by way of grant at Common Law, to some person and his heirs, to the uses intended to be limited. This gives the grantee the mere seisin to the uses, and the uses declared upon it will be executed by the statute. See 1 *Inst.* 298, *a. in n.*

There are also other species of Rents, which are reducible to these three. Rents of *Assise* are the certain established Rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied. 2 *Inst.* 19. Those of the freeholders are frequently called Chief-Rents, *redditus capitales*; and both sorts are indifferently denominated Quit-Rents, *quieti redditus*; because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were anciently called White-Rents, or *Blanch-farms*, *redditus albi*; in contradistinction to Rents reserved in work, grain, or baser money, which were called *redditus nigri*, or *Black Mail.* 2 *Inst.* 19. See those several titles. Rack-Rent is only a Rent of the full value of the tenement, or near it. A *Fee-farm* Rent is a Rent-charge issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of its reservation: for a grant of lands, reserving so considerable a Rent, is indeed only letting lands to farm in fee-simple, instead of the usual methods for life or years. 1 *Inst.* 143. It seems that the *quantum* of the Rent is not essential to create a fee-farm. See 1 *Inst.* 145, *b. n.* 5: And also, whether a fee-farm must necessarily

necessarily be a Rent-charge; or may not also be a Rent-seck; and *Doug.* 605.

These are the general divisions of Rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for Rents-seck, Rents of Assise, and Chief-Rents, (if paid for three years within twenty years preceding the act, or if created since,) as in case of Rents reserved upon lease. *Stat.* 4 *Geo.* 2. *c.* 28. § 5.

II. By *stat.* 32 *Hen.* 8. *c.* 37, The executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of life, of Rents-service, Rent-charges, Rents-seck, and Fee-farms, unto whom any such Rent or Fee-farm be due, shall have an action of debt for such arrears against the tenants, who ought to have paid in the life-time of their testator, or against their executors and administrators, and distrain for the arrears on the land charged with the payment, so long as the lands continue in the seisin or possession of the tenant in demesne, who ought to have paid the Rent or Fee-farm, or in the seisin or possession of any other person claiming only from the same tenant by purchase, gift, or descent, in like manner as their testator might have done. § 1.

This act shall not extend to any manor in *Wales*, whereof the inhabitants have used to pay to every Lord, at his first entry, any sum of money for discharge of all duties and penalties wherewith the inhabitants were chargeable to any of the Lord's ancestors. § 2.

If any man have, in right of his wife, any estate in Rents or Fee-farms, and the same be unpaid in the wife's life, the husband, after the death of his wife, his executors, and administrators, shall have action of debt for the arrears, or may distrain. § 3.

If any have any Rents or Fee-farms for term of life of any other person, and the Rent, &c. be unpaid in the life of such person, and after the said person doth die, he to whom the Rent or Fee-farm is due, his executors and administrators, shall have an action of debt, or distrain for the same. § 4.

The only clause in *stat.* 12 *Car.* 2. *c.* 24, for converting military into common socage tenures, which seems to affect Rents, is a proviso (§ 5,) to preserve Rents certain, and to make the reliefs on them universally the same, as on the death of tenant in common socage. 1 *Inst.* 162, *b. in n.*

By *stat.* 8 *Ann. cap.* 14, No goods, upon any tenements leased, shall be taken by any execution, unless the party, at whose suit the execution is sued out, shall, before the removal of such goods, pay to the landlord of the premises, or his bailiff, all money due for Rent for the premises; provided the arrears do not amount to more than one year's Rent: And in case the arrears shall exceed one year's Rent, then the party, paying the said landlord, or his bailiff, one year's Rent, may proceed to execute his judgment: and the sheriff is required to levy and pay to the plaintiff, as well the money paid for Rent, as the execution-money. § 1. The Act contains a proviso to prevent prejudice to the Crown, in recovering and seising debts, fines, and forfeitures. § 8.

Landlord dead, and, after execution executed, administration is granted to *A.*; he is not entitled to a year's Rent. 1 *Strange* 97.

The administrator of the landlord may have an action against the officer for taking the goods in execution, and removing them from the premises before the landlord was paid a year's Rent. 1 *Strange* 212.

On motion on behalf of the landlord, the Sheriff was ordered to pay him his year's Rent, without deducting poundage. 1 *Strange* 643.

This statute extends to the *immediate* landlord, and not to the ground landlord. 2 *Strange* 787. After the landlord had been paid a year's Rent on one execution, another execution came in, and he moved to be paid another year's Rent on the last execution, but was denied; for *the intent of the Act was only to continue a lien as to one year*, and to punish him for his *laches*, if he lets more run in arrear. 2 *Strange* 1024.

It shall be lawful for any person having Rent due on any lease for life, years, or at will, determined, to distrain for such arrears, *after determination* of the leases: Provided, That such distress be made *within six calendar months after the determination of such lease*, and during the continuance of such landlord's title, and during the possession of the tenant from whom such arrear became due. *Stat.* 8 *Ann. c.* 14. §§ 6, 7. The above clauses were made to remedy the defect of the Common Law, under which the power of distress ceased with the tenure. 1 *Inst.* 162, *b. in n.*

By *stat.* 4 *Geo.* 2. *cap.* 28, In case any tenant for life or years, or other person who shall come into possession of any lands, &c. under or by collusion of such tenant, *wilfully hold over*, after the determination of such term, and *after demand made in writing, for delivering possession*, such person holding over shall pay double the yearly value of the lands, &c. so detained. § 1.

In all cases between landlord and tenant, on half a year's Rent being in arrear, the landlord having a right by Law to re-enter for non-payment, may, without any formal demand or re-entry, serve a declaration in ejectment; and in case of judgment, or nonsuit for not confessing lease, entry, and ouster, it shall appear that half a year's Rent was due before a declaration served, and no sufficient distress to be found, and that the lessor in ejectment had power to re-enter; the lessor in ejectment shall recover judgment. § 2. See title *Ejectment*.

Lessees, &c. filing a Bill in Equity, shall not have an injunction against Proceedings at Law, unless they shall, within forty days after answer filed, bring into Court such money as the lessors in their answer shall swear to be in arrear, over and above all just allowances, and costs taxed, there to remain till the hearing of the cause, or to be paid to the lessors on good security, subject to the decree of the Court; and in case such bill shall be duly filed, and execution executed, the lessors shall be accountable for only so much as they shall really make of the premises from the time of their re-entry; and if the same shall happen to be less than the usual Rent reserved, the lessees shall not be restored to the possession, until they shall make up the deficiency to the lessors. § 3.

If the tenant, at any time before trial, tender or pay into Court all arrears with costs, Proceedings on Ejectment shall cease. § 4.

Previous to the above statute the Courts, both of Law and Equity, had exercised a discretionary power of staying the lessor from proceeding at Law, in cases of forfeiture for non-payment of Rent, by compelling him to take the money really due to him. See *Andr.* 341: 2 *Salk.* 597: 8 *Mod.* 345: 10 *Mod.* 383: 2 *Vern* 103: *Wil.* 75: 2 *Stra.* 900.

By *stat* 11 *Geo.* 2. *c.* 19, It shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the tenements occupied by defendants, in *an action on the case*, for the *use and occupation* of what was held; and if in evidence on the trial any parol demise, or agreement, not by deed, whereon a certain Rent was reserved, shall appear, plaintiff may make use thereof as an evidence of the *quantum* of the damages. § 14.

Where any tenant for life dies before or on the day, on which any Rent was reserved, on any demise which determined on the death of such tenant for life, the executors or administrators of such tenant for life may, in an action on the case, recover of the under-tenants, if such tenant for life die on the day on which the same was made payable, the whole, or if before such a day, then a proportion, of such Rent, according to the time such tenant for life lived of the last year, or quarter, or other time, in which the Rent was growing due; making all just allowances. § 15.

The above clause gives action on the case to executors of a lessor or landlord, being only tenant for his own life, where he dies before or on a Rent-day; and by his death the lease or demise determines: In which case the lessee or under-tenant, by the Common Law, might have avoided paying any Rent. 1 *Inst.* 162, *b. in n.*

If any tenant, holding tenements at a Rack-Rent, or where the Rent reserved be full three-fourths of the yearly value of the premises, who shall be in arrear for one year's Rent, desert the premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears; it shall be lawful for two Justices of the Peace (having no interest in the premises) to go upon and view the same, and to affix, on the most notorious part, notice in writing, what day (at the distance of fourteen days at least) they will return to take a second view; and if, on such second view, the tenant, or some person on his behalf, shall not appear and pay the Rent in arrear, or there shall not be sufficient distress on the premises, the Justices may put the landlord in possession, and the lease to such tenants, as to any demise therein contained only, shall become void. § 16.

In case any tenant give notice of his intention to quit, and shall not accordingly deliver up the possession at the time in such notice contained, the tenant, his executors or administrators, shall pay to the landlord *double the Rent* which he should otherwise have paid. § 18.

The general remedy for *Rent* is by distress, under the restrictions and directions of the foregoing statutes; and, as to which, see further at length this Dict. title *Distress*: But there are also other remedies particularized by *Blackstone*, 3 *Comm. c.* 15, which it will be sufficient here to notice in a summary manner; as they are treated of under the several titles in this Dictionary.

By Action of *Debt*, for the breach of the express contract. This is the most usual remedy, when recourse is had to any action at all for the recovery of pecuniary Rents: to which species of render, almost all free services are now reduced since the abolition of the military tenures: But for a freehold Rent, reserved on a lease for life, *&c.*, no Action of *Debt* lay, by the Common Law, during the continuance of the freehold, out of which it issued; for the Law would not suffer a *real* injury to be remedied by an action that was merely personal. 1 *Rol. Abr* 595. But by *stat.* 8 *Ann. c.* 14. § 4, an Action of Debt is given for Rents on leases for life or lives, as upon a lease for years: And by *stat.* 5 *Geo* 3. *c.* 17, which enables ecclesiastical persons to lease tithes and other incorporeal inheritances, Action of Debt is given (by § 3.) for recovery of Rent on such leases; and perhaps the text of these statutes extends to leases of incorporeal hereditaments. See 1 *Inst.* 47, *a. in n.*

An assise of *mort d'ancestor*, or novel *disseisin* will lie of Rents, as well as of lands; if the lord, for the sake of trying the possessory right, will make it his election to suppose himself ousted or disseised thereof. This is now seldom heard of; and all other real actions to recover Rent, being in the nature of Writs of Right, and therefore more dilatory in their progress, are entirely disused, though not formally abolished, by Law.—Such are the Writ *de Consuetudinibus & Servitiis*; the Writ of *Cessavit*; and the Writ of Right *sur Disclaimer*: As to which, see this Dict. under those titles; and see also title *Gavelet*. On the other hand, the Writ of *Ne injuste vexes*; (see that title;) and the *Writ of Meine*, (see *Mean*,) are remedies for the tenant against the oppression of the lord.

The Rent in a lease must be reserved to the lessor, or his heirs, *&c.*, and not to a stranger. See 1 *Inst.* 213, *b.* The principle which gave rise to this rule is, that Rent is considered as a retribution for the land, and is therefore payable to those who would otherwise have had the land. It is to be observed, that remainder-men, in a settlement, being at first view neither feoffors, donors, lessors, nor the heirs of feoffors, donors, or lessors, there seems to have been, for some time after the Statute of Uses, a doubt, whether the Rents of leases, made by virtue of powers contained in settlements, could be reserved to them. In *Chudleigh's case*, 1 *Rep.* 139, it is positively said, that if a feoffment in fee be made to the use of one for life, remainder to another in tail, with several remainders over, with a power to the tenant for life to make leases, reserving the Rent to the reversioners, and the tenant for life accordingly makes leases; neither his heirs, nor any of the remainder-men, shall have the Rent. But, in *Harcourt* v. *Pole*, 1 *Anders.* 273, it was adjudged, that the remainder-men might distrain in these cases: And in *T. Jones* 35, the *dictum* in *Chudleigh's* case is denied to be Law. The determination in *Harcourt* v. *Pole* will appear incontrovertibly right, if we consider, that both the lessees and remainder-men derive their estate out of the reversion or original inheritance of the settler; and therefore the Law, to use *Coke's* expression in *Whitlocke's case*, 8 *Rep.* 71, will distribute the Rent to every one to whom any limitation of the use is made. 1 *Inst.* 214, *a. in n.*; and see *Id.* 213, *b. in n.*

III. Many of the decisions under this and the following Division are, by reason of the statute remedies against non-payment of Rent, become of less consequence than

than they were at the time of their determination: But seem still worthy of being preferred; as shewing, in some measure, the evils remedied by those statutes.

With respect to the necessity of *demanding Rent,* there is a material difference between a remedy by re-entry, and a remedy by distress, for non-payment of the Rent; for where the remedy is by way of re-entry for non-payment, there must be *an actual demand* made, previous to the entry, otherwise it is tortious; because such condition of re-entry is in derogation of the grant, and the estate at Law being once defeated, is not to be restored by any subsequent payment: and it is presumed, that the tenant is there residing on the premises, in order to pay the Rent for preservation of his estate, unless the contrary appears by the lessor's being there to demand it: Therefore, unless there be a demand made, and the tenant thereby, contrary to the presumption, appears not to be on the land ready to pay the Rent, the Law will not give the lessor the benefit of re-entry, to defeat the tenant's estate, without a wilful default in him; which cannot appear without a demand hath been actually made on the land. *Co. Lit.* 201, *b*: *Hob.* 20, 331: 5 *Co.* 56: *Dy.* 51: *Plowd.* 70: 7 *Co.* 56: *Vaugh.* 32. This was at Common Law; but now see the *stat.* 4 *Geo.* 2. *c.* 28. § 2: *ante, Div.* II.; and this Dict. title *Re entry.*

So, if there had been a *nomine pœnæ* given to the lessor for non-payment, the lessor must demand the Rent before he can be entitled to the penalty. *Hut.* 114: *Hob* 207; 331: 7 *Co* 56.

Where the remedy for recovery of Rent is by distress, there needs no demand previous to the distress; though the deed says, that if the Rent be behind, being lawfully demanded, that the lessor may distrain; but the lessor, notwithstanding such clause, may distrain when the Rent becomes due. So it is, if a Rent-charge be granted to *A.*, and if it be behind, being lawfully demanded, that then *A.* shall distrain; he may distrain without any previous demand, because this remedy is not in destruction of the estate, for the distress is only a pledge for payment of it, and the taking a distress is a legal demand of the tenant to pay the Rent, which was all that was required by the deed; and the tenant is not injured by the taking of the distress, because, on tender of the Rent, the pledges are immediately to be restored, or a writ of detinue lies after the *quantum* of the Rent has been settled in the replevin; whereas in the case of re-entry, or of a penalty, the tenant is really injured, either by loss of his estate, or the payment of a greater sum than the Rent, which cannot be restored on payment of the Rent; therefore he shall not be punished in such cases without a wilful default in him, which cannot otherwise appear than by the proof of a demand, which was not answered by the tenant. *Hob.* 207: *Hut.* 13, 23: *Moor* 883: 2 *Rol. Abr.* 426.

But this general distinction must be understood with these restrictions:

That if the King makes a lease, reserving Rent, with a clause of re-entry for non-payment, he is not obliged to make any demand previous to his re-entry; but the tenant is obliged to pay his Rent for the preservation of his estate, because it is beneath the King to attend his Subject to demand his Rent. 4 *Co.* 73: 5 *Co.* 56: *Latch.* 28: *Moor* 152: *Dyer* 87, 88.

But this exception is not to be extended to the Duchy lands, though they be in the hands of the King, for the King must make a demand before he can re enter into such lands; but this is by the *stat.* 1 *H.* 4. *c.* 18, which provides, that, when the Duchy lands come to the King, they shall not be under such government and regulations as the demesnes and possessions belonging to the Crown. *Moor* 149, 160.

So, if a prebendary make a lease, rendering Rent, and if the Rent be in arrear and demanded, that it shall be lawful for the prebendary to re-enter; if the reversion in this case comes to the King, the King must in this case demand the Rent, though he shall be by his prerogative excused of an implied demand, for the implied demand is the act of the Law, the other, the express agreement of the parties, which the King's prerogative shall not defeat: Therefore, in case of the King, if he makes a lease, reserving Rent, with a proviso, that if the Rent be in arrear for such a time, (being lawfully demanded, or demanded in due form,) that then the lease shall be void; it seems that not only the patentee of the reversion in this case, but also the King himself, whilst he continues the reversion in his own hands, *is obliged* to make an actual demand, by reason of the express agreement for that purpose. *Dyer* 87, 210.

But if the King, in cases where he need not make a demand, assigns over the reversion, the patentee cannot enter for non-payment, without a previous demand, because the privilege is inseparably annexed to the person of the King. 4 *Co.* 73: *Moor* 404: *Cro. Eliz.* 462: *Dyer* 87.

Another exception is, where the Rent is payable *at a place off the land,* with a clause that if the Rent be behind, being lawfully demanded *at the place off the land,* or where the clause is, that if the Rent be behind, being lawfully demanded of the person who is to pay it, that then he may distrain; in these cases, though the remedy be by distress only, yet the grantee cannot distrain without a previous demand: because here the distress and demand being not complicate, but different acts, to be performed at different places and times, the demand must be previous to the distress; for distress is an act of grace, not of common right, and therefore must be used in the manner that it is given. *Hob.* 208: 2 *Rol. Abr.* 426: *Moor* 83: *Brownl.* 171: But see *Hutt.* 23. *contra.*

But where the clause is no more than that if the Rent be behind, being lawfully demanded, (without saying at any place off the land, or of the person of the grantor,) that then the grantee may distrain, there needs no actual demand; because here the distress and demand is but one complicate act, the one included in the other, and all done at the time and place, *viz.* on the land; for the distress is in itself a lawful demand, therefore needs no actual demand previous to it; because all that was required by the deed was a lawful demand, which the distress in its own nature is. 2 *Rol. Abr.* 426: *Hob.* 208: and see *Dyer* 348.

And there seems to have been formerly another exception admitted, that where the remedy was by way of *entry for non-payment,* that yet there needed no demand, if the Rent were made payable at any place off the land; because they looked on the money payable off the land to be in nature of a sum *in gross,* which the tenant had at his own peril undertaken to pay; but this opinion has been entirely exploded, for *the place of payment does not change the nature of the service,* but it remains in its nature

ture a Rent, as much [illegible] made payable on the land; therefore [illegible] is, that the tenant was ready to pay it, unless [illegible] overthrown by the proof of a demand; and without such demand, and a neglect or refusal, there is no injury to the lessor, consequently the estate of the lessee [illegible] be defeated. *Plow.* 70: [illegible] *Cro. Eliz.* 415, 435, 536.

But where the power of re-entry is given to the lessor [illegible] without any further demand, there it [illegible] undertaken to pay it, whether it [illegible] or not; and there can be no presumption [illegible] this case; because, by dispensing with the [illegible] put himself under the necessity of making [illegible] proof that he was ready to tender and pay the [illegible]

[illegible] there is another exception when the remedy is by distress, and that is, when the tenant was ready on the land [illegible] the Rent at the day, and made a tender of it; there [illegible] there must be a demand previous to the distress, [illegible] where the tenant has shewn himself ready on the [illegible] he has done all that in reason can be [illegible] of him; for it would put the tenant to endless [illegible] to oblige him every day to make a tender; it [illegible] altogether uncertain when the lessor will come for [illegible] when he has omitted to receive it the day he appointed by the lease for payment and receipt; wherefore [illegible] must expect the lessor, and be ready to pay [illegible] day appointed; or else the lessor may distrain for [illegible] any demand; so where the lessor has lapsed the day of payment, and was not on the land to receive it, he must give the tenant notice to pay it before he can distrain; for the tenant shall be put to no trouble where it appears that he has omitted nothing on his part. *Hob.* 207: 2 *Rol. Abr.* 427.

And where the tender was made by a tenant on the land at the day, there a demand on the land is sufficient to justify a distress after the day; because the demand in this case is of equal notoriety with the tender, and by parity of reason the tenant ought to take notice of such demand, as well as the lessor of the tender on the land. *Hob.* 207.

But if the tenant had tendered the Rent on the day to the person of the lessor, and he refused it, it seems, by the better opinion, that the lessor cannot distrain for that Rent, without a demand of the person of the tenant; because the demand ought to be equally notorious to the tenant, as the tender was to the lessor. *Hob.* 207: 2 *Rol. Abr.* 427.

[illegible] by which the tenant holds be personal [illegible] homage, fealty, &c. the demand must be of the [illegible] performed [illegible] person of the tenant; therefore a demand [illegible] would be improper. *Hut.* 13.

[illegible] the Rent [illegible] and the tenant be [illegible] of payment to pay the [illegible] he must [illegible] the tenant on the [illegible] the tenant, [illegible] was required [illegible] assise, after [illegible] of the person [illegible] damages [illegible] default in him; but in the case of a Rent-charge [illegible] tender by the tenant on the land, the grantee afterwards demand the Rent on the land, because [illegible] remedy by distress, which is no more than [illegible] for the Rent; and that being to be found and taken on the land, the grantee need only demand his Rent where he can find his remedy, which is on the land; but in this case if the grantee cannot find the tenant on the land to demand the Rent, he may, on the next feast on which the Rent is payable, demand all the arrears on the land; and if the tenant is not there to pay it, he has failed of his duty, and is guilty of a wilful default, which amounts to a denial; and that denial being a disseisin of the Rent, the grantee may have his assise, and by that shall recover the arrears. *Cro. Car.* 508: 7 *Co.* 57: *Hob.* 207: 2 *Rol. Abr.* 427.

But if there has been neither a tender of the Rent, nor a demand of the grantee on the day, there the grantee may afterwards demand the Rent on the land; because the tenant having omitted to do his duty by a tender on the day, he is still obliged to answer the legal demands of the grantee, which is well made on the land, because *the Rent issues thereout*; for where there is no tender on the day of payment, the Rent is due and payable every day afterwards; therefore a demand in the same manner as the Law requires is sufficient; consequently the non-payment, after a demand on the land, is a denial and disseisin, for which the grantee may have his assise. *Lit.* § 233: 7 *Co.* 57: 2 *Rol. Abr.* 427.

If a lease be made, reserving Rent, and a bond given for performance of covenants and payment of the Rent, the lessor may sue the bond without demanding the Rent. *Cro. Eliz.* 332: *Cro. Car.* 76: *Hob.* 8.

If there be several things demised in one lease, with several reservations, with a clause, that, if the several yearly Rents reserved be behind or unpaid in part, or in all, by the space of one month after any of the days on which the same ought to be paid, that then it shall be lawful for the lessor, into such of the premisses, whereupon such Rents, being behind, is or are reserved, to re-enter; these are in the nature of distinct demises, and several reservations; consequently there must be distinct demands on each demise to defeat the whole estate demised. *Vaugh.* 71, 72. But see *stat.* 4 *Geo.* 2. *c.* 28. § 2.

Also as to the necessity of a demand of the Rent, there is a difference between a condition and a limitation; for instance, if tenant for life (as the case was by marriage settlement with power to make leases for twenty-one years, so long as the lessee, his executors or assigns, shall duly pay the Rent reserved) makes a lease pursuant to the power; the tenant is at his peril obliged to pay the Rent without any demand of the lessor; because the estate is limited, continuing only so long as the [illegible] therefore [illegible] performance [illegible] ation, the [illegible] to a [illegible] which [illegible] *Vid.* [illegible] *Co.* 64 [illegible]

[illegible]

the Exchequer, or to his Receiver in the country. 4 *Rep.* 73. And, strictly, the Rent is demandable and payable before the time of sun-set of the day whereon it is reserved; though, perhaps, not absolutely due till midnight. *Co. Lit.* 302: 1 *Anders.* 253: 1 *Saund.* 287: *Prec. Chanc.* 555: *Salk.* 578.

If the lessor dies before sun is set on the day upon which the Rent is demandable, it is clearly settled, that the Rent unpaid is due to his heir, and not to his executor: But if he dies after sun-set, and before midnight, it seems to be the better opinion, that it shall go to the executor, and not to the kin. 1 *P. Wms.* 178.

There is a material difference between the reservation of a Rent payable on a particular day, or within a certain time after; and the reservation of a Rent payable at a certain day, with a condition that, if it be behind, by the space of any given time, the lessor shall enter; in both cases, a tender on the first or last day of payment, or on any of the intermediate days, to the lessor himself, either upon or out of the land, is good: But, in the former case, it is sufficient, if the lessee attends on the first day of payment at the proper place; and if the lessor does not attend there to receive the Rent, the condition is saved. In the latter case, to save the lease, it is not sufficient that the lessee attends on the first day of payment, for he must equally attend on the last day. 10 *Rep.* 129, *a*: *Plowd.* 70, *a*, *b*: *Cro. Eliz.* 48. See 1 *Inst.* 202, *a. in n.*

The other effects of this question of the time of the Rent becoming due, are now in equal measure superseded by the statute regulations already stated and alluded to: But the following determinations on the subject may, notwithstanding, be requisite to be known.

The time for payment of Rent, and consequently for a demand, is such a convenient time before the sun-setting of the last day, as will be sufficient to have the money counted; but if the tenant meet the lessor on the land at any time of the last day of payment, and tenders the Rent, that is sufficient tender, because the money is to be paid indefinitely on that day, therefore a tender on the day is sufficient. *Co. Lit.* 202, *a*: *Dalst.* 44: *Sav.* 253: 4 *Leon.* 171: 1 *Saund.* 287.

If a lease is made, rendering Rent at *Michaelmas*, between the hours of one and five in the afternoon, with a clause of re-entry, and the lessor comes at the day, about two in the afternoon, and continues to five, this is sufficient. *Cro. Eliz.* 15. The demand may be by Attorney. 4 *Leon.* 479. But the power must be special, for such land and of such tenant. *Yelv.* 37: 1 *Brownl.* 138. Demand must be proved by witnesses, *Dyer* 68. Must be made of the precise sum due. 1 *Leon.* 305: *Sav.* 121: *Mo.* 307.

If a lease be made, reserving Rent, on condition, that if the Rent be behind at the day, and ten days after, (being in the mean time demanded,) and no distress to be found upon the land, that the lessor may re-enter; if the Rent be behind at the day, and ten days after, and a sufficient distress be on the land till the afternoon of the tenth day, and then the lessee takes away his cattle, and the lessor demands the Rent at the last hour of the day, and the lessee does not pay it, and there is not any distress on the land; yet the lessor cannot enter, because he made no demand in the mean time between the day of payment and the ten days, which by the clause he was obliged to do. *Cro. Eliz.* 63.—But see *Stat.* 4 *Geo.* 2. *c.* 28: *ante* II.

As to the place of demanding Rent, there is a difference between a remedy by re-entry and distress; for when the Rent is reserved, on condition that, if it be behind, that the lessor may re-enter, in such case the demand must be upon *the most notorious place* on the land; therefore, if there be a house on the land, the demand must be at the *fore-door* thereof, because the tenant is presumed to be *there* residing, and the demand being required to give notice to the tenant that he may not be turned out of possession, without a wilful default, such demand ought to be in the place where the end and intention will be best answered. *Co. Lit.* 153, 201: 2 *Rol. Abr.* 428.

And it seems the better opinion, that it is not necessary *to enter* the house, though the doors be open, because that is a place appropriated for the peculiar use of the inhabitant, into which no person is permitted to enter without his permission; and it is reasonable that the lessor shall go no further to demand his Rent, than the tenant should be obliged to go, when he is bound to tender it; and a tender by the tenant *at the door* of the house of the lessor is sufficient, though it be open, without entering; therefore, by parity of reason, a demand by the lessor at the door of the tenant, without entering, is sufficient. *Dalst.* 59: *Co. Lit.* 201: 1 *And.* 27: 3 *Leon.* 4: and see *Cro. Eliz.* 15.

But when the demand is only in order for a distress, there it is sufficient, if it be made on any notorious part of the land, because this is only to entitle him to his *remedy* for his Rent; therefore, the whole land being equally debtor, and chargeable with the Rent, a demand on it, without going to any particular part of it, is sufficient. *Co. Lit.* 153.

See other cases, on this subject, *Co. Lit.* 202: *Bendl.* 59: *Cro. Eliz.* 324: *Cro. Car.* 507, 521: *Co. Lit.* 153; 201: 4 *Co.* 73: *Cro. Eliz.* 462: *Mo.* 404: *Dyer* 37: 2 *Rol. Abr.* 428: *Dyer* 229.

For more learning on this subject, see 4 *New Abr.*: and 18 *Vin. Abr.* title *Rent.*

RENTAL, (corrupted from *Rent-roll.*) A Roll wherein the Rents of a manor are written and set down, by which the lord's bailiff collects the same: It contains the lands and tenements let to each tenant, and the names of the tenants, the several Rents arising, and for what time, usually a year. *Compl. Court Keep.* 475.

RENTS OF ASSISE, The certain Rents of freeholders, and ancient copyholders; so called, because they were *assised*, and different from others which were uncertain, paid in corn, &c. 2 *Inst.* 19. See title *Rent* I.

RENTS RESOLUTE, *Redditus resoluti.*] Are accounted among the Fee-farm Rents, to be sold by *st.* 22 *Car.* 2. *c.* 6; being such Rents or Tenths as were anciently payable to the Crown, from the lands of abbies and religious houses; and after their dissolution, notwithstanding the lands were demised to others, yet the Rents were still reserved, and *made payable again* to the Crown. *Cowell.*

REPARATIONS. A tenant for life or years may cut down timber-trees to make Reparations, although he be not compelled thereto; and where a house is ruinous at the time of the lease made, and the lessee suffers it to fall, he is not bound to rebuild it; and yet if he fell timber for Reparations, he may justify the same. *Co. Lit.* 54.

Lessee covenants, That from and after the amendment and Reparation of the houses by the lessor, he at his own charges will keep and [illegible] them in repair: In this case the lessee is not obliged to do it, unless the lessor first

 make

make good the Reparations: And if it be well repaired at first, when the lease began, and after happen to decay; the lessor must first repair, before the lessee is bound to keep it so. *Cro. Jac.* 645: see also 2 *Leon. c.* 72: and this Dict. titles *Lease*; *Covenant*; *Waste*.

REPARATIONE FACIENDA, An ancient Writ which lies in many cases; one whereof is where there are tenants in common or joint-tenants of a house, &c. which is fallen into decay, and one is willing to *repair* it, but the others are not: In this case, the party willing to *repair* the same shall have this writ against the others. *F. N. B.* 127.

And if a man have a house adjoining to my house, and he suffer his house to lie in decay, to the annoyance of my house, I may have a writ against him to *repair* his house. So, if a person have a passage over a bridge, and another ought to *repair* the bridge, who suffers it to fall to decay, &c. *New Nat. Br.* 281.

REPEAL, from the Fr. *rappel*, i. e. *revocatio*.] A Revocation; as the *repealing* of a statute is the revoking or disannulling it. *Rastal*.

It is said, a pardon of felony, &c. may be repealed on disproving the suggestion. 1 *Keb.* 19. See title *Pardon*.

A deed or will may stand good as to part, and be repealed for the rest. *Style* 241. And a defendant, in a suit, cannot repeal or revoke his Warrant of Attorney, given to an Attorney to appear for him, &c. 2 *Lil. Abr.* 452: without first paying his bill. See title *Attorney*.

REPLEADER, *Replacitare*.] To plead *again*. See title *Pleading* I. 3. *ad finem*.

Repleader is to be had where the pleading hath not brought the issue in question, which was to be tried: Also, if a verdict be given where there was no issue joined, there must be a Repleader to bring the matter to trial, &c. 2 *Lil. Abr.* 460.

In debt on a Sheriff's bond, for defendant's appearance in *B. R.* upon the return of the writ, the defendant pleaded, that he had appeared *secundum*, &c. and on this they were at issue; and there being a verdict for the plaintiff, a Repleader was allowed, because the appearance was not triable by a Jury, but by the record. 1 *Leon.* 90.

It was held, that, at Common Law, a Repleader was granted before trial, because a verdict did not cure an immaterial issue; but that now a Repleader ought never to be awarded before trial, because the fault in the issue may be helped by the Statutes of *Jeofails*: That if a Repleader is denied where it should be granted, or *è converso*, it is error; and the judgment in Repleader is general, (viz.) *Quod partes replacitent*: They must begin again at the first fault, which occasioned the immaterial issue; if the declaration and the bar, and the replication, be all ill, they must begin *de novo*; but if the bar be good, and the replication ill, they must begin at the replication; and no costs are allowed on either side; and a Repleader cannot be awarded after a default. 2 *Salk.* 579.

Though a Repleader is allowed after verdict; it has been adjudged, not to be awarded after demurrer: (But a Repleader hath formerly been granted after demurrer, and likewise after the demurrer argued;) and that a Repleader can never be awarded after a writ of error; but only after issue joined, &c. *Latch.* 147: 3 *Lev.* 440: *Mod. Ca.* 102. See the *Reason of Repleader*, *Lutw.* 1612.

REPLEGIARE, To redeliver a thing detained or taken by another, by putting in legal sureties. See *Replevin*.

REPLEGIARE DE AVERIIS, A Writ brought by one whose cattle are distrained, or put in the pound, on any cause, by another person, on surety given to the Sheriff to prosecute or answer the action at Law. *F. N. B.* 68: *Reg. Orig.*: *Stat.* 7 *H.* 8. *c.* 4. See *Replevin*.

REPLEVIN,

PLEVINA; from *replegiare*, to redeliver to the owner on Pledges; 1 *Inst.* 145, *b.*: or, to take back the Pledge; 3 *Comm.* 13: It is sometimes incorrectly used for the bailing a man.

I. *The Definition of the Term; and the general Principles of the Law of Replevin.*

II. *More particularly; for what Things a Replevin lies; and for whom.*

III. *Of the different Kinds of Replevins; out of what Courts they issue; and of the Power and Duty of the Sheriff.*

IV. 1. *Of the Pledges, and the Proceedings against them.* 2. *Of the Pleadings and Damages.*

V. *Of the Original Writ, and the Writ of* Withernam.

VI. 1. *Of the Writ of second Deliverance; and,* 2. *the Writ* De Proprietate probandâ.

VII. *Of the Writ* De Retorno habendo; *of Returns irreplevisable; and in what Manner the Sheriff is to return and execute such Processes.*

I. A REPLEVIN is, a remedy grounded and granted on a Distress; being a redeliverance of the thing distrained, to remain with the first possessor, on security (or pledges) given by him, to try the right with the distrainer, and to answer him in a course of Law.—Or, it is bringing the Writ called *Replegiari facias*, by him who has his cattle or goods distrained by another, and putting in surety to the Sheriff, that, on delivery of the thing distrained, he will prosecute the action against the distrainer. *Lit. lib.* 2. *c.* 12. § 219: 1 *Inst.* 145, *b.*

Replevin is a Writ, and usually granted in cases of distress, and *is a matter of right*; so that if a man grants a rent with clause of distress, and grants further, that the distress taken shall be irreplevisable, yet it may be replevied; for such restraint is against the nature of a distress, and no private person can alter the common course of the Law. *Co. Lit.* 145.

An Action of Replevin is founded upon, and is the regular way of contesting the validity of, a distress: being a redelivery of the pledge, or thing taken in distress, to the owner, by the Sheriff, or his Deputy: upon the owner's giving security to try the right of the distress, and to restore it, if the right be adjudged against him: after which, the distrainer may keep it, till tender made of sufficient amends, but must then redeliver it to the owner. 3 *Comm. c.* 9. *p.* 147, cites 1 *Inst.* 145: 8 *Rep.* 147.

In this writ, or action, both plaintiff and defendant are called *Actors*; the one, *i. e.* the plaintiff, suing for damages, and the other, the avowant, or defendant, to have a return of the goods or cattle. 2 *Brownl.* 84: *Cro. Eliz.* 799: 2 *Mod.* 149. Therefore, either party may carry down the cause; and if the defendant give notice, and do not go on to trial, the Court will give costs against him; for

the

the same reason, the defendant may not move for judgment of nonsuit, unless the plaintiff has given notice of trial. *Bull. N. P.* 61.

That the avowant (the person making the distress) is in nature of a plaintiff, appears, 1st, from his being called an Actor, which is a term in the Civil Law, and signifies plaintiff; 2dly, from his being entitled to have judgment *de retorno habendo*, and damages, as plaintiff; 3dly, from this, that the plaintiff may plead in abatement of the avowry, consequently such avowry must be in nature of an action. *Carth.* 122: 6 *Mod.* 103: *Yelv.* 148.

The avowant, being in nature of a plaintiff, need not aver his avowry with an *hoc paratus est verificare*, more than any other plaintiff need aver his count. *Plowd.* 263. See *post.* IV.

Nor shall he have a protection cast for him more than any other plaintiff. 2 *Inst.* 339.

But though an avowry be in nature of an action, yet one tenant in common may avow for taking cattle damage-feasant. *Cro. Eliz.* 530.

Replevin is an action founded on the right, and different from trespass. *Carth.* 74: *Yelv.* 148: *Hob.* 16: *Cro. Eliz.* 799.

It is now held, that, as no lands can be recovered in this action, it cannot, with any propriety, be considered as a real action; though the title of lands may incidentally come in question, as it may do in an action of trespass, or even of debt, which are actions merely personal. *Finch's Law* 316: and see *Comb.* 476: *Fitzg.* 109.

Formerly, when the party distrained upon intended to dispute the right of the distress, he had no other process by the old Common Law, than by a Writ of Replevin, *replegiari facias*; which issued out of Chancery, commanding the Sheriff to deliver the distress to the owner, and afterwards to do justice, in respect to the matter in dispute, in his own County-Court. *F. N. B.* 68. But, this being a tedious method of proceeding, the beasts, or other goods, were long detained from the owner, to his great loss and damage. 2 *Inst.* 139. For which reason, the Statute of *Marlbridge*, (52 *Hen.* 3.) *c.* 21, directs, that (without suing a writ out of the Chancery) the Sheriff immediately, upon plaint to him made, shall proceed to replevy the goods. See *post.* III. And, for the greater ease of the parties, it is farther provided, by *stat.* 1 & 2 *P. & M. c.* 12, that the Sheriff shall make at least four Deputies in each county, for the sole purpose of making Replevins. See *post.* III. Upon application, therefore, either to the Sheriff, or one of his said Deputies, security is to be given; in pursuance of the statute of *Westm.* 2. 13 *Edw.* 1. *c.* 2; 1st, That the party replevying will pursue his action against the distrainor; for which purpose he puts in *plegios de prosequendo*, or pledges to prosecute: 2dly, That if the right be determined against him, he will return the distress again; for which purpose he is also bound to find *plegios de retorno habendo*. See *post.* IV. Besides these pledges, the sufficiency of which is discretionary, and at the peril of the Sheriff, the *stat.* 11 *Geo.* 2. *c.* 19. § 23, requires, that the officer, granting a Replevin on a distress for rent, shall take a bond with two sureties in a sum of double the value of the goods distrained, conditioned to prosecute the suit with effect and without delay, and for return of the goods; which bond shall be assigned to the avowant, or person making cognizance, on request made to the officer; and, if forfeited, may be sued in the name of the assignee. See *post.* IV. And certainly, as the end of all distresses is only to compel the party distrained upon, to satisfy the debt or duty owing from him, this end is as well answered by such sufficient sureties, as by retaining the very distress, which might frequently occasion great inconvenience to the owner; and that the Law never wantonly inflicts. The Sheriff, on receiving such security, is immediately, by his officers, to cause the chattels, taken in distress, to be restored into the possession of the party distrained upon; unless the distrainor claims a property in the goods so taken. For if, by this method of distress, the distrainor happens to come again into possession of his own property in goods, which before he had lost, the Law allows him to keep them, without any reference to the manner by which he thus has regained possession; being a kind of personal *Remitter*. See title *Remitter*. If, therefore, the distrainor claims any such property, the party replevying must sue out a writ *de proprietate probanda*, in which the Sheriff is to *prove*, by an inquest, in whom the *property*, previous to the distress, subsisted. *Finch. L.* 316. And if it be found to be in the distrainor, the Sheriff can proceed no farther; but must return the claim of property to the Court of King's Bench or Common Pleas, to be there farther prosecuted, if thought advisable, and there finally determined. *Co. Lit.* 145: *Finch. L.* 450.

But if no claim of property be put in, or if (upon trial) the Sheriff's inquest determines it against the distrainor; then the Sheriff is to replevy the goods; (making use of even force, if the distrainor makes resistance; 2 *Inst.* 193;) in case the goods be found within his county. But if the distress be carried out of the county, or concealed, then the Sheriff may return, that the goods, or beasts, are *eloigned*; *elongata*, carried to a distance, to places to him unknown: and thereupon the party replevying shall have a writ of *capias in withernam*; *in vetito*, (or, more properly, *repetito*,) *namio*; a term which signifies a second or reciprocal distress, in lieu of the first which was eloigned. It is therefore a command to the Sheriff to take other goods of the distrainor, in lieu of the distress formerly taken, and eloigned, or withheld from the owner. *F. N. B.* 69, 73. So that here is now distress against distress; one being taken to answer the other, by way of reprisal, and as a punishment for the illegal behaviour of the original distrainor. For which reason, goods taken in *withernam* cannot be replevied, till the original distress is forthcoming. 3 *Comm. c.* 9. See *post.* III.

But, in common cases, the goods are delivered back to the party replevying, who is then bound to bring his action of Replevin; which may be prosecuted in the County-Court, be the distress of what value it may. 2 *Inst.* 139. But either party may remove it to the superior Courts of King's Bench or Common Pleas, by writ of *recordari*, or *pone*; 2 *Inst.* 23; the plaintiff at pleasure, the defendant upon reasonable cause; *F. N. B.* 69, 70: And also, if in the course of proceeding any right of freehold comes in question, the Sheriff can proceed no farther; so that it is usual to carry it up, in the first instance, to the Courts of *Westminster-Hall*. *Finch. L.* 317. Upon this action brought, and a declaration delivered, the distrainer, who is now the defendant, makes *Avowry*; that is, he *avows* taking the distress in his own right, or the right of his wife; and sets forth the reason of it, as for rent arrere, damage done, or

 other

other cause; or else, if he justifies in another's right as his bailiff or servant, he is said to make Cognizance: that is, he acknowledges the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain; and on the truth and legal merits of this avowry or cognizance the cause is determined. If it be determined for the plaintiff, *viz.* that the distress was wrongfully taken; he has already got his goods back into his own possession, and shall keep them, and moreover recover damages. *F. N. B.* 69. See *stat.* 21 *H.* 8. *c.* 19: and *post.* IV. But if the defendant prevails, by the default or nonsuit of the plaintiff, then he shall have a writ *de retorno habendo*, whereby the goods or chattels (which were distrained and then replevied) are returned again into his custody; to be sold, or otherwise disposed of, as if no Replevin had been made. And at the Common Law, the plaintiff might have brought another Replevin, and so *in infinitum*, to the intolerable vexation of the defendant. Wherefore the statute of *Westm.* 2. *c.* 2, restrains the plaintiff, when nonsuited, from suing out any fresh Replevin; but allows him a judicial writ, issuing out of the original record, and called a Writ of *Second Deliverance*, in order to have the same distress again delivered to him, on giving the like security as before. And, if the plaintiff be a second time nonsuit, or if the defendant has judgment upon verdict or demurrer in the first Replevin, he shall have a Writ of Return irreplevisable: after which, no Writ of Second Deliverance shall be allowed. 2 *Inst.* 340. But in case of a distress for rent arrere, the Writ of Second Deliverance is in effect taken away by *stat.* 17 *Car.* 2. *c.* 7; which directs that, if the plaintiff be nonsuit before issue joined, then, upon suggestion made on the record in nature of an avowry or cognizance; or if judgment be given against him on demurrer, then, without any such suggestion; the defendant may have a writ to inquire into the value of the distress by a Jury, and shall recover the amount of it in damages, if less than the arrear of rent; or, if more, then so much as shall be equal to such arrear, with costs: or, if the nonsuit be after issue joined, or if a verdict be against the plaintiff, then the jury impannelled to try the cause shall inquire concerning the sum of the arrears, and the value of the goods, &c. distrained: and thereupon the defendant shall have judgment for such, or so much thereof, as the goods, &c. distrained amounted unto: And if (in any of these cases) the distress be insufficient to answer the arrears distrained for, the defendant may take a farther distress, or distresses. See 1 *Vent.* 64. But otherwise, if, pending a Replevin for a former distress, a man distrains again for the same rent or service, then the party is not driven to his action of Replevin, but shall have a writ of recaption, and recover damages for the defendant, the re-distrainer's, contempt of the process of the Law. *F. N. B.* 71. 3 *Comm.* *c.* 9. See title *Recaption.*

II. It is a general rule, that the plaintiff ought to have the property of the goods in him at the time of the taking: and not only a general property, which every owner hath, but also a special property, such as a person hath who hath goods pledged with him, or who hath the cattle of another to manure his lands, &c. is sufficient to maintain a Replevin, and in such cases either party may bring a Replevin. *Co. Lit.* 145: *Winch* 26.

A Replevin doth not lie of things which are *feræ naturæ*, as conies, hares, monkies, dogs, &c.; but if things, wild by nature, are made tame, or are reclaimed, so long as they continue in that condition, they belong to the person who hath the possession of them, and he may bring Replevin; and the general rule herein seems to be, that a Replevin lies for any thing that may by Law be distrained. 2 *Rol. Abr.* 430: *Godb.* 124. See title *Distress.*

We read of *Canes replegiati*, hounds replevied, in a case between the abbot of *St. Alban's* and *Geoffrey Childwick*, 24 *Hen.* 3.

Goods may be replevied by Writ, which is by the Common Law, or by plaint, which is by Statute Law, for the more speedy having again their cattle and goods.

A Replevin lies of a leveret; for it has *animum revertendi*; for the same reason it lies of a *ferret*; but it is said not to lie for a mastiff dog, though an action of trespass will. *Br. Repl.* 64: 2 *Rol. Abr.* 430. *Sed quære?*

Replevin lies of a swarm of bees. *F. N. B.* 68.

But not of trees, or timber growing; nor of things annexed to the freehold, because such things cannot be distrained; yet Replevin lies of certain iron belonging to the party's mill. *F. N. B.* 68.

So Replevin doth not lie of deeds or charters concerning lands; for they are of no value, but as they relate thereto. *Bro. Repl.* 34.

Nor of money, or leather made into shoes. *Moor* 394: 2 *Brownl.* 139.

If a mare in foal, a cow in calf, &c. are distrained, and they happen to bring forth their young, whilst they are in the custody of the distrainer, a Replevin lies for the foal, calf, &c. *Bro. Repl.* 41: *F. N. B.* 69: 1 *Sid.* 82.

Replevin lies for a ship; so for the sails of the ship. *March* 110: *Raym.* 232. Replevin lies not for goods taken beyond sea, though brought hither by the defendant afterwards. 1 *Show.* 91.

He that brings Replevin must have an absolute, or at least a special, property in the thing distrained; and therefore several men cannot join in a Replevin, unless they be joint-tenants, or tenants in common. Executors may have a Replevin of a taking *in vitâ testatoris*. So, if the cattle of a *feme sole* be taken, and she afterwards intermarry, the husband alone may have Replevin; but, if they join after verdict, judgment will not be arrested, because the Court will presume them jointly interested; (as they may be, if a distress be taken of goods of which a man and woman were joint-tenants, and afterwards intermarry;) the avowry admitting the property to be in the manner it is laid. *Bull. N. P.* *c.* 4. *p.* 53.

If I distrain another's cattle damage-feasant, and, before they are impounded, he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of them, after tender of amends, is wrongful, and he shall have an action of Replevin against me to recover them; in which he shall recover damages only for the detention, and not for the caption, because the original taking was lawful. *F. N. B.* 69. See 3 *Comm.* *c.* 9. But if the tender were before the taking, the taking is tortious: if after impounding, neither the taking nor detaining is tortious. And after the avowant has had return irreplevisable, yet if the plain. make sufficient tender, he may have his action of *detinue* for the detainer after. *Bull. N. P.* 60.

III. REPLEVIN may be made either by original writ of Replevin, at Common Law, or by plaint, under the *Stat.* of *Marl.* 52 *H.* 3. *c.* 21 : *Co. Lit.* 145 : *F. N. B.* 69.

The following are the words of this statute; "That if the beasts of any person be taken, and wrongfully withholden, the Sheriff, after complaint made to him thereof, may deliver them, without let or gainsaying of him that took the beasts, if they were taken out of liberties; and if the beasts were taken within any liberties, and the bailiff of the liberty will not deliver them, then the Sheriff, for default of those bailiffs, should cause them to be delivered."

The mischiefs before this act, as has been already hinted, were the great delay and loss the party was at, by having his beasts or goods withholden from him; as also that, when cattle were distrained and impounded within any liberty which had return of writs, the sheriff was obliged to make a warrant to the bailiff of the liberty to make deliverance; and there was another mischief, when the distress was taken without and impounded within the liberty. To remedy which, by this statute, the Sheriff, *on plaint made* to him *without writ*, may, either by parol or precept, command his bailiff to deliver the beasts or goods, that is, to make *Replevin* of them; and by these words *(post querimoniam sibi fact')* the Sheriff may take a plaint out of the County-Court, and make a *Replevin* presently, which he is to enter in the Court; as it would be inconvenient, and against the scope of the statute, that the owner, for whose benefit the statute was made, should tarry for his beasts till the next County-Court, which is holden from month to month. And, by this act, the Sheriff may hold plea in the County-Court on *Replevin* by plaint, though the value be of 40*s.* or above; and yet, in other actions, he shall only hold plea where the matter is under 40*s.* value. 2 *Inst.* 139: 13 *Co.* 31: 1 *Keb.* 205: *Dalt. Sh* 430.

Replevins by writ issue, properly, out of Chancery, returnable into the Courts of *K. B.* and *C. B.* at *Westminster.* *F. N. B.* 68 : *Gilb. Distr. & Repl.* 68. and *post.* V.

Replevins by plaint are made by the Sheriff by force of the above-mentioned statute of *Marlebridge*; by which he directed, *on complaint made* to him by the party, that his goods or cattle are distrained, to command his bailiff (which may be by parol or precept) to make deliverance; and which plaint may be taken at any time, and as well out of, as in Court. *Bro. Repl. pl.* 4 : *Co. Lit.* 145 : 2 *Inst.* 139.

It becomes the Sheriff's duty, on complaint, by parol or by precept to his bailiff, to replevy the cattle, which *precept may be given before any County Court*; but such plaint is afterwards to be entered by the party who made the complaint, and not by the Sheriff. 2 *Com. Rep.* 591.

The action of *Replevin* is of two sorts: 1. In the *detinet*; 2. In the *detinuit*. Where the party has had his goods redelivered to him by the Sheriff, upon a writ of Replevin, or upon a plaint levied before him, the action is in the *detinuit*; but where the sheriff has not made such Replevin, but the defendant still has the goods, the action is in the *detinet*: However, of late years, no action has been brought in the *detinet*, though there is much curious learning in the old books concerning it. The advantage the plaintiff has in bringing an action of Replevin in the *detinet*, in preference to an action of trespass *de bonis asportatis*, is, that he can oblige the defendant to redeliver the goods immediately, in case, upon making his avowry, they appear to be repleviable; but as, in such cases, he may more speedily have them delivered to him by application to the Sheriff in the common way, it is of no use; unless the distrainer have eloigned the goods, so that the Sheriff cannot get at them to make Replevin; and in such case the plaintiff may bring an action of Replevin in the *detinet*, and, after avowry, pray that the defendant may gage deliverance; or he may, upon return of an *elongavit* to the *pluries* writ of Replevin, have a writ to the Sheriff, commanding him to take other beasts, *&c.* of the defendant in *withernam*; But if the defendant, before the return of the *withernam*, appear to the writ of Replevin, and offer to plead *non cepit*, it shall stay the *withernam*; for the defendant shall not be concluded by the return of an *elongavit*, since the Sheriff can make no other return where he cannot find the thing to be replevied *Bull. N. P. c.* 4.

The Hundred Court, and Courts of Lords of Manors, may *by prescription* hold plea in *Replevin*, so may *incidentally* have power to replevy goods or cattle; but that, it seems, *must be by process* of the Court after a plaint entered, but not by parol complaint out of Court. *Carth.* 380.

Therefore, where in trespass for taking goods, *&c.* the defendant justified that the place *where*, &c. was a Hundred, and time out of mind had a Court of all actions, *Replevins*, &c. grantable in or out of Court, *virtute cujus*, &c. The question was, *If good or not?* And the reason of the doubt was, because the County-Court could not hold plea in *Replevin* at Common Law; but were enabled by the Statute of *Marlebridge*, which extends not to the Hundred Court, which is *a Court derived out of the County-Court*; but *per Cur.* clearly, Supposing they may grant them in Court, yet they cannot prescribe to grant them *out* of Court. 2 *Salk.* 580: 5 *Mod.* 252: *Skin.* 674: *Carth.* 380: 1 *Ld. Raym.* 219.

The Sheriff is *obliged* to grant *Replevins* in all such cases as they are allowed by Law; and the officer who takes the goods, by virtue of a *Replevin* issuing for what cause soever, is *not liable to an action of trespass*, unless the party, in whose possession the goods were, *claims property* in them: And note; that in all cases of misbehaviour by the Sheriff, or other officers, in relation to *Replevins*, they are subject to the control of the King's superior Courts, and punishable by attachment for such misbehaviour. *Carth.* 381.

And though the Sheriff may grant *Replevins by plaint*, and may proceed thereon in his County Court, yet if any thing touching freehold come in question, or ancient demesne be pleaded, the Sheriff can proceed no further; nor can any such proceedings be carried on in the Hundred Court, Court-Baron, or any other Court claiming a jurisdiction herein by prescription. 2 *H.* 7, 6: 4 *H.* 6, 30: *Co. Lit.* 145, *b.*

So, when the King is party or the taking is in right of the Crown, in these cases the Sheriff is to surcease. *Bro. Repl. pl.* 3: 1 *Brownl.* 3.

Where an Act of Parliament orders a distress *and sale* of goods, THIS *is in nature of an Execution*, and *Replevin* does *not* lie; but if the Sheriff grants one, yet it is not such a contempt as to grant an attachment against him; and

and *Powell*, Justice, said, He remembered a case in the Exchequer, where a distress was taken for a fee-farm rent due to the King, and a Replevin granted, yet, on debate, no attachment was granted, though it was in the King's case. *Trin.* 12 *W.* 3. in *C. B. Bradshaw's* case. But it is now determined that, if goods be taken in execution, (for on a conviction before Justices,) the Sheriff shall not make Replevin of them; and if in such case the Sheriff should make Replevin, he would subject himself to an attachment; for goods are only replevisable where they have been taken by way of distress. *Bull. N. P.* c. 4. p. 53.

The following is the provision of *stat.* 1 & 2 *P. & M.* c. 12, already alluded to; "That the Sheriff shall at his first county-day, or within two months after he receives the patent, depute and proclaim in the shire-town four deputies to make Replevins, not dwelling twelve miles distant from one another; on pain to forfeit, for every month he wants such deputy or deputies, 5*l.* to be divided between the King and the prosecutor."

IV. 1. When the Sheriff makes Replevin he ought to take two kinds of pledges; *plegii de prosequendo*, by the Common Law, and *plegii de retorno habendo*, by the statute of *Westm.* 2. c. 2; by which it is provided, "that Sheriffs or Bailiffs, from thenceforth, shall not only receive of the plaintiff pledges for pursuing the suit, before they make deliverance of the distress, but also for return of the beasts, if return be awarded; and if any take pledges otherwise, he shall answer for the price of the beasts, and the lord that distrains shall have his recovery by writ, that he shall restore to him so many beasts or cattle; and if the plaintiff be not able to restore, his superior shall restore."

In the construction hereof the following points have been ruled, and opinions holden:

If the Sheriff returns insufficient pledges, he shall answer according to the statute; for insufficient pledges are no pledges in Law; and such pledges must not only be sufficient in estate, *viz.* capable to answer in value, but likewise sufficient in Law, and under no incapacity; therefore infants, feme coverts, persons outlawed, &c. are not to be taken as pledges, nor are persons politic, or bodies corporate. *Co. Lit.* 145: 2 *Inst.* 340: 10 *Co.* 102.

In Replevin the Sheriff did not return any pledges, and after issue joined and found, it was moved, if they could be put in by the Court after verdict; and the Court held they might, notwithstanding the statute of *Westm.* 2, as before that statute the Court might take pledges on the omission of the Sheriff; and a diversity was taken between pledges for prosecuting, which were at Common Law, and *pro retorno habendo* given by this statute; and the Court held, that though on default of the Sheriff he was subject to the action of the party, that yet the taking of pledges by the Court did not make the judgment erroneous. *Noy* 156. And that the omission of pledges of the first description is error; but the omission of pledges *de retorno habendo* does not vitiate the proceedings, but subjects the Sheriff to an action. See 1 *Jon.* 419: *Cro. Car.* 594. And if the Sheriff omit to take bond, pursuant to the *stat.* 11 *Geo.* 2. c. 19, (see *ante* I. and *post.*) an attachment will not be granted, but the remedy is by action against him. 2 *Term Rep.* 617.

A Replevin by plaint was sued in the Sheriff's Court in *London*, and pledges were found *de retorno habendo, si,* &c. this plaint was removed according to their custom into the Mayor's Court, and after into the King's Bench by *certiorari*, and there oyer of *certiorari* being demanded, the party declared in *B. R.* On this a return was awarded, and on an *elongat'* returned, a *scire facias* went against the pledges in the Sheriff's Court of *London*. On demurrer, the question was, Whether, this case being removed by *certiorari*, the pledges in the inferior Court are discharged, or whether they remain liable to be charged by this *scire facias*? It was adjudged, that the pledges were not discharged. *Skin.* 244: 2 *Show.* 421. *Comb.* 1, 2: 3 *Mod.* 56. *S. C.*

The plaintiff declared, that he distrained for 7*l.* 10*s.* rent, reserved on a lease, and that the defendant delivered the cattle without taking pledges; to which the defendant pleaded, that the plaintiff in Replevin delivered to him 3*l.* 10*s.* for pledges, which he accepted; and on demurrer the Court held, that pledges being to be found to answer the party, if he had good cause of avowry, and to be answerable for amercement to the King, if nonsuited, or if it be found against him; the taking of money for a pledge was not lawful; and that although he might take money for pledges, yet he ought not to accept less than the plaintiff's demand; on which account the Court likewise held the plea vicious; but they agreed, that if the defendant had taken but one pledge, (if he had been sufficient,) it had been well enough. *Cro. Car.* 446: 1 *Jon.* 378.

A bond taken by the Sheriff, conditioned that if the party applying for the Replevin should appear at the next County-Court, &c. and prosecute his action with effect, and should make return of the thing replevied, if return should be adjudged, and save the Sheriff harmless, &c. is good in Law; and agreeable to the intent of the statute of *Marlebridge* which requires pledges or sureties, of which nature the obligors are; and this method of taking bond instead of pledges was said to be of ancient usage; and that in the old books *plegii* signified the same as sureties; and that there being a proper remedy on such bond, it differed from the case of taking a deposit or sum of money; but the Court agreed, that at Common Law this bond had been void, because it had been to save the Sheriff harmless in making Replevin by plaint, which he could not have done before the statute of *Marlebridge*. 1 *Ld. Raym.* 278: 2 *Lutw.* 686.

If in Replevin in an inferior Court, the condition of the bond is, if he prosecute his suit commenced with effect in the Court of, &c. and make return, &c. if a return be adjudged by Law, and it happens, that the plaintiff hath judgment in the Court below, which is afterwards reversed on a Writ of Error in *B. R.*; in such case, unless the party make a return, he forfeits his bond; for though he had judgment in the Court below, yet the words, "if he prosecute his suit commenced," &c. extend to the prosecution of the Writ of Error, which is part of the suit commenced in the Court below; and in this case, the taking such bond was held to be lawful, and said to be common practice. *Carth.* 248: 1 *Show.* 400: *Filng.* 158.

In debt on a Replevin-bond taken by the Sheriff, conditioned that if *C. B.* appear at the next County-Court, and

and prosecute with effect for taking, &c. and make return, &c. if return be adjudged, and save harmless the Sheriff, &c. then, &c. the defendant after oyer pleaded, that at the next County-Court, held on such a day, he did appear, and prosecuted, &c. until it was removed by *recordari*, and did save the Sheriff harmless, but doth not say, that no *retorn. habend'* was adjudged; on demurrer, the Court inclined for the plaintiff; for the defendant should have said, that no return was adjudged at all; and though he prosecuted to the *recordari*, yet *retorn. habend'* might be adjudged afterwards; and the condition goes to any adjudication of return. *Comb.* 228.

An action was brought on a bond in Replevin to prosecute his suit with effect, and also to make return, &c. the defendant pleaded that *E.G.* did levy a plaint in Replevin in the Court before the Steward of *Westminster*, and that afterwards, and before the suit was determined, *viz.* such a day, &c. *E. G.* died; *per quod* the suit abated; the plaintiff replied, that true it is, that *E. G.* levied such a plaint against the defendant, who immediately afterwards exhibited an *English* bill in the Exchequer against the plaintiff in that suit, and by injunction hindered the proceedings below until such a day, &c. on which *E. G.* died; so that he did not prosecute his suit with effect: On demurrer to this replication the defendant had judgment; for, *per Holt*, this was a prosecution with effect, because there was neither a nonsuit or verdict against *E. G. Carth.* 519.

In action on a Replevin-bond common bail shall be filed. 1 *Salk.* 99. See title *Bail.*

Under *stat. Westm.* 2. *c.* 2, an action lies against the Sheriff, if he omit to take pledges, or if he take those that are insufficient; and the party may have a *scire facias* against the pledges, where the suit is in any Court of Record; and though in the County-Court, &c. a *scire facias* will not lie against the pledges, because these are not Courts of Record, and every *scire facias* ought to be grounded on a Record, yet there the party may have a precept, in nature of a *scire facias*, against the pledges. 1 *Ld. Raym.* 278: See 1 *Comb.* 1, 2: *Com.* 593.

In such action against the Sheriff, some evidence must be given, by the plaintiff, of the insufficiency of the pledges or sureties; but very slight evidence is sufficient to throw the proof on the Sheriff: for the sureties are known to him; and he is to take care that they are sufficient. *Bull. N. P. c.* 4. *p.* 60.

An action on the case was brought against a Sheriff for taking insufficient pledges on a Replevin; to which he pleaded not guilty; and a verdict being found against him, and judgment given thereon in the Court of *C. B.* on a Writ of Error brought in *B. R.*; it was objected, first, That an action on the case was not the proper remedy; 2dly, Supposing such action lay, that there ought to have been a *scire facias*, first sued out against the pledges. As to the first, the Court held, That the party distraining has, by the statute of *Westm.* 2, an interest in the pledges; and if the Sheriff omits to take such, or, which is the same thing, takes insufficient ones, he is aggrieved, and consequently entitled to his action; 2dly, That though a *scire facias* may be brought against the pledges, yet it does not follow from thence, that an action does not lie against the Sheriff, without any such previous *scire facias*; and such *scire facias*, which is only to certify the insufficiency of the pledges, is the less necessary in the present case; such insufficiency being set forth in the declaration, and found by the verdict. *Mich.* 12 *Geo.* 2. *Rouse* v. *Patterson*, in *B. R*: 16 *Vin. Ab.* 399. *c.* 4.

The following is the clause of the *stat.* 11 *Geo.* 2. *c.* 19, alluded to *ante*, *Div.* I. "That officers, having authority to grant Replevins, shall, in every Replevin of a distress for rent, take in their own names, from the plaintiff and two sureties, a bond in double the value of the goods distrained; (such value to be ascertained by the oath of one or more witnesses not interested, which oath the person granting such Replevin is to administer;) conditioned for prosecuting the suit with effect, without delay, and for returning the goods, in case a return shall be awarded, before any deliverance be made of the distress; and such officer, taking such bond, shall, at the request and costs of the avowant, or person making conusance, assign such bond to the avowant, &c. by indorsing the same, and attesting it under his hand and seal, in the presence of two witnesses; which may be done without stamp, provided the assignment be stamped before any action brought thereon; and if the bond be forfeited, the avowant, &c. may bring an action thereupon in his own name, and the Court may by rule give such relief to the parties on such bond, as may be agreeable to justice; and such rule shall have the effect of a defeasance.

2. THE declaration in Replevin ought to be certain in setting forth the numbers and kinds of cattle distrained; because, otherwise, the Sheriff cannot tell how to make deliverance, if it should be necessary: yet an avowry may make that good, which would be bad on demurrer; both parties agreeing what the *quantum* and nature of the goods are. And the Sheriff may require the defendant to shew him the goods; and it would be a good return to say, "that no one came, on the part of the defendant, to shew the goods and chattels." *Aleyn* 32: *Stile* 71.

The declaration ought to be not only of a taking in a ville or town, but also "in a certain place called," &c.; but if the defendant would take advantage of this, he must demur to the declaration. *Hob.* 16.

A man may count of several takings, part at one day and place, and part at another; and if the plaintiff alleges two places, and the defendant answer only one, *i. e.* if the plea begin only as an answer to part, and be in truth but an answer to part, it is a discontinuance; and the plaintiff must not demur, but must take his judgment for that by *nihil dicit*; for if he demur or plead over, the whole action is discontinued. But if a plea begin with an answer to the whole, but is in truth only an answer to part, the whole plea is nought, and the plaintiff may demur. *F. N. B.* 68: *Salk.* 176. Where the defendant avows at a different place, in order to have a return, he must traverse the place in the Count, because his avowry is inconsistent with it; but where he does not insist upon a return, he may plead *non cepit*, and prove the taking to be at another place, for the place is material. *Stra.* 507. This is to be understood where the defendant never had the cattle in the place laid in the declaration at all; for if, on the plea of *non cepit*, the plaintiff prove that the defendant had the cattle in the place laid in the declaration, he will have a verdict; and if the fact be, that the defendant

defendant took the cattle in another place, and only had them in the place mentioned in the declaration, in the way to the pound, he ought to plead that matter specially. *Bull. N. P. c. 4. p.* 54.

The general issue in Replevin is *non cepit*; upon which property cannot be given in evidence, for that ought to be pleaded; and if he plead property in himself, he may either plead it in bar, or in abatement; but if he pleads it in a stranger, it ought strictly to be pleaded in abatement; though it may likewise be pleaded in bar. 2 *Vent.* 249: 1 *Salk.* 5; *Co. Lit.* 145: 2 *Lev.* 92.

If the defendant plead property, whether it be in himself or a stranger, he shall have a return without making an avowry for it; but where the plea in abatement is of a collateral matter, such as *cepit in alio loco*, he must make an avowry in order to have a return; for he must shew a right to the property, or at least to the possession, to have a return; but the plaintiff ought not to traverse the matter of the conusance; and if he do, and demurrer be joined upon it, it is a discontinuance, and the defendant will have judgment. *Salk* 94: *Bull. N P.* 54.

The defendant may either avow the taking, or justify it; if he avow, it must be upon a right subsisting, such as rent-arrear, *&c.* and then he entitles himself to a return; but where, by matter subsequent, he is not to have the thing for which the distress was taken, there he will not be entitled to a return, and therefore cannot avow, but must justify; as, if a lord distrain for homage, and afterwards the tenant die, and then his executor bring Replevin But a man may distrain for one thing, and avow for another. 3 *Co.* 26, *a*: *Bull. N. P.* 54, 55.

By *stat.* 11 *Geo.* 2 *c* 19. § 22, any person distraining for rent, relief, heriot, or other service, may in Replevin avow or make cognizance generally, without setting out a title.

If a defendant make cognizance as bailiff to *J. S.* the plaintiff may traverse his being bailiff, for this is different from trespass *quare clausum fregit*; for there, if the defendant justify an entry by command, or as bailiff to one in whom he alleges the freehold to be, the plaintiff shall not traverse the command, because it would admit the truth of the rest of the plea, *viz.* that the freehold was in *J. S.* which would be sufficient to bar his action. But in trespass *de bonis asportatis, e. g* for taking the plaintiff's sheep, if the defendant justify the taking them, damage-feasant, as servant to *J. S.* the plaintiff may traverse the command or authority; for though *J S.* had a right to take the cattle, yet a stranger, who had no authority from him, would be liable. And there is a great difference between a justification in trespass, and an avowry in Replevin, in another respect, *e. g.* for an amerciament in a Court Leet; in the justification it is necessary for the defendant to set forth a warrant or precept, *&c.* but not to aver the matter of the presentment, because his plea is only in excuse: but in avowry he ought to aver, in fact, that the plaintiff committed the crime for which he is amerced; because he is an actor, and is to recover, which must be upon the merits. *Bull. N. P.* 55: cites 1 *Salk.* 107.

If an avowry be made for rent, and it appear by the defendant's own shewing, that part of it is not yet due, yet the avowry will be good for the residue. In such case the avowant must abate his avowry, *quoad* the rent not due, and take judgment for the rest; but if it appear that he has title only to two undivided parts of the rent, the avowry shall abate. 1 *Saund.* 285: *Moor* 281: *Salk.* 580. So, if the avowry be for part of a quarter or half a year's rent, he must shew how the rest is satisfied, or it will be bad. *Hardw.* 84: *Comb.* 346: 1 *Saund.* 191. In avowry for rent, and a *nomine pœnæ* together, without alleging any demand of rent, the avowry is good for the rent, though it will be ill for the penalty. 1 *Saund.* 286: *Hob.* 133. Avowry for rent due at a latter day, is no bar to avowry for rent due at a former day: but an acquittal under seal is; if not under seal, contrary proof will be admitted. *Bull. N. P.* 56. See further, this Dictionary, titles *Avowry*; *Rent*; *Distress*.

By *stat.* 21 *H.* 8. *c.* 19, If the avowry, cognizance, or justification be found for the defendant, or the plaintiff be nonsuited, the defendant shall recover such damages and costs as the plaintiff would have had if he had recovered. But this act mentions only persons avowing or making cognizance for rent-service, customs, services, damage-feasant, or for other rent or rents; so that it does not extend to an avowry for a *nomine pœnæ*, or for an estray; and therefore, if in such case damages and costs were given, the judgment would be reversed. 1 *Jon.* 135; and see *Bull. N. P.* 57.

The avowant or defendant in Replevin, though not within the words, is plainly within the meaning of the *stat.* 4 *Ann. c.* 16; (by which a plaintiff in replevin, which to certain purposes an avowant is, may plead as many pleas as he may think necessary:) And accordingly, where some issues in Replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant, the latter must be allowed the costs of the issues found for him, out of the general costs of the verdict; unless the Judge certify, that the plaintiff had a probable cause for pleading the matters on which those issues are joined. 2 *Term Rep.* 235.

If issue be joined on the property, the defendant may give in evidence the plaintiff's having the cattle, in mitigation of damages. *Godb.* 98. If the plaintiff plead *riens arrere* in bar to an avowry for rent, he cannot, upon such issue, give in evidence *non-tenure*. *Bull. N. P.* 59. In an avowry for rent, the plaintiff may plead a tender and refusal, without bringing the money into Court; because, if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. *Bull. N. P.* 60.

V. The original writ of Replevin issues out of Chancery, and neither it nor the *alias* Replevin are returnable, but are only in nature of a *justicies*, to empower the Sheriff to hold plea in his County-Court, when a day is given the parties; but the *pluries* Replevin is always with this clause, *vel causam nobis significes*, and it is a returnable process. *F. N. B.* 69, 70: *Doct. Pl.* 313, 314: 2 *Inst* 139: *Salk.* 410. It is usual to take out the *alias* and *pluries* at the same time. *Dalt. Sh.* 273.

A *pluries* Replevin returned in *Michaelmas* Term, the defendant claimed property, and nothing was afterwards done, nor any appearance nor continuance till *Easter* Term following, at which term they appeared and pleaded, and judgment was thereupon given; though no continuance was between *Michaelmas* and *Easter*, yet this was not any discontinuance, because there is not any continuance till appearance;

appearance; for the parties have not any express day in Court, and where there is not any continuance, there cannot be any discontinuance. 1 *Rol. Abr.* 485.

The *pluries* Replevin supersedes the proceedings of the Sheriff, and the proceedings are on that, and not on the plaint, as they are when that is removed by *recordari*; and though there is no summons in the writ, yet it gives a good day to the defendant to appear; and if he does not appear, then a *pone* issues, and then a *capias*. 1 *Ld. Raym.* 617.

Capias and process of outlawry lies in Replevin; for when on the *pluries replegiari fac* the Sheriff returns *averia elongata*, then a *capias in withernam* issues; and on that being returned *nulla bona*, a *capias* issues; and so to outlawry. *Capias* and process of outlawry in Replevin were given by *stat.* 25 *Ed.* 3. *st.* 5. *c* 17: 6 *Mod.* 84.

If on the *pluries* Replevin the Sheriff return, that the cattle are eloigned to places unknown, &c. so that he cannot deliver them to plaintiff, then shall issue a *withernam*, directed to the Sheriff, commanding him to take the cattle or goods of the defendant, and detain them till the cattle or goods distrained are restored to the plaintiff; and if, on the first *withernam*, a *nihil* be returned, there an *alias* and *pluries* Replevin issue; and so to a *capias* and *exigent*. *F. N. B.* 73.

The writ of *withernam* ought to rehearse the cause which the Sheriff returns, for which he cannot replevy the cattle or goods; so that it does not lie on a bare suggestion, that the beasts are eloigned, &c. *F. N. B.* 69, 73. See *ante* III.

If on the *withernam* the cattle are restored to the party who eloigned them, yet he shall pay a fine for his contempt. 2 *Leon* 174.

Cattle taken in *withernam* may be worked, or, if cows, may be milked; for the party has them in lieu of his own. 1 *Leon.* 220: *Dyer* 280.

And as the party is to have the use of the cattle, he is not to have any allowance made him for the expences he has been at in maintaining them. *Owen* 46: *Cro. Eliz.* 162: 3 *Leon.* 235.

Scire facias against an executor, reciting, that where Replevin was brought against his testator for a cow, and judgment against him *de retorno habendo*, which was not executed, that he should shew cause why he should not have execution. The executor pleads *plene administravit*, upon which the plaintiff demurred; and *Wyld*, Justice, said, that upon the judgment the cow is in the custody of the Law, therefore he ought to have execution; but the doubt is, because the Replevin is determined by the death of the party; yet (by him and *Rainsford*, being only in Court) the plaintiff shall have execution, for the defendant cannot be prejudiced; for if the Sheriff return *averia elongata*, he shall not have a *withernam*, but of the goods of the testator; or, if there are no goods of the testator, the Sheriff can take nothing, but shall return *nulla bona*, and then the plaintiff hath his ordinary way to charge the defendant, if he hath made a *devastavit*; and it was adjudged for the plaintiff. *Pasch.* 20 *C.* 2. in *B. R. Sucklin* v. *Green*.

W. sues a Replevin, *B.* removes it by *recordari* into the King's Bench, the plaintiff does not declare, and on that a return awarded to *H.* upon which the Sheriff returns *averia elongata*, and then a *withernam* was awarded and executed; and now the plaintiff comes and prays he may be admitted to declare, and prays a deliverance of the *withernam*; and it was testified by the clerks, that on the plaintiff's submission to a fine for not declaring, and that being imposed on him by the Judges, he shall have deliverance of the *withernam*; and a fine of 3*s.* 4*d.* being accordingly imposed on the plaintiff, he then declared, and had deliverance. *Hob.* 50. The course of *B. R.* is contrary to that of *C. B.*

If, on an *elongata* returned, the Sheriff's cattle are taken in *withernam*, yet on the defendant's appearance, and pleading *non cepit*, on claiming property, the defendant shall have his cattle again; and if they are eloigned, a *withernam* against the plaintiff; for if the property or taking be in question, there is no reason that the plaintiff should have the defendant's cattle. 1 *Ld. Raym.* 614.

The *withernam* is but mesne process, and cannot be on execution, because it is granted before judgment. 1 *Ld. Raym.* 614: and see *Comb.* 201: *Salk.* 582.

VI. The Writ of *Second Deliverance* is a judicial Writ depending upon the first original, and is given by *stat. Westm* 2. 13 *E.* 1. *c.* 2; which recites, that, after the return is awarded, the party distrained does replevy again, and so the judgments given in the King's Courts take no effect; wherefore it enacts, that when return is awarded to the distrainer, the Sheriff shall be commanded by a judicial Writ to make return, in which it shall be expressed that the Sheriff shall not deliver them without writ making mention of the judgment: And it further enacts, that if the party make default again, or, for any other cause, return of the distress be awarded, being now twice replevied, the distress shall remain irreplevisable. See *ante* I.

If a defendant in Replevin has return awarded on nonsuit of a plaintiff, on which he sues a writ *de retorno habendo*, upon which Writ the Sheriff returns *averia elongata per querentem*, and on this a *withernam* is awarded, and on the *withernam* the defendant has *tot catalla* to him delivered of the goods of the plaintiff, and thereupon the plaintiff sues a Second Deliverance; he shall sue it for the first distress taken, not for the *withernam*; and this by the nature and form of the Writ of Second Deliverance. 2 *Rol. Abr.* 435.

If a *retorno habendo* be awarded to the Sheriff after a Writ of Second Deliverance prayed by plaintiff, this is a *supersedeas* to the *retorno habendo*, and closes the Sheriff's hand from making any return thereto; and if the Sheriff will not execute the Writ of Second Deliverance, the party has his remedy against him. *Dyer* 41: *Dalt. Sh* 275.

The statute of *Westm.* 2, gives the Writ of Second Deliverance out of the same Court where the first Replevin was granted, and a man cannot have it elsewhere; for if he may, then he shall vary from the place limited as to this by the statute. *Plowd.* 200.

In Replevin a defendant avowed, that the plaintiff being nonsuited brought a Writ of Second Deliverance, whereupon it was moved to stay the Writ of Inquiry of Damages; And *per Curiam*, this is a *supersedeas* to the *retorno habendo*, but not to the Writ of Inquiry of Damages; for these Damages are not for the thing avowed for, but are given by *stat.* 21 *H.* 8. *c.* 19, as a compensation for the expence and trouble the avowant has been at. 1 *Salk.* 95. See *Palm.* 403: *Latch*, 72.

Error of judgment in *C. B.* in a Second Deliverance; on demurrer in pleading, the error assigned was, because there was not any Writ of Second Deliverance certified; and

and *in nullo est erratum* being pleaded, it was moved not to be material, because it is awarded on the roll, and the parties had appeared and pleaded to it; but it was adjudged ill, and reversed for that cause; for there ought to be a writ, and if it vary from the declaration in the Replevin, it shall be abated. *Cro. Jac.* 424.

No Second Deliverance lies after a judgment on a demurrer, or after verdict, or confession of the avowry; but, in all these cases, the judgment must be entered with a return irreplevisable; but on a nonsuit, either before or after evidence, a Second Deliverance will lie, because there is no determination of the matter, and there a Writ of Second Deliverance lies to bring the matter in question; but, in the case of demurrer and verdict, the matter is determined by confession of the party. 2 *Lill. Reg.* 457.

If the plaintiff's Writ abates, he may have a new Writ, and is not put to his Writ of Second Deliverance. *Com.* 122.

If the plaintiff in Replevin be nonsuited for want of delivering a declaration, if it happened through sickness of the person employed to prosecute, the Court will order the defendant to accept a declaration on payment of costs; otherwise plaintiff would be remediless, the Writ of Second Deliverance being taken away by *stat.* 17 *C.* 2. *c.* 7, in case of distresses for rent arrear. See *ante* I.

If the person taking the goods claims property, the Sheriff cannot make Replevin of them; for property must be tried by Writ, and in this case the plaintiff may have the Writ *de proprietate probandâ* to the Sheriff; and if it be found for the plaintiff, then the Sheriff is to make Replevin; if for the defendant, then he is to proceed no further; but as this is but an inquest of office, though the property be found in the defendant, yet the plaintiff is not concluded, for he may still have his action of Replevin, or of trespass: But if in an action of Replevin the defendant plead property, and it be found for him, the plaintiff is concluded: And if the Sheriff return the claim of property, yet shall it proceed in *C. B.* where the property shall be put in issue, and finally tried. *Co. Litt.* 145, *b*: *F. N. B.* 77: *Dyer* 173: *Com.* 592: *Bull. N. P.*

None but he who is party to the Replevin shall have the Writ *de proprietate probandâ*; so that if on a Replevin the beasts of a stranger are delivered to the plaintiff, such stranger, being no party to the Replevin, shall not have this Writ. 14 *Hen.* 4. 25: 2 *Roll. Abr.* 431.

The Sheriff is to return the claim of property on the *pluries*, before which time the Writ *de proprietate probandâ* does not issue, for it recites the *pluries*. *Reg.* 83: *Com.* 595.

The Writ *de proprietate probandâ* is an inquest of office, and the Sheriff is to give notice to the parties of the time and place of executing it. *Dalt. Sh* 274.

If the defendant claims property in Replevin, the plaintiff may have the Writ *de proprietate probandâ* without continuance of the Replevin, though it be two or three years after; because, by claim of property, the first suit is determined. *Moor* 403.

If the plaintiff has property, and omits to claim it before the Sheriff, he may notwithstanding plead property in himself or in a stranger, either in abatement or in bar; though it was formerly held, that property in a stranger could only be pleaded in abatement. *Cro. Eliz.* 475: *Wimb.* 26: 1 *Show.* 402: *Salk.* 594: 6 *Mod.* 81.

In Replevin the defendant in his avowry pleads, that the beasts taken belong to a third person, and not to the plaintiff, therefore prays a return; to which the plaintiff demurs; for on the avowant's own shewing he ought not to have return, having admitted the property of the beasts to be in another; but judgment was given for the defendant; for the prior possession was in him, and he hath a right against all others but the right owner, and the plaintiff by his demurrer hath admitted, that he hath no property in them. *Comb.* 477: See 6 *Mod.* 68, 139: 2 *Mod.* 242.

VII. The *retorno habendo* is a judicial Writ, which lies for him who has avowed the distress, and proved the same to be lawfully taken; or where, on removal of the plaint into the Courts above, the plaintiff, whose cattle were replevied, makes default, or does not declare or prosecute his action; and thereby becomes nonsuited, *&c.* and by this Writ the Sheriff is commanded to make a return of the cattle to the defendant in the Replevin. 35 *Hen.* 6. 40: *Dyer* 280: *Co. Litt.* 145. See *ante* I.

A bailiff who makes conusance may have judgment of a return, and consequently a Writ *de retorno habendo* grounded on such judgment. *Co. Ent.* 59.

If a defendant hath a return awarded him, and he sueth a writ *de retorno habendo*, and the Sheriff return on the *pluries, quod averia elongata sunt*, &c. he shall have a *scire facias* against the pledges, *&c.* according to the statute of *Westm.* 2; and if they have nothing, then they shall have a *withernam* against the plaintiff, of the plaintiff's own cattle. *F. N. B.* 172.

Since the *stat.* 17 *Car.* 2. *c.* 7, (see *ante* I,) it has been the custom, as it was before, to enter judgment for a *retorno habendo*: but, notwithstanding, the defendant may enter a suggestion on that statute, and a Writ of Second Deliverance will be no *supersedeas* to such Writ. The whole fact is to be proved, and may be litigated in the Writ of Inquiry, directed by that statute. *Bull. N. P.* 58. And if the Jury, impannelled to try a cause in Replevin, omit to inquire the value of the rent arrear, or of the distress, according to the directions of the said statute, it cannot be supplied by a Writ of Inquiry, because the statute confines the inquiry to the Jury impannelled in the cause. Therefore, in such case, the defendant must take judgment *de retorno habendo* at Common Law: but it is not the same upon *stat.* 21 *H.* 8. *c.* 19; (see *ante* IV. 2;) nor upon *stat.* 43 *Eliz. c.* 2, if the defendant avow as overseer for a distress for a poor's rate; because, if the Jury had inquired, it had been as an inquest, on which no attaint would have lain, and the statute does not tie it up to the same Jury. And if the plaintiff, being nonsuited, bring a Writ of *Second Deliverance*, though it will be a *supersedeas* to the Writ *de retorno habendo*, yet it will be none to the Writ of Inquiry. *Bull. N. P.* 58.

Return irreplevisable is a judicial Writ, directed to the Sheriff, for the final restitution or return of cattle unjustly taken by another, and so found by verdict, or after a nonsuit in a Second Deliverance. 2 *Roll. Abr.* 434.

If the plea be to the writ, or any other plea be tried by verdict, or judged on demurrer, return irreplevisable shall be awarded, and no new Replevin shall be granted, nor any Second Deliverance by the *stat. West.* 2, but only on nonsuit. 2 *Inst.* 340: *Dyer* 280. See I. V.

If, on issue joined in Replevin, the plaintiff does not appear on the trial, being called for that purpose, yet return irreplevisable shall not be awarded, as in case of a verdict's being given, but the party may have a Writ of

of Second Deliverance, as well as if it had been a nonsuit before declaration, or appearance. 3 *Leon.* 49. See *ante* VI.

If a man has return irreplevisable, and a beast die in the pound, he may distrain anew; so, if the beast die before judgment. *Hob.* 61.

If return irreplevisable be awarded, the owner of the cattle may offer the arrears; and if the defendant refuses to deliver the distress, the plaintiff may have his action of detinue, because the distress is only in nature of a pledge. 1 *Ld Raym.* 720.

By the statute of *Westm.* 1. 3 *E.* 1. *c.* 17, If the party who distrains, conveys the distress into any house, park, castle, or other place of strength, and refuses to suffer them to be replevied, the Sheriff may take the *posse comitatus*, and, on request and refusal, break open such house, castle, &c. and make deliverance; and this was a necessary law so soon after the irregular time of *Hen.* III. 2 *Inst.* 193: 5 *Co.* 93: *Dalt. Sh* 373.

If the Sheriff return, that the beasts are inclosed in a park among savages, or inclosed in a castle, &c. he shall be amerced, and another Writ of Replevin shall be awarded; for he ought to have taken the *posse com.* for this was a denial. *F. N. B.* 257.

If the Sheriff return, *quod mandavi balliwo libertati*, &c. *qui nullum dedit mihi responsum*, or that the bailiff will not make deliverance of the cattle, these are not good returns; for by statute of *Westm.* 1, the Sheriff, on such return made to him by the bailiff, ought presently to enter into the franchise, and make deliverance of the cattle taken. *F. N B.* 157.

If a man sue a Replevin in the County-Court without writ, and the bailiff return to the Sheriff, that he cannot have view of the cattle to deliver them, the Sheriff, by inquest of office, ought to inquire into the truth thereof; and if it be found by a Jury, that the cattle are eloigned, &c. the Sheriff in the County-Court may award a *withernam* to take the defendant's cattle; and if the Sheriff will not award a *withernam*, then the plaintiff may have a Writ out of Chancery, directed to the Sheriff, rehearsing the whole matter, commanding him to award a *withernam*, &c.; and he may have an *alias*, and after a *pluries*, and an attachment against the Sheriff, if he will not execute the King's command. *F. N. B.* 158.

If the Sheriff return, *quod averia elongata ad locum incognitum*, this is a good return, and the party must pursue his writ of *withernam*; but if the Sheriff return *averia elongata ad locum incognitum infra comitatum meum*, he shall be amerced, for the Law intends that he may have notice in his county. *Bro. Retur. de Br. pl.* 100.

If in Replevin the Sheriff return, *quod averia mortua sunt*, that is a good return. *Bro. Retur. de Br. pl.* 125.

If the Sheriff be shewn a stranger's goods, and he takes them, an action of trespass lies against him, for otherwise he could have no remedy; for being a stranger he cannot have the Writ *de proprietate probanda*, and were he not entitled to this remedy, it would be in the power of the Sheriff to strip a man's house of all his goods; but *Keilway* seems to hold, that the action lies more properly against the person who shews the goods. 2 *Roll. Abr.* 552: *Com.* 596.

The Sheriff comes to make Replevin of beasts impounded in another man's soil; if the place be inclosed, and has a gate open to the inclosure, he cannot break the inclosure, and enter thereby, when he may enter by the open gate; but if the owner hinder him so that he cannot go by the open gate for fear of death, he may break the inclosure, and enter there. 10 *Hen.* 6. 28: 2 *Roll. Abr.* 552.

The Sheriff is to return, that the cattle are eloigned, or that no person came to [illegible] or a delivery; but he cannot return, that [illegible] the cattle, because it is supposed in the Writ [illegible] the ground of it, which the Sheriff cannot falsify. 1 *Ld. Raym.* 613: 1 *Lutw.* 581.

For further information on this subject, see *Vin. Abr.* title *Replevin*.

REPLEVISH, To let one to mainprise on surety. *Stat.* 3 *Ed.* 1. *c.* 11.

REPLICATION, *Replicatio*.] An exception or answer made by a plaintiff to a defendant's plea. And it is also that which the complainant replies to the defendant's answer in Chancery, &c. *West. Symb. par.* 2. See title *Pleading* I. 2: and as to Replications in criminal cases, see *Pleading* I.

The Replication is to contain certainty, and not vary from the declaration, but must pursue and maintain the cause of the plaintiff's action; otherwise it will be a departure in pleading, and going to another matter. *Co. Litt.* 304. Though as a faulty bar may be made good by the Replication; so sometimes a Replication is made good by a rejoinder; but if it wants substance, a rejoinder can never help it. 2 *Lill. Abr.* 462. A Replication being entire, and ill in part, is ill in the whole: but if there be three Replications, and one is superfluous, and the other two sufficient, and the defendant demurs generally, the plaintiff may have judgment on those which are sufficient. 1 *Saund.* 338: 2 *Saund.* 17.

Where the defendant pleads in bar, and the plaintiff replies insufficiently; if the defendant demurs specially on the Replication, and the bar is insufficient, if the action be of such a nature that a title is set forth in the declaration, or count, as in a *formedon*, &c. judgment may be given for the plaintiff on the insufficient bar of the defendant: and where the title doth not appear till set forth in the Replication, and that is insufficient, there judgment shall be had for the defendant for the ill Replication. *Godb.* 138: 1 *Leon.* 75.

A Replication concludes either with *hoc paratus est verificare*, or to the country. In action on a bond to pay all sums expended about certain business, &c. on the defendant's pleading he paid all; the plaintiff replies that he had not, *et hoc paratus*, &c. Upon a demurrer it was held, that the plaintiff ought to have concluded to the country; because there is an affirmative and negative, and if he might be admitted to aver his Replication thus, there would be no end in pleading. *Raym.* 9[illegible].

But where new matter is offered in a Replication, the plaintiff should aver his plea, so as to give the defendant an opportunity to rejoin. 4 *Mod.* 283: *Lutw.* 98.

REPORT, from Lat. *reportare*.] A public relation, or bringing again to memory, of cases judicially adjudged in Courts of Justice, with the reasons as delivered by the Judges. *Co. Litt.* 293. See title *Law Books*.

There are likewise Reports, when the Court of Chancery, or other Court, refer the stating some case, settling some account, &c. to a Master of Chancery, or other referee, his certificate therein is called a Report. This

Report may be excepted to, disproved, or over-ruled; or otherwise it is confirmed and made absolute, by order of the Court. See 3 *Comm.* 453.

A Master in Chancery, having an order of reference, is to issue his summons for the parties to attend him at a certain time and place; when and where they may come with their counsel, clerk, or solicitor, to defend themselves, and maintain, or object against, his Report, or certificate, &c. And Masters are to draw their Reports briefly and as succinctly as may be, preserving the matter clearly for the judgment of the Court; without recital of the several points of the order of reference, or the debates of Counsel before them; unless in cases doubtful, when they may shortly represent the reasons which induce them to what they do.

None shall take any money for Report of an order, or cause, referred to them by any Judges, on pain of 100*l.* &c. so as not to prohibit the clerk from taking 12*d.* for the first, and 2*d.* for every other sheet. *Stat.* 1 *Jac.* 1. *c.* 10.—But by *stat* 13 *Car.* 2. *st.* 1. *c.* 12, Masters in Chancery, may take for every Report, or certificate, made on an order on hearing of a cause, 20*s.* And for any other Report, &c. made on petition or motion, 10*s.* And their clerks shall have 5*s.* for writing every Report. See further, title *Reference.*

A Report by a Master in Chancery, is as a judgment of the Court. 1 *P. Wms.* 653.

By a standing order of the Court of Chancery, made by the Lords Commissioners, in the 4 *W.* & *M.* it was directed, that all Reports should be filed within four days after the making, otherwise no decree or proceedings to be had thereupon; but the Register reporting, that it was sufficient if the Report were filed before any proceedings had thereupon, though not done within four days after making, Ld. C. J. *King*, agreed thereto. And the Court took it to be well enough; though, in this case, the motion to confirm the Report, *nisi causa*, was made the same day that the Report was filed. 2 *P. Wms.* 517.

It is not usual to confirm Reports of Receiver's accounts, *per* Master of the Rolls. 2 *P. Wms.* 661.

REPOSITION OF THE FOREST, *Repositio Forestæ*, i. e. a reputting to.] A Statute, whereby certain Forest-grounds, being made *purlieu.* on view, were, by a second view, put to the Forest again. *Manw. par.* 1.

REPOSITORIUM, *Lat.*] A storehouse or place wherein things are kept; a warehouse. *Cro. Car.* 555.

REPRESENTATION, *Representatio.*] The personating another: There is an heir by Representation, where a father dies in the life of the grandfather, leaving a son, who shall inherit his grandfather's estate, before the father's brother, &c. *Bro. Abr.* 303. Also, executors represent the person of the testator. to receive money and assets. *Co. Litt.* 209. See titles *Heir*; *Executor.*

REPRIEVE, from the Fr. *Repris*.] The taking back or suspending a prisoner from the execution and proceeding of Law for that time. *Terms de Ley.* See title *Execution of Criminals.*

REPRISAL, *Reprisale*; *Reprisalia.*] The taking one thing in satisfaction for another, derived from the Fr. *Reprise*; and is all one in the Common and Civil Law.

Reprisals are ordinary and extraordinary; ordinary Reprisals are to arrest and take the goods of merchant-strangers within the realm; and the other is for satisfaction out of the realm, and is under the Great Seal, &c. *Lex Mercat.* 120.

If any person be killed, wounded, spoiled, or any ways damaged in a hostile manner, in the territories of any Potentate, to whom letters of request are transmitted, and no satisfaction be made, there is no necessity to resort to the ordinary prosecution, but Letters of Reprisal issue forth; and the Prince against whom the same are issued is obliged to make satisfaction out of the estates of the persons committing the injuries; and in case of a deficiency there, it will then be adjudged a common debt on his country. But where misfortunes happen to persons, or their goods, residing in a foreign country in time of war, Reprisals are not to be granted: In this case they must be contented to sit down under the loss, for they are at their liberty to relinquish the place on the approach of the enemy, when they foresee the country is subject to spoil: and if they continue, they must partake of the common calamity. *Lex Mercat.*

Reprisals may be granted on illegal prosecutions abroad; where wrong judgment is given in matters not doubtful, which might have been redressed, either by the ordinary or extraordinary power of the country or place, and which was apparently denied, &c. See further, title *Letters of Marque*: and as to *Reprisal of Goods*, see title *Recaption.*

REPRISES, Fr. *Resumptions*, taking back.] Is used for deductions and payments out of a manor or lands, as rent-charges, annuities, &c. Therefore when we speak of the clear yearly value of a manor, or estate, or land, we say it is so much *per annum, ultra Reprises*, besides all Reprises.

REPUBLICATION OF WILLS; See title *Will.*

REPUGNANT, *Repugnans*.] What is contrary to any thing said before: Repugnancy in deeds, grants, indictments, verdicts, &c. make them void. 3 *Mod.* 135. See title *Deeds*, &c.

The Common Law abhors Repugnances, and all incongruities; but the former part of a deed, &c. shall stand, where the latter part is repugnant to it. *Jenk. Cent* 251, 256.

Where contrarieties are in several parts of deeds or fines, the first part shall stand; in wills, the last, if the several clauses are not reconcileable. *Jenk.* 96 *pl.* 86.

In contracts, gifts, verdicts, evidences, &c. where direct contrarieties are for the same thing at the same time, all is void. *Jenk* 96. *pl.* 86.

A. made *B.* and *C.* executors, provided that *C.* shall not administer his goods. *B.* and *C.* brought debt on bond, as executors. It was held, that the action was well brought; for the *proviso* is void. *Dy* 3. *b.* a. *pl* 7, &c.

A. gives lands to *B.* in tail, provided *A.* shall take the profits of part for 1000 years; the *proviso is void*; for in common presumption it takes away the benefit and interest of the grantee in that parcel. *Cro. Eliz.* 35.

An award, that each shall give the other a general release within four days after the award; *proviso* that if either disliked the award within 20 days after made, and should pay to the other within the said twenty days 10*s.* that then the arbitrement should be void. the *proviso* is repugnant, and judgment for plaintiff. *Cro. Eliz.* 291. See title *Award.*

A *proviso*, good in the commencement, may by consequence become repugnant, as grant of rent by deed for life,

life, provided that it shall not charge his person; the *proviso* is good, but if the rent be arrear, and the grantee die, his executors shall charge the person of the grantor in debt; for otherwise they be remediless; and so it is now repugnant, by consequence void. 6 *Rep.* 41, *b.* See further, titles *Condition*; *Proviso*.

REPUTATION, [*Reputatio*] Is defined by *Coke* to be *vulgaris opinio ubi non est veritas*. 4 *Rep.* 104. That is not Reputation which this or that man says; but that which generally hath been, and many men have said or thought. 1 *Leon.* 15.

A little time is sufficient for gaining Reputation, which needs not a very ancient pedigree to establish it, for general acceptation will produce a Reputation. *Cro. Jac.* 308. [illegible] been held, that common Reputation cannot be intended of an opinion which is conceived of four or five years standing; but of long time. [illegible] must be averred to induce a Reputation. [illegible] *Abr.* 64.

[illegible] parcel of a manor, though not really [illegible] 1 *Vent.* 51: 2 *Mod.* 6[illegible]: 3 *Nels. abr.* 137. And there [illegible]

REPUTATION OF FAME, Is under the protection of the Law, as all persons have an interest in their good name; and scandal and defamation are injurious to it, though defamatory words are not actionable, otherwise than as they are a damage to the estate of the person injured. *Wood's Inst.* 37.

The security of Reputation, or good name, from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right. 1 *Comm.* 134. See title *Liberty*.

REQUEST, of things to be done: Where one is to do a collateral thing, agreed on making a contract, there ought to be a Request to do it. 2 *Lil. Abr.* 464. If a duty is due, it is payable without Request; on promise to pay a duty precedent on Request, there needs no actual Request; but on a promise for a penalty, or collateral sum, there should be an actual Request before the action is brought. *Cro. Eliz.* 74: 1 *Saund.* 33: 1 *Lev.* 289.

If a debt is before a promise, a Request is not necessary, for then a Request is not any cause of the action; though, upon a promise generally to pay on Request, the action arises on Request, and not before. *Cro. Jac.* 2[illegible]1: 1 *Lev.* 48. See [illegible].

Action of [illegible] money due on a bond, may be brought without alleging a special Request. *Cro. Eliz.* 229. 523.

A man promises to redeliver, on Request, such goods as were delivered to him; if an action of detinue is brought, the plaintiff need not allege a special Request, because the action is for the thing itself: but if an action on the case is had for these goods, then the Request must be specially alleged; as it is not brought for the thing itself, but for damages. *Sid.* 66: 3 *Salk.* 309.

If a promise is made to pay money to the plaintiff, on Request, no special Request is required: But where there are mutual promises between two persons to pay each other money on Request, if they do not perform such an award, the Request is to be specially alleged. And if there is a promise to pay money to a man on Request, and he dies before any Request made, it shall be paid to his executors; but not till Request made. 3 *Salk.* 09: 3 *Bulst.* 259.

Where a person promises to pay a precedent duty, the general allegation is sufficient, because there was a duty without a promise: As for instance; if one buys or borrows a horse, and promises to pay so much on Request: But where the promise is collateral, as to pay the debt of a stranger on Request, &c. the Request is part of the agreement, and therefore, there being no duty before the promise made, and for that reason the Request must be specially alleged, for bringing the action will not be a sufficient Request. *Latch.* 93: 3 *Leon.* 200: 3 *Salk.* 308.

Where the thing is a duty before any Request made, a Request is only alleged to aggravate damages, and such Request is not traversable; but if the Request makes the duty, as in *assumpsit* to do such a thing on Request, there the day, &c. of the Request ought to be alleged, because it is traversable. *Palm.* 389.

[illegible] a Request is to be specially made, the day and year when made should be specially alleged. 1 *Lutw.* 231: 2 *Lill. Abr.* 406: *Cro. Car.* 280. But where a person is not restrained to make the Request by a time limited, if made at any time during his life, it has been held to be good. *Cro. Eliz.* 136. And a Request at any other time than named may be given in evidence. *Sid.* [illegible]68.

If a debt or duty does not accrue on a promise, until Request made, the statute of Limitations runs from the time of the Request, only, and not from the time of the precedent promise. *Cro. Car.* 98. See title *Limitation of Actions*.

At a trial, the defendant would have the plaintiff to prove the Request; but it was ruled that he need not; for, not being traversed in the plea, it is admitted. 1 *Lev.* 166.

Unreasonable Requests are not regarded in Law; and there is no difference where a thing is to be done on Request, and reasonable Request. *Dyer* 218: *Cro. Car.* 1[illegible]6: 3 *Nels. Abr.* 140, 142. See titles *Action*; *Declaration*; *Pleading*; *Rent*, &c.

REQUESTS, Court of; See *Court of Requests*.

RESSE COUNTY; See *Rese County*.

RESCEIT, (or RECEIT,) *Receptio*] An admission or receiving of a third person to plead his right in a cause formerly commenced between two other persons; as, where an action is brought against tenant for life or years, or any other particular tenant, and he makes default, in such case he in the reversion may move that he may be received to defend his right, and to plead with demandant.

Resceit is likewise applied to the admittance of a plea, where the controversy is between the same two persons. *Broke* 205: *Co. Litt.* 192: 3 *Nels. Abr.* 1[illegible]6.

He in reversion may come into Court, and pray to be received in a suit against his particular tenant; and after such Resceit the business shall be hastened, as much as may be by Law, without any delay of either side. *Stat.* 13 *R.* 2. *c.* 17. But Resceit is admitted only for those who have estates depending on particular estates for life, tenants by the curtesy, or after possibility, &c. and not for him in remainder after an estate-tail, which is perdurable. 1 *And.* 135.

Husband and wife were tenants for life, remainder to another in fee; a *formedon* was brought against the husband, who made default after default; and thereupon the wife prayed that she might be received to defend her right; but it was denied by the Court, because, if defendant should recover against her husband, it would not bar her right if she survived him, therefore it would be to no purpose. Then he in remainder prayed to be received, which at first the Court doubted, by reason if the husband should recover, he might falsify such Recovery; and because his estate did not depend on the estate of the husband alone, but on the estate of the husband and wife; but at last he was received. *1 Leon* 86.

The statute of *Gloucester*, 6 *E*. 1. c. 11, enacts, that a termor may be received to falsify, if he hath a deed, and comes before judgment; this is where he in reversion causeth himself to be impleaded by collusion, to make the termor lose his term, &c. And by *stat*. 20 *E*. 1. *st*. 3, if any stranger come in by a collateral title, before he is received, he shall find surety to satisfy the demandant the value of the lands, if he recovers from that time till final judgment; and demandant recovering, he shall be grievously amerced, &c.

RESCEIT OF HOMAGE, *Receptio Homagii*] The Lord's receiving Homage of his tenant, at his admission to the land. *Kitch*. 148. See title *Homage*.

RESCOUS, or RESCUE.

RESCUSSUS, from the Fr. *Rescouse*, i. e. *Liberatio*] A resistance against lawful authority.

I. *Of the different Kinds of Rescues*, &c.

II. *Of the Offence of making Rescue of a Prisoner; and how the Offenders are to be proceeded against, and punished.* And see title *Escape* (B) IV. 3.

III. *Of the Form of the Proceedings on a Rescue.*

IV. *In what Cases the Sheriff may return a Rescue; of the Form of a Return, and for what Defects it may be quashed.*

I. IN the case of a distress, the goods being, from the first taking, considered as in the custody of the Law, and not merely in that of the distrainer, the taking them back by force is looked upon as an atrocious injury, and denominated a *Rescous*; for which the distrainer has a remedy in damages, either by Writ of Rescous, in case they were going to the pound; or by Writ *de parco fracto*, or Pound-breach, in case they were actually impounded *F. N. B* 100, 101. He may also, at his option, bring an action on the case for this injury, and shall therein, if the distress were taken for rent, recover treble damages. *Stat*. 2 *W*. & *M*. *st*. 1, c 5: see *post*. II.; and this Dictionary, titles *Distress*; *Rent*; *Replevin*; *Pound-breach*.

The term *Rescous* is likewise applied to the forcible delivery of a defendant, when arrested, from the officer who is carrying him to prison. In which circumstances, the plaintiff has a similar remedy by action on the case, or of Rescous; or if the Sheriff makes a return of such Rescous to the Court out of which the process issued, the Rescuer will be punished by attachment. 6 *Mod*. 211: *Cro*. *Jac*. 419: *Salk*. 586. See 3 *Comm*. c. 9: and *post*. II. III. IV.

If a bailiff, or other officer, on a writ, arrest a man, and others by violence take him away, or procure his escape; this is a Rescous in fact. So, if one distrain beasts damage-feasant, in his ground, as he drives them in the highway towards the pound, they enter into the owner's house, and he withholds them there, and will not deliver them on demand, this detainer is a Rescous in Law. *Co. Litt. lib* 2. *c*. 12, 161. *Cassanæus*, in his book *De Consuetud. Burg*. *f*. 294, hath the same words coupled with *resistentia*.

In other terms, Rescue is the taking away and setting at liberty, against Law, any distress taken for rent, or services, or damage-feasant; but the more general notion of Rescous is, the forcible freeing another from an arrest, or some legal commitment; which, being an high offence, subjects the offender not only to an action at the suit of the party injured, but likewise to fine and imprisonment at the suit of the King. *Co. Litt*. 160: *F. N. B*. 226. See *post*. II.

But there can be no Rescous but where the party has had the actual possession of the cattle, or other things whereof the Rescous is supposed to be made; for if a man come to arrest another, or to distrain, and is disturbed, regularly his remedy is by action on the case. *Co. Litt*. 161, *a*: *Litt. Rep*. 296: *Hetl*. 145.

If on *f. fa*. the Sheriff seizes goods, which are taken away by a stranger, this is not properly a Rescue; for by seizure of the goods, by virtue of the *fieri facias*, the Sheriff has a property in them, and may maintain trespass, or trover, for them: also the party injured may have an action on the case against the wrong-doer. *Hetl*. 145: *Litt. Rep*. 296.

If the lord distrain for rent when none is due, the tenant may lawfully make Rescous; so may a stranger, if his beasts be distrained when no rent is due. So, if the tenant tender the rent when the lord comes to distrain, and yet he does distrain, or if he distrain any thing not distrainable, as beasts of the plough, when other sufficient distress may be taken, the tenant may make Rescous; so, if the lord distrain in the highway, or out of his fee. *Co Litt*. 47; 160, *b*; 161, *a*.

But though there must be reason for the distress, and that otherwise the Rescue cannot be unlawful; yet it hath been held, in a *parco fracto*, that a defendant cannot justify breaking the pound and taking out the cattle, though the distress was without cause, because they are now in the actual custody of the Law. *Salk*. 247.

There is a difference between a man's being arrested by a warrant on record, and by a general authority in Law; for if a *capias* be awarded to the Sheriff to arrest a man for felony, though he be innocent, he cannot make Rescue; but if the Sheriff will, by the general authority committed to him by Law, arrest any man for felony, if he be innocent, he may rescue himself. *Co. Litt*. 161. See 5 *Co*. 68: 6 *Co*. 54: *Cro. Jac*. 486.

II. RESCUE is classed, by *Blackstone*, amongst offences against public justice; and is defined to be the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing, as it would have been in a gaoler to have voluntarily permitted an escape. A Rescue, therefore, of one apprehended for felony, is felony;

 for

for treason, treason; and for a misdemeanor, a misdemeanor also. But here, likewise, as upon voluntary escapes, the principal must be first attainted, or receive judgment, before the Rescuer can be punished; and for the same reason, because perhaps, in fact, it may turn out that there has been no offence committed. 4 *Comm. c.* 10. *p.* 131: 1 *Hal. P. C.* 607: *Fost.* 344. And see this Dictionary, title *Escape*.

By *stat.* 16 *Geo.* 2. *c.* 31, to convey to any prisoner, in custody for treason or felony, any arms, instruments of escape, or disguise, without the privity of the gaoler, though no escape be attempted; or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony; and subjects the offender to transportation for seven years: or if the prisoner be in custody for petty larceny, or other inferior offence, or charged with a debt of 100*l.*, it is then a misdemeanor, punishable with fine and imprisonment. See title *Escape* (B) IV. 3.

By several special statutes, to rescue, or attempt to rescue, any person committed for the offences enumerated in those acts, is felony without benefit of clergy. See *stats.* 6 *Geo.* 1. *c.* 23. § 5: 24 *Geo.* 3. *c.* 56, as to *Transportation*; and this Dictionary under that title, and title *Escape*: *Stats.* 9 *Geo.* 1. *c.* 22: 27 *Geo.* 2. *c.* 15; as to offences against the *Black Act*; *stat.* 8 *Geo.* 2. *c.* 20, as to destroying turnpikes; and this Dictionary, title *Highways* VI. (B) 10; *stat.* 19 *Geo.* 2. *c.* 34, as to *Smuggling*; *stat.* 25 *Geo.* 2. *c.* 37, as to *Murder*.

Under the last mentioned statute, to rescue, or attempt to rescue, the body of a felon executed for murder, is single felony, punishable by transportation for seven years; and a like punishment is inflicted by *stats.* 11 *Geo.* 2. *c.* 26: 24 *Geo.* 2. *c.* 40. § 28; against persons assembling, to the number of *five*, or more, to rescue any unlawful retailers of spirituous liquors, or to assault the informers against them.

Even if any person, charged with any of the offences against the *Black Act stat.* 9 *Geo.* 1. *c.* 22; and being required by order of the Privy Council to surrender himself, neglects to so do for forty days, both he and all that knowingly conceal aid, abet, or succour him, are declared felons without benefit of clergy.

It seems agreed, that the rescuing a person imprisoned for felony, is also felony by the Common Law. 1 *Hal. P. C.* 606.

Also it is agreed, that a stranger who rescues a person committed for, and guilty of, high treason, knowing him to be so, is in all cases guilty of high treason. *Staundf. P. C.* 11: 1 *Jon.* 455. Whether he knew that the prisoners were so committed or not *Cro. Car.* 583.

To make a Rescue felony, it is necessary that the felon be in custody, or under arrest for felony; therefore, if *A.* hinder an arrest, whereby the felon escapes, the township shall be amerced for the escape, and *A.* shall be fined for the hindrance of his taking; but it is not felony in *A.* because the felon was not taken. 1 *Hal. P. C.* 606: 3 *Ed.* 3. *Coron.* 333: *Staundf.* 31.

So, to make a Rescue felony, the party rescued must be under custody for felony, or suspicion of felony; and it is all one whether he be in custody for that account by a private person, or by an officer, or warrant of a Justice; for where the arrest of a felon is lawful, the Rescue of him is felony; but it seems necessary that he should have knowledge that the person is under arrest for felony, if he be in the custody of a private person. 1 *Hal. P. C.* 606.

But if he be in custody of an officer, there, at his peril, he is to take notice of it; so if there be felons in a prison, and *A.* not knowing it, breaks the prison, and lets out the prisoners, though he knew not that there were felons there, it is felony. 1 *Hal. P. C.* 606. *Cro. Car.* 583.

A person committed for high treason, who breaks the prison, and escapes, is guilty of felony; unless he lets others also escape, whom he knows to be committed for high treason; in which case he is guilty of high treason, not in respect of his own breaking of prison, but of the Rescous of the other. 2 *Hawk. P. C. c.* 21. § 7.

If the person rescued were indicted or attainted of several felonies, yet the escape or Rescue of such a person makes but one felony. 1 *Hal. P. C.* 599

Wherever the imprisonment is so far groundless or irregular, or the breaking of a prison is occasioned by such a necessity, *i. e.* that the party himself, breaking prison, is either by the Common Law, or by the Statute *de frangentibus prisonam*, saved from the penalty of a capital offender, a stranger who rescues him from such imprisonment is, in like manner, also excused; *& sic è converso*. 2 *Hawk. P. C. c.* 21. § 6.

The return of a Rescue of a felon, by the Sheriff against *A.*, is not sufficient to put him to answer for it as a felony, without indictment or presentment, by the statute 25 *E.* 3. *st.* 5. *c.* 4: 1 *Hal. P. C.* 606.

As in case of an escape, so in case of a Rescue, if the party rescued be imprisoned for felony, and rescued before indictment, the indictment must surmise a felony done, as well as an imprisonment for felony, or suspicion thereof; but if the party be indicted, and taken by a *capias*, and rescued, then there needs only a recital that he was indicted *prout*, and taken and rescued. 1 *Hal. P. C.* 607.

Though the Rescuer may be indicted, before the principal is convicted and attainted, yet he shall not be *arraigned or tried* before the principal be attainted; but if the person rescued were imprisoned for high treason, the Rescuer may immediately be *arraigned*, for in high treason all are principals: *Sed quære.*—But it seems that he may be immediately proceeded against for a misprision only, if the King please. 2 *Hawk. P. C. c.* 21. § 8.

The Rescuer of a prisoner for felony, though not within clergy, yet shall have his clergy. 1 *Hal. P. C.* 607; unless where it is otherwise declared by statute.

As the offence of rescuing persons in cases of high treason and felony is usually punished by indictment, so the offence of rescuing a person arrested on mesne process, or in execution after judgment, subjects the offender to a Writ of Rescous, or a general action of trespass *vi & armis*, or an action on the case, in all which damages are recoverable. Also it is the frequent practice of the Courts to grant an attachment against such wrong-doers, it being the highest violence and contempt that can be offered to the process of the Court. *Co Litt.* 161: *Co. Ent.* 614: *Rast. Ent.* 577.

He who rescues a prisoner from any of the Courts of *Westminster Hall*, without striking a blow, shall forfeit his

goods

goods and profits of his lands, and suffer imprisonment during life; but not lose his hand, because he did not strike. 22 *Ed.* 3. 13: 3 *Inst.* 141: 1 *Hawk. P. C. c.* 21. § 5.

It is clearly agreed, that for a Rescous on mesne process, the party injured may have either an action of trespass *vi et armis*, or an action on the case, in which he shall recover his debt and damages against the wrong-doer; and the rather, because on mesne process he can have no remedy against the Sheriff. *Cro. Jac.* 486: *Hob.* 180. See *post.* IV.

Also it hath been adjudged, that for Rescous of a person in execution on a *ca. sa.* or *ca. utlag.* an action will lie against the Rescuer, though the party injured hath his remedy against the Sheriff, and the Sheriff hath his remedy against the wrong doer; for perhaps the Sheriff may be dead or insolvent; but herein it hath been held, that if he bring his action against the party who made the Rescue, he may plead it in bar to an action brought by the Sheriff; so, if against the Sheriff, or his bailiff, they may plead that he had satisfaction from the party, so that if he recovers against one, the other is discharged. *Hetl.* 95: *Cro. Car.* 109: *Hut.* 38: *Hob.* 180.

By *stat.* 2 *W.* & *M. st.* 1. *c.* 5. § 5, on Pound-breach, or Rescous of goods distrained for rent, the person grieved shall, in a special action on the case, recover treble damages and costs against the offenders, or against the owner of the goods, if they come to his use.

In an action on the case for a Rescous, on this statute, it hath been held, that the plaintiff shall recover treble costs as well as treble damages, for the damages are not given by the statute, but increased; an action on the case lying for a Rescous at Common Law. 1 *Salk.* 205.

An attachment will be granted not only against a common person, but even against a Peer of the Realm, for rescuing a person arrested by due course of Law: so that if the Sheriff in any case return to the Court, that a person arrested, or goods seized, or possession of lands delivered by him, by virtue of the King's writ, were rescued or violently taken from him, &c. they will award an attachment against the Rescuers. *Dyer* 212: 2 *Jon.* 39: *Salk.* 322.

But it seems to be the practice, not to grant an attachment in any case for a Rescous, unless the officer will return it; for it hath been found by experience, that officers will take on them to swear a Rescous where they will not venture to return one. 2 *Hawk. P. C. c.* 22. § 34.

A distinction was taken where an attachment is prayed for a Rescous in the first instance, and where a rule to shew cause is only asked; in this, affidavits of the fact are sufficient; in the other case, the Sheriff's return is requisite. *Trin.* 5 *Geo.* 2. in *B. R. Young* v. *Payne.*

Where, on the return of a Rescue, an attachment is granted, and the party examined on interrogatories, upon answering them, he shall be discharged; but if the Rescous is returned to the Filazer, and process of outlawry issues, and the Rescuer is brought into Court, he shall not be discharged on affidavits. *Salk.* 586.

III. An indictment of a Rescous ought to set forth the special circumstances of the fact, with such certainty, as to enable defendant to make a proper defence. *Dyer* 164. No defect can be aided by the verdict. 1 *Rol. Abr.* 781.

Therefore, if an indictment lay the offence on an uncertain or impossible day, as where it lays it on a future day, or lays one and the same offence at different days, or lays it on such a day which makes the indictment repugnant to itself, it is void. *Moor* 555: *Rast. Ent.* 263.

It has been adjudged, on exceptions taken to an indictment for a Rescous, that it was not necessary to allege the place where the Rescue was made, and that it should be intended that where the arrest was, there also was the Rescue. *Cro. Jac.* 345: 2 *Inst.* 208.

An exception was taken to an indictment of Rescous, that it wanted the words *vi & armis*, or *manu forti*; but over-ruled, it being held by the Court, that the word *rescussit* implies it to be done by force. *Cro. Jac.* 345. The same exception taken in *Cro. Jac.* 473, over-ruled, and there held, that though it were error at Common Law, yet it is made good by the *stat.* 37 *Hen.* 8. *c.* 8.

It is said, that an indictment of Rescous is not within the Statute of Additions, and that naming the person indicted of such a parish, without giving him any title, is sufficient. 2 *Inst.* 665: 2 *Show.* 84.

Note; on an indictment of Rescous, if it were on an arrest upon mesne process, and the party has appeared, the Court will be easily induced to quash it; so, if it be on process out of an inferior Court, though the party has not appeared, for no aid is given to inferior jurisdictions.

In an action for a Rescue, the plaintiff must allege in his declaration all the material circumstances; as that such a writ issued, that he was arrested, and in custody, and that he was rescued, &c. *Godb.* 124: 1 *Lutw.* 130.

In an action on the case for a Rescous on mesne process, the evidence was, the bailiff stood at the street door, and sent his follower up three pair of stairs, in disguise, with the warrant, who laid hands on the party, and told him that he arrested him; but he, with the help of some women, got from the follower, and ran down stairs, and the defendant, hearing a noise, ran up, and put the party into a room, locked the door, and would not suffer the bailiff to enter. *Holt* doubted whether this was a lawful arrest, being by the bailiff's servant, and not in his presence; but said, that the plaintiff must prove his cause of action against the party; that he must prove the writ and warrant by producing sworn copies of them; he must prove the manner of the arrest, that it may appear to the Court to be legal; and, in point of damage, he must prove the loss of his debt, *viz.* that the party became insolvent, and could not be retaken. 6 *Mod.* 211.

Form of the Writ of Rescous.

GEORGE *the Third*, &c. *To the Sheriff of* M. *greeting: If* A. B. *shall make you secure*, &c. *then put* C. D. &c. *to shew wherefore, whereas the said* A. B. *at*, &c. *certain beasts of the said* C. D. *had taken, and distrained for rent*, &c. *And those, there, according to the Law and custom of our kingdom of* England, *would have impounded, the said* C. D. *the beasts aforesaid, with force and arms*, rescued, *and other enormities there did, to the contempt of us, and grievous damage of the said* A. B. *and against our peace*, &c.——OR THUS:

PUT E. F. *and* G. H. *to answer*, &c. *wherefore, whereas the said* A. B. *according to the duty of his office*, C. D. *whom by our Sheriff of the county aforesaid, by writ to him directed, we commanded to be taken, at* L. *by virtue of*

our said Writ had taken, and him to our prison of, &c. there to abide, would have conveyed, the said E. F. *and* G. H. *him the said* C. D. *at* L. *aforesaid, with force of arms* rescued, *and other enormities*, &c.

IV. The distinction laid down in a variety of books and cases is, that on a Rescue on mesne process the Sheriff may return the Rescue, and is subject to no action; for that on a mesne process he was not obliged to raise his *posse comitatus*, nor would it be convenient so to do on the execution of every mesne process. *Cro. Eliz.* 868: 1 *March* 1: 1 *Jon.* 201: 3 *Bulst.* 198: 1 *Rol. Rep.* 389: *Noy* 40: *Moor* 852: 2 *Lev.* 144: 6 *Mod.* 141: *Lutw.* 130, 131. But the Sheriff may, if he pleases, take his *posse* to arrest one on mesne process. *Noy* 40.

But if the Sheriff takes a man on an execution, as on a *ca. sa.* and he is rescued from him before he can bring him to prison, though he returns the Rescue, yet this shall not excuse him; for when judgment is passed, and he and his bail do not surrender him, nor pay the condemnation-money, and then a *capias* issues, to which there can be no bail, there it is presumed that he will not be forthcoming, because neither he nor his bail have satisfied the judgment; therefore the Sheriff ought to take the *posse comitatûs*; consequently it cannot be a good return, that he took the body, but that it was rescued; and the party may have an action of escape against the Sheriff on this return; and this is provided by the *stat. West.* 2. 13 *E.* 1. *st.* 1. *c.* 39, which was made to prevent Sheriffs from returning Rescues to the King's writs. *Cro. Jac.* 419: 1 *Rol. Rep.* 388, 440: 3 *Bulst.* 198: *Moor* 852: Or on a *capias utlagatum* after judgment. *Cro. Jac.* 419: 1 *Rol. Rep.* 389.

In an action on the case against the Sheriff for an escape on mesne process, the defendant pleaded a Rescue, which on demurrer was held a good plea, though he did not shew that the Rescue was returned. 3 *Lev.* 46.

But if one taken on mesne process be once in prison, the Sheriff cannot return a Rescous, for the Law presumes that he hath a power to keep him there. 1 *Rol. Rep.* 441: 3 *Bulst.* 198: *Cro. Jac.* 419. Unless the prison is broken by the King's enemies, which shall excuse the Sheriff. 4 *Co.* 84: 1 *Vent.* 239. But not if broken by rebels and traitors, for the Sheriff or gaoler hath his remedy over against them. 4 *Co.* 84: *Cro. Eliz.* 815: 2 *Mod.* 28: 1 *Vent.* 239.

If a felon be attainted, and in carrying him to execution he is rescued from the Sheriff, the Sheriff is punishable notwithstanding the Rescue; for there is judgment given, and the Sheriff should have taken sufficient power with him; therefore in that case the township is not finable. 1 *Hal. P. C.* 602: and there said that a Rescue is no excuse in felony.

It hath been adjudged, that the return of a Rescue by a Sheriff must shew the year and day on which it was made, such Return being in lieu of an indictment. 3 *H.* 7. 11. *pl.* 3. *Bro. Return de Brief* 97: *Fitz. Coro.* 45: *Attach.* 1.

But it hath been held, that the Sheriff's return of a Rescue on a *latitat*, without mentioning the day of the caption, was sufficient; all the clerks in Court affirming the precedents to have been so. *Palm.* 552.

The Sheriff's return of a Rescue, without mentioning the place where it was made, was held bad, and the party discharged. *Moor* 422. *pl.* 585.

Where the Sheriff returned *virtute brevis mihi direct' feci warrant'* A. & B. *ballivis meis qui virtute inde ceperunt* the defendant, & *in custodia mea habuerunt quousque* such and such *rescusserunt* him *ex custodia ballivorum meorum*; this return was on motion quashed; for, *per Holt*, when bailiffs have arrested the party, he is in fact in their custody, but in Law he is in custody of the Sheriff; an answer either way is good, *viz.* that he was rescued out of the bailiff's custody, or that he was rescued out of the Sheriff's custody; but to say that he was in the custody of the Sheriff, and yet rescued out of the custody of the bailiff, is repugnant. 2 *Salk* 586.

It seems that anciently, when the Sheriff returned a Rescue, the party was admitted to plead to it as to an indictment; but the course of late has been not to admit any plea to it, but drive the party to his action against the Sheriff, in case the return were false; hence it is now settled that the return of a Rescue is not traversable, but yet it hath been held that submission to the fine doth not conclude the party grieved from bringing his action for the false return, if it were so. *Cro. Eliz.* 781: *Dyer* 212: 2 *Jon.* 29: 1 *Vent.* 224: 2 *Vent.* 175: *Comb.* 295.

If on a *fieri facias* the Sheriff returned that he had seised the goods, but that they were rescued by *B.* and *C.* &c. this is not a good return, but he shall be amerced; the party also, at whose suit the execution issued, may charge him by *scire facias* for the value of the goods. 1 *Vent.* 21: 2 *Saund.* 343: 1 *Show.* 180.

See farther, as to exceptions to returns of Rescue; *Yelv.* 51: 2 *Rol. Rep.* 255: *Stil.* 155: 1 *Sid.* 332: 1 *Lev.* 214: *Lit. Rep.* 2: 1 *Vent.* 2: 2 *Keb.* 436: 2 *Jon.* 197: 6 *Mod.* 220: 5 *Mod.* 218: 2 *Rol. Rep.* 263: 1 *Lev.* 214: *Cro. Jac.* 242: *Raym.* 161: 5 *Mod.* 217: and also, 19 *Vin. Abr.* title *Rescus*: and *Com. Dig.* title *Rescous*.

RESCUSSOR, The party making a Rescue.

RESEISER, *Resseisire.*] The taking lands into the hands of the King, where a general livery or *ouster le main* was formerly misused, contrary to the order of Law. *Staundf. Prærog.* 26.

RESERVATION, *Reservatio.*] A keeping aside, or providing; as, when a man lets or parts with his land, but reserves or provides for himself a rent out of it, for his own livelihood; sometimes it has the force of a saving or exception. *Co. Litt.* 143.

Exception is always of part of the thing granted, and of a thing in being: and a Reservation is of a thing not in being, but is newly created out of the lands or tenements demised; though Exception and Reservation have been used promiscuously. *Co. Litt.* 47. The proper place for a Reservation is next after the limitation of the estate; and Reservation of rent may be every two, three, or more years; as well as yearly, half-yearly, quarterly, &c. *Co. Litt.* 47: 8 *Rep.* 71.

It must be out of an house, or lands; and be made either by the words yielding and paying, &c. or the word covenant; which is of both lessor and lessee, therefore makes a Reservation. *Rel. Rep.* 80.

The Reservation of Rent is good, although it is not reserved by apt and usual words, if the words are equivalent. *Plowd.* 120. But Reservation of a Rent *secundum ratam*, is a void Reservation. 2 *Vent.* 272. See titles *Deed*; *Reddendum*; *Rent*, &c.

RESIANCE, *Resiantia.*] Residence; abode or continuance; whence comes the participle *Resiant*, that is, continually

continually dwelling or abiding in any place. *Old Nat. Br.* 85: *Kitch.* 33.

RESIANT ROLLS, *i. e.* Rolls containing the Resiants in a tithing, *&c.* which are to be called over by the steward on holding Courts-leet. *Comp Court Keep.*

RESIDENCE, *Residentia.*] Is peculiarly used both in the Canon and Common Law, for the continuance of a Parson or Vicar on his benefice. And personal Residence is required of ecclesiastical persons on their cures, on pain of forfeiting 10*l* for every month, if they are absent one month at once, or two months at several times in the year; 5*l.* to the King, and 5*l.* to the informer. *Stat* 21 *H.* 8. *c.* 13. See title *Parson* II.—But chaplains to the King, or other great persons, (Peers, *&c.* mentioned in this statute, and *stat.* 25 *H.* 8. *c.* 16,) may be *non resident*.

The statute 21 *H.* 8 *c.* 13, must be put in suit by a common informer within a year, or by the King within two years *after the end of that year*; so that twelve penalties, or 120*l.* may be recovered at once by a Subject for himself and the King; or the King may recover at once twenty-five penalties, or 250*l.* See *stat.* 31 *Eliz.* *c.* 5, this Dictionary, title *Limitation of Actions* II. 2.: and 1 *Comm.* *c.* 11. *p.* 392, *in n.*—Is there not a contradiction in the above, and may not more than twenty-five penalties be recovered by the King?

Independent of this statute, the Bishop in his Court may compel the Residence of all the Clergy, who have the cure or care of souls within his diocese. 3 *Burn's Eccl. Law* 281: *Gibs.* 887.—This statute is not confined to parsonages and vicarages, but extends to all archdeaconries, deaneries, and dignities in cathedral and collegiate churches. Those who have two benefices or dignities, upon each of which Residence is required, must reside upon one or the other. But the incumbent of an augmented curacy cannot be prosecuted under the statute for the penalties of Non Residence. 4 *Term Rep.* 665.

A Bishop is not punishable under this statute, for Non-Residency on his bishoprick; but if he hold a deanery, parsonage, *&c.* *in commendam*, he must reside thereon, under the penalties of this statute. Bishops are liable to ecclesiastical censures for Non-Residence on their bishoprick; and the King may issue a mandatory writ to enforce their attendance, and compel them to it, by seizing their temporalties; as King *Henry* III. did, by the Bishop of *Hereford*. 2 *Inst.* 625.

One of the great duties incumbent on clergymen, is that they be resident on their livings: And on the first erecting parochial churches, every clergyman was obliged to reside on his benefice, *for reading of prayers, preaching, &c.* by the laws and canons of the church; and by statute, the parson ought to abide on his rectory or the parsonage-house; for the statute is intended not only for serving the cure, and for hospitality, but to maintain the house in repair, and prevent dilapidations: though lawful imprisonment, sickness, *&c.* being things of necessity, are good cause of excuse for absence, and excepted out of the act by construction of Law: And it is the same where a person is employed in some important business for the Church or King; or is entertained in the King's service. 6 *Rep.* 21: *Cro. Eliz.* 180: *Gibs Cod.* 887.

In an information on the statute, it was adjudged, that the parson is to live in the parsonage-house, and not in any other, though in the same parish. Under *stat.* 13 *Eliz.* *cap.* 20, leases made by parsons are declared void, where the parson is absent above eighty days in any one year, *&c.* On this act, the defendant pleaded to an agreement for tithes, that the parson was absent from his parsonage by the space of eighty days in one year; and the Jury found that he dwelt in another town adjoining, and came constantly to his parish church four days in every week, and there read divine service; and it was held, that this was not such an absence as is intended by the statute to avoid any agreement or lease made by the parson. 1 *Bulst.* 112. See title *Lease* II.

A person allowed to have two benefices, may demise or lease one of them (on which he is non-resident) to his curate only; but if the curate leases over, such lease shall last no longer than during the curate's residence, without absence above forty days in any one year. 1 *Leon.* 100. See *Cro. Eliz* 123. Some words in the act 13 *Eliz* *c.* 20, as to leases by parsons not resident, repealed. See *stat.* 14 *Eliz* *c.* 11.

An incumbent presented by the University to a recusant's living, shall lose it by sixty days absence in a year. 1 *W. & M.* *c.* 26. § 6.

See further 19 *Vin. Abr.* title *Residence.*

RESIDUARY LEGATEE, Is he to whom the *residuum* of the estate is left by will. See titles *Executor*; *Legacy*.

RESIGNATION, *Resignatio*] The yielding up a benefice into the hands of the Ordinary, called, by the Canonists, Renunciation; and though it is all one in nature with the word Surrender, yet it is, by use, restrained to yielding up a spiritual living to the Bishop; as Surrender is the giving up of temporal land into the hands of the lord. And a Resignation may now be made into the hands of the King as well as the Diocesan, because he has *supremam authoritatem ecclesiasticam*, as the Pope had in ancient times; though it has been adjudged that a Resignation ought to be made only to the Bishop of the diocese, and not to the King; because the King is not bound to give notice of the Resignation to the patron, as the Ordinary is; nor can the King make a collation himself, without presenting to the Bishop. *Plowd* 498: *Rol. Abr.* 358.

Every parson who resigns a benefice, must make the Resignation to his superior, as an incumbent to the Bishop, a Bishop to the Archbishop, and an Archbishop to the King, as supreme Ordinary. A donative is to be resigned to the patron, not the Ordinary; for in that case the clerk received his living immediately from the patron. 1 *Rep.* 137.

A common benefice is to be resigned to the Ordinary, by whose admission and institution the clerk first came into the church: And the Resignation must be made to that Ordinary who hath power of institution; in whose discretion it is either to accept or refuse the Resignation, as the Law hath declared him the proper person to whom it ought to be made, it hath likewise empowered him to judge thereof. *Cro. Jac.* 64, 198.

The instrument of Resignation is to be directed to the Bishop; and when the Bishop hath accepted of it, the Resignation is good, to make void the church, and not before; unless it be where there is no cure, when it is good without the acceptance of the Bishop. A Resignation may be made before a public notary, but without the Bishop's acceptation it doth not make the church void: the notary can only attest the Resignation, in order to its being presented, *&c.* *Cro. Jac.* 64, 198.

Ref-

Before acceptance of the Resignation by the Bishop, no presentation can be had to the church; but, as soon as the acceptance is made, the patron may present to the benefice resigned: And when the clerk is instituted, the church is full against all men in case of a common person; though, before induction, such incumbent may make the church void again by Resignation. *Count. Pars. Comp.* 106.

It seems to be clear, that the Bishop may refuse to accept a Resignation upon a sufficient cause for his refusal: But whether he can, merely at his will and pleasure, refuse to accept a Resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions undecided. In the case of the *Bishop of London* v. *Ffytche*, the Judges in general declined to answer whether a Bishop was compellable to accept a Resignation: One thought he was compellable by *Mandamus*, if he did not shew sufficient cause; and another observed, that, if he could not be compelled, he might prevent any incumbent from accepting an *Irish* bishoprick; as no one can accept such bishoprick till he has resigned all his benefices in *England*. But Lord *Thurlow* seemed to be of opinion, that he could not be compelled, particularly by *Mandamus*, from which there is no appeal on writ of error. 1 *Comm. c.* 11. *p.* 393, *in n.*

A parsonage is not to be granted over by the incumbent, but it may be resigned; and Resignations are to be absolute, and not conditional; for it is against the nature of a Resignation to be conditional, being a judicial act. 3 *Nels. Abr.* 157.

If any incumbent corruptly resign his benefice, or take any reward for resigning the same, he shall forfeit double the value of the sum, &c. given, and the party giving it, be incapable to hold the Living. *Stat.* 31 *Eliz. c.* 6. § 8. But a man may bind himself by bond to resign, and it is not unlawful, but may be on good and valuable reasons; as, where he is obliged to resign if he take a second benefice, or if he be non-resident by the space of so many months, or to resign on request, if the patron shall present his son or kinsman, when he shall be of age capable to take the living, &c. *Cro. Jac.* 249, 274. Though bonds for Resignation of benefices have no encouragement in Chancery; for on such bonds, generally, the incumbent is relieved, and not obliged to resign. 1 *Rol. Abr.* 443. On debt upon a bond to resign a benefice, the Court would not let the defendant's counsel argue the validity of the bond, these bonds having been so often established even in a Court of Equity. 1 *Strange* 227. But such a bond will not be allowed, where money has been paid on it. *Ibid.* 534. See further, title *Simony*.

A parson's refusal to pay his tenths, it is said, is a Resignation, for which he may be deprived. *Owen* 5. And where Resignation is actually made *de ecclesiâ*, it extends to all the lands and possessions of the church. *Cro. Jac.* 63.

The usual words of a Resignation are *Renuncio*, *Cedo*, *Dimitto*, and *Resigno*; and the word *Resigno* is not a proper term alone. 2 *Rol.* 350.

As to Resignation of temporal offices,—Declaring, at an assembly of the Corporation, that he would hold the place of Alderman no longer, is a good Resignation, especially since the Corporation accepted it, and chose another in his place; but, till such election, he had power to waive his Resignation, but not afterwards. 2 *Salk.* 433.

A Burgess of a Corporation came to the Mayor, and desired the Mayor to remove and dismiss him from the place of Burgess. On return of this, a *Mandamus* was denied to restore him; for having resigned voluntarily, he is estopped to say, that the Mayor had no power to remove him; and the case being sent to *Hale*, Ch. B. he agreed, and said, that a Corporation, as such, have power to take such Resignation. *Sid.* 14.

But giving consent to be removed, does not amount to a Resignation. A man may resign an office by parol. *Holt's Rep.* 450.

Resignation by a Common-Council-man need not be by deed. *Lutw.* 405.

Where an Alderman is a Justice of Peace for life, by force of the patent of the King, who created the Corporation, he cannot resign his office of Justice of Peace; because he cannot resign it but to a superior; *per Coke*, Ch. J.: *Rol. Rep.* 135. *pl.* 19.

So, if a man can have no title to the profits of an office, without the admission or confirmation of a superior, there the Resignation of that office must be to him. 3 *Nels. Abr.* 158. See titles *Corporation*; *Mandamus*; *Quo Warranto*.

RESORT, *Resortum*; The authority or jurisdiction of a Court. *Spelm.*

Dernier Resort, the last refuge.—The House of Lords is the *Dernier Resort* in cases of Appeal.

RESPECTU COMPUTI VICECOMITIS HABENDO, A Writ for respiting a Sheriff's account, directed to the Treasurer and Barons of the *Exchequer*. *Reg. Orig.* 139. See title *Sheriff*.

RESPITE, *Respectus*.] A delay, forbearance, or continuation of time. *Glanvil, lib.* 12. *c.* 9. See this Dict. title *Execution of Criminals*.

RESPITE OF HOMAGE, *Respectus Homagii*.] The forbearance or delay of Homage, which ought to be performed by tenants holding by Homage, &c. It was most frequently in use for such as held by *knights-service* and *in capite*, who formerly paid into the *Exchequer*, every fifth term, some small sum of money to be *respited* their Homage: But this charge being incident to, and arising from *knights-service*, it is taken away by *stat.* 12 *Car.* 2. *c.* 24. See titles *Tenures*; *Homage*.

RESPITE OF JURY; See titles *Jury*; *Nisi Prius*; *Trial*.

RESPONDEAS, or RESPONDEAT OUSTER, *To answer over*, in an action, to the merits of the cause, &c. If a demurrer is joined on a plea to the jurisdiction, person, or writ, &c. and it be adjudged against the defendant, judgment is given that he shall answer over. See titles *Judgment*; *Demurrer*.

RESPONDEAT SUPERIOR. If Sheriffs of *London* are insufficient, the Mayor and Commonalty must answer for them: And *pur insufficience del bailiff d'un liberty, respondeat dominus libertatis*. 4 *Inst.* 114: *Stat.* 44 *Edw.* 3. *cap.* 13.

If a Coroner of a county is insufficient, the county as his *Superior* shall answer for him. *Wood's Inst.* 83.

A Gaoler constitutes another under him, and he permits an escape, if he be not sufficient, *Respondeat Superior*; and superior officers must answer for their deputies in civil actions, if they are insufficient to answer damages. *Doct. & Stud. c.* 24. See titles *Deputy*; *Officer*.

RESPONDENTIA; See *Bottomry*; *Insurance* IV.

RESPONSALIS, *Qui responsum defert*.] He who appears and answers for another in Court at a day assigned. *Glan. lib.* 12. *c.* 1. *Fleta* makes a difference between

respansalem, *atturnatum*, and *essoniatorem*; he says, that *responsalis* was for the tenant, not only to excuse his absence, but to signify what trial he meant to undergo, the combat or the country. *Fleta, lib* 6. *c* 21.

This word is made use of in the Canon Law for a Proctor.

RESTITUTION, *Restitutio.*] The restoring any thing unjustly taken from another. It signifies also the putting him in possession of lands or tenements, who had been unlawfully disseised of them. *Cromp. Just* 144. And Restitution is a Writ, which lies where judgment is reversed, to restore and make good to the defendant what he hath lost: The Court which reverses the judgment, gives, on reversal, a judgment for Restitution; whereon a *scire facias quare restitutionem habere non debet*, reciting the reversal of the judgment, and the writ of execution, &c. must issue forth. But the Law doth often restore the possession to one without a Writ of Restitution, *i. e.* by writ of *habere facias possessionem*, &c. in the common proceeding of justice on a trial at Law. 2 *Lil. Abr.* 472, 3. See title *Execution*.

There is a Restitution of the possession of lands in cases of forcible entry, a Restitution of lands to an heir, on his ancestor's being attainted of treason or felony; and Restitution of stolen goods, &c.

A Writ of Restitution is not properly to be granted but where the party cannot be restored by the ordinary course of Law; and the nature of it is, to restore the party to the possession of a freehold, or other matter of profit, from which he is illegally removed; and it extends to Restitution on *Mandamus* to any public office. 2 *Lill.* 472, 473.

Where a judgment for land is reversed in *B R* by Writ of Error, the Court may grant a Writ of Restitution to the Sheriff to put the party in possession of the lands recovered from him by the erroneous judgment; though there ought to be no Restitution granted of the possession of lands, where it cannot be grounded on some matter of record appearing to the Court. *Hil.* 22 *Car.* And persons who are to restore, are to be parties to the record; or they must be made so by special *scire facias*. *Cro. Car.* 328: 2 *Salk.* 587.

If a lease is taken in execution on a *Fi. fa.* and sold by the Sheriff, and afterwards the judgment is reversed; the Restitution must be of the money for which it was sold, not the term. *Cro. Jac.* 246: *Moor* 788. But where a Sheriff extended goods and lands on an *elegit*, and returned that he took a lease for years, which he sold and delivered to the plaintiff as *Bona & Catalla* of the defendant for the debt, and afterwards the judgment was reversed for error; it was adjudged, that the party shall be restored to the lease, because the *elegit* gave the Sheriff no authority to sell the term, therefore a Writ of Restitution was awarded. *Yelv.* 179. And there has been, in this case, a distinction made between compulsatory and voluntary acts done in execution of justice; where the Sheriff is commanded by the writ to sell the goods, and where he is not, when the goods are to be restored, &c. 8 *Rep.* 96.

If a plaintiff hath execution, and the money is levied and paid, and afterwards the judgment is reversed, there the party shall have Restitution without a *scire facias*, for it appears on the record what the party hath lost and paid; but if the money was only levied, and not paid, then there must be a *scire facias* suggesting the sum levied, &c. And where the judgment is set aside after execution for an irregularity, there needs no *scire facias* for Restitution; but an attachment of contempt, if, on the rule for Restitution, the money is not restored 2 *Salk.* 588.

In a *scire facias quare restitutionem* &c. the defendant pleaded payment of the money mentioned in the *scire facias*, and it was held to be no plea. *Cro. Car* 328. But now payment is a good plea to a *scire facias* by the *stat.* 4 & 5 *Ann c.* 16 § 12 2 *Lill Abr* 479

Upon a Writ of *Vi laica removenda* a parson was put out of possession, and on a suggestion thereof, and affidavit made, Restitution was ordered *Cro. Eliz.* 465.

The Justice of Peace, before whom an indictment for forcible entry is found, must give the party Restitution of his lands, &c. who was put out of possession by force *Stat* 8 *H* 6 *c* 9.—But where one is indicted for a forcible entry, and the party indicted traverses the indictment, there cannot be Restitution before trial and a verdict, and judgment given for the party, though the indictment be erroneous, it being too late to move to quash the indictment after the traverse, which puts the matter on trial 2 *Lill.* 473, 474 See *Forcible Entry* II.

A person being attainted of treason, &c he or his heirs may be restored to his lands, &c by the King's charter of pardon; and the heir, by petition of right, may be restored if the ancestor is executed But Restitution of blood must be by act of Parliament; and Restitutions by Parliament are some of blood only, some of blood, honour, inheritance, &c The King may restore the party, or his heirs, to his lands, and the blood, as to all issue begotten after the attainder 3 *Inst* 240 *Co. Litt.* 8, 391. See titles *Attainder*, *Forfeiture*, &c

On a conviction of larceny, the prosecutor shall have Restitution of his goods, by virtue of *stat* 21 *H* 8. *c.* 11: for, by the Common Law, there was no Restitution of goods upon an indictment, it being considered as at the suit of the King only; and therefore the party was enforced to bring an Appeal of Robbery, in order to have his goods again. 3 *Inst.* 242. But it being considered, that the party prosecuting the offender by indictment deserves, to the full, as much encouragement as he who prosecutes by appeal; this statute was made, which enacts, that if any person be convicted of larceny, by the evidence of the party robbed, he shall have full Restitution of his money, goods, and chattels, or the value of them, out of the offender's goods, if he has any, by a writ to be granted by the Justices And the construction of this act having been in a great measure conformable to the Law of Appeals, it has therefore in practice superseded the use of appeals of larceny. For instance: As formerly upon appeals, so now upon indictments, of larceny, this Writ of Restitution shall reach the goods so stolen, notwithstanding the property of them is endeavoured to be altered by sale in market-overt. 1 *Hal. P. C.* 543. And, though this may seem somewhat hard upon the buyer, yet the rule of Law is, that *spoliatus debet, ante omnia, restitui*; especially when he has used all the diligence in his power to convict the felon. And, since the case is reduced to this hard necessity, that either the owner or the buyer must suffer; the Law prefers the right of the owner, who has done a meritorious act, by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative,

that

that he has been guilty of no unfair transaction. See 2 *Inst.* 714: 3 *Inst.* 242: 5 *Rep.* 109. And it is now usual for the Court, upon the conviction of a felon, to order (without any writ, no instance of the suing out of which has occurred for three hundred years) immediate Restitution of such goods, as are brought into Court, to be made to the several prosecutors. Or, else, secondly, without such Writ of Restitution, the party may peaceably retake his goods, wherever he happens to find them, unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods; and recover a satisfaction in damages. But such action lies not before prosecution; for so felonies would be made up and healed: 1 *Hal. P. C.* 546: And also recaption is unlawful, if it be done with intention to smother or compound the larceny; it then becoming the heinous offence of *Theft-bote*. See 4 *Comm. c.* 27. *p.* 363.

If goods stolen are not waived by flight, or seized for the King, the party robbed may take his goods again without prosecuting the felon; but after they are seized for the King, they may not be restored without appeal or indictment. *Kel.* 48: 2 *Hawk. P. C. c.* 23. § 49.

A servant took gold from his master, and changed it into silver; the master shall have Restitution of the silver by this statute. *Cro. Eliz.* 661. *pl.* 9.

A. stole cattle and sold them at *Coventry*, in an open market, and immediately he was apprehended by the Sheriff of *Coventry*, and they seized the money; and afterwards the thief was arraigned and hanged, at the suit of the owner of the cattle: And, by the Court, the party shall have Restitution of the money, notwithstanding the words of the *stat.* 21 *H.* 8. *c.* 11, the *goods* stolen, &c. *Noy* 128.

A Bank-note of 50*l.* was stolen from *Golightly*, by one *Ferguson*. He was apprehended, and several articles of silver plate, a Bank-note of 20*l.*, and ten guineas in gold, which were found upon him, were produced at the trial, and placed in the custody of *Reynolds*, Clerk of the Arraigns. *Golightly* gave evidence against *Ferguson* at the Old Bailey, and he was convicted of stealing the 50*l.* note. The owner demanded Restitution from *Reynolds* of the goods found upon *Ferguson*; but, as they were not the identical *goods* which *Golightly* had lost, *Reynolds* refused to restore them. But on trover being brought in *B. R.* they were ordered to be restored, they being the produce of the 50*l.* Bank note. *Lofft.* 90.

The owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased them, and sold them again, even with notice of the theft, before conviction. 2 *Term Rep.* 750. But the plaintiff has a right to the Restitution of the goods in *specie*, and perhaps would be entitled to recover damages in trover against any person who is fixed with the goods after conviction, and refuses to deliver them; for then the goods are converted to the prejudice of the owner. *Per Kenyon*, C. J.

If the owner of goods loses them by a fraud, and not by a felony, and afterwards convicts the offender, he is not entitled to Restitution, or to retain them, against a person (as a pawnbroker) who has fairly acquired a new right of property in them. 5 *Term Rep.* 175.

See further, this Dictionary, title *Market*; and the *stat.* 1 *Jac.* 1. *c.* 21, there noticed, by which the sale of goods, wrongfully taken, to a pawnbroker within *London*, or two miles thereof, shall not alter the property. See also *stat.* 36 *Geo.* 3. *c.* 87. § 10; and this Dictionary, title *Pawnbrokers*, as to goods illegally pawned. As to stolen horses, see this Dictionary, title *Horses*; and *stat.* 31 *Eliz. c.* 12, whereby the owner may, within six months, on paying the buyer what he actually paid, recover his horse without prosecution.

RE-RESTITUTION, Takes place when there hath been a Writ of Restitution before granted: And Restitution is generally matter of duty; but Re-restitution is matter of grace. *Raym.* 85.

A Writ of Re-restitution may be granted on motion, if the Court see cause to grant it. And on quashing an indictment of forcible entry, the Court of *B. R.* may grant a Writ of Re-restitution, &c. 2 *Lill. Abr.* 474. See title *Forcible Entry* II.

RESTITUTIONE EXTRACTI AB ECCLESIA, A Writ to restore a man to the Church, which he had recovered for his sanctuary, being suspected of felony. *Reg. Orig.* 69.

RESTITUTIONE TEMPORALIUM, A Writ directed to the Sheriff, *to restore the Temporalties* of a bishoprick to the Bishop elected and confirmed. *F. N. B.* 169: 1 *Rol. Abr.* 880.

RESULTING USE. Whenever the Use limited by a deed expires, or cannot vest, *it returns back to him who raised it*, after such expiration, or during such impossibility, and is styled a Resulting Use. As, if a man makes a feoffment to the Use of his *intended* wife for life, with remainder to the Use of the first-born son in tail: Here, *till he marries, the Use results back to himself*; after marriage, it is executed in the wife for life; and if she dies without issue, the whole results back to him in fee. *Bacon of Uses* 350: 1 *Rep.* 120. See title *Uses*.

RESUMMONS, *Resummonitio.*] A second Summons, or calling a man to answer an action, where the first Summons is defeated by any occasion; and when, by death, &c. of the Judges, they do not come on the day to which they were continued, for trial of causes, such causes may be revived or recontinued by Resummons. There is also a Writ of Resummons, which issues after *parol demurrer*. See titles *Parol Demurrer*; *Re attachment*.

RESUMPTION, *Resumptio.*] Is particularly used for taking again into the King's hands such lands or tenements, &c. as before on false suggestion he had granted by letters patent to any man. *Broke* 298. It is said, that the King cannot grant a prerogative of power so, but that he may resume it; otherwise it is of a grant of an interest. *Skinner's Rep.* 236. *Resumption of Grants* is mentioned in the *stat.* 31 *Hen.* 6. *c.* 7, and other statutes. See title *Grant of the King*.

RETAINER, from the Latin *Retinere.*] Signifies, in a legal sense, a servant, but *not menial or familiar*, that is, not continually dwelling in the house of his master, but only *wearing his livery*, and attending sometimes upon special occasions. This livery was wont to consist of hats, (or hoods,) badges, or other suits of one garment by the year; and was many times given by great men, on design of maintenance and quarrels; and was therefore justly forbidden by several statutes; as by *stat.* 1 *R.* 2.

c. 7, on pain of imprisonment and forfeiture to the King; and again, by *stat.* 16 *R.* 2. *c.* 4: 20 *R.* 2. *c.* 1: 1 *H.* 4. *c.* 7. by which the offender should make ransom at the King's will; and any Knight or Esquire thereby duly attainted should lose his livery, and forfeit his fee for ever, &c. Which statutes were further confirmed and explained by *stat.* 2 *H.* 4. *c.* 21: 7 *H.* 4 *c.* 3: 8 *H.* 6. *c.* 4. Yet this offence was so deeply rooted, that *Edward* the Fourth was necessitated to confirm the former statutes, and further to extend their meaning, as appears by *stat.* 8 *Edw.* 4. *c.* 2. adding a special penalty of five pounds on every man who gave such *livery*, and as much on every one so *retained*, either by writing, oath, or promise, for every month.

These were, by the *feudists*, called *Affidati*, *sic enim dicuntur qui in alicujus fidem & tutelam recepti sunt*. And as our Retainers were thus forbidden, so were those *affidati* in other countries. But most of the above-mentioned statutes were repealed by *stat.* 3 *Car.* 1. *c.* 4. *Cowell.* And the provisions of these obsolete and expired laws, are rendered useless by the alteration of manners. See further, title *Maintenance*.

RETAINER OF DEBTS, By an Executor or Administrator, See title *Executor* V. 6.

RETAINING FEE, *Merces retinens.*] The first fee given to any Serjeant or Counsellor at Law, whereby to make him sure that he shall not be on the contrary part.

RETALIATION; See *Lex Talionis*.

RETENEMENTUM, Is a word used for detaining, withholding, or keeping back. And *sine ullo retenemento* was an usual expression in old deeds and conveyances of lands. *Cowell.*

RETINENTIA, A Retinue, or persons retained to a Prince or Nobleman. *Pat.* 14 *R.* 2.

RETORNO HABENDO; See *Returno habendo*; *Replevin*.

RETRACTUS AQUÆ, The ebb or return of a tide. *Plac.* 30 *Ed.* 1.

RETRAXIT, Is when a plaintiff cometh in person in Court where his action is brought, and saith he will not proceed in it; and this is a bar to that action for ever. It is so called, because it was the emphatical word in the Latin entry. See *Salkeld's Pract.*; and this Dictionary, titles *Nonsuit*; *Nolle Prosequi*.

A *Retraxit* must be always in person; if it is by attorney, it is error. 8 *Rep.* 58: 1 *Salk.* [illegible].

A *Retraxit* is a bar to any action of equal nature, brought for the same cause or duty; but a nonsuit is not. [illegible] See *Will.* 98.

If a plaintiff says, he will not appear, this is not a *Retraxit*, but a nonsuit: But if the plaintiff says he will not [illegible], it is a *Retraxit*. 2 *Danv. Abr.* 471. And *Retraxit* [illegible] on the part of the plaintiff or demandant, [illegible] be after a declaration, for before the [illegible] it is only a nonsuit. 3 *Leon.* 47: 2 *Lil. Abr.* 470.

If a plaintiff enters a *Retraxit* against one joint-trespasser, it is a release to the rest. *Cro. Eliz.* 762. *Sed qu.*? For [illegible] a *Retraxit* [illegible] in an appeal of murder, [illegible] against the rest; because the appellant [illegible] execution against every one of them. [illegible] In a prosecution by three, a *Retraxit* [illegible] but the other two plaintiffs. *Moor* 469: *Nels. Abr.* 165. A *Retraxit* in its operation is mostly similar to a *Nolle prosequi*, entered to the whole cause of action. See that title.

RETTE, *Fr.*] A charge or accusation. *Stat. Westm.* 1. *c.* 2. *Co. Litt.* 173, *b.* and *n.*

RETURN, *Returna*, or *Retorna*, from the *Fr. retour*, i. e. *redditio*, *recursus*.] Hath many applications in Law; but is most commonly used for the Return of writs, which is the certificate of the Sheriff made to the Court, of what he hath done touching the execution of any writ directed to him; and where a writ is executed, or the defendant cannot be found, &c. then this matter is indorsed on the back of the writ by the officer, and delivered into the Court whence the writ issued, at the day of the return thereof, in order to be filed. *Stat. Westm.* 2. 13 *E.* 1. *c.* 39: 2 *Lil. Abr.* 476. See titles *Sheriff*; *Writ*.

The name of the Sheriff must always be to the Return of writs; otherwise it doth not appear how they came into Court: If a writ be returned by a person to whom it is not directed, the Return is not good, it being the same as if there was no Return on it. And after a Return is filed, it cannot be amended; but before, it may. *Cro. Eliz.* 310.

If the Sheriff doth not make a Return of a writ, the Court will amerce him: So, if he makes an insufficient Return; and if he makes a false Return, the party grieved may have an action on the case against him. *Wood's Inst.* 71.

If a Sheriff return a vouchee summoned, where in truth he is dead, and there is no such person: or in a *præcipe quod reddat* that the tenant is dead, &c. there may be an averment against such Returns, by the *stat.* 14 *Ed.* 3. *c.* 18: *Jenk. Cent.* 121, 122.

Some Returns are a kind of declaration of an accusation; as the Return of a rescous, and the like; and these must be certain and perfect, or they will be ill. 11 *Rep.* 40: *Plowd.* 63, 117: *Keilw.* 165.

Writs to do things in franchises, are directed to, and returned by the Sheriff, to whom bailiffs make their Returns: And an action will lie against a Sheriff, who takes the Return of one who is no bailiff, and against him who makes it; and likewise against the bailiff of a franchise, for negligence in execution, &c. 7 *Ed.* 4. 14: 12 *Ed.* 4. 15: *Moor*, *c.* 606.

There is also a Return of Juries by Sheriffs; and Returns of commissions by Commissioners, &c. See the several appropriate titles.

RETURN-DAYS, Certain Days in Term, for the Return of Writs, or Days in Bank. See *Term*.

RETURNO HABENDO, A Writ which lies where cattle are distrained and replevied, and the person who took the distress justifies the taking, and proves it lawful; on which the cattle are to be returned to him.

This writ also lieth when the plaint in replevin is removed by *recordari*, into the King's Bench or Common Pleas, and he whose cattle are distrained makes default, and doth not prosecute his suit. *F. N. B.* 74. See title *Replevin*.

RETURNS OF MEMBERS TO PARLIAMENT; See *Parliament*.

RETURNUM AVERIORUM, A judicial Writ, the same with *Returno habendo*. *Reg. Jud.* [illegible]

RETURNUM IRREPLEGIABILE, A Writ judicial, directed to the Sheriff for [illegible] restitution or return of cattle to the owner when unjustly taken or distrained, and

and so found by verdict; and it is granted after a nonsuit in a second deliverance. *Reg. Judic.* 27. See title *Replevin.*

REVE, or *Gereve*, from the *Saxon* word, *Græfa, Præfectus. Lambard's* explication of *Saxon* words, verb. *Præfectus.*] The bailiff of a franchise or manor, especially in the Western part of *England*: Hence Shire-reve for Sheriff. See *Kitchin* 43.

REVELACH, Rebellion, from *revellare*, to rebel. *Gale. Domesday*, title *Cestrescire.*

REVELAND, *Terra Regis. Hæc terra fuit tempore Edwardi Regis* Tainland, *sed postea conversa est in* Reveland. *Et item dicunt legati Regis, quod ipsa terra & census qui inde exit, furtim aufertur à Rege. Domesd. Herefordsc.*

The land here said to have been *Thaneland, T. E. R.* and after converted into Reveland, seems to have been such land as having reverted to the King after the death of his *Thane*, who had it for life, was not since granted out to any by the King, but rested in charge on the account of the Reve or bailiff of the manor; who (as it seemeth) being in this lordship of *Hereford*, like the Reeve in *Chaucer*, a false brother, concealed the land from the auditor, and kept the profit of it; till the surveyors, who are here called *Legati Regis*, discovered this falsehood, and presented to the King that *furtim aufertur à Rege.*

This passage from Domesday-book is imperfectly quoted by Sir *Edward Coke*, who, from these words, draws a false inference, that land holden by knight-service was called Thainland, and land holden by socage was called Reveland. *Cowell.* See *Spelman* of *Feuds*, *c.* 24: 1 *Inst.* 86, *a.* and *n.*

Dalrymple attempts to establish a distinction between *Bockland*, or *Thaneland*; and *Reveland*, also called *Folkland*: and to shew that the former was feudal, and the latter allodial. *Dalrymp. Feud. prop.* 9. See titles *Tenures*; *Copyhold*; *Bockland*; *Folkland.*

REVELS, Sports of dancing, masking, &c. formerly used in Princes' Courts, the Inns of Court, and noblemen's houses; commonly performed by night; there was an officer to order and supervise them, who was intitled Master of the Revels. *Cowell.*

REVENUE, *Fr.*] Properly the yearly rent which accrues to any man from his lands and possession; and is generally used for the Revenues or profits of the Crown.

Whoever chooses to be informed of the fiscal prerogatives of the King, or such as regard his Revenue; which the *British* Constitution hath vested in the Royal person, in order to support his dignity, and maintain his power, will find them very curiously and learnedly treated of by *Blackstone*, in the 8th chapter of the first volume of his *Commentaries*. And see this Dict. titles *King*; *Taxes.*

REVERSAL, Of judgment; Is the making it void for error; and when, on the return of a writ of error, it appears that the judgment is erroneous, then the Court give judgment, *Quod judicium revocetur, adnulletur & penitus pro nullo habeatur.* 2 *Lill. Abr.* 481.

The eldest Judge of the Court, or, in his absence, the next in seniority, always pronounces the Reversal of an erroneous judgment openly in Court, on the prayer of the party; formerly it was the course to pronounce it in *French*, to this effect, *Pur les errors avandits, & auter errors manifest in le record, soit le judgment reverse*, &c. *Trin.* 23 *Car. B. R.* The Judge now only says, *Judgment affirmed*, or, *Judgment reversed*, as the case happens.

Reversal of a judgment may be pronounced conditionally, *i. e.* That the judgment is reversed if the defendant in the writ of error doth not shew good cause to the contrary at an appointed time; and this is called a *revocetur nisi*; and if no cause be then shewn, it stands reversed without further motion. 2 *Lil.* 482.

By the Statute of Limitations, *stat.* 21 *Jac.* 1. *c.* 16. § 4, where judgment is given for a plaintiff, and reversed by Writ of Error; or if judgment for a plaintiff be arrested, or if a defendant in an action by original be outlawed, and the outlawry reversed, the plaintiff may commence a new action within twelve months after such Reversal, or arrest of judgment, or Reversal of outlawry: though it be beyond the time of limitation directed by the statutes. See title *Limitation of Actions.*

See further, this Dictionary, titles *Attainder*; *Error* VI: *Judgment* II.

REVERSION, *Reversio*, from *Revertor.*] A returning again. 1 *Inst.* 142.

A Reversion hath two significations; the one is an estate left, which continues during a particular estate in being; and the other is the returning of the land after the particular estate is ended: It is said to be *an interest in the land, when the possession shall fall*, and so it is commonly taken; or it is when the estate, which was parted with for a time, ceaseth, and is determined in the persons of the alienees or grantees, &c. and returns to the grantor or donor, or their heirs, from whence derived. *Plowd.* 160: 1 *Inst.* 142.

But the usual definition of a Reversion is, that it is *the residue of an estate left in the grantor after a particular estate granted away*, continuing in him who granted the particular estate; and where the particular estate is derived out of his estate. Also a Reversion takes place after a Remainder, where a person makes a disposition of a less estate, than that whereof he was seised at the time of making thereof. 1 *Inst.* 22, 142: *Wood's Inst.* 151.

The difference between a Reversion and a Remainder is, that a Remainder is general, and may be to any man, except to him who granteth the land, for term of life, or otherwise; and a Reversion is to himself from whom the conveyances of the land proceeded, and is commonly perpetual, &c. Remainder is an estate, appointed over at the same time: But the Reversion is not always at the same time appointed over. See title *Remainder.*

Blackstone, with his usual accuracy and perspicuity, shortly defines a *Reversion* thus: "The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him." *Coke* describes a Reversion to be the returning of land to the grantor, or his heirs, after the grant is over: As, if there be a gift in tail, the Reversion of the fee is, without any special reservation, vested in the donor by act of Law; and so also the Reversion, after an estate for life, years, or at will, continues in the lessor: For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted, remains in him. A Reversion is never therefore created by deed or writing, but arises from construction of Law; a Remainder can never be limited, unless

unless by either deed or devise. But both are equally transferrable, when actually vested, being both estates *in præsenti*, though taking effect *in futuro*. 2 *Comm. c.* 11, cites 1 *Inst.* 22, 142.

The doctrine of Reversions is plainly derived from the feudal constitution: For, when a feud was granted to a man for life, or to him and his issue male, rendering either rent, or other services; then, on his death, or the failure of issue male, the feud was determined and resulted back to the lord or proprietor, to be again disposed of at his pleasure: And hence the usual incidents to Reversions are said to be fealty and rent. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the Reversion. 1 *Inst.* 143. The rent may be granted away, reserving the Reversion; and the Reversion may be granted away, reserving the rent; by special words: but by a general grant of the Reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the Reversion will not pass. The incident passes by the grant of the principal, but not *è converso*. 1 *Inst.* 151, a.

These incidental rights of the Reversioner, and the respective modes of descent, in which remainders very frequently differ from Reversions, have occasioned the Law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them: For if one, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere Reversion, to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done: For it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to *A.*, reserving rent, with Reversion to *B.* and his heirs, *B.* hath a remainder descendible to his heirs general, and not a Reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of *A.*'s estate. 2 *Comm. c.* 11, cites *Cro. Eliz.* 321: 3 *Lev.* 407: 4 *Mod.* 23.

When the particular estate determines, then the Reversion comes into possession, and before it is separated from it; for he who hath the possession, cannot have the Reversion, because, by uniting them, the one is drowned in the other. 2 *Lil. Abr.* 484. See title *Merger*.

The Reversion of land when it falls, is the land itself; and the possession of the tenant, preserves the Reversion of the lands, with the rents, &c. in the donor, or lessor. 1 *Inst.* 324.

A Reversion of an estate of inheritance may be granted by bargain and sale inrolled, lease and release, fine, &c. And by the grant of lands, a Reversion will pass; though by the grant of a Reversion, land in possession will not pass. 6 *Rep.* 36: 5 *Rep.* 124: 10 *Rep.* 107.

If one have a Reversion in fee, expectant on a lease for years, he may make a bargain and sale of his Reversion for one year, and then make a release to the bargainee in fee; by which the Reversion in fee will pass to the bargainee. 2 *Lil. Abr.* 483. And a Reversioner may covenant to stand seised of a Reversion to a use, &c. 11 *Rep.* 46. Likewise a Reversion may be devised by will; and a testator being seised in fee of lands which he had in possession, and of other lands in Reversion, devised all his lands for payment of debts; adjudged, that by the words "all his lands," the Reversion as well as the possession passed. 2 *And.* 59: *Cro. Eliz.* 159.

A person devised a manor to *A. B.* for six years, and some other lands to *C. D.* and his heirs: and all the rest of his lands to his brother, and the heirs male of his body: and it was held that these words, "the rest of his lands," did not only extend to the lands which were not devised before, but to the Reversion in fee of the manor, after the determination of the estate for years. *Allen* 28. And by devise of all lands, tenements, and hereditaments, undisposed of before in a will, a Reversion in fee will pass. 2 *Vent.* 285: 3 *Ness. Abr.* 166.

One seised of lands in fee, devises part thereof to *B.* for life, and after, by the same will, gives to *C.* all his lands not before particularly disposed of; by this devise of "all lands," &c. the Reversion of the part given for life passes to *C.* *Preced. Chanc.* 202. See title *Will*.

There was lessee for years, remainder for life, Reversion in fee, the tenant for life died, and the lessee for years did not attorn to him in the Reversion; yet it was resolved, that it passed without attornment, and he might bring an action of debt, or avow. *Hetl.* 73. See title *Attornment*.

If tenant for life, and he in Reversion, join in a lease for life, or gift in tail, rendering rent; it shall enure, after the death of tenant for life, to him in Reversion. 1 *Inst.* 214.

The particular estate for life or years, and the estate of him in Reversion, are divers and distinct; therefore aid may be prayed of him in Reversion: Yet these estates have relation one to another. 3 *Shep. Abr.* 220.

Copyholder for life, cannot, by forfeiture or otherwise, destroy the estate in Reversion: And he who hath a Reversion cannot be put out of it, unless the tenant be ousted of his possession also. 39 *Hen.* 6: *Plowd.* 162: *Yelv.* 1.

Reversions expectant on an estate-tail, are not assets, or of any account in Law, because they may be cut off by fine and recovery; but it is otherwise of a Reversion on an estate for life, or years. 1 *Inst.* 173: 6 *Rep.* 38. See title *Assets*.

No lease, rent-charge, or estate, &c. made by tenant in tail in remainder, shall charge the possession of the Reversioner. 2 *Lil.* 448. But as no statute hath made any provision for those who have Remainders or Reversions on any estate-tail, they are barred by a Recovery. 10 *Rep.* 32. See title *Recovery*.

There were no Reversions or Remainders on estates in tail, at Common Law: And by the Common Law, no grantee of a Reversion could take advantage of any condition or covenant broken by the lessees of the same land; but by statute, grantees of Reversions may take advantage of conditions and covenants against lessees of the same lands, as fully as the lessors and their heirs; and the lessees may have the like remedies against the grantees of Reversions, &c. 1 *Inst.* 327. See *Stat.* 32 *H.* 8. *c.* 34: And titles *Condition*; *Lease*.

A Reversioner

A Reversioner may bring an action on the case for spoiling trees; so, for any injury to his Reversion, he may have this action, but he cannot have trespass, which is founded on the possession. 3 *Lev.* 209, 233: 3 *Co.* 55.

He in Reversion shall have a writ of *entry ad communem legem*, where tenant for life, &c. aliens the lands: And writ of intrusion, after their deaths, &c. *New Nat. Br.* 461. But see title *Recovery*.

How to plead a Reversion in Fee. 2 *Lutw.* 1174.

In order to assist such persons as have any estate in Remainder, Reversion, or Expectancy after the death of others, against fraudulent concealments of their deaths, the *stat.* 6 *Ann. c.* 18, provides, that all persons on whose lives any lands are holden, shall, (on application to the Court of Chancery, and order made thereon,) once in every year, if required, be produced to the Court, or its Commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements till the party shall appear to be living. See title *Life-Estate*.

Reversions in Offices; Vide *Office*.

REVIEW, Bill of; *in Chancery*. The object of this is to procure an examination and reversal of a decree, made upon a former bill, and signed by the person holding the Great Seal, and inrolled. It may be brought upon error of Law appearing in the body of the decree itself, or upon discovery of new matter. In the first case, the decree can only be reversed upon the ground of the apparent error; as if an absolute decree be made against a person who, upon the face of it, appears at the time to have been an infant. A bill of this nature may be brought without leave of the Court previously given. But if it is sought to reverse a decree signed and inrolled, upon discovery of some new matter, the leave of the Court must be first obtained; and this will not be granted but upon allegation, upon oath, that the new matter could not be produced or used by the party claiming, at the time when the decree was made. If the Court is satisfied, that the new matter is relevant and material, and such as might probably have occasioned a different determination, it will permit a Bill of Review to be filed. See *Mitf. Treat. on Chanc. Pleadings* 78; and the authorities there cited: See also this Dictionary, titles *Chancery*; *Decree*.

A Bill of Review, upon new matter discovered, has been permitted, even after an affirmance of the decree in Parliament; but it may be doubted, whether a Bill of Review, upon error, in the decree itself, can be brought after such affirmance. If, upon a Bill of Review, a decree has been reversed, another Bill of Review may be brought upon the decree of reversal: But see 1 *Vern.* 417. But when twenty years have elapsed from the time of pronouncing a decree, which has been signed and inrolled, a Bill of Review cannot be brought: and after a demurrer to a Bill of Review has been allowed, a new Bill of Review on the same ground cannot be brought. It is a rule of the Court, that the bringing a Bill of Review shall not prevent the execution of the decree impeached; and if money is directed to be paid, it ought regularly to be paid before the Bill of Review is filed, though it may afterwards be ordered to be refunded. *Mitf. Treat.* 79, 80.

In a Bill of this nature it is necessary to state the former Bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the Bill of Review conceives himself aggrieved by it; and the ground of Law, or new matter discovered, upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the Bill the leave obtained to file it, and the fact of the discovery; though it may be doubted, whether after leave given to file the Bill that fact is traversable. The Bill may pray simply, that the decree may be reviewed, and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the Bill may also pray the farther decree of the Court, to put the party complaining of the former decree, into the situation in which he would have been if that decree had not been executed. If the Bill is brought to review the reversal of a former decree, it may pray that the original decree may stand. The Bill may also, if the original decree has become abated, be at the same time a Bill of Revivor: (See title *Revivor*:) A supplemental Bill may likewise be added, if any event has happened which requires it; and, particularly, if any person, not a party to the original suit, becomes interested in the subject, he must be made a party to the Bill of Review, by way of supplement. *Mitf. Treat.* 80, 81.

To render a Bill of Review necessary, the decree sought to be impeached must have been signed and inrolled. If, therefore, this has not been done, a decree may be examined and reversed upon a species of supplemental Bill *in nature of a Bill of Review*, where any new matter has been discovered since the decree. As a decree not signed and inrolled may be altered upon a rehearing, without the assistance of a Bill of Review, if there is sufficient matter to reverse it appearing upon the former proceedings; the investigation of the decree must be brought on by a petition of rehearing: and the office of the supplemental Bill, in nature of a Bill of Review, is to supply the defect which occasioned the decree upon the former Bill. It is necessary to obtain the leave of the Court to bring a supplemental Bill of this nature; and the same affidavit is required for this purpose, as is necessary to obtain leave to bring a Bill of Review on discovery of new matter. The Bill, in its frame, nearly resembles a Bill of Review; except, that instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter, made the subject of the supplemental Bill, at the same time that it is reheard upon the original Bill; and that the plaintiff may have such relief as the nature of the case made by the supplemental Bill requires. *Mitf. Treat.* 81—83.

If a decree is made against a person who had no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree, against him, binding upon some person claiming the same, or a similar interest, relief may be obtained against error in the decree by a Bill in the nature of a Bill of Review. Thus, if a decree is made against a tenant for life only, a remainder-man in tail, or in fee, cannot defeat the proceedings against the tenant for life, but by a bill shewing the error in the decree, the incompetency of the tenant for life to sustain the suit, and the accruer of his own interest; and thereupon praying that the proceedings in the

the original cause may be reviewed, and, for that purpose, that the other party may appear to, and answer this new Bill, and that the rights of the parties may be properly ascertained. A Bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without leave of the Court. *Mitf. Treat.* 83.

REVIEW OF APPEAL OR DELEGATES, A commission granted by the King to certain Commissioners, *&c.* See title *Appeal to Rome.*

REVILING CHURCH ORDINANCES, Is a positive offence against Religion, that affects the established Church; and the reviling the Sacrament of the Lord's Supper, is punished by *stats.* 1 *Ed.* 6. *c.* 1: 1 *Eliz. c.* 1, with fine and imprisonment: And by *stat.* 1 *Eliz. c.* 2, if any *Minister* shall speak any thing in derogation of the *Book of Common Prayer*, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second: And if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice: for the second offence he shall be deprived, and suffer one year's imprisonment; and for the third, shall, in like manner, be deprived, and suffer imprisonment for life. And if *any person* whatsoever shall, in plays, songs, or other open words, speak any thing in derogation, defaming, or despising of the said Book, or shall forcibly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit for the first offence one hundred marks; for the second, four hundred; and for the third shall forfeit all his goods and chattels, and suffer imprisonment for life. The policy and propriety of these punishments, even at this distance from the Reformation, are well stated by *Blackstone*, 4 *Comm. c.* 4. *p.* 51.

REVIVAL OF PERSONS HANGED; See *Execution of Criminals.*

REVIVING, A word metaphorically applied to rents and actions, and signifies renewing them after they are extinguished. Of which see many examples in *Broke*, title *Revivings of Rents, Actions, &c.* 13. See also 19 *Vin. Abr.* 228—230.

REVIVOR, BILL OF; When a Bill hath been exhibited in Chancery, against one who answers, and before the cause is heard, or if heard, and the decree is not inrolled, either party dies, or a female plaintiff marries; in these cases a Bill of Revivor must be brought.

A Bill of Revivor must state the original Bill, and the several proceedings thereon, and the abatement: It must shew a title to revive, and charge that the cause ought to be revived, and stand in the same condition, with respect to the parties in the Bill of Revivor, as it was in with respect to the parties to the original Bill, at the time the abatement happened; and it must pray, that the suit may be revived accordingly. It may likewise be necessary to pray that the defendant may answer the Bill of Revivor; as in the case of a requisite admission of assets, by the representative of a deceased party. In this case, if the defendant does admit assets, the cause may proceed against him on an order of Revivor merely; but if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party, to answer the demands made against it by the suit; and the prayer of the Bill, therefore, in such cases, usually is, not only that the suit may be revived, but also that in case the defendant shall not admit assets, to answer the purposes of the suit, those accounts may be taken; and so far the Bill is in the nature of an original Bill. If a defendant to an original Bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the Bill, to which no answer has been given, the Bill of Revivor, though requiring in itself no answer, must pray that the person, against whom it seeks to revive the suit, may answer the original Bill, or so much of it as the exceptions taken to the answer of the former defendants extend to, or the amendment remaining unanswered. See *Mitf. Treat. on Pleadings in Chanc.* 70, 71; and the authorities there referred to.

Upon a Bill of Revivor the defendant must answer in eight days after appearance, and submit that the suit shall be revived, or shew cause to the contrary; and in default, unless the defendant has obtained an order for further time to answer, the suit may be revived without answer, by an order made upon motion as a matter of course. The ground for this is an allegation, that the time allowed the defendant to answer by the course of the Court is expired, and that no answer is put in; it is therefore presumed, that the defendant can shew no cause against reviving the suit in the manner prayed by the Bill. *Mitf. Treat.* 71, 72.

An order to revive may also be obtained, in like manner, if the defendant puts in an answer submitting to the Revivor; or even without that submission if he shews no cause against the Revivor. Though the suit is revived of course, in default of the defendant's answer within eight days, he must yet put in an answer if the Bill requires it; as if the Bill seeks an admission of assets, or calls for an answer to the original Bill; the end of the order of Revivor being only to put the suit and proceedings in the situation, in which they stood at the time of the abatement, and to enable the plaintiff to proceed accordingly. And notwithstanding an order for Revivor has been thus obtained, yet if the defendant conceives that the plaintiff is not entitled to revive the suit against him, he may take those steps which are necessary to prevent the farther proceeding on the Bill; and though these steps should not be taken, yet if the plaintiff does not shew a title to revive, he cannot finally have the benefit of the suit, when the determination of the Court is called for on the subject. *Mitf. Treat.* 72, 73.

After a decree, a *defendant* may file a Bill of Revivor, if the plaintiffs, or those standing in their right, neglect to do it. For then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and equally have a right to prosecute it. The Bill of Revivor, in this case therefore, merely substantiates the suit, and brings before the Court the parties necessary to see to the execution of the decree, and to be the objects of its operation; rather than to litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided. In the case of a Bill by creditors, on behalf of themselves and other creditors, any creditor is entitled to revive. A suit, become entirely abated, may be revived as to part only of the matter in litigation; or as to part by one bill, and as to the other part by another. Thus, if the rights of a plaintiff in a suit, upon his death, become vested part in his real, and part in his personal represent-

representatives, the real representative may revive the suit so far as concerns his title; and the personal so far as his demand extends. *Mitf. Treat.* 73, 74.

When the interest of a party dying is transmitted to another, in such a manner that the transmission may be litigated in a Court of Equity, as in the case of a devise, the suit cannot be revived by or against the person to whom the interest is so transmitted; but such person, if he succeeds to the interest of a plaintiff, is entitled to the benefit of the former suit; and if he succeeds to the interest of a defendant, the plaintiff is entitled to the benefit of the former suit against him: This benefit is to be obtained by an original Bill, *in nature* of a Bill of Revivor. A Bill for this purpose must state the original Bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it. The Bill is said to be original, merely for want of that privity of title, between the party to the former and the party to the latter Bill, though claiming the same interest, which would have permitted the continuance of the suit by Bill of Revivor. Therefore, when the validity of the alledged transmission of interest is established, the party to the new Bill shall be equally bound by, or have advantage of, the proceedings on the original Bill, as if such privity had actually existed: And the suit is considered as pending, from the time of filing the original Bill; so as to save the Statute of Limitations; to have the advantage of compelling the defendant to answer, before an answer can be compelled, to a cross Bill; and every other advantage which would have attended the institution of the suit by the original Bill, if it could have been continued by Bill of Revivor merely. *Mitf. Treat.* 88, 89.

If the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person, not claiming under him, the suit cannot be continued by a Bill of Revivor; nor can its defect be supplied by a supplemental Bill, but the benefit of the former proceedings must be obtained by an original Bill in the nature of a supplemental bill. *Mitf. Treat.* 89, 90.

REVOCATION, *Revocatio*] The calling back of a thing granted: or a destroying or making void of some deed that had existence, until the act of Revocation made it void. 2 *Lil. Abr.* 485. A Revocation may be either general, of all acts and things done before; or special, to revoke a particular thing: And where any deed or thing is revoked, it is as if it never had been. 5 *Rep.* 90: *Perk.* § 10[illegible] ntary deeds and conveyances, there are frequently provisoes containing power of Revocation, which being coupled with an use, and tending to pass by raising of uses, according to the *stat.* 27 *Hen.* 8. *c.* 10, are allowed to be good, and not repugnant; as where one seised of an estate in fee, covenants to stand seised thereof to the use of himself for life, and after to the use of his son in tail, remainder over, &c. with proviso that he may revoke any of the said uses; now, if afterwards he revokes them, he is seised again in fee, without entry or claim: But in case of a feoffment or other conveyance, whereby the feoffee or grantee is in by the Common Law, such proviso would be merely repugnant and void. 1 *Inst.* 237: See title *Uses*.

Voluntary estates made with power of Revocation, as to purchasers, are held in equal degree with conveyances made by fraud and covin to defraud purchasers, under *stat.* 27 *Eliz. c.* 4: 3 *Rep.* 82. See title *Frauds*.

Where a power of Revocation is reserved for a man to dispose of his own estate, it shall always have a favourable construction; but it shall be taken strictly when it is to charge the estate of another. 2 *Vent.* 250.

If power is reserved to a man to revoke a deed by writing, subscribed and sealed in the presence of two or more credible witnesses: if he makes his will in writing, without making any express Revocation, it will be a good Revocation, and the will a good execution of the power. *Hob.* 312: *Raym.* 295. But see title *Power*.

If a person make a feoffment in fee, or levy a fine, &c. of the lands, before the deed of Revocation is executed; these amount to a Revocation in Law, and extinguish the power of Revocation. 1 *Vent.* 371: 1 *Rep.* 111.—Power of Revocation may be released; and where a man has an entire power of Revocation, and he suspends or extinguishes it as to part, he may revoke as to the residue, if the conveyance was by way of use; but not where a condition is annexed to the land. 1 *Rep.* 174: *Moor* 615.

A Will is revocable; and a last will revokes the former: And a new publication of the first will, if made in due form, will revoke the last. *Perk.* 479: 2 *Sid.* 2: 3 *Mod.* 207. See title *Wills*.

Letters of Attorney, and other authorities, may be revoked, by the persons giving the powers; and as they are revocable in their nature, it has been adjudged, that they may be revoked, though they are made irrevocable. 8 *Rep.* 82: *Wood's Inst.* 286. These Revocations of all powers regularly must be made after the same manner they are given; and there ought to be notice to the party, &c. But if once the power be executed, a Revocation after will come too late. *Dyer* 210.

A warrant of attorney from a defendant to appear and accept a declaration, and plead for the defendant, may not be revoked with an intent to stay the plaintiff's proceedings; but the defendant, on good cause shewn to the Court, may change his attorney, so as he plead by another in due time. 2 *Lil.* 486.

As to the Revocation of *Letters of Administration*, and *Presentations* to Benefices, see those titles.

REVOCATIONE PARLIAMENTI. An ancient Writ for recalling a Parliament; and *anno* 5 *Ed.* 3, the Parliament being summoned, was recalled by such writ before it met. *Pryn's Animad.* on 4 *Inst. fol.* 44. See title *Parliament*.

REWARDS. In order to encourage the apprehending of certain felons, Rewards, and immunities are bestowed on such as bring them to justice, by divers statutes. The *stat.* 4 & 5 *W.* & *M. c.* 8, enacts, That such as apprehend a highwayman, (and by *stat.* 6 *Geo.* 1. *c.* 23, highway robbers in the streets of *London*, or other towns, and prosecute him to conviction, shall receive a Reward of 40*l.* from the public; to be paid to them (or, if killed in the endeavour to take him, their executors) by the sheriff of the county; besides the horse, furniture, arms, money, and other goods taken upon the person of such robber; with a reservation of the right of any person from whom the same may have been stolen: to which *stat.* 8 *Geo.* 2. *c.* 16, superadds 10*l.* to be paid by the

Hundred indemnified by such taking. By *stat.* 6 & 7 *W.* 3. *c.* 17: 15 *Geo.* 2. *c.* 28, persons apprehending and convicting any offender against those statutes, respecting the coinage, shall (in case the offence be treason or felony) receive a Reward of forty pounds; or ten pounds, if it only amount to counterfeiting the copper coin. By *stat.* 10 & 11 *W.* 3. *c.* 23, any person apprehending and prosecuting to conviction a felon guilty of burglary, housebreaking, horsestealing, or private larceny to the value of 5*s.*, from any shop, warehouse, coach-house, or stable, shall be excused from all parish offices: (which is vulgarly termed, having a Tyburn-ticket): And by *stat.* 5 *Ann.* *c.* 31, any person so apprehending and prosecuting a burglar, or felonious housebreaker, (or, if killed in the attempt, his executors,) shall also be entitled to a Reward of 40*l.* By *stat.* 6 *Geo.* 1. *c.* 23, persons discovering, apprehending, and prosecuting to conviction, any person taking Reward for helping others to their stolen goods, shall be entitled to 40*l.*—By *stat.* 14 *Geo.* 2. *c.* 6, explained by *stat.* 15 *Geo.* 2. *c.* 34, any person apprehending and prosecuting to conviction such as steal, or kill with intent to steal, any sheep, lamb, bull, cow, ox, steer, bullock, heifer, or calf, shall for every such conviction receive a Reward of 10*l.*—Lastly, by *stats.* 16 *Geo.* 2. *c.* 15: 8 *Geo.* 3. *c.* 15, persons discovering, apprehending, and convicting felons, and others, being found at large during the term for which they are ordered to be transported, shall receive a Reward of 20*l.*

The *stats.* 4 & 5 *W.* & *M.* *c.* 8: 6 & 7 *W.* 3. *c.* 17: 5 *Ann.* *c.* 31, together with *stat.* 3 *Geo.* 1. *c.* 15. § 4, which directs the method of reimbursing the Sheriffs, are extended to the county palatine of *Durham*, by *stat.* 14 *Geo.* 3. *c.* 46.

In the spirit of the above statutes, the *stats.* 9 *Geo.* 1. *c.* 22: 10 *Geo.* 2. *c.* 32, allow a recompence of 50*l.* to persons maimed in endeavouring to apprehend offenders against the Black Act, destroyers of sea-banks, cutters of hop-binds, and firers of collieries. And by *stat.* 19 *G.* 2. *c.* 34, several strong regulations are made for recompensing persons wounded or plundered by smugglers; and Rewards of 50*l.* are given to accomplices in smuggling, discovering two or more offenders; and one of 500*l.* for detecting proclaimed smugglers in certain cases.

REWEY, A term among clothiers, signifying cloth unevenly wrought, or full of Rewes. See *stat.* 43 *Eliz.* *cap.* 10.

RHANDIR, A part in the division of *Wales* before the Conquest: Every township comprehended four gavels, and every gavel had four Rhandirs, and four houses or tenements constituted every Rhandir. *Taylor's Hist. Gav.* *p.* 69.

RIAL, from the Span. *Reale*, i. e. Royal Money, because it is stamped with the King's effigies: In *England*, a Rial was a piece of gold coin, current for 10*s.* in the reign of King *Henry* VI. at which time there were Half-Rials passing for 5*s.* and Quarter Rials, or Rial Farthings, going for 2*s.* 6*d.* In the beginning of Queen *Elizabeth's* reign, golden Rials were coined at 15*s.* a-piece; and 3 *Jac.* I, there were Rose-Rials of gold at 30*s.* Spur-Rials at 15*s.* *Lowuds's Essay on Coins*, *p.* 38.

RIBAUD, Fr. *Ribauld*, *Ribaldus*.] A rogue, vagrant, whoremonger, or person given to all manner of wickedness: *Anno* 50 *E.* 3, there was a petition in Parliament against Ribauds and Sturdy Beggars.

RICE, As to the importation of, see titles *Navigation Acts*; *Customs on Merchandise*.

RICHMOND IN SURRY, *Richmond* Old Park settled on Queen *Charlotte* for life. *Stat.* 2 *Geo.* 3. *c.* 1. See title *Queen*.

RICHMOND IN YORKSHIRE, Spiritual persons in the archdeaconry of *Richmond*, shall not exact portions of the deceased's goods. *Stat.* 26 *Hen.* 8. *c.* 15.

RIDER-ROLL, A Schedule, or small piece of parchment, often added to some part of a Roll, Record, or Act of Parliament.

RIDGE-WASHED KERSEY, *Kersey* cloth made of fleece wool, washed only on the sheep's back. See *stat.* 35 *Eliz.* *c.* 10.

RIDING ARMED; See *Armour and Arms*.

RIDING-CLERK, One of the six Clerks in Chancery, who in his turn, for one year, keeps the controlment-books of all grants that pass the Great Seal. *Blount*.

RIDINGS, corrupted from *Trithings*.] Are the names of the parts or divisions of *Yorkshire*, which are *three*, viz. East-Riding, West-Riding, and North-Riding, mentioned in *stat.* 22 *Hen.* 8. *c.* 5: And, in indictments for offences in that county, the Town and the Riding must be expressed, &c. *West. Symb.* *p.* 2. See 1 *Comm.* 116: and this Dictionary, titles *Rape*; *Registry of Deeds*.

RIENS ARREAR, A plea used in an action of debt for Arrearages of Account, whereby the defendant alleges that there is *nothing in Arrear*. *Book Entr.* See titles *Account*; *Issue*; *Pleading*.

RIENS PASSE PER LE FAIT, *Nothing passes by the Deed*; The form of an exception taken in some cases to an action. *Broke*. See title *Pleading*.

RIENS PER DESCENT, The plea of an heir, where he is sued for his ancestor's debt, and hath no land from him by Descent, or assets in his hands. 3 *Cro.* 151. In an action of debt against the heir, who pleads *Riens per Descent*, judgment may be had presently; and when assets descend, a *scire facias* lies against the heir, &c. 8 *Rep.* 134. See title *Heir*.

RIER COUNTY, *Retro Comitatus*, from the Fr. *Arrear*, i. e. *posterior*.] Is opposed to full and open County; and appears to be some public place, which the Sheriff appoints for receipt of the King's money, *after* the end of his County-Court. See *stat.* 2 *Ed.* 3. *cap.* 5: and also *stat.* *West.* 2. 13 *Ed.* 1. *c.* 38: *Fleta*, *l.* 2. *c.* 67.

RIFFLARE, from the Saxon, *riefe*, *rapina*.] To take away any thing by force; from whence comes our *English* word *rifle*. *Leg. Hen.* 1. *c.* 57.

RIFFLURA, A slight wound in the flesh. *Fleta*, *lib.* 1. *c.* 41.

RIGHT, *Jus*.] In general signification, includes not only a Right for which a Writ of Right lies, but also any title or claim, either by vi[illegible] of a condition, mortgage, or the like, for which ac[illegible]on is given by Law, but only an entry. *Co. Lit.* *l.* 3. *c.* 8. § 445.

There is *jus proprietatis*, a Right of Property; *jus possessionis*, a Right of Possession; and *jus proprietatis & possessionis*, a Right both of Property and Possession; and this was anciently called *jus duplicatum*. For example, if a man be disseised of an acre of land, the disseisee hath

hath *jus proprietatis*, the disseisor hath *jus possessionis*; and if the disseisee release to the disseisor, he hath *jus proprietatis & possessionis*. *Co. Lit. l. 3. § 447.*

Jus est sextuplex. 1. *Jus recuperandi.* 2. *Intrandi.* 3. *Habendi.* 4. *Retinendi.* 5. *Percipiendi.* 6. *Et possidendi.* 8 *Co. Edward Altham's* case.

The disseisor has only the naked possession, because the disseisee may enter and evict him; but against all other persons the disseisor has Right, and in this respect only can be said to have the Right of possession; for in respect to the disseisee, he has no Right at all. But when a descent is cast, the heir of the disseisor has *jus possessionis*, because the disseisee cannot enter upon his possession, and evict him, but is put to his real action, being the freehold cast upon the heir. The notions of the Law do make this title to him, that there may be a person in being to do the feudal duties, to fill the possession, and to answer the actions of all persons whatever; and since it is the Law that gives him this Right, and obliges him to these duties, antecedent to any act of his own, it must defend such possession from the act of any other person whatever; till such possession be evicted by judgment; which being also the act of Law may destroy the heir's title. *Gilb. Ten.* 18. See further, titles *Estate*; *Property*; *Release*; *Title*.

There is also a present and future Right; a *jus in re*, which may be granted to a stranger; and what is called a naked Right, or *jus ad rem*, where an estate is turned to a Right, on a discontinuance, &c. *Co. Lit.* 345.

Right doth also include an estate *in esse* in conveyances; and therefore if tenant in fee-simple makes a lease and release of all his Right in the land to another, the whole estate in fee passes. *Wood's Inst.* 115, 116.

Sir *Edward Coke* tells us, That of such an high estimation is Right, that the Law preserveth it from death and destruction; trodden down it may be, but never trodden out: And there is such an extreme enmity between an estate gained by wrong and an ancient Right, that the Right cannot possibly incorporate itself with the estate gained by wrong. 1 *Inst.* 279: 6 *Rep.* 70: 8 *Rep.* 105. A Right may sometimes sleep, though it never dies; a long possession, exceeding the memory of man, will make a Right; and if two persons are in possession by divers titles, the Law will adjudge the possession in him that hath the Right. *Co. Lit.* 478: 6 *Lit.* § 158: When there is no remedy, there is presumed to be no Right by Law. *Vaugh.* 38.

RIGHT CLOSE, Writ of; See titles *Recto*; *Writ of Right*.

RIGHT CLOSE, *secundum Consuetudinem Manerii*.] A Writ which lies for the King's tenants in ancient demesne, and others of a similar nature, to try the Right of their lands and tenements in the Court of the Lord exclusively. See *Writ*.

RIGHT IN COURT; See *Rectus in Curia*.

RIGHTS AND LIBERTIES; See title *Liberty*.

RINE, Saxon, *Ryne*.] A water-course, or little stream, which rises high with floods.

RINGA, A military girdle; from the Sax. *Ring*, i. e. *annulus*, *circulus*, because it was girt round the middle: But, according to *Bracton*, Ringa *enim dicuntur quod renes cirundant, unde dicitur accingere gladio*. *Bract. lib.* 1. *cap.* 8.

RINGHEAD, An engine used in stretching of cloth. See *stat.* 43 *Eliz. c.* 10.

RINGILDRE, A kind of bailiff or serjeant; and such *Rhingyl* signifies in *Welsh*. *Chart. Hen.* 7.

RIOT,

ROUT; AND UNLAWFUL ASSEMBLY.

RIOT, *Riota* and *Riottum*, from the French, *Riotte*; *quod non solum rixam & jurgium significat, sed vinculum etiam, quo plura in unum, fasciculorum instar, colligantur.*] The forcible doing of an unlawful thing by three, or more persons assembled together for that purpose. *West. Symbol. part* 2. title *Indictments*, § 65.

The difference, between a Riot, Rout, and unlawful Assembly, see in *Lamb. Eiren. lib.* 2. *c.* 5: *Kitchin* 19; the latter of whom gives these examples of Riots; the breach of inclosures, banks, conduits, parks, pounds, houses, barns, the burning of stacks of corn, &c. *Lamb. ubi supra*, mentions these; to beat a man, to enter upon a possession forcibly. *Cowell.*

I. *What are considered as Riots, Routs, and unlawful Assemblies, at Common Law.*

II. *The Punishment of these Offences: And the Provisions against them, by Statute Law.*

I. HOLT, Ch. J. in delivering the opinion of the Court, said, That the books are obscure in the definition of Riots, and that he took it, that it is not necessary to say they assembled for that purpose; but there must be an unlawful Assembly; and as to what act will make a Riot or Trespass, such an act as will make a Trespass will make a Riot; as, if a number of men assemble with arms, *in terrorem populi*, though no act is done; so if three come out of an alehouse, and go armed. 11 *Mod.* 116, 117. See *Hob.* 91.

Hawkins says, a *Riot* seems to be a tumultuous disturbance of the peace by three persons, or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them, in the execution of some enterprise of a private nature; and afterwards actually executing the same in a violent turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful. 1 *Hawk. P. C. c.* 65. § 1.

A *Rout* seems to be, according to the general opinion, a disturbance of the peace by persons assembling together with an intent to do a thing, which, if it be executed, will make them Rioters, and actually making a motion towards the execution thereof; but, by some books, the notion of a Riot is confined to such Assemblies only, as are occasioned by some grievance common to all the company, as the inclosure of land, in which they all claim a right of common, &c. However, inasmuch as it generally agrees with a Riot, as to all the rest of the above-mentioned particulars, requisite to constitute a Riot, except only in this, that it may be a complete offence without the execution of the intended enterprise; it seems not to require any farther explication. 1 *Hawk. P. C. c.* 65. § 8.

An *Unlawful Assembly*, according to the common opinion, is a disturbance of the peace by persons barely assembling together, with an intention to do a thing, which,

which, if it was executed, would make them Rioters, but neither actually executing it, nor making a motion toward the execution of it; but (says *Hawkins*) this seems to be much too narrow a definition; for any meeting whatsoever of great numbers of people, with such circumstances of terror, as cannot but endanger the public peace, and raise fears and jealousies among the King's Subjects, seems properly to be called an Unlawful Assembly; as where great numbers, complaining of a common grievance, meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an Assembly. 1 *Hawk. P. C. c.* 65 § 9.

These offences are thus defined and distinguished by *Blackstone*: An *Unlawful Assembly* is, when three or more do assemble themselves together to do an unlawful act, as, to pull down inclosures, to destroy a warren, or the game therein; and part, without doing it, or making any motion towards it. 3 *Inst.* 176. A *Rout*, is where three or more meet to do an unlawful act upon a common quarrel; as, forcibly breaking down fences, upon a right claimed of common, or of way, and make some advances towards it. *Bro. Ab.* title *Riot* 4, 5. A *Riot*, is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel: 3 *Inst.* 176: As if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty: or do any other unlawful act, as removing a nuisance in a violent and tumultuous manner. 4 *Comm. c.* 11. *p.* 146.

If a man be in his house, and he hears that *J. S.* will come to his house to beat him, he may well make an Assembly of people of his friends and neighbours to assist and aid him in safe keeping his person. *Per Fineux*, Ch. Jus. *Br. Riots, pl.* 1, cites 21 *Hen.* 7. 39.

But if a man be menaced or threatened, that if he comes to the market of *B.* or to *W.* that he shall be beat, he cannot make an Assembly of people to assist him to go there, and this in safeguard of his person; for he need not go there, and he may have remedy by surety of the peace; but the house of a man is to him his castle and his defence, and where he properly ought to abide, &c. *Br. Riots, pl.* 1. cites 21 *H.* 7. 39.

Hawkins, citing the above case, remarks, That such violent methods cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace.—Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the Law, which is sufficient for his defence. See 1 *Hawk. P. C. c.* 65 § 10: *Dalt. J. c.* 137: 11 *Mod.* 116, 117.

If a number of people be assembled together in a lawful manner, and upon a lawful occasion, as for electing a Mayor, or the like, and during the Assembly a sudden affray happens, this will not make it a Riot *ab initio*; but it is only a common affray. *Ld. Raym.* 965.

If a number of people assemble in a riotous manner to do an unlawful act, and a person, who was upon the place before, upon a lawful occasion, and not privy to their first design, comes and joins himself with them, he will be guilty of a Riot equally with the rest. *Ld. Raym. Rep.* 965.

If several are assembled lawfully without any ill intent, and an affray happens, none are guilty but such as act; but if the Assembly was originally unlawful, the act of one is imputable to all. *Per Holt*, Ch. J. 2 *Salk.* 595.

It seems agreed, that if a number of persons, being met together at a fair, or market, or church ale, or any other lawful and innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a Riot, but of a sudden affray only, of which none are guilty, but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention concerning it; yet it is said, that if persons innocently assembled together, do afterwards, upon a dispute happening to arise among them, form themselves into parties, with promise of mutual assistance, and then make affray, they are guilty of a Riot; because, upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design; however, it seems clear, that if, in an Assembly of persons, met together on any lawful occasion whatsoever, a sudden proposal shall be started of going together in a body to pull down a house or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion be agreed to and executed accordingly, the persons concerned cannot but be Rioters, because their associating themselves together for such a new purpose is no way extenuated by their having met at first upon another. 1 *Hawk. P. C. c.* 65. § 3.

II. THE punishment of unlawful Assemblies, if to the number of twelve, may, as hereafter fully noticed, be capital, according to the circumstances that attend them; but from the number of *three* to *eleven*, is by fine and imprisonment only. The same is the case in Riots and Routs by the Common Law; to which the pillory, in very enormous cases, has been sometimes superadded. 4 *Comm. c.* 11.

By statute 34 *E.* 3. *c.* 1, Justices of the peace have power to restrain Rioters, &c. to arrest and imprison them, and cause them to be duly punished. By *stat.* 17 *R.* 2. *c.* 8, the Sheriff, and other the King's Ministers, generally have power to arrest Rioters with force. And by *stat.* 13 *H.* 4. *c.* 7, any two Justices, together with the Sheriff or Under-Sheriff of the county, may come, with the *posse comitatus*, if need be, and suppress any Riot, Assembly, or Rout, arrest the Rioters, and record, upon the spot, the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders: And if the offenders are departed, the said Justices, &c. shall, within a month after, make inquiry thereof, and hear and determine the same; and if the truth cannot be found, then, within a further month, the Justices and Sheriffs are to certify to the King and Council, &c; on default whereof, the Justices, &c. shall forfeit 100*l.*

These statutes are understood of great and notorious Riots: And the record of the Riot within the view of the Justices, by whom it is recorded, is such a conviction as cannot be traversed, the parties being concluded thereby; but they may take advantage of the insufficiency of the record, if the Justices have not pursued the statute, &c. It is said, that the offenders being convicted

victed upon the record of their offence, in the presence of the Justices, ought to be sent immediately to gaol, till they pay a fine assessed by the same Justices; which fine is to be estreated into the Exchequer; or the Justices may record such Riot, and commit the offenders, and after certify the record into *B. R.* or to the Assizes or Sessions: If the offenders are gone, then the Justices shall inquire by a Jury; and the Riot being found, they are to make a record of it, and fine them, or receive their traverse, to be sent by the Justices to the next Quarter-Sessions, or into the King's Bench, to be tried according to Law. *Dalt.* 200, 201, 202.

It hath been adjudged, that where Rioters are convicted upon the view of two Justices, the Sheriff must be a party to the inquisition on the *stat.* 13 *Hen.* 4. *c.* 7. But if they disperse themselves before conviction, the Sheriff need not be a party; for in such case the two Justices may make the inquisition without them; and this is *pro Domino Rege*: And if the Justices neglect to make an inquisition within a month after the Riot, they are liable to the penalty for not doing it within that time; but the lapse of the month doth not determine their authority to make an inquisition afterwards. 2 *Salk.* 594.

In the interpretation of the above *stat.* 13 *Hen.* 4. *c.* 7, it hath also been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the Justices in suppressing a Riot, upon pain of fine and imprisonment: And that any battery, wounding, or killing the Rioters, that may happen in suppressing the Riot, is justifiable. 1 *Hal P. C.* 495: 1 *Hawk. P. C. c.* 65, § 20, 21.

On the above, *Blackstone* remarks, that our ancient Law seems pretty well to have guarded against any violent breach of the public peace; especially as any riotous Assembly, on a public or general account, as to redress grievances, or pull down all inclosures, and also resisting the King's forces, if sent to keep the peace, may amount to overt acts of high treason, by levying war against the King.—This observation will appear confirmed, by a statement of the following statutes, also made on this subject. And see further 1 *Hawk. P.C. c.* 65.

Rioters convicted on view of two Justices, and of the Sheriff of the county, are to be fined by the two Justices and the Sheriff; and if the Sheriff do not join in setting the fine, it is error; for the statute requires that he should be joined with the Justices in the whole proceedings. *Raym.* 386. By *stat.* 2 *Hen.* 5. *st.* 1. *c.* 8, If the Justices make default in inquiring of a Riot, at the instance of the party grieved, the King's commission shall be issued to inquire, as well of the Riots as of the default, by sufficient and indifferent men of the county, at the discretion of the Chancellor; and in case the Sheriff is in default, the Coroners shall make the panel of inquest upon the said commission, which is returnable into the Chancery, *&c.* and by this statute, heinous Rioters are to suffer one year's imprisonment.

The Lord Chancellor, having knowledge of a Riot, may send the King's writ to the Justices of peace, and to the Sheriff of the county, *&c.* requiring them to put the statute in execution; and the Chancellor, upon complaint made, that a dangerous Rioter is fled into places unknown, and on suggestion, under the seals of two Justices of peace and the Sheriff, that the common fame runneth in the county of the Riot, may award a *capias* against the parties, returnable in Chancery upon a certain day, and afterwards a writ of proclamation, returnable in the King's Bench, *&c.* *Stat.* 2 *H.* 5. *st.* 1. *c.* 9: 8 *H.* 6. *c.* 14.

Where Riots are committed, the Sheriff, upon a precept directed to him, is to return twenty-four persons, dwelling within the county, to inquire thereof, *&c.* *Stat.* 19 *Hen.* 7. *c.* 13.

A Mayor and Alderman of a town making a Riot, are punishable in their natural capacities; but where they have countenanced dangerous Riots within their precincts, their liberties have been seized, or the corporation fined. 3 *Cro.* 252: *Dalt.* 204, 326. Women may be punished as Rioters; but infants, under the age of fourteen years, are not punishable. *Dalt.* 325: *Wood's Inst.* 429.

The riotous assembling of *twelve* persons, or more, and not dispersing upon proclamation, was first made high treason by *stat.* 3 & 4 *Edw.* 6. *c.* 5, when the King was a minor, and a change in religion to be effected: but that statute was repealed by *stat.* 1 *Mar. c.* 1, among the other treasons created since the 25 *Edw.* 3; though the prohibition was in substance re-enacted, with an inferior degree of punishment, by *stat.* 1 *Mar. st.* 2. *c.* 12, which made the same offence a single felony. These statutes specified and particularized the nature of the Riots they meant to suppress; as, for example, such as were set on foot with intention to offer violence to the Privy Council, or to change the Laws of the kingdom, or for certain other specific purposes: in which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of *Mary* made felony, but within the benefit of clergy; and the act also indemnified the peace-officers and their assistants, if they killed any of the mob in endeavouring to suppress such Riot. This was thought a necessary security in that sanguinary reign, when Popery was intended to be re-established, which was like to produce great discontents: but at first it was made only for a year, and was afterwards continued for that Queen's life. And, by *stat.* 1 *Eliz. c.* 16, when a reformation in religion was to be once more attempted, it was revived and continued during her life also: and then expired. From the accession of *James* I. to the death of Queen *Anne*, it was never once thought expedient to revive it: but, in the first year of *George* I. it was judged necessary, in order to support the execution of the Act of Settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a Riot, the statute 1 *Geo.* 1. *c.* 5, enacts, generally, That if any persons, to the number of twelve, are unlawfully assembled, to the disturbance of the peace, and any one Justice of the peace, Sheriff, Under-Sheriff, or Mayor of a town, shall think proper to command them by proclamation to disperse, if they contemn his orders, and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy: and all persons to whom such proclamation *ought to have been made*, and knowing of such hinderance, and not dispersing, are felons without benefit of clergy. There is in this act also an indemnifying clause, in case any of the mob be unfortunately killed in the endeavour to disperse them; and

and, by a subsequent clause, if any person, so riotoufl assembled, begin, even before proclamation, to pull dow any church, chapel, meeting-house, dwelling-house, o out-houses, they shall be felons without benefit of clergy and inhabitants of towns and Hundreds are to yield dama ges for rebuilding or reparation, to be levied and paid u such manner as money recovered against the Hundred by persons robbed on the highway, &c. Prosecutions o this act are to be commenced within one year after th offence: This statute, being wholly in the affirmative doth not take away any authority in the suppressing a Rio by Common Law, or by other statutes. *Wood's Inst.* 430 *See 4 Comm.* 125, 433.

The owners of houses may recover damages for th destruction of their *furniture*, or for any injury to their property, done at the same time that the buildings are demolished, or in part pulled down. *Doug.* 673, (699), *Hyde v. Cogan.*

A person, present aiding and abetting Rioters, is a principal in the second degree under this statute 4 *Burr.* 2073.

Nearly related to this head of Riots, is the offence of *Tumultuous Petitioning*; which was carried to an enormous height in the times preceding the Grand Rebellion. Wherefore, by *stat.* 13 *Car.* 2. *st.* 1. *c.* 5, It is enacted, That not more than twenty names shall be signed to any petition to the King, or either House of Parliament, for any alteration of matters, established by Law, in Church or State; unless the contents thereof be previously approved, in the Country, by three Justices, or the majority of the Grand Jury at the Assises or Quarter Sessions; and, in *London*, by the Lord Mayor, Aldermen, and Common Council: and that no petition shall be delivered by a company of more than ten persons, on pain, in either case, of incurring a penalty not exceeding 100*l.* and three months imprisonment. See this Dictionary, titles *Petition*; *Liberty.*

Proceedings of the same nature, and manifestly tending to the same end, as the tumultuous petitions above alluded to, by *Assembling* the lower class of people in public meetings *on Political Questions*, and by reading *Lectures* on Political Subjects, had arrived to such a height in the year 1795, through the machinations of persons friendly to, and not improbably connected with, the *French* Revolutionists, that the Legislature found it necessary to interpose: and the following Act was passed; after several debates, in both Houses, in which the perseverance of the opposers of the measure was more remarkable than their numbers. It is but justice to say, that the evils dreaded from this fresh restraint of the liberty of the Subject never appear to have taken place, while the benefits were unquestionable: Though the Act was in some measure eluded, particularly in the provision against Political Lectures.

The first part of the *stat.* 36 *Geo.* 3. *c.* 8, after reciting that "Assemblies of divers persons collected for the purpose, or under the pretext, of deliberating on public grievances, and of agreeing on petitions, complaints, remonstrances, declarations, or other addresses to the King, or to both Houses, or either House of Parliament, had of late been made use of to serve the ends of factious and seditious persons, to the great danger of the public peace; and might become the means of producing confusion and calamities in the Nation;" enacts, That no meeting of any description of persons, exceeding the number of *fifty* persons, (except county-meetings; or meetings called by two Justices; or by the major part of the Grand Jury of the county; or meetings of corporate bodies, or of towns corporate, and their divisions, called by the proper officer;) shall be holden for the purpose, or on the pretext, of considering or preparing any petition, &c. to the King, or Parliament, for alterations of matters established in Church or State; or for the purpose, or on pretext, of deliberating upon any grievance in Church or State; unless previous notice of the time, place, and purpose of such meeting shall be given, by *seven* householders of the place, in some public news-paper, five days previous to the meeting. Such notice not to be inserted in any paper, unless the authority for so doing shall be signed by seven householders, at the foot of the notice for the meeting. The notice and authority to be preserved and produced to a Justice, if required; and a penalty of 50*l.* is imposed on the person inserting the notice in a paper without such authority, or refusing to produce the notice and authority when required. § 1.

Or a notice, signed as above by seven householders, may be delivered to the Clerk of the Peace, who shall send a copy of the same to *three* Justices of the place, at least. § 2.

All meetings of any description of persons, exceeding fifty in number, (except as aforesaid,) which shall be held without such notice, for the purpose or on the pretexts before stated, shall be deemed and taken to be *Unlawful Assemblies.* § 3.

If twelve or more persons, of a greater number than fifty assembled contrary to this statute, shall continue together one hour, after being required by a Justice to disperse, they shall be guilty of felony without benefit of clergy. § 4. *For the proclamation for dispersing, see at the end of this title.*

In case any meeting shall be holden, in pursuance of such notice, and the purpose for which the same shall in such notice have been declared to be holden, or any matter which shall be in such notice proposed to be propounded or deliberated upon at such meeting, shall purport that any thing by Law established may be altered, except by authority of King, Lords, and Commons, in Parliament, a Magistrate may order them to disperse: And if twelve or more shall then continue together, they shall be guilty of felony without benefit of clergy. § 5.

At the meetings so held, Justices may order any persons to be taken into custody, who shall propound or maintain propositions for altering any thing by Law established, except by authority of the King and Parliament; or who shall wilfully and advisedly make any proposition, or hold any discourse, for the purpose of inciting and stirring up the people to *hatred* or *contempt* of the King, or the Government and Constitution: And in case of resistance, proclamation may be made, and the Assembly must disperse, on the penalties before imposed. § 6.

Magistrates may resort to all such Meetings and Assemblies, and act according to Law, and require the assistance of peace-officers. § 8: And persons obstructing Magistrates attending, or going to attend, the meetings, are declared capital felons. § 10: And the other provisions of the Riot Act, 1 *Geo.* 1. *c.* 5, are adopted for enforcing this Act.

The other part of the Statute relating to *Political Lectures*, after reciting "That certain houses, &c. in *London*, *Westminster*, and the neighbourhood, and in other places, had of late been frequently used for the purpose of delivering lectures and discourses on supposed public grievances

grievances and matters relating to the Laws, Constitution and Government, and Policy of these kingdoms, and treating and debating on and concerning the same; and that under pretence thereof, lectures or discourses had been delivered, and debates held, tending to stir up hatred and contempt of the King's person, and of the Government, and Constitution of the realm as by law established;" Enacts, that every place where lectures shall be delivered, or debates held, on public grievances, or any matter relating to the Laws, Constitution, Government, or Policy of these kingdoms, where money is, directly or indirectly, given or paid for admission, unless previously licensed pursuant to the act, shall be deemed *disorderly places*, and the persons opening or using them shall forfeit 100*l*. § 12. And the usual provisions are made to prevent the statute being eluded. See title *Sunday*.

Magistrates, who, by information on oath, may have reason to suspect that any place is opened for delivering lectures, *&c.* may demand to be admitted: And in case of refusal, the place shall be deemed disorderly, and the person refusing admittance shall forfeit 100*l*. § 14.

Magistrates may demand admittance to any licensed place, at the time of delivering lectures; on the same penalties. § 15.

Two Justices may license places for delivering lectures, (for which only 1*s*. shall be paid) for one year, or any time therein specified; which licences may be revoked by the General Quarter Sessions. § 16.

It is expresly provided that the act shall not extend to lectures in the Universities; nor to Schoolmasters in the exercise of their duty: And that the act shall not take away or abridge any previous provision of the Law for punishing or suppressing such offences.—

The continuance of the act was limited to three years, from the 18th *December* 1795; and to end of the then next Session of Parliament.

A Record of a Riot on View.

BE it Remembered, *That on the —— day of*, &c. *in the —— year of the reign of our Sovereign Lord* George the Third, *now King of* Great Britain, *&c. We* A. B. *and* C. D. *Esquires, two of the Justices of our said Lord the King assigned to keep the peace in the county of*, &c. *aforesaid, and* E. F. *Esquire, then Sheriff of the said county, upon the complaint and humble supplication of* L. B. *of*, &c. *in the county aforesaid, in our own proper persons have come to the mansion-house of the said* L. B. *in the parish*, &c. *in the county aforesaid; and then and there do find* G. H. *of*, &c. *and* J. K. *and* L. M. *of*, &c. *in the county aforesaid, and other malefactors and disturbers of the peace of our said Lord the King, to us unknown, to the number of — persons, armed with swords, staves*, &c. *unlawfully, riotously and routously assembled at the said house, and the same house besetting, threatening great damage to the said* L. B. *to the disturbance of the peace of the said Lord the King, and terror of his people, against the form of the statute*, &c. *And therefore we the said* A. B. *and* C. D. *do then and there cause the said* G. H., J. K., *and* L. M. *to be arrested, and carried to the next gaol of our said Lord the King in the county aforesaid, by our view and record being convicted of the unlawful Assembly, Riot, and Rout aforesaid, there to remain every and each of them respectively, until they shall severally and respectively have paid to our said Lord the King the several sums of* 10*l*. *each, which we do impose upon them and every of them separately for their said offences.* In Witness *whereof we have set our seals to this our present record, dated at*, &c. *aforesaid, the day and year above-mentioned.*

Form of an Inquisition of a Riot.

South'ton, ss. *AN Inquisition for our Sovereign Lord the King, taken at*, &c. *in the county aforesaid, the —— day of*, &c. *in the —— year of the reign*, &c. *by the oath of* A. B., C. D., E. F., G. H., &c. *(the Jury) honest and lawful men of the said county, before* T. D. *and* J. B. *Esquires, two Justices of our said Sovereign Lord the King, assigned to keep the peace in the said county*, &c. *Which said Jurors upon their oath aforesaid say, that* J. K. *of*, &c. L. M., N. O., &c. *and other malefactors and disturbers of the peace of our said Lord the King, to the said Jurors unknown, on the —— day of*, &c. *last past, with force and arms, that is to say, with swords, staves*, &c. *and other offensive weapons, unlawfully, riotously and routously did assemble to disturb the peace of our said Lord the King: And, so being then and there assembled, into the messuage of* T. W. *in the parish*, &c. *aforesaid, in the said county, between the hours*, &c. *of the same day, unlawfully, riotously and routously entered, and him the said* T. W. *assaulted, beat and wounded, to the great disturbance of the peace of our said Lord the King, and terror of his people; and against the form of the statute in such case made and provided.*

An Indictment for a Riot.

THE Jurors, &c. *do present, That* J. K *late of*, &c. *in the county of*, &c. *aforesaid, yeoman*, L. M. *late of*, &c. *and* N. O. *late of*, &c. *and divers other persons (to the Jurors aforesaid yet unknown) on the —— day*, &c. *in the —— year of the reign*, &c. *at*, &c. *with force and arms, unlawfully, riotously and routously did meet, assemble and gather together, to disturb the peace of our said Lord the King; and being so assembled and met together, did then and there unlawfully, riotously and routously make an assault upon one* L. B. *then being in the peace of God and of our said Sovereign Lord the King; and then and there beat, wounded, and evilly treated the said* L. B. *and other injuries did to him, to the great damage of the said* L. B. *and against the peace of our said Lord the King, his crown and dignity*, &c.

Proclamation for Rioters to disperse.

OUR Sovereign Lord the King, *chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peacefully to depart to their habitations, or to their lawful business, upon the pains contained in the Act, made* [*in the 1st year of King* George, *for preventing Tumults and Riotous Assemblies.*] or [*in the 36th year of King* George *the* Third, *for the more effectually preventing Seditious Meetings and Assemblies.*] (As the case may be.)

God save the King!

For other forms, see *Burn's Justice*, title *Riot*.

RIPARIA, from *ripa*, a bank of a river.] A water running between the banks. *Magn. Cart. c.* 5: *stat. Westm.* 2. *c.* 47: 2 *Inst.* 478.

RIPIERS, *riparii, à fiscellâ, quâ in devehendis piscibus utuntur, Anglicè*, a rip] Those that bring fish from the sea coast to the inner parts of the land. *Camd. Britan.* 234.

RIPPERS, *Reapers* or cutters down of corn: Hence *Riptowel* was a gratuity or reward given to customary tenants when they had reaped their lord's corn. *Cowell.*

RIVAGIUM, *rivage*, or *riverage.*] A duty paid to the King on some rivers for the passage of boats or vessels. —*Quieti sint ab omni lastagio, passagio, tallagio,* rivagio, *&c. Placit. temp Ed.* 1.

RIVEARE, To have the liberty of a river for fishing and fowling. *Pat.* 2 *Ed.* 1.

RIVERS. By the statute of *Westm.* 2. *c.* 47, The King may grant commissions to persons to take care of Rivers, and the fishery therein:—The Lord Mayor of *London* is to have the conservation in breaches and ground overflown as far as the water ebbs and flows in the river *Thames. Stat.* 4 *Hen.* 7. *c.* 15.—Persons annoying the River *Thames*, making shelves there, casting dung therein, or taking away stakes, boards, timber-work, *&c.* off the banks, incurred a forfeiture of 5 *l.* under *stat.* 27 *Hen.* 8. *c.* 18. Commissioners appointed to prevent exactions of the occupiers of locks, wears, *&c.* upon the River *Thames* westward from the city of *London*, to *Cricklade* in the county of *Wilts*, and for ascertaining the rates of water carriage, on the said River, *&c. stat.* 6 *&* 7 *W.* 3. *c.* 16. Which statute was revived with authority for the Commissioners to make orders and constitutions, to be observed under penalties, *&c. stats.* 3 *Geo.* 2. *c.* 11: 24 *Geo.* 2. *c.* 8.

As to annoyances in Rivers, either positively by actual obstructions, or negatively, by want of reparations, the persons so obstructing, or such individuals, as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distrained to repair and amend them, and in some cases fined. 4 *Comm.* 167. See title *Nusance.*

By *stats.* 6 *Geo.* 2. *c.* 37: 10 *Geo.* 2. *c.* 32. it is made felony, without benefit of clergy, maliciously to cut down any River or sea-bank, whereby lands may be overflowed. See title MISCHIEF, *Malicious.* By *stat.* 1 *Geo.* 2. *st.* 2. *c.* 19, (now expired,) To destroy the toll-houses, or any sluice or lock on any navigable River, was made felony to be punished with transportation for seven years. And by *stat.* 8 *Geo.* 2. *c.* 20, Destroying sluices upon Rivers, or rescuing any person in custody for the same, is made felony without benefit of clergy, and the offence may be tried as well in an adjacent county, as in that where the fact is committed. By *stat.* 4 *Geo.* 3. *c.* 12, Maliciously to damage or destroy any banks, sluices, or other works on such navigable River, to open the flood-gates or otherwise obstruct the navigation, is again made felony, punishable with fourteen years transportation. Persons may justify the going of their servants or horses upon the banks of navigable Rivers, for towing of barges, *&c.* to whomsoever the right of the soil belongs. 1 *Ld. Raym.* 725.

RIVERS *making navigable, and Canals*: Divers acts of parliament pass for this purpose every session, which it would be no less tedious than useless to particularize in such a work as the present.

ROBA, A robe, coat, or garment. *Walsingh.* 267. See *Retainer.*

ROBBERY, *Roberia.*] A felonious taking away of another man's goods, from his person or in his presence, against his will, by putting him in fear, and of purpose to steal the same. *West. Symbol. part.* 2. *title Indictments.* 660. And this offence was called Robbery, either because they bereaved the true man of some of his robes or garments, or because his money or goods were taken out of some part of his garment or robe about his person. *Co.* 3 *Inst. c.* 16. This is sometimes called violent theft. *West. Symbol. ub. sup.*. *Kitchin, fol.* 16: 22 *Lib ass.* 39: See *Skene de verborum signif.* verb. *Reif,* and *Cromp. Justice of Peace, fol.* 30.

ROBBERY is a felony by the Common Law, committed by a violent assault, upon the person of another, by putting him in fear, and taking from his person his money, or other goods of any value whatsoever. 3 *Inst.* 68. *c.* 16.

What is or amounts to a Robbery in respect of the Manner, or the Person from whom any Thing is taken.

* Open and violent Larceny from the person, or Robbery, is the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear, 1 *Hawk. P. C. c.* 34. 1*st*, There must be a taking, otherwise it is no Robbery. A mere attempt to rob was indeed held to be felony, so late as *Henry* the Fourth's time: 1 *Hal. P C.* 532. But afterwards it was taken to be only a misdemeanor, and punishable with fine and imprisonment; till the statute 7 *Geo.* 2. *c.* 21. which makes it a felony, (transportable for seven years,) unlawfully and maliciously to assault another, with any offensive weapon or instrument;—or by menaces, or by other forcible or violent manner, to demand any money or goods;—with a felonious intent to rob. If the thief, having once taken a purse, return it, still it is a Robbery; And so it is, whether the taking be strictly from the person of another, or in his presence only: As, where a Robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face. 1 *Hal. P. C.* 533. But if the taking be not either directly from his person, or in his presence, it is no Robbery. *Com.* 478: *Stra.* 10. 15.

2*dly*, It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a Robbery. 1 *Hawk. P. C. c.* 34. § 5.

Lastly, The taking must be by force, or a previous putting in fear; which makes the violation of the person more atrocious than privately stealing. This previous violence, or putting in fear, is the criterion that distinguishes Robbery from other larcenies. For if one privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no Robbery, for the fear is subsequent: Neither is it capital, as privately stealing, being under the value of twelvepence. 1 *Hal. P. C.* 534. Not that it is indeed necessary, though usual, to lay in the indictment that the Robbery was committed by putting in fear; it is sufficient, if laid to be done by violence, and against the will of him robbed. *Fost* 128. And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: It is enough that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent. Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be put in fear, yet this is undoubtedly a Robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence, this is a felonious Robbery. 1 *Hawk. P. C. c.* 45. § 6. So if, under

under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted, whether the forcing a higler, or other chapman, to sell his wares, and giving him the full value of them, amounts to so heinous a crime as Robbery. 1 *Hawk. P. C. c.* 34. § 7.

This species of larceny is debarred of the benefit of clergy by *stat.* 23 *Hen.* 8. *c.* 1, and other subsequent statutes; not indeed in general, but only when committed in a dwelling-house, or in or near the King's highway. A Robbery therefore in a distant field, or foot-path, was not punished with death; 1. *Hal. P. C.* 535. but was open to the benefit of clergy, till the *stat.* 3 & 4 *W. & M. c.* 9; which takes away clergy, from both principals and accessaries before the fact, in Robbery, wheresoever committed. 4 *Comm. c.* 17. *p.* 243, 4. Principals and accessaries, before the fact, were debarred of clergy by *stat.* 23 *Hen.* 8. *c.* 1. And accessaries, after, by *stat.* 4 *P. & M. c* 4, in the cases above-mentioned. The words of the *stat* 23 *Hen.* 8, are still pursued in indictments for this offence. 1 *Hawk. P. C c.* 34. § 11. *n.*

The circumstance of putting one in fear, makes the difference between a Robbery and a cut-purse; both take it from the person, but this takes it *clam et secrete* without assault or putting in fear, and the Robber by violent assault and putting in fear. 3 *Inst.* 68. *c.* 16.

Wherever a person assaults another, with such circumstances of terror as put him in fear, and causes him, by reason of such fear, to part with his money, the taking thereof is adjudged Robbery; whether there were any weapon drawn or not, or whether the person assaulted delivered his money upon the other's command, or afterwards gave it to him upon his ceasing to use force, and begging an alms; for he was put into fear by his assault, and gives him his money to get rid of him. 1 *Hawk. P. C. c.* 34. § 9.

In the case of *Macdaniel* and others, at the *Old Bailey* Sessions in *December* 1755, Mr. Justice *Foster* was of opinion, that if a man attacked by an highwayman and robbed, previous to the Robbery resists, and is overpowered, without being under any fear at all, it is not the less Robbery upon that account. *Fost.* 128.

If the fact appear, upon the evidence, to have been attended with those circumstances of *violence* or terror which, in common experience, are likely to induce a man to part with his property against his consent, either for the safety of his person, or for the preservation of his character and good name, it will amount to a Robbery; and this, though no express demand of money is made. Thus if an officer feloniously take money from a prisoner, not to take him to gaol, under colour of authority: Or if one obtain property by threatening to accuse another of having been guilty of an unnatural crime, these Acts, particularly the latter, on the solemn opinion of all the Judges, have been held acts sufficient to raise, in the mind of the party menaced, such a *terror* and apprehension of mischief, as to constitute the offence of Robbery, by putting in fear. 1 *Hawk. P. C. c.* 34. § 6. *Leach's note*

The following distinction has also been frequently admitted in prosecutions for Robbery, *viz.* That if any thing is snatched suddenly from the head, hand, or person of any one without any struggle on the part of the owner, or without any evidence of force or violence being exerted by the thief, is does not amount to Robbery. But if any thing is broken or torn in consequence of the sudden seizure, it would be evidence of such force as would constitute a Robbery: As where part of a lady's hair was torn away by snatching a diamond pin from her head, and an ear was torn by pulling of an ear-ring, each of these cases was determined to be a Robbery. 4 *Comm. c.* 17. *p.* 244. *n.* cites *Leach* 238.

The words of the indictment, *violenter et felonicè cepit*, must be understood to imply that there is an actual taking in deed, and a taking in Law, and that may be when a thief receives, &c. For example: If thieves rob a true man, and finding but little about him, take it, this is an actual taking; and by threats of death compel him to swear upon a book to fetch them a greater sum, which he does and delivers it to them, which they receive, this is a taking in Law by them, and adjudged Robbery; for fear made him take the oath, and the oath and fear continuing, made him bring the money, which amounts to a taking in Law; and in this case there needs no special indictment, but the general indictment (*Quod violenter & felonicè cepit*) is sufficient. And so it is, if at the first the true man for fear delivers his purse, &c. to the thief. 3 *Inst.* 68. *c.* 16.

See 1 *Hawk. P. C. c.* 34. § 4. That the thief must be in possession of the thing stolen, or otherwise he is not guilty of Robbery. 3 *Inst.* 69. *c.* 16. *S P.*

The words of the indictment are *from the person*, &c. If the true man, seeking to escape for the safeguard of his money, casts it into a bush, which the thief perceiving, takes it: This is a taking in Law from the person, because it is done at one time. 3 *Inst.* 69. *c.* 16. And so, if one drive my cattle in my presence out of my pasture, or takes my hat, which fell from my head, he may be indicted as having taken things from my person. 1 *Hawk. P. C. c.* 34. §. 8. See also 3 *Inst.* 69. *c.* 16: *And.* 116. *pl.* 161: *Sty.* 156.

In some cases, a man may be said to rob me, where in truth he never actually had any of my goods in his possession; as where I am robbed by several in one gang, and one of them takes my money, in which case; in judgment of Law, every one of the company shall be said to take it, in respect of that encouragement which they give to another through the hopes of mutual assistance in their enterprise: Nay, though they miss of their first intended prize, and one of them afterwards rides from the rest, and robs a third person in the same highway, without their knowledge, out of their view, and then returns to them, all are guilty of Robbery; for they came together with an intent to rob, and to assist one another in so doing. 1 *Hawk. P. C c.* 34. § 7.

If a carrier's man or son conspire to rob him, and do it accordingly, the carrier not being privy to it, he may sue the Hundred on the statute of *Winton*; but the conspiracy may be given in evidence in mitigation of damages. *Style* 427.

If a man-servant be robbed of his master's goods, in his master's sight, this shall be taken for a robbing of the master. *Style* 156.

Taking cattle from *A.* which he is driving on the highway, is a taking from his person, and so a Robbery; 2 *Salk.* 641.

As to recovering against the Hundred, see this Dictionary, title *Hue and Cry*: And as to Robberies from the person without violence and others, see tit. *Larceny.*

ROBBERSMEN, or ROBBERDSMEN, Were a sort of great thieves, mentioned in the statutes 5 *Edw.* 3. *c.* 14: 7 *R.* 2. *c.* 5: of whom *Coke* says, That *Robin Hood* lived in the reign of King *Rich.* I. on the borders of *England* and *Scotland*, by robbery, burning of houses, rapine and spoil, &c. and that these Robberdsmen took name from him. 3 *Inst.* 197.

ROCHET, That linen garment which is worn by bishops, gathered at the wrists; It differs from a surplice; for that hath open sleeves hanging down; but a Rochet hath close sleeves. *Lindewode, lib.* 3. *tit.* 27.

ROCK-SALT; See *Salt*.

ROD, *Roda terræ*.] A measure of sixteen feet and a half long, otherwise called a Perch.

ROD-KNIGHTS, From the Sax. *Rad. Equitatio* & *Cnyt, Famulus, quasi Ministri Eqitantes*.] Certain servitors who held their land by serving their lords on horseback. *Bract. lib.* 2. *c.* 35.

ROGATION-WEEK, *Dies Rogationum*; *Robigalia*.] A time so called, because of the special devotion of prayer and fasting then enjoined by the Church for a preparative to the joyful remembrance of Christ's Ascension. *Cowell*.

ROGUE, Fr.] An idle sturdy beggar, who, by ancient statutes, for the first offence, was called a Rogue of the first degree, and punished by whipping, and boring through the gristle of the right ear, with a hot iron; and for the second offence, he was termed a Rogue of the second degree, and executed as a felon, if he were above eighteen years old; *stats.* 27 *H.* 8. *c.* 25: 14 *Eliz.* *c.* 5: but repealed by *stat.* 35 *Eliz. c.* 7. § 24: as relates to vagabonds of the second degree. See further title *Vagrants*.

ROGUS, *Lat*.] A funeral pile: A great fire wherein dead bodies were burned; and sometimes it is taken simply for a pile of wood. *Claus.* 5 *Hen.* 3.

ROLL, *Rotulus*.] A schedule of parchment that may be turned up with the hand in the form of a pipe. *Staundf. P. C.* 11. Rolls are parchments on which all the pleadings, memorials, and acts of Courts are entered and filed with the proper officer; and then they become records of the Court. 2 *Lil. Abr.* 491. By a rule made by the Court of King's Bench, every Attorney is to bring in his Rolls into the office fairly engrossed by the times thereby limited, *viz.* The Rolls of *Trinity, Michaelmas*, and *Hilary* terms, before the essoin day of every subsequent term; and the Rolls of *Easter* term before the first day of *Trinity* term; and no Attorney at law, or any other person, shall file any Rolls, &c. but the clerks of the chief clerks of this Court. *Ord. B. R. Mich.* 1705. If Rolls are not brought into the office in time, it has been ordered that they shall not be received without a particular rule of Court for that purpose. *Mich.* 9 *W.* 3. See titles *Practice*; *Pleadings*.

ROLL OF COURT, *Rotulus Curiæ*.] The Court-Roll in a manor, wherein the names, rents, and services of the tenants were copied and inrolled. See tit. *Copyhold*.

ROLLS OFFICE OF THE CHANCERY, An Office in *Chancery Lane, London*, which contains all the Rolls and Records of the High Court of Chancery, the Master whereof is the second person in the Chancery, &c. See titles *Chancery*; *Master of the Rolls*.

ROLLS OF THE EXCHEQUER, Are of several kinds; as the great Wardrobe Roll, the Cofferer's Roll, the Subsidy Roll, &c. See title *Exchequer*.

ROLLS OF PARLIAMENT, The manuscript registers of the proceedings of our old Parliaments; in these Rolls are likewise a great many decisions of difficult points in Law; which were frequently, in former times, referred to the determination of this supreme Court by the Judges of both Benches, &c. *Nichol. Hist. Libr. part.* 3. *cap.* 3. *edit.* 1714.

ROLLS OF THE TEMPLE. In the two Temples is a Roll called the Calves-head Roll, wherein every bencher, barrister, and student, is taxed yearly at so much to the cook and other officers of the houses, in consideration of a dinner of Calves-head provided in *Easter* term. *Orig. Jurid.* 199.

ROMA-PEDITÆ, Pilgrims that travelled to *Rome* on foot. *Mat. Paris, anno* 1250.

ROME, Church of, its encroachments of power here, and how suppressed: See titles *Papists*; *Pope*; *Præmunire*.

ROME-SCOT; See *Peter-Pence*.

ROMNEY-MARSH, A large tract of land in the county of *Kent*, containing 24,000 acres: and is governed by certain ancient and equitable laws of sewers composed by *Henry de Bathe*, a venerable Judge in the reign of King *Henry* III.; from which laws all Commissioners of Sewers in *England* may receive light and direction. 4 *Inst.* 276. King *Henry* III granted a charter to *Romney-Marsh*, empowering twenty-four men thereunto chosen, to make distresses equally upon all those who have lands and tenements in the said Marsh, to repair the walls and watergates of the same against the dangers of the sea. There are also several laws and customs observed in the said Marsh, established by ordinance of Justices thereto appointed in 42 *Hen.* 3: 16 *E.* 1: 33 *E.* 3, &c. The Commissioners of Sewers, in other parts of *England*, may act according to the laws and customs of *Romney Marsh*, or otherwise at their own discretion. See title *Sewers*.

ROOD, or Holy Rood, Holy Cross.

ROOD OF LAND, *Rodata Terræ*.] The fourth part of an acre.

ROOTS, Trees, shrubs, or plants. See this Dict. title MISCHIEF, *Malicious*.

ROPE-DANCERS, &c. are public nusances, and may, upon indictment, be suppressed and fined. 1 *Hawk. P. C* 75. § 6. See title *Play Houses*.

ROPES, Old ones may be imported duty-free. *Stat.* 11 *Geo.* 1. *c.* 7. § 10. See title *Navigation Acts*.

ROS, A kind of rushes, which some tenants were obliged, by their tenures, to furnish their lords withal. *Brady*.

ROSE-TILE, To lay upon the ridge of a house; is mentioned in the statute 17 *Edw.* 4. *c.* 4.

ROSETUM, A low watery place of reeds and rushes; and hence the covering of houses with a thatch made of reeds, was so called. *Cartular. Glaston. MSS.* 107.

ROSLAND, *Brit. Rhos*.] Heathy land, or ground full of ling; also watery and moorish land. 1 *Inst.* 5.

ROTHER-BEASTS. Under this name are comprehended oxen, cows, steers, heifers, and such like horned beasts. See *stat.* 21 *Jac. c.* 18.

ROTULUS WINTONIÆ, Was an exact survey of all *England, per Comitatus, Centurias,* & *Decurias*, made by King *Alfred*, not unlike that of *Domesday*; and it was so called, for that it was of old kept at *Winchester* among other records of the kingdom; but this roll time hath consumed. *Ingulph. Hist.* 516.

ROUT,

ROUT, Fr. *Route*, i. e. a company or number.] In a legal ſenſe, ſignifies an aſſembly of perſons, going forcibly to commit an unlawful act, though they do not do it. *Weſt. Symb. par.* 2. A Rout is the ſame which the *Germans* call Rot, meaning a band or great company of men gathered together, and going to execute, or indeed executing, any riot or unlawful act. See title *Riot*.

ROYAL ASSENT, *Regius aſſenſus*.] That Aſſent which the King gives to a thing formerly done by others, as to the election of a Biſhop by Dean and Chapter; which given, then he ſends a ſpecial writ for the taking of fealty. See *F. N. B. fol.* 170. When the Royal Aſſent is given to an act of Parliament, it is indorſed in the proper terms upon the Act. See title *Parliament* VII.

ROYAL FAMILY. See titles *King*; *Queen*; *Prince*.

ROYALTIES, *Regalitates*.] See title *King*. Thoſe Royalties which concern government in an high degree, the King may not grant or diſpoſe of. *Jenk. Cent.* 79.

ROYNES, Streams, currents, or other uſual paſſages of rivers and running waters. *Cowell*.

ROZIN, Is among the numerous articles, the importation of which is regulated by the *Navigation Acts*. See that title.

RUBRICAS, *à rubro colore*, because anciently written in red letters.] Conſtitutions of the Church, founded upon the ſtatutes of uniformity and public prayer, *viz. ſtatutes* 5 & 6 *Ed.* 6. *c.* 1: 1 *Eliz. c.* 2: 13 & 14 *Car.* 2. c. 4. See titles *Nonconformiſts*; *Religion*, &c.

RUDMAS-DAY, From the Sax. *Rode*, *Crux*, and Maſs-day.] The feaſt of the Holy Croſs: there are two of theſe feaſts, one on the 3d of *May*, the invention of the Croſs; and the other the 14th of *September*, called Holy Rood-day, the exaltation of the Croſs.

RULE OF COURT; An order made either between parties to a ſuit on motion: Or to regulate the practice of the Court. See titles *Motion in Court*; *Practice*.

Rule of Court is alſo granted to priſoners in the King's Bench or Fleet priſons, every day the Court ſits, to go at large, if ſuch priſoner have buſineſs in law of his own to follow. By Rule of Court of *K. B. Eaſter* term, 30 *Geo.* 3, on this ſubject, no priſoner within the King's Bench priſon, or the Rules thereof, ſhall have Day Rules above three days in each term; when they are to return within the walls or Rules before nine o'clock in the evening. 3 *Term Rep.* 584.

The Rules of the King's Bench Priſon, are certain limits without the walls, within which priſoners in cuſtody are allowed to live, on giving ſecurity to the Marſhal, not to eſcape. The benefit of theſe Rules may be had by one in cuſtody in an *excom. cap.* but is never granted to a priſoner in execution on a criminal account, or for a contempt. See Rule *Eaſter*, 30 *Geo.* 3: 3 *Term Rep.* 383: *Tidd's Pract. K. B.*

RUMNEY-MARSH; See *Romney-Marſh*.

RUMOURS, Spreading. See title *Falſe News*; and 19 *Vin. Abr.* 272.

RUNCARIA, from *Runca*.] Land full of brambles and briars. 1 *Inſt.* 5, *a*.

RUNCILUS; RUNCINUS; is uſed in *Domeſday* (ſays *Spelman*) for a load-horſe, *Equus operarius colonicus*; or a ſumpter-horſe, and ſometimes for a cart-horſe, which *Chaucer*, in the *Seaman's Tale*, calls a *Rowney*. *Cowell*.

RUNDLET; RUNLET, A meaſure of wine, oil, &c. containing eighteen gallons and a half. *Stat* 1 *R.* 3. *c.* 13.

RUNNERS of FOREIGN GOODS; See titles *Cuſtoms on Merchandiſe*; *Smuggling*.

RUPTARII, Were ſoldiers, or rather robbers, called alſo *Rutarii*; and *Rutta* was a company of robbers: Hence we derive the word rout, and bankrupt. *Mat. Paris, anno* 1250.

RUPTURA, Arable land, or ground broke up; A word uſed in ancient charters.

RURAL DEANS; See title *Dean*.

Rural Deanery. As every dioceſe is divided into archdeaconries, (of which there are ſixty) ſo each archdeaconry is divided into Rural Deaneries, which are the circuit of the Archdeacon's and Rural Dean's juriſdiction: And every Deanery is divided into pariſhes. 1 *Comm.* 111.

RUSCA, A tub or barrel of butter, which in *Ireland* is called a Ruſkin: *Ruſca apum* ſignifies a hive of bees. *Mon. Ang.* ii. 986.

RUSCATIA, The place where kneeholm or broom grows. *Co. Lit.* 5.

RUSH-LIGHTS; See *Candles*.

RUSSIA COMPANY, (or as it has ſometimes been termed *The Muſcovy Company*,) ſubſiſted by virtue of a charter granted by *Philip* and *Mary*, in the firſt and ſecond year of their reign, which was confirmed by a private ſtatute, paſſed in 8th of *Elizabeth*. The charter was granted to them under the ſtyle of *The Merchants Adventurers of* England *for the Diſcovery of Lands, Territories, Iſles, Dominions, and Seigniories unknown, and not, before their late Adventure or Enterpriſe, by Seas or Navigation commonly frequented*. In the ſtatute they were deſcribed by the name of *The Fellowſhip of* Engliſh *Merchants for the Diſcovery of new Trades*. The extent of their rights under the ſtatute was the ſole privilege of trading to and from the dominions and territories of the Emperor of *Ruſſia*, lying Northward, North-eaſtward, and North-weſtward from *London*, as alſo to the countries of *Arminia Major* or *Minor*, *Media*, *Arcania*, *Perſia*, or the *Caſpian Sea*. It was ſaid in *ſtat.* 10 & 11 *W.* 3. *c.* 6, to be commonly called *The Ruſſia Company*.

In the reign of King *Will.* III. it was thought this trade might be conſiderably enlarged, if the admiſſion of perſons into the Company was made more eaſy; and that it would be very proper to aſcertain the fee of admiſſion, which had not been done either by the charter or the ſtatute [of *Elizabeth*]. It was accordingly enacted by the ſaid ſtatute of 10 & 11 *W.* 3. *c.* 6. § 1, 2, that every Subject of this realm might be admitted into the Company on payment of 5*l.* only.

For the charter and other matters relating to this Company, ſee *Hackluyt*, vol. 1. *p.* 258—274. And for the particulars of *ſtat.* 14 *Geo.* 2. *c.* 36, as to the trade to *Perſia* through *Ruſſia*, See *Reeves's Law of Shipping and Navigation*.

RUSTICI. The churls, clowns, or inferior country tenants, who held cottages and lands by the ſervices of ploughing, and other labours of agriculture for the lord. The land of ſuch ignoble tenure was called by the Saxons *Geſalland*, as afterwards *ſocage tenure*, and was ſometimes diſtinguiſhed by the name of *terra ruſticorum*. *Paroch. Antiq.* 136. See title *Tenures*.

RYE, A grain, of which bread is made in ſome parts of *England*. See title *Corn*.

Rye and Winchelsea, An ancient ſtatute was made againſt ballaſt caſt into the channel at *Rye* and *Winchelſea*, &c. *Stat.* 2 *Ed.* 6. *c.* 30. See title *Cinque Ports*.

S.

SABBATH-BREAKING. The profanation of the Lord's Day. See title *Sunday*.

SABBATUM, The Sabbath, or day of rest; the seventh day from the Creation: It is used for peace in the book of *Domesday*.

SABALLINÆ PELLES, Sable furs, mentioned in *Hovend. p.* 578: *Brompt. anno* 1188.

SABBULONARIUM, A gravel pit: or liberty to dig gravel and sand; also the money paid for the same. *Pet. Parl. temp. Ed.* III.

SAC; See *Soke*.

SACA, In the *Saxon* is properly synonymous with *Causa* in *Latin*, whence we in *England* still retain the expression, For whose sake, *i. e.* For whose cause, *&c.*

SACABURTH; SACABERE; SAKABERE: He that is robbed, or by theft deprived of his money or goods, and puts in surety to prosecute the felon with fresh suit. *Brit. c.* 15 & 29; with whom agrees *Bracton, l.* 3. *c.* 32. The *Scots* term it *Sikerborgh*, that is *certum vel securum plegium vel pignus*; for with them *Siker* signifieth *securus*, and *borgh legius*. *Spelm.*

SACCINI, Monks so called, because they wore next their skins a garment of goat's hair; and *saccus* is applied to coarse cloth made of such hair. *Walsing.*

SACCIS, *Fratres de Saccis*, the sack-cloth brethren, or the penitential order. *Placit.* 8 *Ed.* 2.

SACCUS CUM BROCHIA, A service or tenure of finding a sack and a broach (pitcher) to the King, for the use of his army. *Bracton, lib.* 2. *c.* 16. See *Brochia*.

SACK OF WOOL, A quantity of twenty-six stone of Sheep's Wool; and of Cotton Wool, from one hundred and a half to four hundred. *Stat. antiq.* 14 *Ed* 3 *st.* 1. *c.* 2.

SACRAMENT, *Sacramentum*.] Usually applied to the Holy Sacrament of *The Lord's Supper*. By the *Rubrick* there must be three at the least to communicate, and a minister is not without lawful cause to deny it to any who shall devoutly and humbly desire it: But notorious sinners are not to be admitted to it till they have repented; nor those who maliciously contend, until they are reconciled, *&c.* also the Sacrament is not to be administered to such who refuse to be present at the prayers of the church, or to strangers; for a minister is not obliged to give it to any but those of his own parish; and the partakers of the Holy Sacrament ought to signify their names to the curate at least a day before it is administered. *Can.* 27.

If a minister refuse to give the Sacrament to any one, being required by the Bishop, he is to certify the cause of such refusal; and a parson refusing to administer the Sacrament to any without just cause, is liable to be sued in action on the case; because a man may have a temporal loss by such refusal. 1 *Sid.* 34. See the *Corporation and Test Acts*; this Dictionary, title *Nonconformists*.

In every parish church the Sacrament is to be administered three times in the year, (whereof the feast of *Easter* to be one) and every layman is bound to receive it thrice every year, *&c.* In Colleges and halls of the Universities, the Sacraments are to be administered the first or second *Sunday* of every month; and in cathedral churches, upon all principal feast-days. *Canon* 21, 22, 23.

The Churchwardens, as well as the Minister, are to take notice whether the parishioners came so often to the Sacrament as they ought; and on a Churchwarden's presenting a man for not receiving the Sacrament, he may be libelled in the Ecclesiastical Court and excommunicated, *&c.* See further, title *Reviling*, &c.

SACRAMENTUM, An oath: The common form of all inquisitions might, in *Latin*, by a Jury, run thus: *Qui dicunt supra Sacramentum suum*, &c. whence possibly the proverbial offering to take the Sacrament of the truth of a thing, was first meant by attesting upon oath.

SACRAMENTUM ALTARIS, The Sacrifice of the Mass, or what is now called, the Sacrament of the Lord's Supper. *Paroch. Antiq.* 438.

SACRILEGE, *Sacrilegium*.] Church robbery, or a taking of things out of a holy place; as where a person steals any vessels, ornament, or goods of the church: And it is said to be a robbery of God, at least of what is dedicated to his service. 3 *Cro.* 153. If any thing belonging to private persons, left in a church, be stolen, it is only common theft, not Sacrilege: But the Canon Law determines that also to be Sacrilege; as likewise the stealing of a thing known to be consecrated, in a place not consecrated. *Treat. Laws* 360.

By the Civil Law, Sacrilege is punished with greater severity than any other thefts; and the Common Law distinguished this crime from other robberies; for it denied the benefit of the clergy to the offenders, which it did not do to other felons: But by statute it is put upon a footing with other felonies, by making it felony excluded of clergy, as most other felonies are. 2 *Inst.* 250.

All persons not in holy orders, who shall be indicted, whether in the same county where the fact was committed, or in a different county, of robbing any church, chapel, or other holy place, are excluded from their clergy, by *stats.* 23 *Hen.* 8. *c.* 1: 25 *Hen.* 8. *c.* 3: 5 & 6 *Ed.* 6. *c* 10. And all persons in general are ousted of their clergy for the felonious taking of any goods out of any parish church, or other church or chapel, by *stat.* 1 *Ed.* 6. *c.* 12 See title *Larceny* II. 1. But the word robbing being always taken to carry with it some force, it seems no Sacrilege is within these statutes, which is not accompanied with the actual breaking of a church, *&c.* *Kel.* 58, 69: *Dyer* 224 And the *stat.* 23 *Hen.* 8. *c.* 1, is the only act which extends to accessaries to these robberies; except the offence amount to burglary, in

which

which case accessaries before are ousted of clergy, by *stat.* 3 & 4 *W.* & *M* c. 9. See titles *Accessary*; *Burglary.*

The term *Sacrilege* was also anciently applied to the alienation to laymen, and to *profane* or common purposes, of what was given to religious persons and to pious uses: This was a guilt which our forefathers were very tender of incurring; and therefore when the order of the Knights Templars was dissolved, their lands were, under this pretext, afterwards violated, given to the Knights Hospitallers of *Jerusalem*, for this reason: *Ne in pios usus erogata contra donatorum voluntatem in alios usus distraherentur. Paroch. Antiq.* 390.

SACRISTA, *Lat.*] A sexton, belonging to a church, in old times called *Sagerson* and *Sagiston.*

SAFE-CONDUCT, *Salvus Conductus.*] A security given by the Prince, under the Great Seal, to a stranger, for his safe-coming into, and passing out of, the realm; the form whereof is in *Reg. Orig.* 25.

The royal prerogative of granting *Safe-conducts* is considered by *Blackstone* as nearly related to, and plainly derived from, that of making war. See this Dictionary, title *King* V. 3.

Great tenderness is shewn by our laws, not only to foreigners in distress, (see title *Wreck*,) but with regard also to the admission of strangers who come spontaneously; for as long as their nation continues at peace with ours, and they behave themselves peaceably, they are under the King's protection; though liable to be sent home whenever the King sees occasion. But no Subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandise from one place to another, without danger of being seized by our Subjects, unless he has letters of Safe-conduct; which by divers ancient statutes must be granted under the King's Great Seal, and inrolled in Chancery, or else are of no effect; the King being supposed the best judge of such emergencies, as may deserve exception from the general law of arms. But passports under the King's sign-manual, or licences from his embassadors abroad, are now more usually obtained, and are allowed to be of equal validity. 1 *Comm.* c. 7. p. 259, 260. See *stats.* 15 *H.* 6. c. 3: 18 *Hen.* 6. c. 8: 20 *Hen* 6. c. 1: and further, title *Alien.*

Indeed the Law of *England*, as a commercial country, pays a very particular regard to foreign merchants in innumerable instances. One is highly proper to be mentioned in this place. By *Magna Carta*, c. 30. it is provided, that all merchants (unless publicly prohibited beforehand) shall have Safe-conduct to depart from, to come into, to tarry in, and to go through *England*, for the exercise of merchandise, without any unreasonable imposts; except in time of war: And, if a war breaks out between us and their country, they shall be attached (if in *England*) without harm of body or goods, till the King or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours. See 1 *Comm.* p. 260: *Montesq. Sp. L.* xx. 13.

The *Violation* of *Safe-conducts* or *Passports*, or the committing acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied Safe-conduct, are breaches of public faith; without the preservation of which there can be no intercourse or commerce between one Nation and another; and they are considered as one just ground of national war. And as, during the continuance of any Safe-conduct, either express or implied, the foreigner is under the protection of the King and the Law; and, more especially, as we have seen that it is one of the articles of *Magna Carta*, that foreign merchants should be entitled to Safe-conduct and security throughout the kingdom; there is no question but that any violation of either the person or property of such foreigner may be punished, by indictment in the name of the King, whose honour is more particularly engaged in supporting his own Safe conduct. And when this malicious rapacity was not confined to private individuals, but broke out into general hostilities, by *stat.* 2 *Hen.* 5 *st.* 1. c. 6, the breaking of truce and Safe-conducts, or abetting and receiving the truce breakers, was (in affirmance and support of the Law of Nations) declared to be *high treason* against the Crown and dignity of the King; and conservators of truce and Safe-conducts were appointed in every port, and empowered to hear and determine such treasons (when committed at sea) according to the ancient Marine Law, then practised in the Admiral's Court; and together with two men learned in the Law of the land, to hear and determine according to that Law the same treasons, when committed within the body of any county. Which statute, so far as it made these offences amount to treason, was suspended by *stat.* 14 *Hen.* 6. c. 8, and repealed by *stat.* 20 *Hen.* 6. c 11, but revived by *stat* 29 *Hen.* 6. c. 2; which gave the same powers to the Lord Chancellor, associated with either of the Chief Justices, as belonged to the conservators of truce and their assessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects, prior to any claim of the Crown. And it is farther enacted by *stat.* 31 *Hen.* 6. c. 4, that if any of the King's Subjects attempt or offend, upon the sea, or in any port within the King's obeisance, against any stranger in amity, league, or truce, or under Safe-conduct; and especially by attaching his person, or spoiling him or robbing him of his goods; the Lord Chancellor, with any of the Justices of either the King's Bench, or Common Pleas, may cause full restitution and amends to be made to the party injured.

It is observed, that the suspending and repealing acts of 14 & 20 *Hen.* 6, and also the reviving act of 29 *Hen.* 6, were only temporary; so that it should seem that, after the expiration of them all, the *stat.* 2 *Hen.* 5; continued in full force: but yet it is considered as extinct by the *stat.* 14 *Ed.* 4. c. 4, which revives and confirms all statutes and ordinances, made before the accession of the House of *York*, against breakers of amities, truces, leagues, and Safe-conducts, with an express exception to the *stat.* 2 *Hen.* 5. But (however that may be) it seems to have been finally repealed by the general statutes of *Ed.* VI. and Queen *Mary*, for abolishing new-created treasons; though *Hale* seems to question it as to treasons committed on the sea. 1 *Hal. P. C.* 267. But certainly the *stat.* 31 *Hen.* 6. remains in full force to this day. 4 *Comm.* c. 5. p. 69, 70.

SAFEGUARD, *Salva Guardia.*] A protection of the King to one, who is a stranger, that fears violence from some of his Subjects, for seeking his right by course of Law. *Reg. Orig.* 26.

SAFE-

SAFE-PLEDGE, *Salvus plegius.*] A surety given for a man's appearance at a day assigned. *Bracton, lib.* 4. *cap.* 2. See *Pledge*.

SAGAMAN, from Saxon *Saga, Fabula.*] A tale-teller; or secret accuser. *Leg. Hen.* I. *cap.* 63.

SAGIBARO, *alias* SACHBARO, Is the same that we now call *Justiciarius*, a Judge. *Leg. Inæ, c.* 6.

SAGITTA BARBATA, A bearded arrow. *Blount*.

SAGITTARII, A sort of small ships or vessels, with oars and sails. *R. de Diceto, anno* 1176.

SAIL-CLOTH. For encouraging the manufacture of Sail-cloth, any person may import into this kingdom undressed flax, without paying any duty for the same, so as a due entry be made thereof at the Custom-house, &c. And no drawback is to be allowed on re-exportation of foreign Sail-cloth: But an allowance shall be made of 1*d. per* ell for *British* Sail-cloth exported, &c. All foreign Sail-cloth imported, from which duties are granted, shall be stamped, expressing from whence imported, &c. And manufacturers of Sail-cloth in this kingdom are to affix, to every piece by them made, a stamp containing their names, and places of abode; or, exposing it to sale, shall forfeit 10*l.* And if any persons cut off or obliterate such stamps, they incur a forfeiture of 5*l.* upon conviction before one or more Justices, to be levied by distress, &c. *Stat.* 4 *Geo.* 2. *c.* 27.

Ships built, on first setting out to sea, to have one complete set of sails manufactured here, on pain of 50*l.* No sail-maker may work up into sails foreign Sail-cloth not stamped, under 20*l.* penalty: Sail-cloth made in *Great Britain*, the pieces being made of certain lengths and breadths, shall weigh so many pounds each bolt, and the warp wrought of double yarn, &c. Flax yarn used in *British* Sail-cloth not to be whitened with lime, on forfeiture of 6*d.* a yard. Sail-makers, &c. are to cause this act to be put up in their shops and work-houses, under the penalty of 40*s.* *Stat.* 9 *Geo.* 2. *c.* 37.

Masters of ships are to make entry of all foreign-made sails on board, under the penalty of 50*l.* and pay duty for the same, unless they choose to deliver up the sails as forfeited: Sails brought from the *East Indies* are exempted from duty: Foreign made Sail-cloth imported, is to be stamped at the landing: Forger of stamps, &c. shall forfeit 50*l.* A sail-maker making foreign Sail-cloth unstamped into sails, shall forfeit 50*l.* A sail-maker shall not repair or amend the same under the penalty of 20*l.* *Stat.* 19 *Geo.* 2. *c.* 27, continued by subsequent acts. By the *stat.* 23 *Geo.* 2. *c.* 32, duties are laid on Sail-cloths imported from *Ireland*. See also *stats.* 23 *Geo.* 2. *c.* 21. § 26: 26 *G.* 2. *c.* 32: 29 *G.* 3. *c.* 55.

SAINT MARTIN LE GRAND, Court of. The chief of the several Courts in *London* are the Sheriffs' Courts, holden before their steward or judge; from which a writ of error lies to the Court of Hustings, before the Mayor, Recorder, and Sheriffs; and from thence to Justices appointed by the King's commission, who used to sit in the church of *Saint Martin le Grand*; and from the judgment of those Justices a writ of error lies immediately to the House of Lords. 3 *Comm.* 80. *n.* cites *F. N. B.* 32.

SAIO, *onis*, A Tipstaff, or serjeant at arms; derived from the Saxon, *Sagol, Fustis*, because they used to carry a rod or staff. *Spelm.*

SALARY, *Salarium.*] A recompence or consideration made to a person for his pains and industry in another man's business: The word is used in the *stat.* 23 *Ed.* 3. *c.* 1. *Salarium* at first signified the rents or profits of a *Sala*, hall or house; (and in *Gascoigne* they now call the seats of the gentry *Sala's*, as we do halls;) but afterwards it was taken for any wages, stipend, or annual allowance. *Cowell.*

SALE, *Venditio.*] The transferring the property of goods from one to another, upon valuable consideration: If a bargain is that another shall give me 5*l.* for such a thing, and he gives me earnest, which I accept, this is a perfect Sale. *Wood's Inst.* 316. On Sale of goods, if earnest be given to the seller, and part of them are taken away by the buyer, he must pay the residue of the money upon fetching away the rest, because no other time is appointed; and the earnest given binds the bargain, and gives the buyer a right to demand the goods; but a demand without paying the money is void: And it has been held, that, after the earnest is taken, the seller cannot dispose of the goods to another, unless there is some default in the buyer; therefore if he doth not take away the goods and pay the money, the seller ought to require him so to do; and then if he doth not do it in convenient time, the bargain and Sale is dissolved, and the seller may dispose of them to any other person. 1 *Salk.* 113. A seller of a thing is to keep it a reasonable time, for delivery: But where no time is appointed for delivery of things sold, or for payment of the money, it is generally implied that the delivery be made immediately, and payment on the delivery. 3 *Salk.* 61. Where one agrees for wares sold, the buyer must not carry them away before paid for; except a day of payment is allowed him by the seller. *Noy* 87.

It is said a perfect bargain and Sale between parties, will be good, though the seller knows of an execution that is against him; and doth sell the goods to prevent the falling of it upon them. 3 *Shep. Abr.* 115. A Sale may be of any living or dead goods in a fair or market, be they whose they will, or however the seller come by them; if made with the cautions required by Law: But if one sell my goods unduly, I may have them again. *Doct. & Stud.* 328: *Perk.* § 93. If a man affirm a thing sold is of such a value when it is not, this is not actionable; but if he actually warrants it, at the time of the Sale, and not afterwards, it will bear an action, being part of the contract. 2 *Cro.* 5, 386, 630: 1 *Rol. Abr.* 97: See titles *Agreement*; *Consideration*; *Contract*; *Fraud*; *Market*, &c.

SALET, from Fr. *Salut, Salus.*] A head piece; a Salet, or scull of iron, &c. See *stat.* 20 *R.* 2. *c.* 1.

SALICETUM, An osier bed. 1 *Inst.* 4.

SALINA, A salt-pit, or place wherein salt is made. And *salina* is sometimes wrote for *salma* i. e. a pound weight. *Chart.* 17 *Ed.* 2.

SALIQUE LAW, *Lex Salica.*] A law by which males only are allowed to inherit. It was an ancient law made by *Pharamond*, King of the *Franks*, part of which seems to have been borrowed by our *Henry* I. in compiling his laws, *Qui hoc fecerit, secundum legem salicam moriatur*, &c. *cap.* 89.

SALMON. No person may take Salmons in rivers, between the 1st of *August* and the 11th of *November*; and Salmon are not to be taken under eighteen inches long, &c.

&c. under penalties. *Stats.* 13 *Ed.* 1. *c.* 47: 1 *Eliz. c.* 17. None shall sell any *pickled* Salmon in vessels before it be viewed, unless the barrel contain forty-two gallons, and the half barrel twenty-one gallons, well packed, and the great Salmon by itself, and small fish by themselves, &c. on pain to forfeit for every vessel 6*s.* 8*d.* *Stat.* 22 *Ed.* 4. *c.* 2. See *stat.* 11 *H.* 7. *c.* 23.—Salmon not to be taken in the *Thames* between 24th *August* and 11th *November*. *Stat.* 9 *Ann.* *c.* 26.—Fishmongers prohibited to buy Salmon under six pounds weight. *St.* 1 *Geo* 1. *c.* 18.—Salmon may be taken in the *Ribble* between 1st *January* and 15th *September*. *St.* 23 *Geo.* 2. *c.* 26. See farther, title *Fish*.

SALTATORIUM, A deer-leap: *Quod habeat unum* Saltatorium *in parco de E. Pat.* 1 *Ed.* 3.

SALT. The price of Salt is to be set by Justices of the peace in their sessions; and persons selling it at a higher rate shall forfeit 5*l.* Also Salt shall be sold by weight after the rate of 56 *lb.* to the bushel, under the like penalty. See *stats.* 7 & 8 *W.* 3. *c.* 31. § 44, 92: 9 & 10 *W.* 3. *c.* 6.—A duty is imposed on Salt; pits to be entered, &c. at the Salt-office on pain of 40*l.* penalty; and proprietors removing Salt from any pit, before weighed, in presence of the proper officer, to forfeit 20*l.* &c. *Stat.* 10 & 11 *W.* 3. *c.* 22: 1 *Ann. st.* 1. *c.* 21.—The duties on Salt made in this kingdom were taken off, and duty on foreign Salt to continue, except for the *British* fishery, &c. by *stat.* 3 *Geo.* 2. *c.* 20. Since then, the duties on Salt have been revived and continued, to be managed by commissioners, &c. who may grant licences to erect houses for refining of Rock-Salt, at certain places in the counties of *Essex* and *Sussex*. *Stats.* 5 *Geo.* 2. *c.* 6: 7 *Geo.* 2. *c.* 6.—The Salt duties continued for a further term, and under the same provisions, &c. with a clause of loan of 500,000*l.* And proprietors of Salt-works in *Scotland* are not to pay their work-people in Salt, under the penalty of 20*l.* *Stat.* 8 *Geo.* 2. *c.* 12.—The Salt duties further continued, with a loan of 1,200,000*l.* at 4*l.* *per cent.* interest, &c. Rock-Salt may be used in the making of Salt from sea-water in works in *Wales*, paying the duties on both. 14 *Geo.* 2. *c.* 22.—The Salt duties are made perpetual by *stat.* 26 *Geo.* 2. *c.* 3. The duties on this article are further regulated, frauds guarded against, and provisions made as to the use of Salt in the fisheries, by a vast variety of statutes. See *stats.* 26 *G.* 2. *c.* 32: 5 *G.* 3. *c.* 43: 12 *G.* 3. *c.* 58: 19 *G.* 3. *c.* 52: 20 *Geo.* 3. *c.* 34: 22 *Geo* 3. *c.* 39: 26 *Geo.* 3. *c.* 90: 25 *Geo.* 3. *c.* 58, 63: 26 *Geo.* 3. *c.* 36, 81.—As also this Dictionary, title *Navigation Acts*; and *Burn's Just.* title *Excise* (*Salt*).

SALT-DUTY in *London*. There is a custom duty in the city of *London* called *Granage*, payable to the Lord Mayor, &c. for Salt brought to the port of *London*, being the twentieth part. *Cit. Lib.* 125.

SALT-PETRE. What quantity to be delivered yearly into the royal stores; *stat.* 1 *Ann. st.* 1. *c.* 12. § 113. The King may prohibit the exportation of it; *stat.* 29 *Geo.* 2. *c.* 16. § 1. See title *Gunpowder*.

SALT-SILVER, One penny paid at the feast of St. *Martin*, by the tenants of some manors, as a commutation for the service of carrying their Lord's Salt from market to his larder. *Paroch. Antiq.* 496.

SALTUS, A high thick wood or forest. See *Boscus*.

SALVA-GARDA; See *Safe-guard*.

SALVAGE; See title *Insurance* II. 6.

SALVAGIUS, Wild, savage. *Rot. Cart.* 1 *Joh.*

SALUTE, *Salus*.] A coin made by King *Hen.* V. after his conquests in *France*; whereon the arms of *France* and *England* were stamped and quartered. *Stowe's Chron.* 589.

SANCTA, The reliques of the saints; *jurare super sancta* was to make oath on those reliques. *Leg. Canut.* c. 57.

SANCTUARY, *Sanctuarium*.] A place privileged for the safeguard of offenders' lives, being founded upon the Law of mercy, and the great reverence and devotion which the Prince bears to the place whereunto he grants such privilege. Sanctuaries were first granted by King *Lucius* to our churches and their precincts; and among all other nations, our ancient kings of *England* seem to have attributed most to those Sanctuaries, permitting [illegible] to fl[illegible] had committed both felonies and [illegible] forty days they acknowledged [illegible] mitted themselves to banishment; [illegible] if any layman expelled them he was [illegible] nd if a clerk, he was made irregular. *Mat. Westm. anno* 1[illegible] *S. P. C. lib.* [illegible] *cap.* 38: *Fleta, lib.* 1. [illegible] 29.

St. John's of *Beverly* in [illegible] had an eminent Sanctuary belonging to it in the time of [illegible] And *St. Buriens* in *Cornwall* had the like granted by King *Athelstan*, *anno* 935: so had *Westminster* granted by King *Edward* the Confessor: and *St. Martin le Grand* in *London*. 21 *Hen.* 8, &c.

Sanctuaries, it has been observed, did not gain the name of such till they had the Pope's bull, though they had full privilege of exemption from temporal Courts by the King's grant only: But no Sanctuary granted by general words, extended to high treason; though it extended to all felonies, except sacrilege, and to all inferior crimes, not committed by a Sanctuary man; and it never was a protection against any action civil, any farther than to save the defendant from execution of his body, &c. 2 *Hawk. P. C. c.* 32.

While this protection against justice remained in force, if a person accused of any crime (except treason, wherein the Crown, and sacrilege, wherein the church, was too nearly concerned) had fled to any church or church-yard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and thereupon took the oath in that case provided, *viz.* that he abjured the realm, and would depart from thence forthwith, at the port that should be assigned him, and would never return without leave from the King; he by this means saved his life, if he observed the conditions of the oath, by going with a cross in his hand, and with all convenient speed, to the port assigned, and embarking. For if, during this forty days' privilege of Sanctuary, or in his road to the sea side, he was apprehended and arraigned in any Court, for this felony, he might plead the privilege of Sanctuary, and had a right to be remanded, if taken out against his will. But by this abjuration his blood was attainted, and he forfeited all his goods and chattels. The immunity of these privileged places was very much abridged by the *stats.* 27 *Hen.* 8. *c.* 19: 32 *Hen.* 8. *c.* 12. And now, by the *stat.* 21 *Jac.* 1. *c.* 28, all privilege of Sanctuary,

tuary, and abjuration consequent thereupon, is utterly taken away and abolished.

There were several statutes made relative to Sanctuaries, whilst they existed, viz. *Art. Cler.* 9 *Ed.* 2. *st.* 1. *cc.* 10, 15: 2 *R.* 2. *st.* 2. *c.* 3: 4 *H* 8. *c.* 2: 21 *H.* 8. *c.* 2: 22 *H.* 8. *c.* 2. § 14. By 26 *H* 8. *c.* 13, Sanctuary was taken from offenders in high treason. See further, titles *Abjuration*; *Arrest*; *Privilege* I.

SANDAL, A merchandise brought into *England*; and a kind of red-bearded wheat. See *stat.* 2 *R.* 2. *c.* 1.

SAND-GAVEL, A payment due to the lord of the manor of *Rodley* in the county of *Gloucester*, for liberty granted to the tenants to dig Sand for their common use. *Tayl. Hist. Gavel.* 113.

SANE MEMORY, *i. e.* Perfect and sound mind and Memory, to do any lawful act, &c. See title *Idiots and Lunaticks.*

SANGUINEM EMERE, Was where villeins were bound to buy or redeem their blood or tenure, and make themselves freemen. *Lib. niger Heref.*

SANGUIS, Is taken for that right or power, which the chief lord of the fee had, to judge and determine cases where blood was shed. *Mon. Ang tom.* 1. *p.* 1021.

SANG and SANC, *Old Fr.* Blood.

SARABARA, A covering for the head. *Mat. Westm. ann.* 1295.

SARCLIN-TIME, from Fr. *Sarcler*, Lat. *Sarclare.*] The time or season when husbandmen weed their corn. *Cowell.*

SARCULATURA, Weeding of corn: *Una Sarculatura*, the tenant's service of one day's weeding for the lord. *Paroch. Antiq.* 403.

SARKE, Isle of; See *Jersey.*

SARKELLUS, An unlawful net or engine for destroying fish. *Inquisit. Justic. anno* 1254.

SARPLER OF WOOL, *Serplera lanæ*, otherwise called a pocket.] Half a sack. *Fleta, lib.* 2. *c.* 12.

SARSAPARILLA, May be imported from the *American* plantations, &c. if of the growth of *America. stat.* 7 *Ann. c.* 8. See title *Navigation Acts.*

SART, or *Assart*, A piece of woodland turned into arable. See *Assart.*

SARUM, *Salisbury.* There was a form of church-service called *secundum usum Sarum*, composed by *Osmond* the second Bishop of *Sarum* in the time of *William* the Conqueror, *Hollingshed, p.* 17. *col. B.*

SASSE, A kind of wear with flood gates, most commonly in navigable and cut rivers; for the damming and shutting up and loosing the stream of water, as occasion requires, for the better passing of boats and barges: This in the West of *England* is called a Lock; and in some places a Sluice. *Cowell.*

SASSONS, The corruption of *Saxons*, a name of contempt formerly given to the *English*, while they affected to be called *Angles*; they are still so called by the *Welch.*

SATISFACTION, Is the giving of recompence for an injury done; or the payment of money due on bond, judgment, &c. In which last case, it must be entered on record. 2 *Lil. Abr.* 495. See title *Payment.*

Where money given one by will, shall be held to be in Satisfaction of a debt, and where not; see title *Legacy.* As to pleading Satisfaction in cases of trespass, see titles *Sheriff*; *Officers*; *Justices*; *Trespass*, &c.

SATURDAY'S STOP, A space of time from evensong on *Saturday* till sun-rising on *Monday*, in which it was not lawful to take salmon in *Scotland*, and the Northern parts of *England*. *MS. Cowell.*

SAVER DEFAULT, Is a Law term signifying to excuse, as when a man having made default by not appearing in Court, &c. comes afterwards and alleges good cause for it, *viz.* Imprisonment at the time, or the like. *Book Ent.* See title *Default.*

SANKEFIN, Fr. *Sang*, i. e. *Sanguis, Fin, Finis.*] The determination or final end of the lineal race and descent of kindred. *Britton, c.* 119.

SAURUS, A hawk of a year old. *Bract. lib.* 5. *tr.* 1. *c.* 2. *part* 1.

SAXON LAGE, *Saxon-laga, Lex Saxonum.*] The Law of the West *Saxons* by which they were governed. See title *Merchenlage.* 4 *Comm. c.* 33.

The reason why so many traces of the *Saxon* Laws, language, and customs are to be found in *England*, are thus stated; *Robertson*, in his History of Emperor *Ch.* V. says, The *Saxons* carried on the conquest of that country with the same destructive spirit, which distinguished the other barbarous nations. The ancient inhabitants of *Britain* were either exterminated, or forced to take shelter among the mountains of *Wales*, or reduced into servitude. The *Saxon* government, laws, manners, and language were, of consequence, introduced into *Britain*; and were so perfectly established, that all memory of the institutions previous to their conquest was abolished. *Roberts.* i. 197. *Note* IV.—As to the laws of the *Saxons*, for putting an end to private wars. See *Id.* 285.

SCABINI, A word used for wardens at *Lynne* in *Norfolk. Norf. Chart. Hen.* 8.

SCALAM, *Ad scalam*, The old way of paying money into the Exchequer. The Sheriff, &c. is to make payment *ad scalam*, i. e. *solvere, præter quamlibet numeratum librum, sex denarios. Stat. W.* 1. And at that time sixpence superadded to the pound made up the full weight, and nearly the intrinsic value. This was agreed upon as a *medium* to be the common estimate for the defective weight of money; thereby to avoid the trouble of weighing it when brought to the Exchequer. *Lowndes's Essay on Coin, p.* 4: *Hale's Sher. Accounts, p.* 21. See *Pensam.*

SCALINGA, A quarry or pit of stones, or rather slates for covering houses: French *escailere*, whence scaling of houses, &c. *Mon. Angl. tom.* 2. *p.* 130.

SCANDAL, A report or rumour, or an action whereby one is affronted in public. See *Libel.*

SCANDAL OR IMPERTINENCE IN BILLS IN EQUITY. If a Bill in Equity contain matter either scandalous or impertinent, the defendant may refuse to answer it, till such Scandal or Impertinence is expunged, which is done upon an order to refer it to one of the Masters. 3 *Comm.* 442. See titles *Chancery*; *Libel* I.

SCANDALUM MAGNATUM.

WORDS spoken in derogation of a Peer, a Judge, or other great officer of the realm: These, though they would not be actionable in the case of a common person, yet

yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury, which is redressed by an action on the case, founded on the ancient statutes; as well on behalf of the Crown to inflict the punishment of imprisonment on the offender, as on behalf of the party to recover damages for the injury sustained. 3 *Comm.* *c.* 8. *p.* 124.

The laws on which this action is grounded, are *stats. Westm.* 1. 3 *E.* 1. *c.* 34: 2 *Rich.* 2. *st.* 1. *c.* 5, which, after speaking of "devisors of false news, and horrible lies, of Prelates, Dukes, Earls, Barons, and other nobles and great men of the realm, and also of the Chancellor, Treasurer, Clerk of the Privy Seal, Steward of the King's house, Justices of the one Bench or of the other, and other great officers of the realm," enact, "That none contrive or tell any false news, whereby discord or slander may grow between the King and his people; or contrive or tell any false things of Prelates, Lords, and of others aforesaid, whereof discord or slander might rise within, or any Scandal to, the realm; and he who doth the same shall be imprisoned till he have brought him forth that did speak the same." This statute is recited by *stat.* 12 *R.* 2. *c.* 11; and thereby it is further provided, that the offender not producing his author shall be punished by the advice of the Council. 4 *Inst.* 51: 4 *Co.* 12, *b.*

At the time of making the law, on which this action is founded, the constitution of this kingdom was martial, and given to arms; the very tenures were military, and so were the services; as knight-service, castle-guard, and escuage; so that all provocations by vilifying words were revenged by the sword, which often created factions in the Commonwealth, and endangered the Government itself; for in this kind of quarrels the great men, or Peers of the realm, usually engaged their vassals, tenants, and friends; so that Laws were then made against wearing of liveries or badges, and against riding armed; therefore it is that the *stat. Westm.* 2, appoints that the offender shall suffer imprisonment until he produces the author of a false report. 2 *Mod.* 156.

This action or public prosecution for *scan. mag.* is totally different from the action of slander in the case of common persons. The *scandalum magnatum* is reduced to no rule or certain definition, but it may be whatever the Courts in their discretion shall judge to be derogatory to the high character of the person of whom it is spoken: as to say of a Peer, "that he was no more to be valued than a dog;" which words would have been perfectly harmless, if uttered of an inferior person. *Bull. N. P.* 4.

Though this action is now seldom or ever resorted to, it may be matter of some utility, as well as curiosity, to peruse the following determinations on the subject:

I. *Who may bring this Action, and for what Words it lies.*

II. *Of the Proceedings in this Action.*

I. IT hath been held, that the King is not included in the words "great men of the realm," as the statute begins with an enumeration of persons of an inferior rank, as Prelates, Dukes, &c. *Cromp. Jurisd.* 19, 35.

Scandalizing the marriage of King *Hen.* VIII. with *Anne Bullein* was declared treason, by *stat.* 25 *Hen.* 8. *cap.* 22.

Also it is held, that a woman noble by birth is not entitled to this action. *Cromp. Juris.* 34.

It hath been adjudged, that though there was no Viscount at the time of making this statute, (the first Viscount being *John Beaumont* who was created Viscount, 18 *Hen.* 6,) yet when created noble, though by a new title, he was entitled to his action on this statute. *Cro. Car.* 136: *Palm.* 565, *Say and Seal* (Visc.) v. *Stephens.*

Also it hath been adjudged, that since the Union, a Peer of *Scotland* may have an action on this statute, and that it is not necessary for him to allege that he hath a seat and voice in Parliament; for by *stat.* 5 *Ann.* *c.* 8. *art.* 23, All Peers of *Scotland*, after the Union, shall be Peers of *Great Britain*, and have rank and precedency, &c. be tried, &c. and enjoy all privileges of Peers as the Peers of *England* now do, or hereafter may enjoy; except the right and privilege of sitting in the House of Lords, and the privilege depending thereon. *Com.* 439, *Falkland* Ld, v. *Phipps.*

It hath been contended, that no words of slander are punishable by this statute, unless they are actionable at Common Law; and that they are only aggravated by the statute, which, in this respect, is like the King's proclamation. 2 *Mod.* 161: *Freem.* 222.

But the contrary hereof seems to have been holden in most of the cases on this head, and not without reason; as it would be to no purpose to make a law, and thereby to give a Peer an action for such words as a common person might have before the making of the statute, and for which the Peer himself had equally a remedy by the Common Law; and therefore the design of the statute must be, not only to punish such things as import a great Scandal in themselves, or such for which an action lay at the Common Law, but also such things as savoured of any contempt of the persons of the Peers or great men; and brought them into disgrace with the Commons, whereby they took occasion of provocation and revenge. 2 *Mod.* 156.

It hath been observed, that no action was brought on this statute till 100 years after the making thereof; the Lords still continuing the military way of revenge to which they had been accustomed. 2 *Mod.* 156.

The first case on this statute, said to be reported, is in *Keilw.* where the Lord *Beauchamp* brought an action of *scan. mag.* against Sir *Richard Crofts*, for that the said *Richard* had sued out a writ of forgery of false deeds against him; and it was held, that the taking out the writ, being done in a legal way, and in a course of justice, the action did not lie. *Keilw.* 26, 27: 3 *Mod.* 164, cited.

Scan. mag. brought for saying of a Judge, "You are a corrupt Judge," and held actionable. *Cromp. Juris.* 35: Ld. Ch. J. *Dyer*'s case—So for these words, "He imprisoned me till I gave him a release." 3 *Leon.* 376; Lord *Winchester*'s case, cited *Freem.* 221.—So these words "You have writ a letter to me, which I have to shew, which is against the word of God, against the Queen's authority, and to the maintenance of superstition, and that I will stand to prove against you;" were held actionable, and 500 marks damages given. *Cro. Eliz.* 1.

 Bishop

Bishop of Norwich v. *Prickett*.—So of these words, " My Lord *Mordant* did know that *Prude* robbed *Shotbolt*, and bid me compound with *Shotbolt* for the same, and said he would see me satisfied for the same, though it cost him 100*l*. which I did for him, being my master, otherwise the evidence I could have given would have hanged *Prude*." *Cro. Eliz*. 67: For these words written in a letter, " I have heard that your Lordship hath sought by uncharitable means to bereft me of my life, lands, and liberty," an action lies. *Moor* 142: *Ld. Lumley* v. *Fox*, 4 *Co*. 16. That the action as well lies for words written as those spoken; see 2 *Show*. 505.

An action of *scan. mag*. was brought for these words, " There are more Jesuits come into *England* since the Earl of *Northampton* was Lord of the Cinque Ports than ever there were before," and held actionable. 12 *Co*. 132. In *scan. mag*. for these words spoken by a parson in the pulpit, " The Lord of *Leicester* is a wicked and cruel man, and an enemy to the Reformation in *England*," adjudged actionable, and 500*l*. damages given. 2 *Sid*. 21.

So these words, " The Earl of *Pembroke* is of so little esteem in the country, that no man of reputation hath any esteem for him, and no man will take his word for 2*d*. and no man of reputation values him more than I do the dirt under my feet;" were held actionable, though said they would not be so in the case of a common person. *Freem*. 49.

If one says, " I met *J. S*. whom I do not know, but my Lord *P*. sent after me to take my purse;" an action of *scandalum magnatum* lies, though not positively said my Lord *P*. sent him, or that it was to take the purse feloniously; which last, in case of an action by a common person, might be a good exception. 1 *Lev*. 277: 1 *Sid*. 434: 2 *Keb*. 537; E. of *Peterborough* v. *Sir John Mordant*. Vide 1 *Sid*. 133: 1 *Keb*. 813: 1 *Lev*. 148, Marquis of *Dorchester* v. *Proby*. If one says of a Peer, " He is an unworthy man, and acts against law and reason;" an action of *scan. mag*. lies, notwithstanding the words are general, and charge him with nothing certain: and so adjudged by *North*, *Windham*, and *Scroggs*, against the opinion of *Atkins*; who said the statute extended not to words of so small and trivial a nature, but to such only which were of greater magnitude, by which discord might arise, *&c*. and therefore the words " horrible lies" were inserted in the statute. Note; the Rule laid down by the Court in this case was, that words should not be construed either in a rigid or mild sense, but according to the general and natural meaning and agreeable to the common understanding of all men. 2 *Mod*. 151, *&c*.: 1 *Mod*. 232: *Freem*. 220: Lord *Townsbend* v. Doctor *Hughes*.

II. It is now clearly agreed, that though there be no express words in the statute which give an action, yet the party injured may maintain one, on this principle of Law; that when a statute prohibits the doing of a thing, which if done might be prejudicial to another, in such a case he may have an action on that very statute for his damages. 2 *Mod*. 152.

Though the action is to be brought *tam pro domino rege quam pro seipso*, yet the party is to recover all the damages. 1 *P. Wms*. 690. If the words are actionable at Common Law, the Peer hath his election to proceed on the statute, or at Common Law. *Freem*. 49. It hath been held, that this being a general law, the plaintiff need not recite it particularly; and that if he sets forth so much thereof as shews his case to be within the statute, it is sufficient. *Cro. Car*. 139: 2 *Sid*. 21: *Freem*. 425. It is now settled that no new trial is to be granted in *scan. mag*. for excessive damages; which point seems to have been first determined in the case of Lord *Townsbend* v. Dr. *Hughes*, where the Jury gave 4000*l*. damages. 2 *Mod*. 151: 1 *Mod*. 231.

It has been ruled, that in *scan. mag*. the defendant cannot justify, let the words be ever so true, because the action is brought *qui tam*, in which the King is concerned; but it hath been held, that the defendant may explain the words by shewing the occasion of speaking of them, and thereby extenuate the meaning of them, as was done in Lord *Cromwell's* case. 4 *Co*. 14: 2 *Mod*. 166: *Freem*. 220: *Poph*. 67.

In *scan. mag*. the Court will never change the *venue* on the common affidavit that the words were spoken in another county, because a Scandal raised on a Peer of the realm reflects on him through the whole kingdom; and he is a person of so great notoriety, that there is no necessity of his being tied down to try his cause among his neighbourhood. *Carth*. 400: 2 *Salk*. 668. Vide 1 *Lev*. 56: 1 *Keb*. 514: 1 *Sid*. 185: 2 *Mod*. 216.

But in the case of Lord *Shaftesbury* v. *Graham*, the Court, in *scan. mag*. on a special affidavit of the plaintiff's power and interest in the county where the action was laid, made a rule for changing the *venue*; but note, that the books, which report and cite this case, mention it as a case of the times, and that it was owing to the great influence that Lord had in the city of *London* that the Court varied from the general rule, and which rule hath ever since, notwithstanding this case, been adhered to. 2 *Jo*. 198: 1 *Vent*. 363: *Skin*. 40: 2 *Show*. 200.

It hath been held, that the statute 27 *Eliz*. c. 8, giving the writ of error in the Exchequer-chamber, does not extend to *scan. mag*. *Cro. Car*. 286, 385: 1 *Sid*. 143. That in an action of *scan. mag*. special bail is not required. 3 *Mod*. 41: *Holt. Rep*. 640. That no costs are to be given the plaintiff on his obtaining a verdict. 2 *Show*. 506.

SCARBOROUGH, Persons incorporated there, with power to distrain every man for the fifth part of houses and lands, towards the repairs of the pier and key, *&c*. See *stat*. 37 *Hen*. 8. *c*. 14.

SCAVAGE, SCEVAGE, or SCHEWAGE, from the Sax. *Sceawian*, i. e. *ostendere*.] A kind of toll or custom, exacted by Mayors, Sheriffs, *&c*. of Merchant-strangers, for wares shewed or exposed to sale within their liberties; prohibited by the statute 19 *Hen*. 7. *c*. 7. But the City of *London* still retains this ancient custom to a good yearly profit: And the Lord Chancellor, Treasurer, President of the Council, Privy Seal, Steward, and two Justices of the King's Bench and Common Pleas, are to ascertain these duties, and order tables to be made, mentioning the particulars, *&c*. *Stat*. 22 *H*. 8. *c*. 8. § 4.

SCAVAIDUS, The officer who collected the Scavage-money, which was sometimes done with great extortion. *Cowell*.

SCAVENGERS, from the Belg. *schaven*, to scrape or carry away.] Persons chosen into this office in *London* and its suburbs, who hire rakers and carts to cleanse the streets, and carry the dirt and filth thereof away.

In *Easter* week yearly, two tradesmen in every parish within the weekly bills of mortality must be elected Scavengers by the constables, churchwardens, and other inhabitants, who are to take upon them the office in seven days, under the penalty of 10*l.* These Scavengers, every day, except *Sundays* or holidays, are to bring their carts into the streets, and give notice by a bell, or otherwise, of carrying away dirt, and to stay a convenient time, or shall forfeit 40*s.* and Justices of the peace in their petit sessions may give Scavengers liberty to lodge their dirt in vacant places near the streets, satisfying the owner for the damage, &c. All persons, within the weekly bills, are to sweep the streets before their doors, every *Wednesday* and *Saturday*, on pain of forfeiting 3*s.* 4*d.* Persons laying dirt or ashes before their houses, incur a forfeiture of 5*s.* Inhabitants and owners of houses are also to pave the streets before their own houses, on the penalty of 20*s.* for every perch: And constables, churchwardens, &c. may make a Scavenger's tax, being allowed by two Justices of the peace, not exceeding 4*d.* in the pound, &c. *Stat.* 2 *W.* & *M. st.* 2. *c.* 8: and see *stats.* 3 *W.* & *M. c.* 12: 8 & 9 *W.* 3. *c.* 37: 6 *Geo.* 1. *c.* 6: 18 *G.* 2. *c.* 33. § 2, 3: and this Dict. title *Police.*

A Scavenger's rate cannot be made for a division in which there is no churchwarden or overseer resident. 1 *Stra.* 630. See further, title *Highways.*

SCEAT, *Sax.*] A small coin among the *Saxons* equal to four farthings.

SCEITHMAN, *Sax.*] A pirate or thief. *LL. Æthelredi apud Brompton.*

SCEPPA SALIS, An ancient measure of salt, the quantity now not known: *Sceppa* or *sceap* was likewise a measure of corn, from the Lat. *schapha*; baskets, which were formerly the common standard of measure, being called *skips* or *skeps* in the south parts of *England*; where a bee-hive is termed a bee-skip. *Mon. Ang. p.* 284: *Paroch. Antiq.* 604.

SCEURUM, A barn or granary. *Ingulphus, p* 862.

SCHAFFA, A Sheaf, as *Schaffa sagittarum*, a sheaf of arrows. See *Skene de verbor. signif. eod. verbo.*

SCHARPENNY, A small duty or compensation: And some customary tenants were obliged to pen up their cattle at night in the pound or yard of the lord, for the benefit of their dung; or if they did not so, they paid a small compensation called Sharpenny or Sharnpenny, *i. e.* dung penny, or money in lieu of dung; The Saxon *scearn* signifying muck or dung. In some parts of the North they still call cow-dung by the name of cow-skern; and in *Westmorland* a Skarny Houghs is a nasty, dirty dunghill-wench. *Cowell.*

SCHAVALDUS; Vide *Scavaldus.*

SCHEDULE, A little roll, or long piece of paper or parchment, in which are contained particulars of goods in a house let by lease, &c. See *Lease.*

Schedules are likewise frequently annexed to answers in a Court of Equity, containing an account of estates or effects, monies, debts, &c. received or disposed of or expended by the person putting in the answer: And Schedule is a term frequently used, instead of Inventory.

SCHETES, An ancient term for Usury; and the Commons prayed that order might be taken against this horrible vice, practised by the Clergy as well as the Laity *Rot. Parl.* 14 *R.* 2. *Cowell.*

SCHILLA, A little bell used in monasteries, mentioned in our histories. *Eadmer. lib.* 1. *c.* 8.

SCHIREMAN, Sax. *Scir man.*] A Sheriff. *LL. Inæ Regis apud Brompton.* The ancient name for an Earl. See titles *Peers of the Realm* I.; *Shireman*; *Sheriff.*

SCHIRRENS-GELD, *Shiregeld.*] A tax paid to Sheriffs for keeping the Shire or County Court. *Cartular. Abbat St. Edmund* 37.

SCHISM, *schisma.*] A rent or division in the church. See title *Heresy.*

SCHOOLMASTER. No person shall keep or maintain a Schoolmaster, who does not constantly go to church, or is not allowed by the Ordinary, on pain of 10*l.* a month; and the Schoolmaster shall be disabled, and suffer a year's imprisonment. *Stat.* 23 *Eliz. c.* 1.—Recusants are not to be Schoolmasters in any public Grammar-school, nor any other, unless licensed by the Bishop; under the penalty of forfeiting 40*s.* a-day. *Stat.* 1 *Jac.* 1. *c.* 4 —Every Schoolmaster keeping any public or private School, and every tutor in any private family, shall subscribe the declaration, that he will conform to the Liturgy of the Church of *England* as by Law established, and be licensed by the Ordinary; or he shall for the first offence suffer three months' imprisonment, &c. *Stat.* 13 & 14 *Car.* 2. *c.* 4.—If any Papist shall be convicted of keeping a School, or taking upon him the education of youth, he shall be adjudged to perpetual imprisonment. *Stat.* 11 & 12 *W.* 3. *c.* 4. See titles *Papists*; *Dissenters*; as to the mitigation of these by later statutes, under certain conditions. The *stat.* 12 *Ann. st.* 2. *c.* 7, which imposed the penalty of three months' imprisonment on persons keeping School without a licence from the Bishop, was repealed by *stat.* 5 *Geo.* 1. *c.* 3.

By the Canons, no man shall teach in a public School, or private house, but such as is examined and allowed by the Bishop, and of sober life: And all Schoolmasters are to teach the catechism of the church in *English* or *Latin*; and bring their Scholars to church, and afterwards examine them how they have benefited by sermons, &c. *Can.* 77, 79 —Though the Act of Uniformity obliges Schoolmasters only to assent to and subscribe the declaration, yet it adds, according to the laws and statutes of this realm, which presupposes some necessary qualification. And therefore a Bishop may take time to inquire into the character of an elected Schoolmaster, before he licenses him. 2 *Strange* 1023.

As to the power of a Schoolmaster in correcting his Scholars, see title *Homicide* II. 1.

SCILICET, An adverb, signifying, that is to say; *to wit*; *Hobart*, in his exposition of this word, says, it is not a direct and separate clause, nor a direct and entire clause, in a conveyance, but *intermedia*; neither is it a substantive clause of itself; but it is rather to usher in the sentence of another, and to particularise that which was too general before, or distribute that which was too gross, or to explain that which was doubtful and obscure; and it must neither increase, nor diminish the premises or *habendum*, for it gives nothing of itself: But it may make a restriction, where the precedent words are not so very express, but that they may be restrained. *Hob.* 171, 172. See also 1 *P. Wms.* 18; and the case of a bond to two with a Scilicet, severing the money between them. *Dy.* 350. The word Scilicet, in a declaration, shall not make any alteration of that which was before. *Poph.* 201.

201, 4. And yet, in some cases, the Scilicet which introduces a subsequent, shall not be rejected. 2 *Cro.* 618. See title *Pleading*.

SCIRE FACIAS.

A Writ judicial, most commonly to call a man to shew cause to the Court whence it issues, why execution of judgment passed should not be made out. This writ is not granted until a year and a day be elapsed after a judgment given. *Old Nat. Brev fol.* 151. *Scire facias* upon a fine lies not, but within the same time after the fine levied; otherwise it is the same with the writ of *habere facias seisinam*. *West. Symbol. part* 2. title *Fines*, § 137. See *stats.* 25 *E.* 3. *st.* 5. *cap.* 2: 39 *Eliz. c.* 7.

Other diversities of this writ are in the table of the *Register Judicial and Original*. See also *Rastall's Entries*, verb. *scire facias*. *Cowell*. And *post.* titles *Scire Facias*, against *Bail*; *ad audiendum errores*; in *detinue*, &c.

All Writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the Court concludes *primâ facie*, that the judgment is satisfied and extinct: But it will grant a writ of *scire facias* in pursuance of *stat. Westm.* 2. 13 *Ed.* 1. *c.* 45, for the defendant to shew cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such matter as he has to allege, in order to shew why process of execution should not be issued. 3 *Comm.* 421.

I. A Scire Facias is deemed a judicial writ, and founded on some matter of record, as judgments, recognizances, and letters patent, on which it lies to enforce the execution of them, or to vacate or set them aside; and though it be a judicial writ of execution, yet it is so far in nature of an original, that the defendant may plead to it, and is in that respect considered as an action; and therefore it is held, that a Release of all actions, or a release of all executions, is a good bar to a *scire facias*. *Litt.* § 505: *Co. Lit.* 290, *b*; 291, *a*: *F. N. B.* 267.

But though it be held that a *scire facias* is in nature of an original, yet it hath been adjudged, that no writ of error lies into the Exchequer-chamber on a judgment given in *B R.* on a *scire facias*; the statute 27 *Eliz. c.* 8, which gives the writ of error, mentioning only suits or actions of debt, detinue, covenant, account, actions upon the case, *ejectione firmæ*, or trespass. *Cro Car.* 286, 300, 464: 1 *Rol. Rep.* 264; 1 *Vent.* 38: 1 *Salk.* 263.

If a bill of exceptions be tendered to a Judge, and he signs it, and dies, a *scire facias* lies against his executors or administrators to certify it. 4 *Inst.* 438: See 2 *Inst.* 428.

A *scire facias* lies against a Sheriff who levies money on a *fi. fa.* and retains it in his hands. *Holt* 32: *Cro. Jac.* 514: 1 *And.* 247: *Godb.* 276.

So a *scire facias* will lie for a fine assessed on the party at the Justice-seat of a forest. *Cro. Car.* 409. It lies to have execution of damages recovered in appeal. *Cro. Jac.* 549.

Upon an *elongavit* returned by the Sheriff, a *scire facias* lies against the pledges in replevin, by the plaintiff in the Sheriff's Court, transmitted to the hustings, and so to *B. R.* by *certiorari*. *Comb.* 1. And a *scire facias* lies against the Sheriff for taking insufficient pledges in replevin. *Hutt.* 77.

If one hath judgment in a *quare impedit*, and afterwards, before execution, the party is outlawed, the King may have a *scire facias* to execute the judgment; the King having privity enough in this case to shew execution, because the thing, as it was in the plaintiff, vested in the King. *Moor* 241: *Cro. Eliz.* 44, 325. Where having the thing gives a sufficient privity to maintain a *scire facias*; see *Keilw.* 168, 169.

On a motion to discharge an outlawry which was pardoned by the act of oblivion, the Court held that it could not be done on motion, but that the party must bring a *scire facias* on the act. *Stil.* 348. See title *Outlawry* IV.

Where one obtained judgment, and after had judgment on a *scire facias* thereupon, and then became a bankrupt, and the original judgment was assigned by the commissioners to *S. S.* upon motion, it was entered to intitle him to the benefit of the judgment on the *scire facias* without bringing a new one. 3 *Mod.* 88.

A *scire facias* brought by the successor of a President of the College of Physicians in *London*, (upon a judgment in debt obtained by him upon the statute 14 & 15 *H.* 8. *c.* 5, against practising physic in *London* without a licence,) who died before execution; it was objected on demurrer, that the *scire facias* ought to have been brought by the executor or administrator of him who recovered: But without argument the Court held, that the successor might well maintain the action; for the suit is given to the College by a private statute, and the suit is to be brought by the President for the time being; and he having recovered in right of the Corporation, the Law shall transfer that duty to the successor of him who recovered. *Cro. Jac.* 159.

A *scire fac.* was brought in the Court of *C. B.* to reverse a Fine in ancient demesne; and it was ruled, that no such writ lay, but that the party ought to bring his writ of deceit. *Salk.* 210: 3 *Salk.* 35: 3 *Lev.* 419: 1 *Ld. Raym.* 177.

Where either party dies, between the verdict and the judgment, it is enacted, by the statute 17 *Car.* 2. *c.* 8, "That his death shall not be alleged for error, so as the judgment be entered within two terms after the verdict." In the construction of this statute, it has been holden, that the death of either party before the Assizes is not remedied: but if the party die after the Assizes begin, though before the trial, that is within the remedy of the statute; for the Assizes are considered but as one day in Law, and this is a remedial act, which shall be construed favourably. The judgment upon this statute is entered by or against the party, as though he were alive; and it should be entered, or at least signed, within two terms after the verdict. But there must be a *scire facias* to revive it, before execution can be taken out: and such *scire facias*, pursuing the form of the judgment, should be general, as on a judgment recovered by or against the party himself. *Tidd's Pract. K. B.*; and the authorities there cited.

By

By *stat.* 8 & 9 *W.* 3. *c.* 11, it is enacted, " That in all actions to be commenced in any Court of Record, if the plaintiff or defendant happen to die, after interlocutory and before final judgment, the action shall not abate by reason thereof, if such action might have been originally prosecuted or maintained, by or against the executors or administrators of the party dying; but the plaintiff, or, if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, or, if he died after, then against his executors or administrators, to shew cause, why damages in such action should not be assessed and recovered by him or them. And if such defendant, his executors or administrators, shall appear at the return of such writ, and not shew or allege any matter sufficient to arrest the final judgment, or being returned warned, or, upon two writs of *scire facias*, it being returned that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the county, shall make default, that thereupon a writ of inquiry of damages shall be awarded; which being executed and returned, judgment final shall be given for the said plaintiff, his executors or administrators, prosecuting such writ or writs of *scire facias*, against such defendant, his executors or administrators, respectively." This statute has been held not to extend to cases, where the party dies before interlocutory judgment; though it be after the expiration of the rule to plead. 1 *Wilf.* 315.

Where either party dies, after interlocutory judgment, and before the execution of the writ of inquiry, the *scire facias* upon this statute ought to be, for the defendant, or his executors or administrators, to shew cause why the damages should not be assessed and recovered against them, and to hear the judgment of the Court thereupon. *Lil. Ent.* 647: 6 *Mod.* 144. But where the death happens after the writ of inquiry is executed, and before the return, the *scire facias* must be to shew cause, why the damages assessed by the Jury should not be adjudged to the plaintiff, or his executors or administrators. 1 *Wilf.* 243: See 1 *Term Rep.* 388. And where the plaintiff dies, after interlocutory and before final judgment, in an action against an executor, the defendant cannot plead to the *scire facias* a judgment upon bond against his testator, and no assets *ultrà*; for the statute never intended, that the executor should be in a better situation, as to the assessing of damages upon the inquiry, than his testator, who could have pleaded nothing but a release, or other matter in bar, arising *puis darrein continuance*. 1 *Salk.* 315: 6 *Mod.* 142.

The judgment upon this statute is not entered by or against the party himself, as upon *stat.* 17 *Car.* 2. *c.* 8, but by or against his executors or administrators. 1 *Salk.* 42. And where the defendant dies, after interlocutory and before final judgment, two writs of *scire facias* must be sued out by the plaintiff, before he can have execution: one before the final judgment is signed, in order to make the executors or administrators parties to the record; the other after final judgment is signed, in order to give them an opportunity of pleading no assets, or any other matter, in their defence: for it would be unreasonable that the executors or administrators should be in a worse situation, where their testator or intestate died before the final judgment was signed, than they would have been in if they had died afterwards. *Say.* 266. See this Dictionary, title *Abatement* I. 6. *c.*

II. There have been different opinions whether a *scire facias* lay at Common Law or not; but this doubt, says *Coke*, arose for want of distinguishing between personal and real actions. At Common Law, if after judgment given, or recognizance acknowledged, the plaintiff did not sue out execution within the year, the plaintiff, or his conusee, was driven to his original upon the judgment; and the *scire facias* in personal actions was given by the statute of *Westm.* 2. *c.* 45. But in real actions, or upon a fine, though no execution was sued out within a year after the judgment given or fine levied, yet after the year a *scire facias* lay for the land, &c. because no new original lay upon the judgment or fine. 2 *Inst.* 469, 470.

A *scire facias* lay as well in mixed as real actions, and upon a judgment in assise. So it lay upon a judgment in a writ of annuity. *Salk.* 258, 600.

It hath been adjudged, that if there be judgment in ejectment, and no execution sued thereon in a year and a day, an *habere facias possessionem* cannot be sued out after, without a *scire facias*; and *Holt*, Ch. J. said, that as to the possession of the land an ejectment was real, and the only remedy a termor for years had, and that a recovery therein bound the right of inheritance. *Salk.* 258, 600: *Comb.* 250: 7 *Mod.* 64: And see 1 *Sid.* 307, 351: 2 *Keb* 307: *Skin.* 161: 3 *Lev.* 100: *Lutw.* 1268.

But though, after a year and a day, there can be no execution of a judgment without a *scire facias*, yet if the plaintiff hath been delayed by a writ of error, he may take out execution within a year and a day after the judgment affirmed. 5 *Co.* 80: *Moor* 566 *pl.* 772: *Cro. Eliz.* 706: *Godb.* 372: *Palm.* 44: See 1 *Rol. Abr.* 899: *Lan.* 20: *Dennis* v. *Drake*: *Cro. Eliz.* 416.

So, if after the year after the recovery the defendant brings a writ of error, and the judgment is affirmed, though before the writ of error brought the recoveror was put to his *scire facias*, yet this affirmance is a new judgment, and the recoveror may have, within the year after the affirmance, a *fieri facias* or *capias*, without a *scire facias*. 1 *Rol. Abr.* 899. And see *Palm.* 449: *Latch* 193.

So, if he be nonsuit in the writ of error, or if the writ of error be discontinued: for though in these cases there is not any new judgment given, yet the bringing of the writ of error revives the first judgment. *Cro. Jac.* 364: 1 *Rol. Rep.* 104, 113: Vide 1 *Rol. Abr.* 899.

If upon a judgment there be a *cesset executio* for a year after the judgment, the plaintiff within the subsequent year may take out execution without a *scire facias*. 6 *Mod.* 288: 7 *Mod.* 64.

Also it hath been held, that where execution hath been taken out after the year and day, it is not void, but voidable only. 3 *Leon.* 404: *Salk.* 273.

If the execution is staid by injunction, though the act of the defendant, yet the Court will not take notice thereof. See title *Execution*.

In such case there must be a *scire facias*; the staying the proceedings by injunction, does not appear to the Court, by any record of its own: Nor is the filing a bill in equity

equity any revival of the judgment, as in the case of a writ of error. 6 *Mod.* 288: *Salk.* 322. See title *Injunction*. But where it appeared that the whole delay had arisen, on the part of the defendant, by bills in Chancery for injunctions, and by obtaining time for payment, &c. the Court were unanimous that this rule of reviving a judgment, above a year old, by *scire facias*, before execution, which was intended to prevent a surprise upon the defendant, ought not to be taken advantage of by one, who was so far from being surprised by the delay, that he himself had been trying all manner of methods, whereby he might delay the plaintiff; and therefore they discharged the rule for setting aside the execution, with costs. 2 *Burr* 660.

If judgment be given in debt, and no execution sued out within the year, yet the plaintiff may, after an award of an *elegit* on the judgment roll, as of the same term with the judgment, continue it from thence, by *vicecomes non misit breve*; so held on a motion to set aside the execution; and though the Court said that an *elegit* ought to be actually taken out within the year, yet being informed by the clerks of the Court, that it had been the practice for many years to make such entry, &c. it was said to be the law of the Court, and they ordered the execution to stand. *Carth.* 283: 2 *Show.* 235: *Comb.* 232.

If the demandant, or plaintiff, taketh his process of execution within the year, though it be not served within the year, yet if he continue the same, he may have execution at any time after the year. 2 *Inst.* 471: *Co. Lit.* 290. *b*: And see 2 *Leon.* 77, 78, 87: 3 *Leon.* 259: 4 *Leon.* 44: 1 *Sid.* 59: 1 *Keb.* 159: 6 *Mod.* 288.

If the plaintiff delay the executing of a writ of inquiry till a year after the interlocutory judgment, he cannot execute it after without a *scire facias*.

In the case of the King, there need not be any *scire facias* after the year and day. 2 *Salk.* 603.

After a judgment, if the plaintiff within the year sues a *scire facias*, he cannot have a *capias*, within the year, until he hath a new judgment on the *scire facias*. 1 *Rol. Abr.* 900: 3 *Danv.* 333. *Q.* *p.* 1.

Where there is any change or alteration of parties, a *scire facias* is in general necessary to warrant an execution, as in case of death, &c. Where there are two or more plaintiffs or defendants in a personal action, and one of them dies before judgment, his death should regularly be suggested on the roll, and judgment entered for or against the survivors. But where one of two plaintiffs died before interlocutory judgment, and the first notwithstanding went on to execution in the name of both; on a motion to set aside the proceedings for this irregularity, the Court permitted the plaintiff to suggest the death of the other before interlocutory judgment on the roll, and to amend the *ca. sa.* without paying costs. And where one of several plaintiffs dies after judgment, execution may be had for or against the survivors without a *scire facias*: But the execution, in such case, should be taken out in the joint names of all the plaintiffs or defendants, otherwise it will not be warranted by the judgment. *Tidd's Pract. K. B. c.* 41, and the authorities there cited. If proceedings are removed out of the County Court, or other Courts, not of Record, by writ of false judgment, and the plaintiff is nonprossed, the execution shall issue out of the Court above, and a *scire facias* seems to be necessary for this purpose. *Tidd's Pract. K. B. c.* 41. And see this Dict. title *Abatement*.

A *scire facias* seems necessary under the Lords' Act, 32 *Geo.* 2. *c.* 28. § 20, which gives execution against the future goods of an insolvent debtor taking the benefit of that act. 1 *Term Rep.* 80.

When a prisoner is charged in execution, the execution is considered as executed, and therefore, though the plaintiff afterwards die, his executors are not bound to revive the judgment by *scire facias*; or even to charge the defendant in execution *de novo*. *Tidd's Pract. K. B.* 211, cites *King* v. *Millett*, *Hil.* 22 *Geo.* 3.

III. Recognizances and Statutes are considered as judgments, being obligations solemnly acknowledged, and entered of record, and the *scire facias* on those is the judicial writ and proper remedy which the conusee hath; but herein we must distinguish between Recognizances at Common Law and Statutes-merchants, &c. for, upon the former, if the conusee did not take out execution within a year, after the day of payment assigned in the recognizance, he was obliged to commence the suit again by original; the Law presuming the debt might have been paid, if execution was not sued within the year after the money became payable; but this Law is altered by *stat. Westm.* 2. *c.* 45, by which the conusee hath a *scire facias* given him to revive the judgment, and put it in execution; if the conusor cannot stop it by pleading such matter as the Law judges sufficient for that end, such as a release, &c. But the conusee of a statute-merchant, &c. may at any time sue execution on them without the delay or charge of a *scire facias*. *Litt. Rep.* 89. That a *capias* lies not on a recognizance, but only a *scire facias*; see 1 *Brownl.* 83: *Co. Lit.* 291: 2 *Inst.* 469: *F. N. B.* 296: *Bro. Recog.* 17.

Also as to recognizances at Common Law, and statutes and recognizances introduced by Statute Law, we must further distinguish; that if on the first the conusee dies before execution sued, his executor shall not sue it, even within the year, without bringing a *scire facias* against the conusor; the reason is, because the Law presumes the debt might have been paid to the testator, and therefore will not suffer the debtor to be molested, unless it appear that he hath omitted to perform the judgment; and this is to be done by *scire facias* brought by the executor, for the alteration of the person altereth the process at Common Law; but this tending to delay, the *scire facias* is taken away in statutes and recognizances by Statute Law, by the several Acts of Parliament which introduced them; and therefore upon the death of the conusee of a statute merchant, &c. his executors may come into Chancery, and upon their producing the testament and the statute, shall have execution without a *scire facias*, as the testator himself might. 2 *Inst.* 395, 471: *Bro. Stat. Merch.* 16, 43, 50.

If a man be bound in a recognizance to the King, upon condition to be of good behaviour, &c. he cannot be indicted for breach of the good behaviour, by which he forfeits his recognizance, without a *scire facias*; for if a *scire facias* had been brought, he might have pleaded some matter in discharge thereof. 4 *Inst* 181: 1 *Rol. Abr.* 900. What shall be said a breach, see *Cro. Car.* 498; and how to be assigned, see 3 *Bulst.* 220: *Cro. Jac.* 415: *Stil.* 369: And this Dict. title *Surety of the Peace*.

If a man acknowledges a recognizance, to be paid at a day within the year after the date of the recognizance, in this case he may have execution by *fieri facias* or *elegit* within the year after the day of payment, though the year be past from the date of the recognizance. 21 *Ed* 3. 22, *b*: 1 *Rol. Abr.* 899, 900: 2 *Inst.* 471. See 2 *Rol. Abr.* 468: *Co Lit.* 292.

If a man recovers an annuity, he shall have execution for every time that occurs after by *fieri facias* or *elegit* within the year after the time incurred; though the year be past from the judgment; but not after the year without a *scire facias*. 1 *Rol. Abr.* 900: 2 *Inst.* 471: *Salk.* 258, 600.

If two acknowledge a recognizance of 100*l.* jointly and severally, the conusee may sue several *scire facias's* against the conusors upon this recognizance. 2 *Inst.* 395.

Scire facias upon a Recognizance in Chancery, may be sued out to extend lands, &c. If, upon a *scire facias* upon a recognizance in Chancery, the record be transmitted into *B. R.* to try the issue, and the plaintiff is nonsuit; he may bring a new *scire facias* in *B. R.* upon the record there. 2 *Saund.* 27. Where a statute is acknowledged, and the cognisor afterwards confesseth a judgment, and the land is extended thereon; in this case the cognisee shall have a *scire facias* to avoid the extent of the lands; but if the judgment be on goods, it is otherwise. 1 *Brownl.* 37: 3 *Nelf. Abr.* 186. *Scire facias* lies on recognizance of the peace, &c. removed into *B. R.* See title *Surety of the Peace*.

IV. Scire facias may be pleaded to, before judgment given upon it; afterwards it is too late: Though a writ of error may be brought to reverse the judgment on the *scire facias*, if that be not good on which the judgment was grounded. 2 *Inst.* 503. Payment was no plea at Common Law to a *scire facias* upon a judgment; because it is a debt upon record. 3 *Lev.* 120; But this was altered by *stat.* 4 *Ann. c.* 16. § 12, which gives the defendant liberty to plead such payment.

Whatever is pleadable to the original action in abatement, shall not be pleaded to disable the plaintiff from having execution on a *scire facias*; because the defendant had admitted him able to have judgment. 1 *Salk.* 2.—If a judgment be obtained against an executor, and afterwards a *scire facias* is brought against him upon that judgment, he cannot plead a judgment recovered against his testator, and that he hath not assets *ultra*, &c. because he might have pleaded it to the first action; for it is a settled rule that if a defendant hath a matter proper for his defence, and he neglects to plead it in bar to the action at the time he may, he shall never take advantage of it after. 2 *Strange* 732.—In *scire facias* on a judgment in debt, or other personal action, the defendant cannot plead non-tenure of the land generally, where it is contrary to the return of the Sheriff; though he may plead a special non-tenure: But on a *scire facias* to have execution in a real action, the defendant may plead non-tenure generally, because the freehold is in question, and that is favoured in Law; and the ter-tenants may plead there are other ter-tenants not named, and pray judgment if they ought to answer till the others are summoned, &c. though it would be otherwise if the *scire facias* had been against particular tenants by name. 2 *Salk.* 601. —On a *scire facias* to have execution upon a judgment in action of debt, every ter-tenant is to be contributory; and therefore one shall not answer, as long as he can shew that another is liable and not warned: *Contrà* on a *scire facias* upon a judgment in a real action; for every tenant is to answer for that which he hath, and one may be contributory, and the other not. 2 *Cro.* 507.

On a *scire facias* against the heir and ter-tenants to reverse a common recovery of lands, the *scire facias* is to issue against all the ter-tenants, for they are to gain or lose by the judgment in the recovery. *Raym.* 16: 3 *Mod.* 274.—A *scire facias* to have execution of a fine, shall not be sued against lessee for years; but against him who hath the freehold, who may have some matter to bar the execution. *Cro. Eliz.* 471: 2 *Brownl.* 144. In ejectment, it was adjudged, that a *scire facias* might be brought by the lessee, though he was but nominal, and that it may be had by the lessor himself; as either of them may have a writ of error on the judgment: And that it might be brought against those who were strangers to the judgment, and against the executors of the defendant, &c. 2 *Lutw.* 1267.

If a judgment be above ten years' standing, the plaintiff cannot sue a *scire facias* without a motion in Court, on affidavit that the debt is due, the judgment unsatisfied, and the defendant living; in *B. R.* But in *C. B.* by motion of course, signed by a Serjeant, unless it is of twenty years standing, when a motion must be made in Court, on affidavit: If under ten, but above seven, he cannot have a *scire facias* without a motion at the side bar; which side bar rule is obtained of course, without any motion by counsel. Note; after such motion, and judgment revived by *scire facias*, if the defendant dies before execution, the plaintiff must sue a new *scire facias*, but may have it without motion, for the judgment was revived before. *Salk.* 598. *Sellon's Pract.*

In the King's Bench, and in all cases, there must be either one *scire facias*, with a *scire feci* returned, or two *scire facias's* with *nihils*. 2 *Inst.* 272: 2 *Mod.* 227.—But in *C. B.* whenever the *scire facias* is to revive a judgment against the same defendant, who was party and privy to the judgment, one *scire facias* is sufficient, though a *nihil* be returned thereto. *Dy.* 186: *Salk* 599.—But not so where the defendant is not party to the record. The time however between the *teste* and return, in both Courts, is in effect the same: For in *C. B.* the one *scire facias* must have fifteen days between the *teste* and return; whereas, in *K. B.* there must be fifteen days between the *teste* of the first and the return of the second *scire facias*. So, in *C. B.*, where two *scire facias's* are necessary.—If only one *scire facias* and a *scire feci* in *K. B.* such *scire facias* should have fifteen days between the *teste* and return.—So must every *scire facias* when the proceeding is by original: But if inclusive both of *teste* and return, it is good. *Sellon's Pract.*

Although the intent of the *scire facias* is to give the party, against whom execution is about to issue, notice or warning thereof, yet by the general practice it is wholly defeated, for the defendant may be summoned or not, as the party thinks fit: And, indeed, the usual way is to revive the judgment without giving the party any notice. *Sellon's Pract.* And it seems that the party may always

always search the office, and on finding a *scire facias* left there for a return, he may appear though he is not warned or summoned. *J. M.*

No *alias scire facias* must issue till the first writ of *scire facias* is returnable. *R. T.* 8 *W.* 3.—And in C.B. not until the appearance day of the return of the first.—The *alias* shall bear *teste* the day of the return of the first. *Salk.* 599: And in C. B. on the appearance day, as must the *alias scire facias* by original. *Sellon's Pract.*

A defendant being summoned upon a *scire facias*, and the summons returned, if he doth not appear, but lets judgment go by default, he is for ever barred. 1 *Lev.* 41, 42.—If the Sheriff hath returned him warned, he shall not have *auditâ querelâ* on a release, &c. for the defendant might have pleaded the same on the return of the *scire facias*; but if the Sheriff return *nihil*, on which an execution is awarded, he shall have *auditâ querelâ*. *New Nat. Br.* 230.—In the first case, he might have appeared and pleaded; in the other, not being warned, he was not bound to appear. Where there has been no *scire feci*, and only two *nihils*, the Court will often relieve upon motion, and not put the party to an *auditâ querelâ*. *Salk.* 93. 264: 2 *Strange* 1075.

Where the plaintiff in the judgment releaseth the defendant of all judgments and executions, &c. the defendant may, upon his release, sue out a writ of *scire facias* against the plaintiff in the judgment *ad cognoscendum scriptum suum relaxationis*; and he need not sue out his *auditâ querelâ*. *Hil.* 5 *W.* & *M. B. R.*

Damages are not recoverable in a *scire facias*. 3 *Burr.* 1791. Also it was formerly held that the plaintiff could not in a *scire facias* recover costs: but this is now remedied by *stat.* 8 & 9 *W.* 3. *c.* 11. *Dal.* 95: 3 *Bulst.* 322.

But the plaintiff is not entitled to costs unless the defendant has appeared and pleaded: And no costs are payable by the plaintiff, on moving to quash his own writ before plea, nor after a plea in abatement. *Cas. Pract. C. B.* 74: 1 *Stra.* 638.—There is a proviso in the statute, that it shall not extend to executors or administrators; and thence it has been determined that in *scire facias* they are not liable, when plaintiffs, to the payment of costs. 1 *Stra.* 188.

For more learning on this subject, see 4 *New Abr*: 19 *Vin. Abr.* title *Scire facias*: *Wilson's Rep. par.* 1. 98, 243: *par.* 2. 61, 372: the Books of Practice, particularly *Sellon's*; and this Dictionary, titles *Error*; *Execution*; *Judgment*, &c.

Scire Facias; against Bail. If a *Capias ad satisfaciendum* (see that title, and title *Execution*) is sued out against a defendant, and a *non est inventus* is returned thereon, the plaintiff may sue out a process against the Bail (where Bail were given); for they stipulate, in this triple alternative; that the defendant shall, if condemned in the suit, satisfy the plaintiff his debt and costs; *or*, that he shall surrender himself a prisoner; *or*, that they will pay it for him.—As therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place. In order to which a writ of *scire facias* may be sued out against the Bail, commanding the Sheriff *to make known* to them the judgment, and that they shew cause why the plaintiff should not have execution against them for his debt and damages: And in such writ, if they shew no sufficient cause, or the defendant does not surrender himself on the day of the return, or of shewing cause, (for afterwards it is not sufficient,) the plaintiff may have judgment against the Bail, and take out a writ of *ca. sa.* or other process of execution against them. 3 *Comm. c.* 26. *p.* 416: See this Dictionary title *Bail* I.

There is no attempt, in point of fact, to find the principal on this *ca. sa.* but it is merely as a warning that the plaintiff means to proceed against the Bail; or rather, the *ca. sa.* against the principal, being left in the Sheriff's office, is as notice to the Bail, that the plaintiff will proceed against the person, and it is incumbent on the Bail to search whether any *ca. sa.* is left in the office. 4 *Burr.* 1360.

A writ of error is a *supersedeas* of execution from the time of its allowance, provided Bail, when requisite, be put in thereon in due time. But it does not prevent the plaintiff from proceeding by action of debt, or *scire facias* on the judgment, against the principal, or by *scire facias*, or action of debt on the recognizance, against the Bail. In such cases however, if the writ of error be not evidently brought for the mere purpose of delay, the Court will stay the proceedings upon terms, pending the writ of error. But this is not a matter of course; and if it be apparent to the Court, that the writ of error is brought merely for delay, they will not stay the proceedings. *Tidd's Pract. K. B.*

In order to stay the proceedings in an action of debt, or *scire facias*, on a judgment, pending a writ of error, it is necessary that the defendant should be first in Court, by putting in Bail. And where an action is brought upon a judgment of the Court of Common Pleas, the Court of *K. B.* will not stay proceedings, pending a writ of error, without the defendant's giving judgment in the second action, and undertaking not to bring a writ of error upon that judgment. But if the action be brought upon a judgment of the Court of *K B.* these terms make no part of the rule; because, in general, actions on judgments are vexatious, and the plaintiff might have his execution on the first judgment. *Tidd's Pract. K. B.* and the authorities there cited.

On a *scire facias*, or action of debt on recognizance, against Bail, when a writ of error is allowed, and the Bail apply within their time for surrendering the principal, the Court will stay the proceedings, until the writ of error is determined; the Bail undertaking to pay the condemnation-money, or surrender the defendant into the custody of the Marshal, within four days next after the determination of the writ of error, in case the same shall be determined in favour of the defendant in error. And in one case, where the writ of error was allowed before the time was expired for surrendering the principal, though notice of such allowance was not given to the plaintiff's attorney, nor the application consequently made, till after the expiration of that time, the Court gave the Bail the same terms, as are usual when they apply within the time granted, by the course of the Court, for surrendering the principal. But, in general, when the Bail do not apply to stay the proceedings, pending error, till their time to surrender is out, the Court will not give them any time for that purpose, but only four days to pay the money in, after the judgment is affirmed, *Tidd's Pract. K. B.* and the authorities there.

Where error was not brought till it was too late for the Bail to surrender, the Court, in one case, would not stay the proceedings. But, in a subsequent case, proceedings were staid; the Bail undertaking to pay the condemnation-money, and the costs on the *scire facias*, in four days after affirmance; but in this case, there being no Bail on the writ of error, the Court made the Bail also undertake to pay the costs, on the writ of error, in case the judgment was affirmed; and said, it was a favour they were asking, and they would make them submit to equitable terms. 1 *Stra.* 443: 2 *Stra.* 887. By the affirmance of the judgment, in these cases, is meant the final affirmance of it; and therefore where the judgment, on a writ of error, was affirmed in the Exchequer-chamber, and afterwards another writ of error was brought, returnable in Parliament, the proceedings against the Bail were further staid, till the determination of the second writ of error. 5 *Burr.* 2819.

The plaintiff got judgment on the *scire facias* against Bail, pending error by the principal, and took them in execution; and on their moving to be discharged, the Court said, though they might have applied, and had the proceedings staid, yet the Court would not set them aside. 1 *Stra.* 526: *Barnes* 202: But see 4 *Burr.* 2454: 3 *Term Rep.* 643: *semb. contrà.*

See further, this Dictionary, titles *Error*; *Bail*, &c.

There must be a particular warrant of attorney to a *scire facias* against the Bail; for a warrant in the principal action is no warrant to the *scire facias*, because these are distinct actions; and the particular warrant is to be entered when the suit commences, which is when the writ is returned. 2 *Salk.* 603.—When a *scire facias* is brought against the Bail, it must be *in cû parte*; and where it is brought against the defendant in the principal action, it is to be *in hac parte*. 2 *Salk.* 599.

Scire Facias ad audiendum Errores, *To hear the Errors assigned.*—When a Writ of Error is brought, as soon as the transcript is entered on record, and the plaintiff hath also assigned his Errors, and entered the same on record, if the defendant does not immediately plead or join in Error, the plaintiff may sue out this *scire facias*: And if the defendant in Error does not come in, and plead or join to the assignment of Errors, upon the return of this writ the plaintiff may have an *alias scire facias*, and upon default thereto the plaintiff must proceed to argument, and will be heard *ex parte*. But this writ of *scire facias* is now seldom sued out, as the defendant usually appears *gratis*; or the plaintiff in Error, after his assignment of Errors, takes out a rule for defendant to appear thereto, and serves a copy on the defendant. *Carth.* 40: *Sellon's Pract.*

Scire Facias in Detinue. In Detinue, after judgment, the plaintiff shall have a *distringas*, to compel the defendant to deliver the goods, by repeated distresses of his chattels; or else a *scire facias* against any third person in whose hands they may happen to be, to shew cause why they should not be delivered. 3 *Comm.* 413. See this Dictionary, title *Execution*; in the Introduction to that title.

Scire Facias to remove an Usurper's Clerk. On a *quare impedit*, and *ne admittas* sued out, if the Bishop after receipt of the latter writ, admit any person, even though the Patron's right may have been found in a *jure patronatûs*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the Incumbent, if the Clerk of a stranger, by writ of *scire facias*. 3 *Comm.* 248. See *Quare impedit*; *Quare incumbravit.*

Scire Facias *to repeal Letters-patent and Grants.* Where the Crown hath unadvisedly granted any thing by Letters-patent, which ought not to be granted, or where the Patentee hath done an act that amounts to a forfeiture of the Grant, the remedy to repeal the Patent, is by writ of *scire facias* in Chancery. This may be brought either on the part of the King, in order to resume the thing granted; or if the Grant be injurious to a Subject, the King is bound of right to permit him (upon his petition) to use his royal name for repealing the Patent in a *scire facias*. And so, also, if upon an office untruly found for the King, he grants the land over to another, he who is grieved thereby, and traverses the office itself, is entitled, before issue joined, to a *scire facias* against the Patentee, in order to record the Grant. 3 *Comm. c.* 17. *p.* 260, 1. See this Dictionary, tit. *Grant of the King*; *Inquest of Office.*

A *scire facias* to repeal a Patent, must be brought where the record is, which is in Chancery; and there are to be two of these writs sued out of the Petty-bag office directed to the Sheriff of *Middlesex*, who, by a letter under the seal of his office, must send notice to the Corporation, or person whose concern the Patent is, that there is a *scire facias* issued out returnable at such a time, and remaining with him, for the revocation of such a Patent, and that if they do not appear thereunto, judgment will be had against them by default; and this letter to be delivered to the Corporation, or person interested in such Patent, by some person who can make oath thereof. *Dalton's Sheriff.* On a *scire facias* out of Chancery returnable in *B. R.* to repeal Letters-patent, it was held, that if the Letters-patent are granted to the prejudice of any person, as if a fair is granted to the damage of the fair of another, &c. he may have a *scire facias* on the inrolment of such Grant in Chancery, as well as the King in other cases; but it may be a question, whether a *scire facias* upon a record in Chancery is returnable in *B. R.* though after it is made returnable into *B. R.* that Court, and not the Chancery, hath the jurisdiction of it. *Mod. Cas.* 229. In all cases at Common Law, where the King's title accrues by a judicial record, and he grants his estate over; the party grieved could not have a *scire facias* against the Patentee, but was forced to his petition to the King; otherwise it is when his title is by conveyance on record, which is not judicial. 4 *Rep.* 59. The King hath a right to repeal a Patent by *scire facias*, where he was deceived in his Grant, or it is to the injury of the Subject. 3 *Lev.* 220. And where a common person is obliged to bring his action, there, upon an inquisition or office found, the King is put to his *scire facias*, &c. 9 *Rep.* 96. A *scire facias* to repeal Letters-patent doth not abate by the demise of the Crown. 1 *Strange* 43.

Scire Facias's have issued to repeal the grants of offices, for conditions broken, non-attendance, &c. For disability, or in case of forfeiture, the offices may be seized without *scire facias*. 3 *Kelf. Abr.* 201, 202. See title *Office* IV.

Scire Facias in *appeal* of murder, before a pardon shall be allowed; See title *Appeal* II.

SCIRE FECI, Is the return of the Sheriff, on a *scire facias*, that he hath caused notice to be given to the party, against whom the *scire facias* issued. See title *Scire facias*.

SCIREWYTE, The annual tax or prestation paid to the Sheriff for holding the Assizes or County Courts. *Paroch. Antiq. p.* 573.

SCITE, *Situs*.] The setting or standing of any place; the seat or situation of a capital messuage, or the ground whereon it stood. *Mon. Ang. tom.* 2. *fol.* 278. The word in this sense is mentioned in the *stats.* 32 *H.* 8. *c.* 20: 22 *Car.* 2. *c.* 11.

SCOLDS, In a legal sense, are troublesome and angry women, who, by their brawling and wrangling amongst their neighbours, break the public peace, increase discord, and become a public nuisance to the neighbourhood. They are indictable in the Sheriff's tourn, and punished by the cucking-stool, *&c. Kitch.* 13: 6 *Mod.* 213. See title *Castigatory*.

SCOT AND LOT, Sax. *Sceat*, pars, and *Llot*, i. e. *Sors*.] Signifies a customary contribution laid upon all subjects, according to their ability. *Spelm.* Nor are these old words grown obsolete, for whoever in like manner (though not by equal proportion) are assessed to any contribution, are generally said to pay Scot and Lot. *Stat.* 33 *H.* 8. *c.* 9. See also *stat.* 11 *Geo.* 1. *c.* 18, as to elections in *London*.

SCOTAL, or SCOTALE, Is where any officer of a forest keeps an *alehouse* within the forest, by colour of his office, causing people to come to his house, and there spend their money for fear of his displeasure: It is compounded of *scot* and *ale*, which by transposition of the words is otherwise called an *aleshot*. This word is often used in the Charter of the Forest, *c.* 8. *Manwood* 216.

SCOTTARE. Those tenants are said *scottare*, whose lands are subject to pay *scot*. *Mon. Aug.* i. 875.

SCOTLAND.

THE KINGDOM OF SCOTLAND, notwithstanding the union of the Crowns on the accession of their King, *James* VI. to that of *England*, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected; which was judged to be the more easy to be done, as both kingdoms were antiently under the same government, and still retained a very great resemblance, though far from an identity, in their laws. By an act of Parliament 1 *Jac.* 1. *c.* 1, it was declared, that these two mighty, famous, and antient kingdoms were formerly one. And Sir *Edward Coke* observes, how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their antient laws, the descent of the Crown, their Parliaments, their titles of nobility, their officers of state and of justice, their writs, their customs, and even the language of their laws. Upon which account he supposes the Common Law of each to have been originally the same; especially as their most antient and authentic book, called *Regiam Majestatem*, and containing the rules of their antient Common Law, is extremely similar to that of *Glanvil*, which contains the principles of ours, as it stood in the reign of *Henry* II. 4 *Inst.* 345. The many diversities, now subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions; and from the acts of two distinct and independent Parliaments, which have in many points altered and abrogated the old Common Law of both kingdoms. See 1 *Comm. Introd.* § 4. *p.* 95, and the note there.

In the reigns of King *James* II. and King *Charles* II. Commissioners were appointed to treat with Commissioners of *Scotland*, concerning an union. But the bringing about this great work was reserved for the reign of Queen *Anne*. The *stat.* 1 *Ann. st.* 1. *c.* 14, ordained articles to be settled, by Commissioners, for the union of the two kingdoms, *&c.* and by *stat.* 5 *Ann. c.* 8, the Union was effected.

By this statute, 5 *Ann. c.* 8, the *Twenty-Five Articles of Union*, agreed to by the Parliaments of both nations, were ratified and confirmed; the purport of the most considerable being as follows:

1. That on the first of *May* 1707, and for ever after, the Kingdoms of *England* and *Scotland* shall be united into one Kingdom, by the name of GREAT BRITAIN.

2. The succession to the Monarchy of *Great Britain* shall be the same as was before settled with regard to that of *England*.

3. The united Kingdom shall be represented by one Parliament.

4. There shall be a communication of all rights and privileges between the Subjects of both Kingdoms, except where it is otherwise agreed.

9. When *England* raises 2,000,000*l.* (accurately 1,997,763*l.* 8*s.* 4½*d.*) by a Land-tax, *Scotland* shall raise 48,000*l.*

16, 17. The standards of the coin, of weights, and of measures, shall be reduced to those of *England*, throughout the united Kingdoms.

18. The laws relating to trade, customs, and the excise, shall be the same in *Scotland* as in *England*. But all the other laws of *Scotland* shall remain in force; though alterable by the Parliament of *Great Britain*. Yet with this caution, that laws relating to public policy are alterable at the discretion of the Parliament; laws relating to private right are not to be altered, but for the evident utility of the people of *Scotland*.

22. Sixteen Peers are to be chosen to represent the Peerage of *Scotland* in Parliament, and forty-five members to sit in the House of Commons.

23. The sixteen Peers of *Scotland* shall have all privileges of Parliament: And all Peers of *Scotland* shall be Peers of *Great Britain*, and rank next after those of the same degree a the time of the Union, and shall have all privileges of Peers, except sitting in the House of Lords, and voting on the trial of a Peer.

It was formerly resolved by the House of Lords, that a Peer of *Scotland* claiming to sit in the *British* House of Peers, by virtue of a patent, passed under the Great Seal of *Great Britain*, had no right to vote in the election of the sixteen *Scotch* Peers; and that no patent of honour granted to any Peer of *Great Britain*, who was a Peer of *Scotland* at the time of the Union, should entitle him to sit in Parliament. But in 1782, on the claim of the Duke of *Hamilton* to sit as Duke of *Braudon*, the question being referred to the Judges, they were unanimously of opinion, that the Peers of *Scotland* were not disabled from receiving, subsequently to the Union, a

patent

patent of Peerage of *Great Britain*, with all the privileges usually incident thereto; and the House accordingly admitted the Duke of *Hamilton* to sit as Duke of *Brandon*. No objection was ever made to an *English* Peer's taking a *Scotch* Peerage by descent; and therefore, formerly, when it was designed to confer an *English* title on a noble family of *Scotland*, the eldest son of the *Scotch* Peer was created in his father's life-time an *English* Peer, and this creation was not affected by the annexation by inheritance of the *Scotch* Peerage.—It seems now to be settled, that a *Scotch* Peer, m[illegible] a Peer of *Great Britain*, *has* a right to vote in the el[illegible]on of the sixteen *Scotch* Peers: And that if any of the sixteen *Scotch* Peers are created Peers of *Great Britain*, they thereby cease to sit as representatives of the *Scotch* Peerage; and new *Scotch* Peers must be elected in their room. See 1 *Comm.* 97, *n.* 7.

25. All laws and statutes in either kingdom, so far as they are contrary to these articles, shall cease and become void: And hence it seems that the Royal prerogative of granting a charter to unrepresented places to send Members to Parliament, is virtually abolished; since the exercise of it would necessarily destroy the population of the representatives of the two kingdoms. 1 *Comm.* 97, *n.* See this Dictionary, title *Parliament* VI (B) 1. (*b*).

In the said statute, 5 *Ann. c.* 8, two acts of Parliament were also recited; the one of *Scotland*, whereby the Church of *Scotland*, and also the four Universities of that kingdom, are established for ever, and all succeeding Sovereigns are to take an oath inviolably to maintain the same; the other of *England*, 5 *Ann. c.* 6, whereby the Acts of Uniformity of 13 *Eliz.* and 13 *Car.* 2. (except as the same had been altered by Parliament at that time) and all other acts then in force for the preservation of the Church of *England*, are declared perpetual; and it is stipulated, that every subsequent King and Queen shall take an oath inviolably to maintain the same within *England*, *Ireland*, *Wales*, and the town of *Berwick upon Tweed*. And it is enacted, that these two acts "shall for ever be observed as fundamental and essential conditions of the Union."

Upon these *Articles* and *Act of Union*, it is to be observed, 1st, That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be *fundamental and essential conditions of the Union*. 2dly, That whatever else may be deemed *fundamental and essential conditions*, the preservation of the two churches, of *England* and *Scotland*, in the same state that they were in at the time of the Union, and the maintenance of the Acts of Uniformity which establish our common prayer, are expressly declared so to be. 3dly. That therefore any alteration in the constitution of either of those churches, or in the Liturgy of the Church of *England*, (unless with the consent of the respective churches, collectively or representatively given,) would be an infringement of these *fundamental and essential conditions*, and greatly *endanger* the Union. 4thly. That the municipal laws of *Scotland* are ordained to be still observed in that part of the island, unless altered by Parliament: and, as the Parliament has not yet thought proper, except in a few instances, to alter them, they still (with regard to the particulars unaltered) continue in full force. Wherefore the municipal or common laws of *England* are, generally speaking, of no force or validity in *Scotland*. See 1 *Comm.* 97, 98; and the note there.

At the time of the Union it was agreed, that the mode of the election of the Peers and Commons should be settled by an act passed in the Parliament of *Scotland*; which was afterwards recited, ratified, and made part of the Act of Union. As to the election of the sixteen Peers, see *stat.* 6 *Ann. c.* 23. With respect to the forty-five Commoners, it was, by an act of the *Scotch* Parliament, (and see *stat.* 6 *Ann. c.* 6,) enacted, that of the forty-five, thirty should be elected by the Shires, and fifteen by the Boroughs: That the City of *Edinburgh* should elect one; and that the other Royal Boroughs should be divided into fourteen districts, and that each district should return one: and it was also provided, that no person should elect or be elected one of the forty-five, but who would have been capable of electing, or of being elected, a representative of a shire or borough to the Parliament of *Scotland*: Hence the eldest son of any *Scotch* Peer cannot be elected one of the forty-five; such eldest son being incapable, prior to the Union, of sitting in the *Scotch* Parliament. Neither can such eldest son be entitled to be inrolled, and vote as a freeholder for any commissioner of a shire, though otherwise qualified; as determined by the House of Peers in Lord *Daer's* case, 1793. But the eldest sons of *Scotch* Peers may represent any place in *England*, as many do. 2 *Hats. Prec.* 12.

The two *stats.* 9 *Ann. c.* 5: 33 *Geo.* 2. *c.* 20, requiring knights of shires and members for boroughs to have respectively 600*l.* and 300*l.* a-year, are expressly confined to *England*: But a commissioner of a shire must be a freeholder; and it is a general rule, that none can be elected but those who can elect. And it was formerly supposed, that it was necessary that every representative of a borough should be admitted a burgess of one of the boroughs which he represented; till the contrary was determined by a Committee of the House of Commons in the case of the Borough of *Wigtown*. 2 *Doug. El.* 181. It still holds generally true in shires in *Scotland*, that the qualifications of the electors and elected are the same; or that eligibility and a right to elect are convertible terms. See 1 *Comm.* 97, *n.* 6.

The election of members of Parliament for *Scotland*, is further regulated by *English* statutes: the Magistrates are required to summon the Councils of boroughs; and an oath is to be taken by every freeholder and voter as to the estates to qualify them, that they are actually their own, and not fictitious: Sheriffs or stewards not to make any false return, &c. under the penalty of 500*l.* recoverable in a summary way: No Judge of the Court of Session, or Baron of the Exchequer, in *Scotland*, shall be elected a member of Parliament. *Stats.* 7 *Geo.* 2. *c.* 16: 16 *Geo.* 2. *c.* 11: and see *stat.* 14 *Geo.* 3. *c.* 81.

Acts of Parliament, in general, passed since the Union, extend to *Scotland*; but where a statute is not applicable to *Scotland*, and where *Scotland* is not intended to be included, the method is to declare by *proviso*, that it does not extend to *Scotland*. 3 *Burr.* 853. As to *Berwick*, see this Dictionary under that title.

Several acts of Parliament have been passed, from time to time, for the internal regulation of this part of the kingdom; for which see the *Index to the Statutes*,

and

and *Williams's Digest of the Statute Law*. It may be sufficient in this place to notice the following acts.

By *stat.* 6 *Ann. c.* 26, a Court of Exchequer is erected in *Scotland*, to be a Court of Record, Revenue, and Judicature, for ever; and Barons of the said Court to be appointed, who shall be Judges there.

An Act for disarming the Highlands of *Scotland*; and requiring bail of persons for their loyal and peaceable behaviour, &c. *Stat.* 1 *Geo.* 1. *st.* 2. *c.* 54.—Persons summoned are to bring in and deliver up their arms, or, refusing to do it, shall be taken as listed soldiers to serve his Majesty beyond the seas; and concealing their arms, are liable to penalties: Also the Lords Lieutenants, or Justices of the Peace, may appoint persons to search houses for arms, &c. *Stat.* 11 *Geo.* 1. *c.* 26.

By the *stats.* 19 *Geo.* 2. *c.* 39: 20 *Geo.* 2. *c.* 51: 21 *Geo.* 2. 34: 26 *Geo.* 2. *c.* 29; Provisions are further made for disarming the Highlands, and restraining the use of the Highland dress; and the masters, and teachers of private schools, chaplains, tutors, and governors of youth and children, are to take the oaths to his Majesty.

When any ordinary place is vacant in the Court of Sessions in *Scotland*, the King may nominate a person, who is to be examined by the Lords of the Session, and then admitted, &c. *Stat.* 10 *Geo.* 1. *c.* 18.

The City of *Edinburgh*, in *Scotland*, was fined 2000*l.* on account of the murder of Captain *Porteus*; (who was hanged by the mob, on pretence that he had ordered his soldiers to fire upon persons hissing at an execution;) and a reward of 200*l.* ordered for apprehending the offenders. *Stat.* 10 *Geo.* 2. *c.* 34.

By *stat.* 20 *Geo.* 2. *c.* 43, the heritable jurisdictions are taken away and restored to the Crown, and more effectual provision is made for the administration of justice by the King's Courts and Judges there: And all persons acting as procurators, writers or agents in the Law, are to take the oaths.—By *stat.* 20 *Geo.* 2. *c.* 50, the tenure of ward-holding is taken away, and converted into blanch and fen-holding. The casualties of single and liferent escheats, incurred by horning and denunciation for civil causes, are taken away. A summary process is given to heirs and successors against superiors. The attendance of vassals at Head-Courts is discharged. Heirs and possessors of tailzied estates, are empowered to sell to the Crown.

By *stat.* 25 *Geo.* 2. *c.* 20, certain doubts are obviated, that had arisen with regard to the admission of the vassals of the principality of *Scotland*, and payment of their rents and duties.

Peers of *Scotland*, and all officers, civil and military, &c. are to take the Oath of Abjuration, &c. A Peer committing High Treason or felony in *Scotland* may be tried by commission under the Great Seal, constituting Justices to inquire, &c. in *Scotland*: And the King may grant commissions of oyer and terminer in *Scotland*, to determine such treason, &c. *Stats.* 6 *Ann. c.* 14; 7 *Ann. cap.* 21.

Persons having lands in *Scotland*, guilty of High Treason by corresponding with, assisting, or remitting money, &c. to the Pretender, on conviction, are to be liable to the pains of treason; and their vassals, continuing in dutiful allegiance, shall hold the said lands of his Majesty in fee and heritage for ever, where the lands were so held of the Crown by the offender: And tenants continuing peaceable, and occupying land, are to hold the same two years, rent-free. *Stat.* 1 *Geo.* 1. *st.* 2. *c.* 20.

By *stat.* 19 *Geo.* 2. *c.* 9, every Juror for trial of High Treason, or misprision of treason, shall be possessed in his own or his wife's right of lands, &c. as proprietor or liferenter within the shire, &c. of the yearly value of 40*s.* sterling at least, or valued at 30*s.* sterling *per ann.* in the tax-roll.

By *stat.* 21 *Geo.* 2. *c.* 19, offences of High Treason, committed in the shire of *Dumbarton, Stirling, Perth, Kincardine, Aberdeen, Inverness, Nairn, Cromartie, Argyl, Forfar, Bamf, Sutherland, Caithness, Elgine, and Ross*, or the shire or stewartry of *Orkney*, may be inquired of in any shire in *Scotland*, as shall be assigned by the King. Jurors may come out of adjoining counties. The practice of taking down evidence in writing, in crimes not affecting life or member, abrogated.

By the *stat.* 22 *Geo.* 2. *c.* 48, the Court before whom any indictment for High Treason, or misprision of High Treason, in *Scotland*, shall be found, may issue writs of *capias*, proclamation, and *exigent* against the party, if not in custody; whereon the defendant not appearing, shall be deemed outlawed and attainted of High Treason, or misprision of High Treason; persons out of the kingdom, and returning within a year, may traverse the indictment.

By *stat.* 25 *Geo.* 2. *c.* 41, forfeited estates in *Scotland* were annexed to the Crown inalienably, and satisfaction made to the lawful creditors thereupon; and the rents thereof applied for the better civilizing the Highlands.

SCOTS. Assessments by Commissioners of Sewers are so called.

SCRIPTURE. All profane scoffing of the Holy Scripture, or exposing any part thereof to contempt and ridicule, is punished by fine and imprisonment. 1 *Hawk. P. C.* See *Reviling*, &c.

SCRIVENERS, Are mentioned in the statute against Usury and excessive interest of money. 12 *Ann. st.* 2. *c.* 16. *Money-Scriveners* were understood to be those who received money to place it out at interest; and who supplied those who wanted to raise money on security; thus rendering themselves useful to, and receiving a profit from, both parties. If a Scrivener is intrusted with a bond, he may receive the interest; and if he fails, the obligee shall bear the loss; and so it is if he receive the principal, and deliver up the bond; for being intrusted with the security itself, it shall be presumed he is trusted with power to receive the principal and interest; and the giving up the bond on payment of the money is a discharge thereof: But if a Scrivener be intrusted with a mortgage deed, he hath only authority to receive the interest, not the principal; the giving up the deed in this case not being sufficient to restore the estate, but there must be a reconveyance, &c. 1 *Salk.* 157. It is held, where a Scrivener puts out his client's money on a bad security, which on inquiry might have been easily found so, yet he cannot be charged in equity to answer the money; for no one would venture to put out money of another upon a security, if he were obliged to warrant and make it good, in case a loss should happen, without any fraud in him. *Preced. Chanc.* 146, 149. See 19 *Vin. Abr.* 289—292: and this Dictionary, titles *Bond*; *Mortgage*; *Trustee*; *Attorney*, &c.

SCUTAGE,

SCUTAGE, *Scutagium*, Sax. *Scildpenig*.] Was a tax or contribution, raised by those that held lands by knights-service, towards furnishing the King's army, at one, two, or three marks for every knight's fee. *Henry* the Third, for his voyage to the Holy Land, had a tenth granted by the Clergy, and Scutage, three marks of every knight's fee, by the Laity. *Baronag. Angliæ, Part.* 1. *fol.* 211, *b*. This was also levied by *Henry* II., *Richard* I., and King *John*. See titles *Taxes*; *Tenures* II. 8.

SCUTAGIO HABENDO, A writ that anciently lay against tenants by knights-service, to serve in the wars, or send sufficient persons, or to pay a certain sum, &c. *F. N. B.* 83. See titles *Taxes*; *Tenures*.

SCUTE, A *French* gold coin of 3*s*. 4*d*. In the reign of King *Henry* V., *Catherine* Queen of *England* had an assurance made her of sundry castles, manors, lands, &c. valued at the sum of forty thousand Scutes, every two whereof were worth a noble. *Rot. Parl.* 1 *Hen.* 6.

SCUTELLA, from *Scutum*, Sax. *Scutel*.] A scuttle, any thing of a flat and broad shape, like a shield.

SCUTELLA ELEEMOSYNARIA, An alms basket or scuttle. *Paroch. Antiq.*

SCUTUM ARMORUM, A shield or coat of arms. See *Seal*.

SCYLDWIT, Sax.] A mulct for any fault; from the Saxon *Scild*, i. e. *Delictum*, & Wite, *pœna*. *Leg. Hen.* 1.

SCYRA, A fine imposed on such as neglected to attend the *scyregemot* Court, which all tenants were bound to do. *Mon. Ang.* i. 52.

SCYRE-GEMOT, *Sax.*] *Shiremote*; A Court held by the *Saxons* twice every year by the Bishop of the diocese, and the *earldorman*, in shires that had earldormen; and by the Bishop and Sheriff, where the counties were committed to the Sheriff, &c. wherein both the ecclesiastical and temporal Laws were given in charge to the county. *Seld. Tit. Hon.* 628. This Court was held three times in the year, in the reign of King *Canutus* the *Dane*. *Leg. Canut. c.* 38. And *Edward* the Confessor appointed it to be held twelve times in a year. *Leg. Edw. Conf. c.* 35. See *Term*.

SEA, *Mare*.] By statute 18 *E*. 3. *c*. 3, the Sea is to be open to all merchants. The main Sea, beneath the low water mark, and round *England*, is part of *England*; for there the Admiral hath jurisdiction. 1 *Inst.* 260: 5 *Rep.* 207. The Seas which environ *England* are within the jurisdiction of the King of *England*. 1 *Roll. Abr.* 528. As to the sovereignty of the Sea, see title *Navy*.

SEA-BANKS. See *Banks*. By the statute 6 *Geo*. 2. *c*. 37. § 5, made perpetual by *stat*. 31 *Geo*. 2. *c*. 42. § 3, it is made felony without benefit of clergy, maliciously to cut down any river or Sea-bank, whereby lands may be overflowed. And by *stat*. 10 *Geo*. 2. *c*. 32, a penalty of 20*l*. is imposed on any person cutting up or removing any piles, chalk, &c. used in securing Sea walls. And *stat*. 15 *Geo*. 2. *c*. 33, imposes penalties on persons cutting or pulling up *Star* or *Bent* on the sand hills on the north-west coast of *England*.

SEAL, *Sigillum*.] Is taken either for wax impressed with a device, and attached to deeds, &c. or for the instrument with which the wax is impressed. In Law the former is the most usual sense. The first sealed charter we find extant in *England*, is that of King *Edward* the Confessor, upon his foundation of *Westminster Abbey*. *Dugdale's Warwickshire, fol.* 138, *b*. Yet we read of a Seal in the manuscript history of *Offa*, King of the *Mercians*. And that Seals were in use in the *Saxons'* time, see *Taylor's History of Gavelkind, fol.* 73. It was usual in the time of *Henry* II. and before, to seal all grants with the sign of the Cross, made in gold, on the parchment. *Monast.* iii. *fol.* 7: *Ordericus Vitalis, lib.* 4. That most of the charters of the *English-Saxon* Kings were thus signed, appears by *Ingulphus*, and in the *Monasticon*. But it was not so much used after the Conquest. *Cowell*. The Royal Seal was most frequently in green, to signify (as it has been quaintly expressed) *rem in perpetuo* vigore *permansuram*. Coats of arms on Seals were introduced about the year 1218. We read of a charter sealed with the royal tooth, called his *wang-tooth*. Wang is the jaw. *Chaucer*. See title *Deed* II. 6: and see further as to the Great and Privy Seal, titles *Treason*; *Grant of the King*; *Privy Seal*, &c. As to Seals of *Corporations*, see that title.

Writs touching the Common Law not to go out under any of the petty Seals, 28 *Ed* 1. *st*. 3. *c*. 6. See *Writs*.

SEA-LAWS, Laws relating to the sea; as the Laws of *Oleron*, &c. See *Oleron Laws*.

SEALER, *Sigillator*.] An officer in Chancery appointed by the Lord Chancellor, or Lord Keeper of the Great Seal of *England*, to seal the writs and instruments there made in his presence.

SEA-MARKS; See title *Beacons*.

SEAMEN; See title *Navy*, particularly under Division II.

SEAMEN'S WAGES, Are one proper object of the Admiralty jurisdiction, even though the contract be made for them upon the land. 11 *Ventr.* 146. Yet the Courts of Common Law have jurisdiction; and an action may be maintained for work and labour. See title *Admiral and Admiralty*.

SEAN-FISH, Seems to be that sort of fish which is taken with a large and long net, called a Sean. *Stat.* 3 *Jac*. 1. *c*. 12.

SEARCHER, An officer of the Customs, whose business it is to search and examine ships outward-bound, if they have any prohibited or uncustomed goods on board, &c. This officer is mentioned in the *stat*. 12 *Car*. 2. *c*. 8. And there are Searchers concerned in alnage duties; of leather; and in divers other cases.

SEA-REEVE, *In villis maritimis est qui maritimam Domini jurisdictionem curat, littus lustrat, & ejectum maris (quod* wreck *appellatur) Domino colligit. Spelm.*

SEA-ROVERS, Pirates and robbers at Sea. See tit. *Pirates*.

SECONDARY, *Secondarius*] An officer who is second, or next to the chief officer; as the Secondaries to the Prothonotaries of the Courts of *B. R.* and *C. B.* The Secondary of the Remembrancer in the Exchequer; Secondary of the Compter, &c. 2 *Lill. Abr.* 506 Secondary of the King's Bench, may have clerks. *Stat.* 2 *Geo*. 2. *c*. 23.

SECONDARY OF THE OFFICE OF PRIVY SEAL, Is taken notice of in the old *stat*. 1 *Edw*. 4. *c*. 1.

SECONDARY CONVEYANCES, Those which presuppose some other Conveyance, precedent; and only serve to confirm, alter, restrain, restore, or transfer the interest granted by such original Conveyance. See titles *Conveyance*; *Deed* IV.

SECONDARY USE, A Use, though executed, may change from one to another by circumstances *ex post facto*: as if *A.* makes a feoffment to the Use of his intended wife and her eldest son for their lives, upon the marriage the wife takes the whole Use in severalty; and, upon the birth of a son, the Use is executed jointly in them both. This is sometimes called a Secondary, sometimes a Shifting Use. See title *Use*.

SECOND DELIVERANCE, *secunda deliberatione*.] Is a judicial writ that lies, after a nonsuit of the plaintiff in replevin, and a *returno habendo* of the cattle replevied, adjudged to him that distrained them; commanding the Sheriff to replevy the same cattle again, upon security given by the plaintiff in the replevin for the re-delivery of them, if the distress be justified. It is a second writ of replevin. *F. N. B.* 68. See title *Replevin*.

SECOND MARRIAGE; See titles *Bigamy*; *Polygamy*.

SECONDS, To duellers. See title *Homicide*.

SECOND SURCHARGE, Writ of. If after admeasurement of common, upon a writ of admeasurement of pasture, the same defendant surcharges the common again, the plaintiff may have this writ of Second Surcharge, *de secunda superoneratione*, which is given by the statute *Westm.* 2. 13 *Ed.* 1. *c.* 8. See title *Common* III.

SECRETARY, *Secretarius, à Secretis*.] A title given to him that is *ab Epistolis & Scriptis Secretis*; as to the Secretaries of State, &c. The Secretaries of State have an extraordinary trust which renders them very considerable in the eyes of the King, and of the Subject also; whose requests and petitions are for the most part lodged in their hands, to be represented to his Majesty, and to make dispatches thereupon, pursuant to his Majesty's directions. They are Privy Counsellors, and a Council is seldom or never held without the presence of one of them; they wait by turns, and one of these Secretaries always attends the Court, and by the King's warrant, prepares all bills or letters for the King to sign, not being matter of Law. And depending on them is the office called the *Paper Office*, which contains all the public writings of State, negotiations, and dispatches, all matters of State and Council, &c. and they have the keeping of the King's seal, called the *signet*, because the King's private letters are signed with it. There was but one Secretary of State in this kingdom, till about the end of the reign of King *Hen.* VIII. but then that great and weighty office was thought proper to be discharged by two persons, both of equal authority, and styled *Principal Secretaries of State*. The correspondence with all parts of *Great Britain* is managed by either of the Secretaries, without distinction; but in respect to foreign affairs, all nations which have intercourse of business with *Great Britain*, are divided into two provinces, the Southern and the Northern: of which the Southern is under the senior, and the Northern is under the junior, Secretary, &c. There are now in fact several persons holding the offices of Principal Secretaries of State; for the Home Department; for Foreign Affairs; the Colonies, &c.

As to the power of Secretaries of State to commit, see this Dictionary, titles *Commitment*; *Justices*; *Bail*, &c. *Blackstone* states shortly, that they are allowed the power of commitment in order to bring offenders to trial; and cites 1 *Leon.* 70: 2 *Leon.* 175: *Comb.* 143: 5 *Mod.* 84: *Salk.* 347: *Carth.* 291.

SECTA, or SUIT, *à sequendo*.] By this word was antiently understood the witnesses or followers of the plaintiff. See title *Pleading* I. 1.

SECTA AD CURIAM, Is a writ that lies against him who refuses to perform his *suit* either to the County Court or Court Baron. *F. N. B.* 158. See further, title *Suit of Court*.

SECTA AD JUSTITIAM FACIENDAM, A service which a man is bound to perform by his fee. *Bracton, lib.* 2. *c.* 16. *num.* 6.

SECTA CURIÆ, Suit and service done by tenants at the Court of their Lord. *Paroch. Antiq. p.* 3. See title *Suit of Court*.

SECTA FACIENDA PER ILLAM QUÆ HABET ENICIAM PARTEM, Is a writ to compel the heir, who hath the *elder's part* of the coheirs, to perform service for all the coparceners. *Reg. Orig. fol.* 177.

SECTA AD MOLENDINUM, A writ lying where a man by usage, time out of mind, &c. hath ground his corn at the mill of a certain person, and afterwards goeth to another mill with his corn, thereby withdrawing his suit to the former. And this writ lies especially for the Lord against his tenant, who holds of him to do *suit at his mill*. *Reg. Orig.* 153: *F. N. B.* 122. The count in this writ may be on the tenure of the land; or upon prescription, *viz.* That the tenant, and all those who held those lands, have used to do their suit at the plaintiff's mill, &c. *New Nat. Br.* 272. *Secta ad molendinum*, like assizes of nuisance, and many other old suits are now much turned into actions of the case, to repair the party injured in damages. See 3 *Comm. c.* 15. *p.* 235.

SECTA REGALIS, A suit by which all persons were bound twice in a year to attend the Sheriff's tourn. It was called *Regalis*, because the Sheriff's tourn was the *King's leet*, wherein the people were to be obliged by oath to bear true allegiance to the King, &c.

SECTA UNICA TANTUM FACIENDA PRO PLURIBUS HÆREDITATIBUS, A writ for an heir who is distrained by the Lord to do more suits than one, in respect of the land of divers heirs descended to him. *Reg. Orig.*

SECTIS NON FACIENDIS, A writ for a woman, who, for her dower, ought not to perform suit of Court. *Reg. Orig. fol.* 174. It lay also for one in wardship to be freed of all suits of Court during his wardship. *Reg. Orig. fol.* 173; but see *stat.* 12 *Car.* 2. *c.* 24.

SECUNDARY; See *Secondary*.

SECUNDA SUPERONERATIONE PASTURÆ; See *Second Surcharge, Writ of*.

SECURITATEM INVENIENDI *quod se non divertat ad partes exteras sine Licentia Regis*. An antient writ lying for the King against any of his Subjects, to stay them from going out of this kingdom to foreign parts; the ground whereof is, that every man is bound to serve and defend the commonwealth, as the King shall think fit. *F. N. B.* 85. See *Ne exeat Regnum*.

SECURITATIS PACIS, Is a writ that lies for one who is threatened with death or bodily harm by another, against him which so threatens; and is issued out of the Chancery directed to the Sheriff, &c. *Reg. Orig.* 88. See *Supplicavit*; *Surety of the Peace*.

SECURITY FOR GOOD BEHAVIOUR, the PEACE, and of PERSON, &c. See *Surety of the Peace*.

SE DEFENDENDO, A plea for him that is charged with the death of another person, by alleging that he was

was driven unto what he did in his own defence; and the other so assaulting him that, if he had not done as he did, he must have been in danger of his own life; which danger ought to be so great, as that it appears to have been otherwise inevitable. *Staundf. P. C. lib.* 1. *c.* 7. See title *Homicide* II.

SEDITIOUS CONVENTICLES, To the disturbance of the peace, &c. See titles *Conventicles*; *Heresy*.

SEDITIOUS MEETINGS and ASSEMBLIES; See title *Riots*.

SEDUCTION OF WOMEN CHILDREN; See title *Marriage*.

SEED-COD, from the Sax. *sæd*, seed, and *codde*, a purse, or such like continent.] A basket or other vessel of wood, carried on one arm of the husbandman or sower of ground, to bear the seed or grain which he sows, and spreads abroad with the other hand. In *Westmorland*, a bolster or pillow is called a cod; and in other Northern parts a pin-cushion is termed a pin-cod.——*Pro uno* Seed-cod *empto* 4*d*. *Paroch. Antiq.* 549: *Kennett's Gloss.*

SEEDER, A seedsman, or one who sows the land. *Blount*.

SEIGNIOR, Fr. *Seigneur*, i. e. *Dominus*.] Is in general signification as much as Lord; but particularly used for the Lord of the fee, or of a manor, as *Seigneur* among the Feudists is he who grants a fee or benefit out of the land to another; and the reason is, because, having granted away the use and profit of the land, the property or *dominum* he still retains in himself. *Hotom.*: *F. N. B.* 23.

SEIGNIOR IN GROSS, Seemeth to be one that is a Lord, but of no manor, and therefore can keep no Court. *F. N. B. fol.* 3. See *Seigniory*.

SEIGNIORAGE, A royalty or prerogative of the King, whereby he claims an allowance of gold and silver brought in the mass, to be exchanged for coin. As Seigniorage, out of every pound weight of gold, the King had for his coin 5s. of which he paid to the Master of the Mint for his work sometimes 1s. and sometimes 1s. 6*d*. Upon every pound weight of silver, the Seigniorage answered to the King, in the time of *Edw.* III. was eighteen pennyweights, which then amounted to about 1s. out of which he sometimes paid 8*d*. at others 9*d*. to the Master: In the reign of King *Henry* V. the King's Seigniorage of every pound of silver was 15*d*. &c. *Stat. antiq.* 9 *Hen.* 5. *c.* 1: *Hale's Sher. Acc. p.* 3.

SEIGNIORY, *Dominium*, from the French *seigneurie*, i. e. *dominatus, imperium, principatus*.] A manor or lordship, *Seigniory de Sokemans*: *Kitchin, fol.* 80. Seigniory in gross seems to be the title of him who is not Lord by means of any manor, but immediately in his own person; as *tenure in capite*, whereby one holds of the King as of his crown, is Seigniory in gross. *Kitchin, fol.* 206. See *Seignior*.

SEISIN, Fr. *seisine*, Lat. *seisina*.] In the Common Law signifies possession. To seise is to take possession of a thing; and *primer Seisin* is the first possession. *Co. Litt.* 152. There is a Seisin in deed or in fact, and a Seisin in Law; a Seisin in deed is when an actual possession is taken; and Seisin in Law is where lands descend, and one hath not actually entered on them, &c. 1 *Inst.* 31. Seisin in Law is a right to lands and tenements, though the owner is by wrong disseised of them: And he who hath an hour's actual possession quietly taken, hath *seisin de droit et de claime*, whereof no man may disseise him, but must be driven to his action. *Perk.* 457, 458. A Seisin in Law is sufficient to avow upon; but, to the bringing an assise, actual Seisin is required, &c. 4 *Rep.* 9. Seisin of a superior service, is Seisin of all inferior services which are incident thereto: And Seisin of homage is a Seisin of all other services, because in the doing thereof the tenant takes upon himself to do all services. 4 *Rep.* 80: 1 *Danv. Abr.* 647. The Seisin of rent, or other annual services, is a sufficient Seisin of casual services. 4 *Rep.* 80. But Seisin of one annual service is not Seisin of another annual service; as if there be lord or tenant by fealty, ten shillings rent, and three days' work in the year; in this case Seisin of the rent is no Seisin of the work, nor is Seisin of the rent Seisin of the suit of Court, which is annual. 4 *Rep.* 9: 1 *Danv. Abr.* 647: 2 *Lil.* 507. The Seisin of the father is not sufficient for the heir: Though if a fine be levied to one for life, the remainder to another in tail, and the tenant for life takes Seisin of the services, this will be a good Seisin for him in remainder; and the Seisin of a lessee for years is sufficient for him in reversion. 2 *Hen.* 6. 7: 45 *Ed.* 3. 26: 1 *Danv.* 646, 805. Where a man is seised of a reversion, depending upon an estate for life, the pleading of it is that he was seised of it *ut de feodo*, leaving out the word *dominico*; but if it be a reversion in fee, expectant upon the determination of a lease for years, there he may plead that he was seised of it *in dominico suo ut de feodo*. *Dyer* 185, 257: 1 *Rep.* 20, 27: 4 *Rep.* 62. Seisin is never to be alleged, but where it is traversable: and when a defendant allegeth a Seisin in fee in any one under whom he claims, the plaintiff cannot allege a Seisin in another, without traversing, confessing, or avoiding of the Seisin alleged by the defendant. *Cro. El.* 30: 1 *Brownl.* 70. If a Seisin in fee is alleged, it shall be intended a lawful Seisin till the contrary appears. 2 *Lutw.* 1337. But the party is to shew of what estate he is seised, &c. 3 *Nels. Abr.* 215. See further, titles *Livery of Seisin*; *Disseisin*; *Estate*, &c.

SEISINA HABENDA, *quia Rex habuit Annum, Diem et Vastum.* A writ for delivery of Seisin to the Lord of lands or tenements; after the King, in right of his prerogative, hath had the year, day, and waste, on a felony committed, &c. *Reg. Orig.* 165.

SEISING OF HERIOTS, Is the seising of the best beasts, &c. (where an Heriot is due) on the death of the tenant. It is a species of self-remedy, not much unlike that of taking of cattle or goods in distress; only in the latter case they are seised as a pledge, in the former, as the property of the person for whom seised. 3 *Comm.* c. 1. VI. See title *Heriot*.

SEISURE OF GOODS FOR OFFENCES. No goods of a felon or other offender can be seised to the use of the King, before forfeited: And there are two Seisures, one verbal only, to make an inventory, and charge the town or place, when the owner is indicted for the offence; and the other actual, which is the taking of them away afterwards on conviction, &c. 3 *Inst.* 103. See title *Forfeiture*.

SEL, Denotes the bigness of a thing to which it is added; as *Selwood* is a great wood.

SELDA, from the Sax. *selde*, a seat, or stool.] A shop, shed, or stall in a market. *Ass.* 9 *R.* 1. It is also made to signify a wood of sallows or willows: And Sir *Edward Coke* takes *selda* for a salt-pit. *Co. Lit.* 4.

SELF-BANE. Sax. *ſelf-bana.*] Self-murder; See title *Homicide* III. 1.

SELF-DEFENCE; See title *Homicide* II.

SELF-MURDER; See title *Homicide* III. 1.

SELF-PRESERVATION; See titles *Homicide* I. 3; II.; *Larceny* I. 1.

SELION OF LAND, *ſelio terræ*; from the French *ſeillon.*] A ridge of ground riſing between two furrows, containing no certain quantity, but ſometimes more and ſometimes leſs: Therefore *Crompton* ſays, that a Selion of Land cannot be in demand, becauſe it is a thing uncertain. *Cromp. Juriſd.* 221.

SEME, Saxon, *ſeam*, i. e. *onus.*] A horſe-load or eight buſhels of corn. *Blount.* A Seme of glaſs is twenty-four ſtone, each ſtone five pounds weight.

SEMEBOLE, A pipe or half a ton of wine. *Merch. Dict.*

SEMINARIES, *Popiſh*; See *Papiſt*; *Præmunire.*

SENAGE, *Senagium*, from *ſenatus*, ſometimes uſed for *ſynod.*] Money paid for *ſynodals.*

SENATOR, *Lat.*] A Member of Parliament. In the Laws of King *Edward* the Confeſſor, we are told, that the *Britons* called thoſe *Senators* whom the *Saxons* afterwards termed *aldermen*, and borough-maſters; though not for their age, but their wiſdom; for ſome of them were young men, but very well ſkilled in the Laws. *Kenulph*, King of the *Mercians*, granted a charter, which ran thus, viz. *Conſilio & conſenſu epiſcoporum &* Senatorum *gentis ſuæ largitus fuit dicto monaſterio*, &c. *Staundf. P. C. cap.* 18.

SENDAL, A kind of thin fine ſilk, mentioned in the *ſtat.* 2 *R.* 2. *c.* 1.

SENESCHAL, *Seneſchallus*, from the Germ. *Scin*, a houſe or place, and *Schale*, an officer.] A ſteward; and ſignifies one who hath the diſpenſing of juſtice, in ſome particular caſes: As the High Seneſchal, or Steward of *England*; *Seneſchal de la Hotel de Roy*, Steward of the King's Houſehold; Seneſchal, or Steward of Courts, *&c. Co. Litt.* 61: *Croke's Juriſd.* 102: *Kitch.* 83. See *Steward.*

SENESCHALLO ET MARESHALLO QUOD NON TENEANT PLACITA DE LIBERO TENEMENTO; A writ directed to the Steward, and Marſhal of *England*, inhibiting them to take cognizance of an action in their Court that concerns freehold. *Reg. Orig.* 185, 191.

SENEUCIA, Widowhood. If a widow, having dower after the death of her huſband ſhall marry, *vel filium, vel filiam in ſeneuciâ peperit*, ſhe ſhall forfeit and loſe her dower in what place ſoever, in *Kent. Tenen.* in *Gavelkind. Plac. Trin.* 17 *E.* 3.

SENEY-DAYS, Play-days, or times of pleaſure and diverſion. *Regiſt. Eccl. Ebor. anno* 1562.

SENNA, Is among the drugs liable to a duty on importation. See title *Navigation Acts.*

SEPARIA, *ſeparaia.*] Several, or ſevered and divided from other ground. *Paroch. Antiq.* 336.

SEPARATION, *ſeparatio.*] Is the living aſunder of man and wife. See titles *Baron and Feme*; *Divorce.*

SEPTENNIAL ELECTIONS; See *Parliament* VIII.

SEPTUAGESIMA, The third *Sunday* before *Quadrageſima Sunday* in *Lent.* It is called *Septuageſima*, becauſe it is about the ſeventieth day before *Eaſter*; as *Sexageſima* and *Quinquageſima*, are thus denominated from their being, the one about ſixty, and the other about fifty days before the ſame feaſt; which are all of them days appropriated by the church to acts of penance and mortification, preparatory to the devotion of *Lent.* From *Septuageſima Sunday* until the *Octaves* after *Eaſter*, the ſolemnizing of marriage is forbidden by the Canon Law; and the Laws of King *Canutus* ordained a vacancy from Judicature, from *Septuageſima* to *Quindena Paſchæ.* See *ſtat. Weſtm.* 1. 3 *E.* 1. *c.* 51.

SEPTUAGINT, The ſeventy interpreters of the *Bible*: who were in truth ſeventy-two, *viz.* ſix for every one of the twelve tribes. *Lat. Dict.*

SEPTUM, An encloſure; ſo called, becauſe it is encompaſſed *cum ſepe & foſſa*, with a hedge and a ditch, at leaſt with a hedge; and it ſignifies any place paled in.

SEPULCHRE, *ſepulchrum.*] The place where any body lies buried; but a monument is ſet up for the memorial of the deceaſed, though the corpſe lie not there. *Cowell.*

SEPULTURA, An offering made to the prieſt for the burial of a dead body. *Domeſd.* See *Mortuary.*

SEQUATUR SUB SUO PERICULO, A writ that lies where a *ſummons ad warrantizand'* is awarded, and the Sheriff returns that the party hath nothing whereby he may be ſummoned; then goes forth an *alias* and a *pluries*, and if he come not in on the *pluries*, this writ ſhall iſſue. *Old Nat. Br.* 163.

SEQUELA CAUSÆ, The proceſs and depending iſſue of a cauſe for trial.

SEQUELA CURIÆ, Suit of Court. *Mon. Ang. tom.* 2. *p.* 253.

SEQUELA MOLENDINI; Vide *Secta ad Molendinum.*

SEQUELA VILLANORUM, The retinue and appurtenances to the goods and chattels of villeins, which were at the abſolute diſpoſal of the Lord. In former times, when any Lord ſold his villein, it was ſaid *dedi B. nativum meum cum tota* ſequelâ *ſuâ*; which included all the villein's offſpring. *Paroch Antiq.* 216, 288.

SEQUENDUM; ET PROSEQUENDUM, To follow a cauſe; as where a guardian is admitted *ad proſequend'* for an infant, *&c.* 1 *Vent.* 74.

SEQUESTER, *ſequeſtrare.*] A term uſed in the Civil and Eccleſiaſtical Law for renouncing; as when a widow comes into Court, and diſclaims having any thing to do, or to intermeddle with her huſband's eſtate who is deceaſed, ſhe is ſaid to ſequeſter. Now, more uſually, to *renounce.* See title *Executor.*

SEQUESTRATION,

SEQUESTRATIO.] Signifies the ſeparating or ſetting aſide of a thing in controverſy, from the poſſeſſion of both the parties that contend for it; and it is two-fold, voluntary and neceſſary; voluntary, is that which is done by conſent of each party; neceſſary, is what the Judge of his authority doth, whether the party will or not. *Forteſcue, c.* 50: *Dyer* 232, 256.

There is alſo a Sequeſtration, in the nature of a diſtreſs infinite, on a perſon's ſtanding out all the proceſſes of contempt for non-appearance in Chancery, upon a bill exhibited; ſo, where obedience is not yielded to a decree, the Court will grant a Sequeſtration of the lands of the party, *&c.*

A Sequeſtration is alſo a kind of execution for debt: eſpecially in the caſe of a beneficed clerk, of the profits of the benefice, to be paid over to him that hath the judg-

judgment, till the debt is satisfied. 2 *Inst.* 472: 2 *Rol. Abr.* 471. See title *Execution*; *Introductory part*, *Div.* 3. But the most usual Sequestration of a benefice is upon a vacancy, for the gathering up the fruits of the benefice to the use of the next incumbent: The profits of the church, being in abeyance, are to be received by the Churchwardens by appointment of the Bishop, to make provision for the cure during the vacancy, &c. *Stat.* 28 *Hen.* 8. *c.* 11.

Sequestration is also the act of the Ordinary, disposing of the goods of one that is dead, whose estate no man will meddle with. See *Kennet's Glossary in v. Sequestrare.*

Sequestration in the Court of Chancery is a commission usually directed to seven persons therein named, and empowering them to seize the defendant's real and personal estate into their hands, (or it may be some particular part or parcel of his lands,) and to receive and sequester the rents and profits thereof, until the defendant shall have answered the plaintiff's bill, or performed some other matter which has been ordered and enjoined him by the Court, for not doing whereof he is in contempt. *Curs Canc.* 89.

If upon a *Commission of Rebellion* (see that title) a *non est inventus* is returned, the Court of Chancery sends a Serjeant at Arms in quest of the defendant; and if he eludes the search of the Serjeant, a Sequestration issues. 3 *Comm. c.* 27.

It appears that there were great struggles between the Common Law Courts and Courts of Equity, before this process came to be established; the former holding that a Court of Conscience could only give remedy *in personam*, and not *in rem*; that Sequestrators were trespassers, against whom an action lay; and in the case of *Colston* v. *Gardiner*, the Chancellor cites a case, where they ruled, that if a man killed a Sequestrator in the execution of such process, it was no murder. *Cro. Eliz.* 651: *Brograve* v. *Watts*: 1 *Mod.* 259.

But these were such bloody and desperate resolutions, and so much against common justice and honesty, which requires that the decrees of this Court, which preserved men from deceit, should not be rendered illusory, that they could not long stand; but this process got the better of these resolutions on this ground; 1st, That the extraordinary jurisdiction might punish contempts by the loss of estate as well as the imprisonment of the person, because that liberty being a greater benefit than property, if they had a power to commit the person, they might take from him his estate till he had answered his contempts. 2dly, To say that a Court should have power to decree about things, and yet should have no jurisdiction *in rem*, is a perfect solecism in the constitution of the Court itself. 2 *P. Wms.* 621: 2 *Ch. Ca.* 44.

And see 2 *Mod.* 258, that the Chancellor having issued such Sequestration, it will be as binding as any other process, according to the rules of the Common Law. 2 *Chanc. Ca* 44.

It has been said, that the first instance of a Sequestration, after a decree, was Sir *Thomas Read*'s case in Lord *Coventry*'s time; and that it was afterwards awarded in Chancery, in the case of *Hyde* v. *Pitt*, 1666, and affirmed in Parliament: And by the Court of Exchequer, *Graves* v. *Fountaine*, 1687, and since, without scruple. The doubt formerly was, that lands were not liable to execution before the statute *Westm.* 2. 13 *E.* 1. *st.* 1. *c.* 18: 1 *Ch. Ca.* 92: 2 *Ch. Ca.* 44.

Sequestrations were first introduced (according to the Commentaries) by Sir *Nic. Bacon*, Lord Keeper, in the reign of Queen *Elizabeth*; before which the Court found some difficulty in enforcing its process and decrees. See 1 *Vern.* 421, 423. After an order for a Sequestration issued, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly; so that this Sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. 3 *Comm.* 444.

I. *In what Cases a Sequestration is to be awarded; by the Court of Chancery.*

II. *The Power and Duty of the Sequestrators; and when a Sequestration is determined.*

I. A SEQUESTRATION *nisi* is the first process against a Peer or Member of the House of Commons. 2 *P. Wms.* 385: 1 *Ch. Ca.* 61, 138. A Sequestration is also the first process against the menial servant of a Peer, within the words and meaning of the statute 12 & 13 *W.* 3. *c.* 3; for that otherwise such servant would have greater privilege than his Lord. 1 *P. Wms.* 535. If there be a *Sequestration nisi* against a Peer for want of an answer, and the Peer puts in an answer, that is insufficient; yet the order for a Sequestration shall not be absolute, but a new *Sequestration nisi*. 2 *P. Wms.* 385. See this Dict. title *Privilege* III.

Notwithstanding the superintendant power formerly possessed by the Courts in this kingdom over those in *Ireland*, and what is said in some of our books, it seems to have always been the better opinion, that the Court of Chancery here could not award a Sequestration against lands in *Ireland*. 1 *Vern.* 76: 2 *Ch. Ca.* 189: 2 *P. Wms.* 261.

It was said, that such process had been awarded to the Governor of *North Carolina*; but herein it was doubted whether such Sequestration should not be directed by the King's Council, to which alone an appeal lies from the decrees in the Plantations. 2 *P. Wms.* 261.

Copyholds may be sequestered, though not extendible at Common Law, or under the statute of *Westm.* 2, for Courts of Equity have *potestatem extraordin' & absolutam*; but it seems a doubt whether such a Sequestration can be revived against the heir of a copyholder; which arises from the difficulty of obliging the Lord to admit, and depriving the Lord of his fine, &c. upon the death of his tenant. 2 *Ch. Ca.* 46. Vide 1 *Barn. C.* 431.

A Sequestration out of Chancery is more effectual than an execution by *fieri facias* at Law, for a Sequestration may lie against the goods, though the party is in custody upon the attachment; whereas in Law, if a *capias ad satisfaciendum* is executed, there can be no *fi. fa.* issue. *Cases in Lord Talbot's Time*, 222.

Where the Sequestrators seize the real estate of the party, any tenant or other person who claims title to the estate, so sequestered, either by mortgage, judgment, lease, or otherwise, who hath a title paramount to the Sequestration, shall not be obliged to bring a bill to contest such a title; but he shall be let in to contest such a title in a summary way. He may move by his counsel, as of course, to be examined *pro interesse suo*; and in this case the plaintiff is to exhibit interrogatories, in order to examine him for a discovery of his title to the

 estate,

eſtate, and he muſt be examined upon ſuch Interrogatories accordingly; and the Maſter muſt ſtate the matter to the Court; and the parties may enter into proof touching the title to the eſtate in queſtion; and when the Maſter hath ſtated the whole matter, the Court proceeds to give judgment therein upon the report; and if it appears that the party who is examined *pro intereſſe ſuo* hath a plain title to the eſtate, and is not affected with the Sequeſtration, then it is to be diſcharged as againſt him, with or without coſts, as the Court ſhall determine upon the circumſtances of the caſe, and ſo *vice verſa*. See *Com.* 712: 1 *P. Wms.* 308.

The Sequeſtration binds from the time of awarding the commiſſion, and not only from the time of executing it and its being laid on by the Commiſſioners; for if that ſhould be admitted, then the inferior officer would have *ligandi & non ligandi poteſtatem.* 1 *Vern.* 58.

II. The Sequeſtrators are officers of the Court, and as ſuch are amenable to the Court, and are to act from time to time in the execution of their office as the Court ſhall direct; they are to account for what comes to their hands, and are to bring the money into Court as the Court ſhall direct, to be put out at intereſt, or otherwiſe, as ſhall be found neceſſary; but this money is not uſually paid to the plaintiff, but is to remain in Court until the defendant hath appeared or anſwered, and cleared his contempt, and then whatſoever hath been ſeized ſhall be accounted for and paid over to him; however, the Court hath the whole under their power, and may do therein as they pleaſe, and as ſhall be moſt agreeable to the juſtice and equity of the caſe. *Dict.*

The plaintiff's Counſel may move and obtain an order for tenants to attorn and pay their rents to the Sequeſtrators, or for the Sequeſtrators to ſell and diſpoſe of the goods of the party, and to keep the money in their hands, or to bring it into Court, as ſhall be moſt adviſable and diſcretionary, and fitting for the Court to do. *Dict.*

Sequeſtrators on meſne proceſs are accountable for all the profits, and can retain only ſo far as to ſatisfy for contempt. 1 *Vern.* 248.

If Sequeſtrators, having power to ſell timber, diſpoſe of 7000*l* worth, and only bring 2000*l* to account, they, as officers and agents of the Court, are reſponſible, and not the plaintiff. 1 *Vern.* 161.

A Sequeſtration is in nature of a *levari* at Common Law, and the party ſequeſtering has neither *jus in rem, vel in re*; the legal eſtate of the premiſes remaining in every reſpect as before. 1 *P. Wms.* 307.

Sequeſtrators being in poſſeſſion of a great houſe in St. *James*'s Square, which was the defendant's for life, the Court ordered that the Maſter allow a tenant for the houſe, and the Sequeſtrators to make a leaſe, and the tenant to enjoy. 3 *Ch. Rep.* 87.

It was moved, that the irregularity of a Sequeſtration might be referred to the deputy, which was taken out againſt the defendant for not appearing, by reaſon of its being taken out ſooner than by the courſe of the Court it could, and yet the Sequeſtrators had taken the goods off the premiſes, and threatened to ſell them; the Chief Baron ſaid, that as to the carrying the goods off the premiſes, it was clear the Sequeſtrators could do that, becauſe a Sequeſtration upon meſne proceſs anſwers to a *diſtringas* at Law; but, however, as to ſelling them, the Court agreed in the preſent caſe it could not be lawful, and ſaid it had lately been ſettled on debate; and obſerved further, that Courts of Equity could not authoriſe Sequeſtrators to ſell goods, even upon a decree, until Lord *Stamford*'s caſe, which makes decrees in this reſpect equivalent to a judgment; and even now, the Counſel ſaid, Sequeſtrators cannot ſell but by leave of the Court; however, the Court ſaid this was a matter proper for them to conſider upon another occaſion, and therefore only referred the irregularity of the Sequeſtration as to the point of time to the deputy. 1 *Barn. Rep. in Scacc* 212.

A Sequeſtration that iſſues as a meſne proceſs of the Court will be diſcontinued and determined by the death of the party; but where a Sequeſtration iſſues in purſuance of a decree, and to compel the execution of it, there, though the ſame be for a perſonal duty, it ſhall not be determined by the death of the party. 1 *Vern.* 58.

A Sequeſtration was againſt the father, who appeared to be only a tenant for life, and on his death the Sequeſtration was diſcharged. 1 *Ch. Ca.* 241: 2 *Ch. Ca.* 46.

Sequestration, in London; Is made upon an action of debt; and the courſe of proceeding in it is thus: The action being entered, the officer goes to the ſhop or warehouſe of the defendant, when there is no body within, and takes a padlock and hangs it upon the door, *&c.* uſing theſe words, *viz.* "I do ſequeſter this warehouſe, and the goods and merchandizes therein of the defendant in the action, to the uſe of the plaintiff," *&c.* and ſo puts on his ſeal, and makes return thereof at the Compter; then four Court-days being paſt, the next Court after, the plaintiff may have judgment to open the doors of the ſhop or warehouſe, and to appraiſe the goods therein by a Serjeant, who takes a bill of appraiſement, having two freemen to appraiſe them, for which they are to be ſworn at the next Court holden for that Compter; and then the officer puts his hand to the bill of appraiſement, and the Court giveth judgment: Though the defendant in the action may put in bail before ſatisfaction, and ſo diſſolve the Sequeſtration; and after ſatisfaction, may put in bail *ad diſproband' debitum*, &c. *Pract. Solic.* 429.

SEQUESTRO HABENDO, A writ judicial for the diſcharging a Sequeſtration of the profits of a church benefice granted by the Biſhop at the King's command, thereby to compel the parſon to appear at the ſuit of another; upon his appearance, the parſon may have this writ for the releaſe of the Sequeſtration. *Reg. Judic.* 36. See titles *Sequeſtration*; *Execution.*

SEREMENT, *Fr.*] An oath. See *Oath.*

SERJEANT, or SERGEANT, Lat. *Serviens.*] A word diverſely uſed in our Law, and applied to ſundry offices and callings. Firſt, a Serjeant at Law, (*Serviens ad legem,*) otherwiſe called *Serjeant Counter*, or of the *Coif*, is the higheſt degree in the Common Law, as a Doctor is in the Civil Law; but, according to *Spelman*, a Doctor of Law is ſuperior to a Serjeant, for the very name of a Doctor is magiſterial, but that of a Serjeant is only miniſterial. To theſe Serjeants, as men beſt learned and experienced in the law and practice of the Courts, one Court is ſevered to plead in, by themſelves, which is that of the Common Pleas, where the Common Law of *England* is moſt ſtrictly obſerved; yet they are

not so limited as to be restrained from pleading in any other Court, where the Judges call them *brothers*, and hear them with great respect; and of which one or more are styled the King's Serjeants, being commonly chosen out of the rest, in respect of their great learning, to plead for the King in all his causes, especially upon indictments for treason, &c. In other kingdoms the King's Serjeant is called *Advocatus Regis*: and here in *England*, in the time of King *Edward* the Sixth, Serjeant *Benloe* wrote himself *solus serviens ad legem*, there being for some time none but himself; and in *Ireland* at this day there is only a King's Serjeant. Serjeants at Law are made by the King's writ, directed unto such as are called, commanding them to take upon them that degree by a certain day; and by the writ or patent of creation it appears, that the honour of Serjeant at Law is a state and dignity of great respect: In confering these degrees, much ceremony was anciently used; and the Serjeants now make presents to the Judges, &c. of gold rings to a considerable value, &c. *Fortescue*, *c.* 50: 3 *Cro.* 1: *Dyer* 72: 2 *Inst.* 213, 214. As to their privilege of being impleaded in *C. B.* &c. see *Privilege*.

In old times, it was necessary that Serjeants should have been Barristers for sixteen years previously to their being called to be Serjeants, but it seems that no precise time is now necessary to qualify them. Serjeants at Law are bound by a solemn oath to do their duty to their clients. 2 *Inst.* 214. And by custom, the Judges of the Courts of *Westminster* are always admitted into this venerable order before they are advanced to the Bench; the original of which was probably to qualify the *puisnè* Barons of the Exchequer to become Justices of Assise according to the exigence of the statute, 14 *E.* 3. *c.* 16: 3 *Comm.* 27: and see titles *Barrister*; *Precedence*.

Serjeants at Arms. Their office is to attend the person of the King; to arrest persons of condition offending, and give attendance on the Lord High Steward of *England*, sitting in judgment on any traitor, &c. There may not be above thirty Serjeants at Arms in the realm, who shall not oppress the people, on pain to lose their offices, and be fined. *Stat.* 13 *R.* 2. *st.* 1. *c.* 6. Two of these, by the King's allowance, do attend on the two Houses of Parliament; the office of him in the House of Commons is, the keeping of the doors, and the execution of such commands touching the apprehension and taking into custody of any offender, as that House shall enjoin him. Another of them attends on the Lord Chancellor in the Chancery; and one on the Lord Treasurer of *England*. Also one upon the Lord Mayor of *London* on extraordinary solemnities, &c. They are in the old books called *Virgatories*, because they carried silver rods gilt with gold, as they now do maces, before the King. *Crompt. Jur.* 9: *Fleta*, *lib.* 2. *c.* 38.

Serjeants, of a more inferior kind, Are Serjeants of the Mace, whereof there is a great band in the city of *London*, and other corporate towns, that attend the Mayor, or other head officer, chiefly for matters of justice, &c. *Kitch.* 143. Formerly all the Justices in Eyre had certain officers attending them called Serjeants, who were in the nature of tip-staves. See *stat. Westm.* 1. 3 *E.* 1. *c.* 30. And the word Serjeant is used in *Britton* for an officer belonging to the county; which is the same with what *Bracton* calls Serjeant of the Hundred, being no more than bailiff of the hundred. *Bract. lib.* 5. *c.* 4. And we read of Serjeants of Manors, of the Peace, &c.

Serjeants of the Household, Officers who execute several functions within the King's Household, mentioned in the statute 33 *Hen.* 8. *c.* 12.

SERJEANTY, *serjeantia*] A service that cannot be due from a tenant to any Lord but to the King only; and this is either Grand Serjeanty, or Petit; the first is a tenure whereby one holds his lands of the King by such services as he ought to do in person to the King at his coronation; and may also concern matters military, or services of honour in peace, as to be the King's butler, carver, &c. Petit Serjeanty, is where a man holds lands of the King, to furnish him yearly with some small thing towards his wars; and in effect payable as rent. Though all tenures are turned into *socage* by *stat* 12 *Car.* 2. *c.* 24, yet the honorary services of Grand Serjeanty still remain, being therein excepted. *Lit.* § 153, 159: 1 *Inst.* 105, 108.

Knight-Service proper, (see title *Tenures* III. 2;) consisted in attending the King in his wars. There were also some other species of Knight service, so called, though improperly, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of Knight-service proper; and because they were attended with similar fruits and consequences. Such was the tenure by Grand Serjeanty, *per magnum servitium*; whereby the tenant was bound, instead of serving the King *generally* in his wars, to do some special honorary service to the King in person; as to carry his banner, his sword, or the like: or to be his butler, champion, or other officer, at his coronation. *Litt.* § 153. It was in most other respects like Knight-service, only he was not bound to pay aid or escuage; and when tenant by Knight-service paid 5*l.* for a relief on every Knight's fee, tenant by Grand Serjeanty, paid one year's value of his land were it much or little. *Litt.* § 154, 158: 2 *Inst.* 233. Tenure by *cornage*, which was to wind a horn, when the *Scots* or other enemies entered the land, in order to warn the King's Subjects, was (like other services of the same nature) a species of Grand Serjeanty. *Litt.* § 156. See 2 *Comm.* *c.* 5.

Generally the service of Grand Serjeanty was of such a kind as necessarily to be within the realm: but some services which amount to Grand Serjeanty might be due out of the realm as well as within; and both *Littleton* and *Coke* give instances of such reservations. See 1 *Inst.* 105, *b.* to 108, *b.*; and the notes there.

Petit Serjeanty, bears a great resemblance to Grand Serjeanty; for as that is a personal service, so this is a rent or render, both tending to some purpose relative to the King's person. Petit Serjeanty, as defined by *Littleton*, consists in holding lands of the King, by the service of rendering to him annually some small implement of war as a bow, a sword, a lance, an arrow, or the like. *Litt.* § 159. This, he says, (§ 160,) is but *socage* in effect, for it is no personal service but a certain rent; and it may be added, (says *Blackstone*,) it is clearly no predial service, or service [illegible] *liberum et commune socagium* [illegible] it is by way of eminence [illegible] with the title of *parvum servitium regis*, or petit serjeanty. And *Magna Carta* respected it in this light, when, by *c.* 27, [illegible]

acted that no wardship of the lands or body should be claimed by the King, in virtue of a tenure by Petit Serjeanty. 2 *Comm. c.* 6. *p.* 81, 82.

See further, titles *Tenures*; *Socage*.

SERMONIUM, Was an interlude or historical play, acted by the inferior orders of the clergy, assisted by youths, in the body of the church, suitable to the solemnity of some high procession day; and before the improvements of the stage, these ruder sorts of performances were even a part of the unreformed religion. *Collect. Matt. Hutton, Ex. Reg. Eccl. Lincoln, MS.*

SERPLES, A mantle or upper coat; from the Lat. *superpellicium*. *Blount*.

SERVAGE. Mentioned in stat. 1 *Rich.* 2. *c.* 6.] That is, when each tenant, besides payment of a certain rent, finds one or more workmen for his lord's service. See *Service*. King *John* brought the Crown of *England* in Servage to the See of *Rome*. 2 *Inst.* 174.

SERVANTS,

PERSONS employed by men of trades and professions, under them, to assist them in their particular callings; or such persons as others retain to perform the work and business of their families, which comprehends both men and women: And Servants are *menial*, or not so; *menial*, being domesticks living within the walls of the house. *Wood's Inst.* 51.

The first sort of Servants acknowledged by the laws of *England*, (to which *Slaves* are unknown; see that title;) are *menial Servants*; so called from their being *intrà mœnia* or *Domesticks*.—The contract between them and their masters arises upon the hiring; if the hiring be general, without any particular time limited, the Law construes it to be a hiring for a year; upon a principle of natural equity, that the Servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not: But the contract may be made for any longer or shorter period. 1 *Comm.* 425: See *Poor* IV. 8.

All single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable, by two Justices, to go out to service in husbandry, or certain specific trades, for the promotion of honest industry: And no master can put away his Servant, or Servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning, unless upon reasonable cause, to be allowed by a Justice of the peace: But they may part by consent, or make a special bargain. See the *stat.* 5 *Eliz. c.* 4; from which the following are extracts.

Every person under the age of thirty years, that has been brought up in handicraft trades, and hath not lands of inheritance, or for life, of the yearly value of forty shillings, or is not worth ten pounds in goods, and so allowed by two Justices of peace; and not being retained with any person in husbandry, or in the said arts, not being lawfully hired as a *Servant* with any nobleman or gentleman, or having any farm or other holding whereupon he may employ his labour; shall, upon request made by any person using the mystery wherein such person hath been exercised, be obliged to serve him as a Servant therein, on pain of imprisonment.

By the same statute, persons are compellable to serve in husbandry, by the year, with any person that keepeth or useth husbandry, and who will require any proper person to serve; and the Justices of peace have authority herein, and to assess the wages of such Servants in husbandry, order payment, &c. Also two Justices, and Mayors or head officers of any city or town, may appoint any poor woman of the age of twelve years, and under forty, unmarried, to go to service by the year, &c. for such wages and in such manner as they think fit; and if any such woman shall refuse to go abroad as a Servant, then the said Justices, &c. may commit such woman until she is bound to service. If any master shall give more wages than assessed by the Justices; or any Servant takes more, or refuses to serve for the statute wages, they are punishable; but a master may reward his Servant as he pleases, so as it be not by way of contract on the retainer: And a master cannot put away a Servant, nor a Servant depart before the end of his term, without some reasonable cause, to be allowed by one Justice; nor after the end of the term, without a quarter's warning given before witnesses; if a master discharges a Servant otherwise, he is liable to a penalty of forty shillings: And where Servants quit their service, testimonials are to be given by two constables and two householders, &c. declaring their lawful departure; and a Servant not producing such a testimonial to the constable where he designs to dwell, is to be imprisoned till he gets one; and in default thereof, be whipped as a vagabond; masters retaining them without such a testimonial, shall forfeit five pounds. *Stat.* 5 *Eliz. c.* 4.: And see title *Labourers*.

It is not settled whether Justices of peace have jurisdiction over any Servants, except those who are employed in husbandry. The title of the statute is "An Act containing divers Orders for Artificers, Labourers, Servants of Husbandry, and Apprentices." But as some of the clauses in the Act speak expresly of Servants of husbandry, and others of Servants generally, it is reasonable to conclude, that the Legislature meant to extend the jurisdiction to all Servants, where they did not expresly confine it to Servants of husbandry: And as this is supported by the practice of the Justices, and by general convenience, it seems certain that the Courts of *Westminster-Hall* would determine in favour of the general jurisdiction, if a case were brought to them. *Cald.* 14.

Servants of another sort are called *Apprentices*, as to whom, see this Dictionary under that title.

A third species of Servants are *Labourers*, who are only hired by the day or the week, and do not live *intrà mœnia* as part of the family; concerning whom the statutes have made many very good regulations. 1. Directing that all persons who have no visible effects may be compelled to work: 2. Defining how long they must continue at work in summer and in winter: 3. Punishing such as leave or desert their work: 4. Empowering the Justices at Sessions, or the Sheriff of the county, to settle their wages: and 5. Inflicting penalties on such as either give, or exact, more wages than are so settled. 1 *Comm. c.* 14. See title *Labourers*.

There is yet a fourth species of Servants, if they may be so called, being rather in a superior, a ministerial, capacity;

capacity; such as *Stewards*, *Factors*, and *Bailiffs*; whom however the Law considers as Servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property. This leads to the consideration of *the manner in which this relation, of service, affects either the master or Servant*. And, first, by hiring and service for a year, or apprenticeship under indentures, a person gains a settlement in that parish wherein he last served forty days. See title *Poor* IV.—In the next place persons, serving seven years as apprentices to any trade, have, by *stat.* 5 *Eliz. c* 4. § 31, an exclusive right to exercise that trade in any part of *England* This Law, with regard to the exclusive part of it, has by turns been looked upon as a hard Law, or as a beneficial one, according to the prevailing humour of the times; which has occasioned a great variety of resolutions in the Courts of Law concerning it; and attempts have been frequently made for its repeal, though hitherto without success. At Common Law every man might use what trade he pleased; but this statute restrains that liberty to such as have served as apprentices: the adversaries to which provision say, that all restrictions (which tend to introduce monopolies) are pernicious to trade; the advocates for it allege, that unskilfulness in trades is equally detrimental to the public, as monopolies. This reason indeed only extends to such trades, in the exercise whereof skill is required: but another of their arguments goes much farther; *viz.* that apprenticeships are useful to the Commonwealth, by employing of youth, and learning them to be early industrious; but that no one would be induced to undergo a seven years' servitude, if others, though equally skilful, were allowed the same advantages without having undergone the same discipline: and in this there seems to be much reason. However, the resolutions of the Courts have in general rather confined than extended the restriction. No trades are held to be within the statute, but such as were in being at the making of it: For, trading in a country village, apprenticeships are not requisite: And following the trade seven years without any effectual prosecution (either as a master or a Servant) is sufficient, without an actual apprenticeship. 1 *Comm.* 428. See title *Apprentice* III.

A master may by Law correct his apprentice for negligence or other misbehaviour, so it be done with moderation: Though if the master or master's wife beats any other Servant of full age, it is good cause of departure; or at least of complaint to a Magistrate, in order to be discharged. But if any Servant, workman, or labourer assaults his master or dame, he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb. *Stat.* 5 *Eliz. c.* 4.

By service, all Servants and labourers, except apprentices, become entitled to wages; According to their agreement, if menial Servants; or, according to the appointment of the Sheriff or Sessions, if labourers or Servants in husbandry: for the statutes for regulation of wages, in strictness, seem to extend to such Servants only; and the reason given is, that it is impossible for any Magistrate to be a Judge of the employment of menial Servants, or of course to assess their wages. But it is the practice of Justices in disputed cases to assess the wages of all Servants; a practice which probably may be supported under *stat.* 20 *Geo.* 2. *c.* 19. See 1 *Comm.* 428, *n.* and *ante.*

Next *as to frauds or robberies committed by Servants* on their masters.

Where a Servant damages goods of his master, action lies against him; and being employed to sell goods in his master's shop, if the Servant carries away and converts them to his own use, action of trespass may be brought by the master against the Servant; for the Servant cannot meddle with them in any other manner than to sell them. 5 *Rep.* 14: 1 *Leon* 88: *Moor* 244: But if a Servant be robbed, without his default, &c. he shall be excused, and allowed it in his account. 1 *Inst.* 9.

Servants being of the age of 18, and not apprentices, going or making away with, embezzling or purloining any of their master's goods, to the value of 40*s.* are guilty of felony, by the statute 21 *Hen.* 8. *c.* 7.

By the *stat.* 27 *H.* 8. *c.* 17, Clergy was taken away in this case, if the indictment were laid specially upon the *stat.* 21 *H.* 8. *c.* 7; and pursuant to the same, and by the *stat.* 28 *H.* 8. *c.* 2, this *stat.* of 21 *H.* 8. *c.* 7, was made perpetual; but by the *stat.* 1 *E.* 6. *c.* 12, these acts were both repealed: But again, by the *stat.* 5 *Eliz. c.* 10, this *stat.* 21 *H.* 8. *c.* 7, was re-enacted and revived; but it did not revive the *stat.* 27 *H.* 8. *c.* 7, for taking away clergy. The statute 12 *Ann. st* 1. *c.* 7, however, takes away the benefit of clergy from persons stealing in a dwelling house or out-house to the value of 40*s.* unless committed against their masters by apprentices under the age of 15. See title *Larceny* II. 1. and 1 *Hawk. P. C* *c.* 33. § 16.

The statute 21 *H.* 8. *c.* 7, extends only to such as were Servants to the owner of the goods, both at the time they were delivered, and also at the time when they were stolen. 1 *Hawk. P. C. c.* 33. § 12.

Therefore a receiver, who having received his master's rents, runs away with them, or a Servant, who being intrusted to sell goods, or receive money due on a bond sells the goods, &c. and departs with the money, is not within the statute. A Servant who receives his master's goods from another Servant to keep for the master, is as much guilty as if he had received them from the master's own hands; because such delivery is looked upon as a delivery by the master. *Dyer* 5. *p.* 2, 3: 3 *Inst.* 105: 1 *Hawk. P. C. c.* 33. § 13.

By the Common Law it was not larceny in any Servant to run away with the goods committed him to keep, but only a breach of civil trust. 4 *Comm. c.* 17. *p* 230. But if the Servant had not the possession, but only the care and oversight of the goods, as the butler of the plate, the shepherd of the sheep, and the like, the embezzling of them was felony, even at the Common Law. 1 *Hal. P. C.* 506. And it seems, that now the Judges, in every case, determine that the property of the master, delivered by him into the custody of the Servant, still remains in the possession of the master; and if it is embezzled by the Servant, or converted to his use, he is guilty of felony. And when Servants are convicted of robbing their masters, as the security of families so much depends on their honesty, and as the violation of the confidence reposed in them is a high aggravation of the crime, they are always punished with the utmost rigour, which the Law admits. 4 *Comm. c.* 17. *p.* 230, *n.*

By *stat.* 33 *H.* 6. *c.* 1, the Servants of *persons deceased*, accused of embezzling their master's goods, may by writ out of Chancery, (issued by the advice of the Chief

Justices

Justices and Chief Baron, or any two of them,) and proclamation made thereupon, be summoned to appear personally in the Court of *K. B.* to answer their master's executors in any civil suit for such goods, and shall on default of appearance be attainted of felony. 4 *Comm.* 230.

Lastly, we come to consider *how Strangers may be affected by this relation of master and Servant*: Or, how a master may behave towards others on behalf of his Servant; and what a Servant may do on behalf of his master.

And, first, the master may maintain, that is, abet and assist, his Servant in any action at Law against a stranger: whereas, in general, it is an offence against public justice to encourage suits and animosities, by helping to bear the expence of them, and is called in Law maintenance. 2 *Roll. Abr.* 115. A master may also bring an action against any man for beating, confining, or disabling his Servant: but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service; and this loss must be proved upon the trial. 9 *Rep.* 113.

This is an action on the case, generally called a *per quod servitium amisit*; and the Servant may also maintain his action of battery or imprisonment against the aggressor. See 1 *Comm.* 429: 3 *Comm.* 142.

This action by a master for assault, *&c.* on his Servant, has been contrived, by a species of fiction, to be extended to a parent, to enable him to recover a pecuniary compensation, under some circumstances, for the seduction of his daughter. See 3 *Comm.* 142, *n.*

A master likewise may justify an assault in defence of his Servant, and a Servant in defence of his master: the master, because he has an interest in his Servant, not to be deprived of his service; the Servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master. 2 *Rol. Abr.* 546.

Also if any person do hire or retain my Servant, being in my service, for which the Servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the Servant, or either of them: But if the new master did not know that he is my Servant, no action lies; unless he afterwards refuse to restore him upon information and demand. *F. N. B.* 167, 168: *Winch.* 51.

In case an action is brought for enticing away, or retaining or employing a Servant, it is advisable to give notice to the intended defendant, that the party is servant to the plaintiff, and to demand him; and proving such notice and a subsequent employment during the time for which the plaintiff hired, retained, took, and engaged the Servant, will entitle the plaintiff to a verdict. To this proof must be added proof of the contract between the plaintiff and the Servant, and that the time was not expired. But if a man do retain another's Servant, not knowing that he was in the service of the other, he shall not be punished for so doing, if he do not retain him after notice of his first service: And if a person do retain one to serve him forty days, and another doth afterwards retain him to serve for a year, the first covenant is avoided, because the retainer was not according to the statute. *New Nat. Br.* 374, 375.

But there are many cases, where Servants may be retained for a longer or shorter term than a year, not within the above statute, in which cases, enticing away or retaining after notice of such Servants, will subject the offender to an action. *Dict.*

The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domesticks; acquired by the contract of hiring, and purchased by giving them wages. 1 *Comm.* 429.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his Servant, if done by his command, either expresly given or implied; *nam qui facit per alium, facit per se.* 4 *Inst.* 109. Therefore, if the Servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it; though the Servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. If an innkeeper's Servants rob his guests, the master is bound to restitution; for as there is a confidence reposed in him, that he will take care to provide honest Servants, his negligence is a kind of implied consent to the robbery; *nam qui non prohibet, cum prohibere possit, jubet.* See title *Inns.* So likewise, if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master; for although the master did not expresly order the Servant to sell it to that person in particular, yet his permitting him to draw and sell it at all, is impliedly a general command. 1 *Comm.* 430.

In the same manner, whatever a Servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's Servant, the banker is answerable for it: If I pay it to a clergyman's or a physician's Servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his Servants, and the principal must answer for their conduct; for the Law implies that they act under a general command; and without such a doctrine as this, no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my Servant takes up upon trust; for here is no implied order to the tradesman to trust my Servant; But if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority. 1 *Comm.* 430.

If a man has a Servant known to be such, and he send him to fairs and markets to buy or sell, his master shall be charged, if the thing come to his use; though if the Servant makes a contract in his master's name, the contract will not be binding unless it were by the master's command or assent; and where a Servant borrows money in his master's name, without order, that does not bind the master. *Doct. & Stud. dial.* 2. *c.* 42. A Servant buys things in his own name, the master shall not be charged, except the things bought come to his use, and he have notice of it. *Kitch.* 371.

A master

A master used to give his Servant money every *Saturday*, to defray the charges of the foregoing week, and the Servant kept the money; *per Holt*, Ch. J. the master is here chargeable; for the master at his peril ought to take care what Servant he employs; and it is more reasonable that he should suffer for the cheats of his Servants, than strangers and tradesmen who do not employ them. 3 *Salk*. 234. Where a Servant usually buys goods for his master upon tick, and takes up things in his master's name, but for his own use, the master is liable; but it is not so where the master usually gives him ready money. If the master gives the Servant money to buy goods for him, and he converts the money to his own use, and buys the goods upon tick, yet the master is answerable, if the goods come to his use; otherwise he is not. Also a note under the hand of an apprentice shall bind his master, where he is allowed to deliver out notes, though the money is never applied to the master's use; but if he be not allowed or accustomed to deliver out notes, his note shall not bind the master, if the money be not applied to the use of the master. 3 *Salk*. 234, 235.

The act of a Servant shall not bind the master, unless he acts by authority of his master; and therefore if a master sends his Servant to receive money, and the Servant instead of money takes a bill, and the master as soon as told thereof disagrees, he is not bound by this payment: But acquiescence, or any small matter, will be proof of his master's consent, and that will make the act of the Servant the act of his master. 2 *Salk*. 442. For what is within the compass of a Servant's business, the master shall be generally chargeable; and also have advantage of the same against others, *Noy's Max*. An *assumpsit* of the Servant, by order and appointment of the master, shall bind his master; and a promise to my Servant is good to me. If my bailiff buy cattle to stock my ground, I shall be chargeable in debt for the money; and if he sell corn for me, I may have action in my own name against the buyer. *Bro*. 24: *Godb*. 360. If one owe me money, and I send my Servant for it, and he pay it to him, this is a good payment and discharge, though the Servant do not bring the same to me; but if I send him not, it is otherwise. *Doct. & Stud* 138.

If a Servant is cozened of his master's money, the master may have action on the case against the person that cozened him. 9 *Rep*. 113. 10 *Rep*. 130. 1 *Roll. Abr*. 98.

If a Servant, lastly, by his negligence, does any damage to a stranger, the master shall answer for his neglect; if a smith's Servant lames a horse while he is shoeing him, an action lies against the master, and not against the Servant. But in these cases the damage must be done while he is actually employed in the master's service, otherwise the Servant shall answer for his own misbehaviour. Upon this principle, by the Common Law, if a Servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master, because this negligence happened in his service; otherwise if the Servant, going along the street with a torch, by negligence set fire to a house; for there he is not in his master's immediate service, and must himself answer the damage personally. But now the Common Law is, in the former case, altered by *stat*. 6 *Ann*. *c*. 31, which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their Servant's carelessness. See title *Waste*. But if such fire happens through negligence of any Servant, (whose loss is commonly very little,) such Servant shall forfeit 100*l*. to be distributed among the sufferers: and, in default of payment, shall be committed to some workhouse, and there kept to hard labour for eighteen months. See *stat*. 14 *Geo*. 3. *c*. 78; and this Dictionary, title *Fire*. A master is also chargeable, if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nusance of his Majesty's liege people; for the master hath the superintendance and charge of all his household. 1 *Comm*. 431. See title *Nusance*.

A master is answerable for the actions and trespasses of his Servant in many cases; but not for trespass of battery, &c. nor in criminal cases, unless done by his command. *Noy's Max*. 99. And if the master order his Servant to distrain another man's cattle, and after he hath distrained he kills or abuses the distress, the master shall not answer it. *Noy* 111.

A master sends his Servant with deceitful wares to market, and orders him to sell them, but says not to whom; if he sells them, no action will lie against the master: Though if he had bid the Servant sell them to such a man in particular, and he had done so, the master would be chargeable in an action on the case. 11 *Ed*. 4: *Keeb*. 185. Where a carrier's Servant loses things delivered to him, the master must answer it, and action lies against him; and if goods be undertaken to be carried safely for hire, but by negligence are spoiled, it has been held, that whosoever employs another, is answerable for him, and undertakes for his care to all that make use of him. 2 *Salk*. 440. See title *Carrier*. If a surgeon undertakes the cure of a person, and, by sending medicines by his Servant, the wound is hurt and made worse, the patient shall have action against the master, and not against the Servant. 18 *Hen*. 8.

In all the cases here put, the master may be frequently a loser by the trust reposed in his Servant, but never can be a gainer; he may frequently be answerable for his Servant's misbehaviour, but never can shelter himself from punishment, by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the Servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong. 1 *Comm*. 432.

The Law which obliges masters to answer for the negligence and misconduct of their Servants, though oftentimes apparently severe on an innocent person, is founded upon principles of public policy; in order to induce masters to be careful in the choice of their Servants, upon whom both their own security and that of others so greatly depends. And to prevent masters from being imposed upon in the characters of their Servants, it is enacted by *stat*. 32 *Geo*. 3. *c*. 56, that if any person shall give a false character of a Servant, or a false account of his former service; or if any Servant shall give such false account, or shall bring a false character, or shall alter a certificate of a character, he shall, upon conviction before a Justice of the peace, forfeit 20*l*. with 10*s*. costs. The informer is a competent wit-

nefs; but if any Servant will inform againft an accomplice, he fhall be acquitted.

An action was tried at the Sittings after *Trin. T.* 1792, at Guildhall, againft a perfon who had knowingly given a falfe character of a man to the plaintiff, who was thereby induced to take him into his fervice. But this Servant foon afterwards robbed his mafter of property to a great amount, for which he was executed. And the plaintiff recovered damages againft the defendant, to the extent of his lofs. This was an action of great importance to the public, and there can be no doubt but it was founded in ftrict principles of law and juftice. 1 *Comm.* 432, *in n.*

See *ftat.* 15 *Geo.* 2. *c.* 13. § 12, as to breach of truft by Officers and Servants employed by the *Bank of England*: And *ftats.* 5 *Geo.* 3. *c.* 25. § 17: 7 *Geo.* 3. *c.* 50, by Officers of the *Poft Office*; which are made felony without clergy. See alfo title *Manufactures*; and in particular, as to the whole of the fubject, *Burn's Juftice*, title *Servants*, at length.

SERVI, Bondmen, or fervile tenants. Our Northern *Servi* had always a much eafier condition than the *Roman* flaves. *Servis non in noftrum morem defcriptis per familiam minifteriis utuntur. Suam quifque fedem, fuos penatis regit. Frumenti modum dominus, aut pecoris, aut veftis, colono, injungit, & fervus hactenus paret* —*Tacitus de Moribus Germanorum.* Which plainly defcribes the condition of our *Saxon* and *Norman* fervants, natives, and villains, whofe fervitude did more refpect their tenure, than their perfons. No author has fixed the diftinction between *Servus* and *Villanus*; though undoubtedly their fervile ftate was different, for they are all along in the *Domefday-Book* diftinguifhed from each other. So in *Burcefter* there were——*Quinque Servi, & viginti octo Villani,* &c. It is fuppofed the *Servi* were thofe, whom our Lawyers have fince called *pure villains*, and *villains in grofs*, who, without any determined tenure of land, were at the arbitrary pleafure of the Lord appointed to fuch fervile works, and received their wages or maintenance at difcretion of the Lord. The other were of a fuperior degree, and were called *villani*, becaufe they were *villæ & glebæ adfcripti*, i. e. held fome cottage and lands, for which they were burdened with fuch ftated fervile offices, and were conveyed as appurtenant to the manor or eftate to which they belonged. See *Kennett's Gloffary*.

The name and quality of their bondage do often occur in *Domefday* regifter: And their condition, no doubt, was worfe than that of the *bordarii* or *Cotfeti*, who performed likewife fome fervile offices for their Lord, and yet as to their perfons and goods were not obnoxious to fervitude, as the proper *Servi* were. Thefe were of four forts: 1. Such as fold themfelves for a livelihood. 2. Debtors that were to be fold, for being incapable to pay their debts. 3. Captives in war, retained and employed as perfect flaves. 4. *Nativi*, fuch as were born fervants, and by fuch defcent belonged to the fole property of the Lord.—All thefe had their perfons, their children, and their goods, at the difpofal of their Lord, incapable of making any wills, or giving away any thing. *Cowell.* There are alfo faid to be *fervi teftimentales*, thofe which we now call *covenant fervants*. *Leg. Athelft. c.* 34. See titles *Villain*; *Slaves*.

SERVICE, *Servitium.*] That duty which the tenant, by reafon of his fee or eftate, oweth unto the Lord. Our ancient law books make many divifions of it; as into perfonal and real; free and bafe; continual or annual; cafual and accidental; intrinfic and extrinfic, *&c.* *Bract. lib.* 2: *Brit. c.* 66: 4 *Co. Rep.* 9.

Perfonal Service, is where fomething is to be done by the perfon of the tenant, as homage and fealty and real, was fubject to wards and marriages, when in ufe.

Annual and certain Service is Rent, Suit of Court to the Lord, *&c.*

Accidental Services, are heriots, reliefs, and the like: And fome Services are only for the Lord's benefit; and fome *pro bono publico*. *Co. Copyhold* 22: *Co. Litt.* 222: 22 *E.* 4. 3.

Alfo Services are faid to be entire; of chattels valuable, fuch as an ox, or things pleafureable, as a hawk, *&c.* And fo are thofe perfonal, and confifting of manual work, or to exercife fome office, *&c.*

The ftatute of *Magna Charta* ordains, that no freeman fhall fell fo much of his lands, but that of the refidue the lord may have his Services. 9 *Hen.* 3. *c.* 32. In feoffments to a man and his heirs, the feoffee fhall hold the land of the Lord by the fame Services, as the feoffor, *&c.* *Stat.* 18 *Ed.* 1. And where Services are entire, and cannot be divided; upon the alienation of parcel of the lands by the tenant, the Services fhall be multiplied, and every alienee render the whole Service; though by the purchafe of parcel by the Lord, the whole is extinct, except in cafe of fealty and heriot cuftom. 6 *Rep.* 1: *Wood's Inft.* 133. See further, title *Tenures*.

Service and Sacraments. The bleffed Sacrament to be adminiftered in both kinds, *ftat.* 1 *Ed.* 6. *c.* 1. For the uniformity of the Service and Adminiftration of Sacraments, *ftats.* 2 & 3 *Ed.* 6. *c.* 1: 5 & 6 *Ed.* 6. *c.* 1: 1 *Eliz. c.* 1: 8 *Eliz. c.* 1: 13 & 14 *Car.* 2. *c.* 4.—The penalty of difturbing a preacher or prieft faying Divine Service, or pulling down an altar, *&c.* *ftat.* 1 *Mar. ft.* 2. *c.* 3.—The penalty of not repairing to church on *Sundays* and holidays, *ftat.* 1 *Eliz. c.* 2. See title *Sunday*.—The Bible and Divine Service fhall be tranflated into the *Welch* tongue, *ftat.* 5 *Eliz. c* 28.—All ecclefiaftical perfons fhall read and fubfcribe to the Book of Common Prayer, *&c.* *ftats.* 13 & 14 *Car.* 2. *c.* 4: 15 *Car.* 2. *c* 6. See title *Parfon*.—All perfons in office to take the Sacrament, and the declaration againft tranfubftantiation, *ftat.* 25 *Car.* 2. *c.* 2. See titles *Nonconformifts*; *Oaths*; *Papifts*.—Allowance of impediments for not reading the Service, extended to the certificate of fubfcription. Reading the articles to indemnify againft neglect in point of time, *ftat.* 23 *Geo.* 2. *c.* 28. See further, title *Religion*; and the references there.

Service Secular, Wordly Service, contrafted to Spiritual and Ecclefiaftical. *Stat.* 1 *Ed.* 4. *c.* 1.

SERVIENTIBUS, Certain writs touching Servants and their Mafters, violating the ftatutes made againft their abufes; which fee in *Reg. Orig. f.* 189, 190, 191.

SERVITIUM FEODALE ET PRÆDIALE, Was not a perfonal Service, but only by reafon of the lands which were held in fee. *Bracton, lib.* 2. *c.* 16. *par.* 7. See title *Tenure*.

Servitium Forinsecum, A Service which did not belong to the chief Lord, but to the King: It was called

called *forinsecum* and *foraneum*, because it was done *foris*, *vel extra servitium quod sit domino capitali*: And we find several grants of liberties with the appurtenances, *salvo forensi servitio*, &c. *Mon. Ang.* ii. 48.

SERVITIUM INTRINSECUM, That Service which was due to the chief Lord alone from his tenants within his manor. *Bracton, lib.* 2: *Fleta, lib.* 3.

SERVITIUM LIBERUM, A Service to be done by feudatory tenants, who were called *liberi homines*, and distinguished from vassals, as was their service; for they were not bound to any of the base services of ploughing the Lord's land, &c. but were to find a man and a horse, or go with the Lord into the army, or to attend his Court, &c. and sometimes it was called *servitium liberum armorum*; as in an old rental of the manor of *South Malling* in *Essex*, mentioned by *Somner* in his treatise of *Gavelkind*, *p*. 56. See title *Tenure*.

SERVITIUM REGALE, Royal Service, or the prerogatives that within a royal manor belonged to the Lord of it; which were generally reckoned to be the following, *viz*. power of judicature in matters of property; and of life and death in felonies and murders; right to waifs and estrays; minting of money; assize of bread and beer; and weights and measures: All which privileges, it is said, were annexed to some manors by grants from the King. *Paroch. Antiq*. 60. See title *Manor*.

SERVI TESTAMENTALES, Covenant Servants; mentioned in the Laws of King *Athelstan*, *c*. 34. See title *Servants*.

SERVITIIS ACQUIETANDIS, A writ judicial for a man distrained for services to one, when he owes and performs them to another, for the acquittal of such services. *Reg. Judic.* 27.

SERVITOR, *Servulus*.] A serving man; particularly applied to *Scholars* in the colleges of the Universities, who are upon the foundation.

SERVITORS OF BILLS, Such servants or messengers of the Marshal of the King's Bench, as were sent abroad with bills or writs to summon men to that Court. *Stat.* 2 *H*. 4. *c*. 23.

SESSEUR, Seems to signify the assessing or rating of wages. *Stat.* 25 *Ed*. 3. *c*. 6.

SESSION, *Sessio*.] Is a Sitting of Justices in Court upon their commission; as the Sessions of Oyer and Terminer, &c.

SESSION OF PARLIAMENT, *Sessio Parliamenti*.] The Sitting of the Parliament; and the Session of Parliament continues till it be prorogued or dissolved, and breaks not off by adjournment. 4 *Inst*. 27. See title *Parliament*.

SESSION, GREAT, of *Wales*. By *stat*. 34 & 35 *H*. 8. *c*. 26, a Session is to be held in *Wales*, twice in every year, in each county, by Judges appointed by the King, to be called the *Great Sessions of Wales*; in which all pleas of real and personal actions shall be held, with the same form of process, and in as ample a manner, as in the Court of Common Pleas at *Westminster*: And writs of error shall lie from judgments therein (it being a Court of Record) to the Court of King's Bench at *Westminster*. 4 *Comm*. 77. See title *Wales*.

SESSION OF GAOL DELIVERY. A Session held for delivering a Gaol of the prisoners therein being. See titles *Justices*; *Gaol-Delivery*.

SESSIONS OF THE PEACE.

THE COURT of *General Quarter Sessions* of the Peace is a Court that must be held in every county once in every quarter of a year. See title *Quarter Sessions*. It is held before two or more Justices of the peace, one of which must be of the *Quorum*. The jurisdiction of this Court, by *stat*. 34 *Ed*. 3. *c*. 1, extends to the trying and determining all felonies and trespasses whatsoever: though they seldom, if ever, try any greater offence than small felonies within the benefit of clergy; their commission providing, that, if any case of difficulty arises, they shall not proceed to judgment, but in the presence of one of the Justices of the Courts of King's Bench or Common Pleas, or one of the Judges of Assise. And therefore murders, and other capital felonies, are usually remitted for a more solemn trial to the Assises.

It is the practice to try all simple larcenies at the Quarter Sessions, whatever may be the value of the article stolen; but it is stated in the indictment to be of some value not exceeding a shilling, in order to reduce the crime to petty larceny. The Justices never try any felonies, upon conviction for which the prisoner must pray the benefit of clergy, or now the benefit of the statute. For before the *stat*. 5 *Ann*. *c*. 6, sentence of death in all such cases must have been passed upon those who could not read: and it may still be doubted, whether it must not be passed on a convict who obstinately refuses to pray the benefit of that statute. 4 *Comm*. *c*. 19. *p*. 271, *n*: and see this Dictionary, titles CLERGY, *Benefit of*; *Mute*.

They cannot try any new-created offence, without express power given them by the statute which creates it. 4 *Mod*. 379: *Salk*. 406: *Ld. Raym*. 1144. But there are many offences, and particular matters, which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this Court: as, the smaller misdemeanors, against the public or commonwealth, not amounting to felony; and especially offences relating to the game, highways, alehouses, bastard children, the settlement and provision for the poor, vagrants, servants' wages, apprentices, and popish recusants. Some of these are proceeded upon by indictment; and others in a summary way by motion and order thereupon; which order may for the most part, unless guarded against by particular statutes, be removed into the Court of King's Bench, by writ of *certiorari facias*, and be there either quashed or confirmed. See *post*.

The records or rolls of the Sessions are committed to the custody of a special officer, denominated the *Custos Rotulorum*, who is always a Justice of the *Quorum*. The nomination of this *Custos Rotulorum* (who is the principal civil officer in the county, as the Lord Lieutenant is the chief in military command) is by the King's sign manual: And to him the nomination of the *Clerk of the Peace* belongs; which office he is expresly forbidden to sell for money. See titles *Custos*, &c.; *Clerk*, &c.

In most Corporation-towns there are Quarter Sessions kept before Justices of their own, within their respective limits; which have exactly the same authority as the General Quarter Sessions of the county, except in a very few instances; one of the most considerable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of Corporation Justices, must be to the Sessions of the

county, by *stat.* 8 & 9 *W.* 3. *c.* 30. In both corporations and counties at large, there is sometimes kept a special or petty Session, by a few Justices, for dispatching smaller business in the neighbourhood between the times of the General Sessions; as for licensing alehouses, passing the accounts of parish officers, and the like.

As to the jurisdiction of the Sessions, in points relative to the Poor-laws, the following summary of decisions is taken from *Const*'s edition of *Bott's Poor Laws*: For its connection with the subject, see this Dict. title *Poor*: and, for further information, *Burn's Justice*, and *Const*, as above referred to.

The Sessions cannot make an original order of removal; but they may adjudge the pauper to be settled in any of the parishes that are parties to the order, although they cannot appoint a new place of settlement, for they can only affirm or quash the order, in the whole or in part. Nor can they review an order, on which they have determined at a preceding Sessions; but they may make a new order, vacating a former order made the same Sessions: and it seems that on quashing an order of removal, they can only direct the pauper to be sent back to the respondent parish, and cannot adjudge his settlement in a third parish. If the Magistrates present are equally divided, no order can be made; but whatever a majority decide, is, as to matters of fact, conclusive, and also as to matters of law, unless they consent to a special case; but this they are not compellable to grant, nor will a bill of exceptions lie.

In stating a special case, the Sessions must state their conclusion from the facts, and not refer the evidence to the opinion of the superior Court.—But they need not set forth the reason of their judgment, nor even state the evidence upon which their judgment is founded; but if they do state all the evidence, the Court will thereupon examine whether they have drawn a right conclusion; except in the case of fraud, for that is a fact that must be expresly found by the Sessions; and the Court will not infer it from the strongest evidence. But the Court may send the case back, and order the Sessions to inquire into that fact; as well as they may any other defective case, to be amended by stating a particular fact: But the Sessions are not in this case obliged to hear new evidence, although they should proceed in it as if it were a new business. The Court, however, will not send a case to be re-stated because the Sessions have admitted hearsay evidence; or on affidavit that the Clerk of the peace has not stated the case truly. Justices of both the contending parishes, who are rated to the poor, are excluded from voting *at Sessions*, upon any question relating to the removal of a pauper belonging to either parish. 4 *Term Rep.* 81.

Not only the pauper removed, but the parish, or any of the parishioners, may appeal against an order of removal. The reasonable notice which the *stat.* 9. *Geo.* 1. *c.* 7, requires to be given, before an appeal can be heard, means such notice as is usual in the practice of the particular Session where the appeal is brought; but they cannot quash an order for want of notice, but must adjourn it to the next Session, unless it clearly appears to the Court that there has been sufficient time since the removal for the appellants to give notice, and come prepared, to try the appeal at the Sessions where it is lodged. And it has been determined that this clause does not relate to the receiving, but to the hearing, of the appeal; and therefore they are bound to receive an appeal though no notice has been given. The appeal must be to the next Sessions after the order of removal is served, or the parties are aggrieved, whether it be an original or an adjourned Session; but as to the time which shall intervene between the order and the appeal, respecting what shall be considered the next Sessions, it must depend upon the special circumstances of the case; for if, from the distance, between the parish to which the pauper has been removed and the place where the Sessions are held, there is not time to lodge an appeal at the Sessions held immediately subsequent to the removal, the first Sessions ensuing are to be considered as the next Sessions, and the Justices are bound to receive the appeal at such Sessions. It must however be so short an interval that the reasonable notice required *cannot* be given: This time of appealing to the next Sessions is not suspended by the matter being referred to arbitration; for the consent of the parties that the Sessions shall delegate their authority, concludes such parties, and gives validity to all acts of the Sessions in consequence of such consent. The Sessions however may, if they think proper, adjourn the appeal; but it cannot be to a time beyond that within which it is required by *stat.* 2 *Hen.* 5. *c.* 4, that a Sessions should be held; and every order made at such adjourned Session must state when the original Session commenced; and on adjourning a Session, the continuance of it by the adjournment must be regularly entered, for unless the Session be regularly adjourned they cannot hear the appeal. The allowance of costs is in the discretion of the Sessions; and in ordering them they need not state the particular sum expended; but they cannot direct costs to attend the event of a presumed appeal; nor can they order costs on a mere adjournment of an appeal.

The proceedings, as has been already noticed, may be removed from the Sessions into the Court of King's Bench by *Certiorari*. But by *stat.* 13 *Geo.* 2. *c.* 18, "No *Certiorari* shall be granted to remove any conviction, judgment, order, or other proceedings before any Justice of the Peace, or Sessions, unless it be applied for in six calendar months after such proceedings had or made; and unless it be duly proved on oath, that the party suing forth the same hath given six days' notice in writing to the Justice or Justices, or two of them, before whom such proceedings have been; to the end that such Justices, or the parties therein concerned, may shew cause, if they think fit, against issuing the *Certiorari*."

By *stat.* 5 *Geo.* 2. *c.* 19, "No such *Certoirari* shall be allowed unless the party enter into a recognizance of 50*l.* with condition to prosecute the same at his own costs and charges, with effect and without delay; and to pay the party, in whose favour the judgment or order was made, within a month after the same shall be confirmed, his full costs: and if he shall not enter into such recognizance, or shall not perform the condition, the Justice may proceed, and make such further order for the benefit of the party for whom judgment shall be given, as if no *certiorari* had been granted. And if the order shall be confirmed by the Court, the person entitled to the costs, for the recovery thereof, within ten days after demand made, upon oath of such demand, and refusal of payment, shall have an attachment granted for the contempt; and the recognizance not to be discharged till the costs are paid, and the order complied with."

This

This writ of *Certiorari* cannot be applied for until after the appeal is allowed; but if it be granted before, and the writ be filed, it is too late to object. It may be directed to the Session, and returned by them. If a Session's case, removed by *certiorari* into the King's Bench, be sent down again to the Sessions to be restated, and the prosecutor abandon it when it is returned, the Court will discharge his recognizance for the costs; but not if he dispute the amended order. See further title *Certiorari*.

SESSIONS FOR ORDERING SERVANTS, called Statute Sessions, held by constables of hundreds, &c. See title *Statutum Sessionum*.

SESSIONS FOR WEIGHTS AND MEASURES, In *London*, four Justices, from among the Mayor, Recorder, and Aldermen, (of which the Mayor or Recorder to be one,) may hold a Sessions to inquire into offences of selling by false Weights and Measures, contrary to the statutes; and to receive indictments, punish the offenders, &c. *Char. K. Cha.* I.

SET-OFF. A mode of defence, whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other, sets up a demand of his own to counterbalance it, either in the whole or in part.

At Common Law, if the plaintiff was as much, or even more, indebted to the defendant, than the defendant was to him, yet he had no method of striking a balance: The only way of obtaining relief, was by going into a Court of Equity. To remedy this inconvenience, it was enacted by the *stat.* 2 *Geo.* 2. *c.* 22. § 13, "That where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other; and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require; so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, *Notice* shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due; or otherwise such matter shall not be allowed in evidence, upon the general issue." This clause was made perpetual, by *stat.* 8 *Geo.* 2. *c.* 24. § 4; and it having been doubted, whether mutual debts of a different nature could be set against each other, it was by the last-mentioned statute, (§ 5,) further enacted and declared, "That, by virtue of the said clause, mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned; notwithstanding that such debts are deemed in Law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty, contained in any bond or specialty; and in all cases, where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued, or shall accrue, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar; in which plea shall be shewn, how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid." And where the debt due to the defendant is less than that due from him, he must, on *pleading* such Set-off, pay the remaining balance into Court. 3 *Comm.* *c.* 20. *p.* 304.

The actions in which a Set-off is allowable, upon these statutes, are Debt, Covenant, and Assumpsit, for the non-payment of money; and the demand intended to be set off must be such, as might have been made the subject of one or other of these actions. A Set-off, therefore, is never allowed in actions upon the case, trespass, or replevin, &c.; nor of a penalty, in debt on bond conditioned for the performance of covenants, &c. nor of general damages in Covenant or Assumpsit: But where a bond is conditioned for the payment of an annuity, or of liquidated damages, a Set-off may be allowed. A debt barred by the Statute of Limitations cannot be set off; and if it be pleaded in bar to the action, the plaintiff may reply the Statute of Limitations; or if given in evidence, on a notice of Set-off, it may be objected to at the trial. *Tidd's Pract. K. B.* and the authorities there cited.

The debts sued for, and intended to be set off, must be mutual, and due in the same right; therefore a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one; but a debt due to a defendant, as surviving partner, may be set off against a demand on him in his own right. In an action of debt against a man on his own bond, he cannot set off a debt due to him in right of his wife. Neither, for the same reason, can a defendant, sued as executor or administrator, set off a debt due to himself personally; nor, if sued for his own debt, can he set off what is due to him as executor or administrator. But where an action is brought by or against a trustee, a Set-off may be made, of money due to or from the *Cestui que trust*. It was formerly holden, that the statutes of Set-off did not extend to assignees of a bankrupt; but it has since been determined, that in an action at their suit, the defendant may set off a debt due to him, at the time of the bankruptcy; but a note indorsed to him afterwards cannot be set off. *Tidd's Pract. K. B.* And in actions by or against the assignees of a bankrupt, the sum really due may be recovered under *stat.* 5 *Geo.* 2. *c.* 30, without either pleading or giving notice of a Set-off. 1 *Term Rep.* 115: 3 *Comm. c.* 20, *n.*

Where either of the debts accrues by reason of a penalty, the debt intended to be set off must, by the *stat.* 8 *Geo.* 2. *c.* 24, be pleaded in bar; and the defendant, in his plea, must aver what is really due; which averment has been held to be traversable: But, in all other cases, the defendant may either *plead* or *give notice of Set-off*, at his election. If, at the time of the action brought, a larger sum was due from the plaintiff to the defendant, than from him to the plaintiff, the action being barred, it seems more proper to plead the Set-off; and it is usually pleaded in country causes, to save the trouble and expence of proving the service of a notice. But where the sum intended to be set off is less than that for which the action is brought, a notice of Set-off should be given. *Tidd.*

The *Notice* of Set off should regularly be given with, or at the time of pleading the general issue. Though if it be not then given, the Court, (it is settled) will give the defendant leave to withdraw the general issue, and plead it again, with a notice of Set-off; and such notice may be given with the general issue, after the defendant has been ruled to abide by his plea. In

point of form, a notice of Set-off ſhould be almoſt as certain as a declaration. The notice of Set-off is uſually written underneath the plea, and delivered therewith to the plaintiff's attorney; and a copy of the notice ſhould be kept by the defendant's attorney, it being neceſſary to prove the delivery of it, at the trial of the cauſe. *Tidd's Pract. K. B.*

SETTLEMENT OF POOR. See title *Poor* IV.

SETTLEMENT, ACT OF. The *ſtat.* 12 & 13 *W.* 3. *c.* 2, is ſo called; whereby the crown was limited to his preſent Majeſty's illuſtrious houſe. See title *King* I.

SEVEN-OAKE. Wool-key, how veſted in Truſtees for the King, ſubject to an agreement concerning the free-ſchool in *Seven-oake. Stat.* 8 *Geo.* 1. *c.* 31.

SEVERAL ACTION; See title *Action*.

SEVERAL COVENANT, A Covenant by two or more ſeverally; *i. e.* ſeparately. See title *Covenant*.

SEVERAL FISHERY; See FISHERY, *Right of*.

SEVERAL INHERITANCE, An Inheritance conveyed, ſo as to deſcend or come to two perſons ſeverally by moieties, &c. See titles *Eſtate*; *Limitation*; *Inheritances*.

SEVERAL TAIL, Is that whereby land is given and intailed ſeverally to two. *Co. Lit.* See titles *Limitation*; *Tail*.

SEVERAL TENANCY, *Tenura ſeparalis.*] A plea or exception taken to a writ that is laid againſt two perſons as joint-tenants, who are ſeveral. *Bro.* 273. See title *Joint-tenants*.

SEVERALTY, Eſtates in. He that holds lands or tenements in Severalty, or is ſole tenant thereof, is he that holds them in his own right only, without any other perſon being joined or connected with him in point of intereſt, during his eſtate therein. 2 *Comm. c.* 12. *p.* 179.

SEVERANCE, The ſeparating or ſevering of two or more, joined in one writ or action. There is a Severance of the tenants in an aſſiſe, when one of two diſſeiſees appear upon the writ, and not the other. *Book Intr.* 81. A Severance in *debet*, where two executors, &c. are plaintiffs, and one refuſeth to act or proſecute. *Ibid.* 220. Severance in *quare impedit*; in attaints, &c. 5 *Rep.* 97. And it lies in real, as well as perſonal actions; and on writs of error. *F. N B.* 78: 10 *Rep.* 135. In writ of error, if three defendants in the action bring error, and one releaſes the errors, he may be ſummoned and ſevered, and then the other two ſhall proceed to reverſe the judgment. 6 *Rep.* 26. And if in error where there are ſeveral plaintiffs, one only appears and aſſigns errors; this is not good, without ſummoning and ſevering the reſt. *Cro. Eliz.* 893.

It has been held, that Summons and Severance lies in partition; yet he who was ſevered ſhall have his part: For partition muſt be made of the whole. *Jenk Cent.* 211. And in caſe of joint-tenants of lands, by Severance the proſecution of the ſuit is ſevered, but not the jointure; for where one alone recovers afterwards, the other may enter into the moiety recovered. *Ibid.* 40. Summons and Severance is uſually before appearance; as nonſuit is after appearance. 10 *Rep.* 134. But, according to *Hale*, there are two ſorts of Severances, one when a plaintiff will not appear; and the other when ſeveral plaintiffs appear, but ſome will not proceed and proſecute. *Hard.* 317: 3 *Nelſ. Abr.* 255. If a plaintiff or defendant on a writ of Summons and Severance, ſued out againſt him by another, doth not come in upon it, judgment ſhall be had *ad proſequendum ſolum*; and this hath been done in *B. R.* by giving a rule to appear and come in. 2 *Lil. Abr.* 539. See *Summons and Severance*.

SEVERANCE OF CORN. The cutting and carrying it from off the ground; and ſometimes the ſetting out the tithes from the reſt of the corn, is called Severance. 2 *Cro.* 325. See title *Tithes*. Where executors of tenants for life, &c. dying before Severance, ſhall have corn ſown, ſee *Emblements*.

SEVERANCE OF JOINT-TENANCY; See title *Joint-tenants*.

SEVERN, A recompence for robberies done on the river *Severn* in *Glouceſterſhire*, may be had by action of debt, according to the ſtatute of *Wincheſter*, 8 *H.* 6. See title *Paſſage*.

SEWARD, (rather SEA-WARD,) A *Saxon* word for him who guards the ſea-coaſts; it ſignifies *Cuſtos Maris*.

SEWER, *Sewera*] A freſh water trench, or little river encompaſſed with banks on both ſides, to carry the water into the ſea, and thereby preſerve the lands againſt inundations, &c. The Kings of *England* uſed to grant Commiſſions of Sewers long before any ſtatute was enacted in Parliament for the purpoſe: and during the reigns of King *Henry* VI., *Ed*[illegible], and *Hen.* VII., ſeveral ſtatutes were made for appointing Commiſſions of Sewers in all parts of the realm where needful; ſome to endure ten years, ſome fifteen years, and others five years, &c. with certain powers to the Commiſſioners: which commiſſions, by *ſtat.* 23 *Hen.* 8. *c.* 5, are to be ſettled by the Lord Chancellor, Lord Treaſurer, and the two Chief Juſtices, or any three of them, whereof the Lord Chancellor to be one; and are to continue ten years, unleſs repealed by a new commiſſion: And by this Law, the Commiſſioners' oath is appointed: they are to be qualified as to eſtates, by having lands, tenements, or hereditaments, in fee or for life, worth forty marks *per annum*, beſides repriſes; (except they are reſiſident in and free of a corporation; and have moveables worth 100*l*:) and if they execute the commiſſion, not being thus qualified, or before ſworn, they incur a forfeiture of 40*l*. Commiſſioners that may lawfully act, have an allowance for their pains 4*s*. *per Diem*, and their clerks 2*s*. out of the taxes to be laid and levied.

By the ſaid *ſtat.* 23 *H.* 8. *c.* 5, the Commiſſioners of Sewers had power to make and ordain Laws, but they were not to continue in force longer than their commiſſion. But by a ſubſequent ſtatute, all laws, and ordinances of the Commiſſioners, are to remain in force till repealed, notwithſtanding the determination of their commiſſion; and Clerks of Commiſſioners of Sewers are to eſtreat fines and penalties impoſed by the Commiſſioners yearly into the Exchequer. *Stat.* 13 *Eliz. c.* 9.

The buſineſs of the Commiſſioners of Sewers is to repair ſea-banks and walls, ſurvey rivers, public ſtreams, ditches, &c. and make orders for that purpoſe. They have authority, grounded on the ſtatutes, to inquire of all nuſances, and offences committed by the ſtopping of rivers, erecting mills, not repairing of banks and bridges, &c. and to tax and aſſeſs all whom it may concern, for the amending of defaults, which tend to the obſtruction or hindrance of the free paſſage of the water through its ancient courſes: and they may arreſt carts and horſes, and take trees, paying a reaſonable price for them, for reparations;

reparations; appoint workmen, bailiffs, surveyors, and other officers, *&c. Terms de Ley* 541: 4 *Inst.* 275: *Laws Sew.* 86, 96.

The Court of Commissioners of Sewers is classed, by *Blackstone*, among those whose jurisdiction is private and special: Their jurisdiction being confined to such county or particular district, as the Commission expressly names. The Commissioners are a Court of Record, and may fine and imprison for contempts. 1 *Sid.* 145. And in the execution of their duty may proceed by a Jury, (who may amerce for neglects,) or upon their own view; and may take order for the removal of any annoyances, or the safeguard and conservation of the Sewers within their commission, either according to the laws and customs of *Romney Marsh*; (see that title;) or otherwise at their own discretion; but they may not imprison persons for disobedience to their orders: Nor can they intermeddle where there is not a public prejudice; nor can they make a new river. *Laws Sew.*: 3 *Comm* c. 6.

Upon the statute 23 *Hen.* 8 c. 5, the Commissioners decreed, that a new river should be made out of another large river, through the main land for seven miles, unto another part of the old river; and for that purpose they laid a tax of a sum in gross upon several towns: Adjudged that the Commissioners have no power to make a new river, or any new invention to cast out water, *&c* for such things are to be done in Parliament; but they may order an old bank to be new made, or alter a Sewer upon any inevitable necessity. The tax of a sum in gross is not warranted by their commission, they being to tax every owner or possessor of the lands, according to the quality of their lands, rents, and number of acres, and their respective portions and profits, whether of pasture, fishing, *&c.* 10 *Rep.* 141.

The Commissioners may assess such rates or scots upon the owners of lands within their district, as they shall judge necessary: and if any person refuses to pay them, the Commissioners may levy the same by distress of his goods and chattels; or they may, by the *stat.* 23 *H.* 8. c. 5, sell his freehold lands; and by *stat.* 7 *Ann.* c. 10, his copyhold also, to pay such rates and assessments.

The Commissioners are to tax all equally, who are in danger to receive any damage by the waters, and not only those whose lands are next adjoining; because the rage of the waters may be so great, that the land contiguous may not be of the value to make the banks; and therefore the statutes will have all that are in danger to be contributory. 5 *Rep.* 100.

There are several causes and considerations for which persons may be obliged to repair and maintain Sewers; as frontagers were bound to the repairs of the walls and banks, *&c.* by reason of frontage. 37 *Lib. Assis. pl.* 10. The being owner of a bank, wall, or other defence, is a sufficient inducement to impose the charge of the repairs thereof upon such owner. 1 *Hen.* 7.—Prescription and custom are much of the same nature, and the Law takes notice of them in this case; but prescription doth not bind a man to the repairs, except it be *ratione tenuræ*. 21 *Ed.* 4. 38: 19 *Hen.* 7.—By tenure of land, a person may be bound to repair a wall, bank, or defence mentioned in the Statute of Sewers. 12 *H.* 4.—A man may bind himself and his heirs by covenant expresly to repair a bank, wall, or sewer, and be good; yet this shall not bind the heir after his death, where assets are not left from the ancestor, who entered into the covenant. *Callis's Reading on Sewers.*

The use of defences may tie a man to the reparation thereof; if one and his ancestors have had the use of a river by sailing up and down the same, or have used a ferry on or over it, *&c.*—If no person or grounds can be known, who ought to make repairs by tenure, prescription, custom, or otherwise, then the Commissioners are to tax the level. *Laws Sewers* 57, 67, 68.

The decrees of Commissioners of Sewers are to be certified into Chancery: Their conduct is under the controul of the Court of *King's Bench*, which will prevent or punish any illegal or arbitrary proceedings. *Cro. Jac.* 336. And yet in the reign of King *Jac.* I. (8th *Nov.* 1616,) the Privy Council took upon them to order that no action or complaint should be prosecuted against the Commissioners, unless before that Board; and committed several to prison who had brought such actions at Common Law, till they should release the same; and one of the reasons for discharging Sir *Ed. Coke* from his office of Lord Chief Justice, was for countenancing those proceedings at Law. *Moor* 825, 826: See 3 *Comm.* 55, 74. But now it is clearly established that this (like other inferior jurisdictions) is subject to the discretionary coercion of the Court of King's Bench. 1 *Vent.* 66, 67: *Salk.* 146.

If it is found before Commissioners of Sewers, that a certain person ought to repair a bank; and this is removed into *B. R.* the Court will not quash the inquisition, or grant a new trial, except he repair it; and if afterwards he is acquitted, he shall be reimbursed. *Sid* 78.—In cases of Sewers, the Court of King's Bench inquire into the nature of the fact, before they grant a *certiorari* to remove orders; that no mischief may happen by inundations in the mean time, which is a discretionary execution of their power. 1 *Salk.* 146.

The Court commonly hears counsel on both sides, where orders of Commissioners of Sewers are removed by *certiorari*, before such orders are filed; for, if good, the Court will grant a *procedendo*, which cannot be done after they are filed: But they will file them in any case, where there is no danger likely to ensue. 1 *Salk.* 145.—If Commissioners of Sewers proceed after a *certiorari* delivered out of *B. R.* attachment will issue against them, and they may be fined. 3 *Nels. Abr.* 218. An order of Sewers was made for levying of 9*d. per* acre on thirteen hundred and twelve acres, to be paid to the clerk, to be applied towards defraying of charges in and about the execution of the commission; and held to be good; the act does not require it should be on the occupiers; and there is an express power to allow charges. 2 *Str.* 1127: 10 *Co.* 139.

Orders of Sewers being removed by *certiorari*, the Court would not file the orders till they had heard the objections debated, so as to have it in their power to send the orders back again. 2 *Str* 1263.—The Court held, that a *certiorari* to bring up an order made by the Commissioners, for the removal of their own clerk, was of common right, and not discretionary, as in the case of other orders, where great inconveniences may follow by inundations in the mean time. 1 *Str.* 609.

The sea, creeks, and bays, on the coasts, are all within the Statutes of Sewers, in point of extent; but they and the shores, and the relinquished grounds, are out of the commission of Sewers, to be determined thereby: bu,

but ports and havens, as well as the walls and banks of waters, are within the commission of Sewers; and the shore and grounds left by the sea, when they are put in gainage and made profitable, are then within the power of the commission of Sewers: And though before, the ground left by the sea is not, as to defence, within the commission of Sewers; yet a wall or bank may be thereon raised, for the succour of the country, although not for any private commodity; the commission of Sewers aiming at the general good. *Callis* 31, 32. The *stat.* 3 *Jac.* 1. *cap.* 14, ordains, that all ditches, banks, bridges, streams, and watercourses, within two miles of *London*, falling into the *Thames*, shall be subject to a commission of Sewers: And the Lord Mayor, &c. is to appoint persons who have power of Commissioners of Sewers.

Breaking down sea-banks, whereby lands shall be damaged, is felony, by *stat.* 6 *Geo.* 2. *c.* 37. And persons removing piles, &c. used to prevent inundations of rivers, shall forfeit 20*l.* or be sent to the house of correction for six months. *Stat.* 10 *Geo.* 2. *c.* 32. See title MISCHIEF, *Malicious.*

SEXAGESIMA *Sunday,* the sixtieth day before *Easter.* See *Septuagesima.*

SEXHINDENI, or SEXHINDMEN, *Sax.*] The middle Thanes, valued at 600 shillings. See title *Hindeni Homines.*

SEXTARY, *Sextarius.*] Was an ancient measure, containing about our pint and a half. The town of *Leicester* paid, among other things, to the King yearly, twenty-five measures, called Sextaries, of honey, as we read in *Domesday.* See *Mon. Angl.* ii. 849, *b*: and i. 136. *b*; in which latter place it seems to have been used for a much greater quantity. A Sextary of ale contained sixteen Lagenas. *Cowell.* See title *Tolsester.*

SEXTERY LANDS, Lands given to a church or religious house, for maintenance of the Sexton or Sacristan. *Cowell.*

SEXTONS. Parish Clerks and Sextons are regarded by the Common Law, as persons who have freeholds in their offices; and therefore, though they may be punished, yet they cannot be deprived by ecclesiastical censures. 2 *Rol. Abr.* 234. 1 *Comm. c.* 11. See titles *Office*; *Mandamus.*

SHACKE, A custom in *Norfolk,* to have common for hogs, from the end of harvest till seed-time, in all men's grounds, without contradiction. 7 *Rep.* 5. And, in that country, To go at shacke, is as much as to go at large. *Cowell.*

SHALLOONS. Under what penalties not to be exported from *Ireland* to any place but *England.* *Stat.* 10 & 11 *W.* 3. *c.* 10. See title *Navigation Acts.*

SHARPING-CORN, A customary gift of corn, which, at every *Christmas,* the farmers in some parts of *England* give to their smith, for sharping their plough-irons, harrow-tines, &c. *Blount.*

SHARNBURN in *Norfolk,* Pleas held at, *temp. Will.* I. for the purpose of confiscating the estates of such as opposed that Conqueror. See *Spelm. Gloss.* in *v. Drenges*; where it is mentioned as *quidam libellus* of the family of *Sharneburne* in *Norfolk.* See *Wright's Tenures* 62; who also mentions pleas held at *Pinenden,* for the same purpose.—*Hume* says, "There is a paper or record of the family of *Sharneborne,* which pretends that that family, which was *Saxon,* was restored upon, proving their innocence. Though this paper was able to impose on such great antiquaries as *Spelman* and *Dugdale,* it is proved by Dr. *Brady* (*Ans. to Petyt, p.* 11, 12,) to have been a forgery." *Hume's Hist. Engl.* i. 263. *note* H.

SHAW, A grove of trees, or a wood, mentioned in 1 *Inst.* 4.; now generally applied to *Underwood.*

SHAWALDRES, *Soldiers. Cowell.*

SHEADING, A riding, tithing, or division in the *Isle of Man*; where the whole island is divided into six Sheadings, in each of which there is a Coroner, or Chief Constable, appointed by delivery of a rod at the Tinewald Court, or annual convention. *King's Descrip. Isle of Man* 17.

SHEARMAN'S CRAFT, A Craft or occupation used at *Norwich,* and elsewhere; the artificers whereof do shear worsteds, fustians, and all woollen cloth. See *stats.* 19 *H.* 7. *c.* 17: 22 & 23 *Car.* 2. *c.* 8.

SHEEP. By an ancient (disregarded!) statute, no person shall keep at one time above two thousand Sheep, on pain of 3*s.* 4*d. per* Sheep above that number; but lambs are not to be accounted as Sheep till they are a year old. *Stat.* 25 *H.* 8. *c.* 13. As to the exportation and shearing of Sheep, &c. see title *Wool*: As to stealing Sheep, &c. see title *Cattle.*

SHEEP-SILVER, A service turned into money; which was paid in respect that anciently the tenants used to wash the Lord's Sheep. *W. Jones's Rep.* 280.

SHEPWAY, *Court of*; A Court held before the Lord Warden of the Cinque Ports. A writ of error lies from the Mayor and Jurats of each port, to the Lord Warden, in this Court of Shepway, and from thence to the King's Bench. See title *Cinque Ports.*

SHERFFEE. The body of the lordship of *Caerdiff* in *South Wales* is so called, excluding the members of it. *Powel's Hist. Wal.* 123.

SHERIFF;

SHIRE-REVE, or SHIRIFF:

THE REEVE, Bailiff, or Officer of the Shire; Lat. *Vicecomes*; Sax. *Scire geresa,* from the Sax *Scyrian,* to divide.] The Chief Officer, under the King, in every Shire or County; being so called from the first division of the kingdom into counties. *Camd. Brit.*

I. *Of Sheriffs generally.*

II. *Who are qualified for, or exempt from, serving the Office of Sheriff*: And see III.

III. *Manner of appointing him, and of his Oath.*

IV. *The Sheriff can execute no other Office*; *how long to continue in Office*; *and of his Jurisdiction.*

V. *The Sheriff cannot dispose of his Bailiwick*; *and of his Power and Duty in appointing an Under-Sheriff.*

I. IT SEEMS that anciently the government of the County was by the King lodged in the Earl or Count, who was the immediate officer to the Crown; and this high office was granted by the King at will; sometimes for life, and afterwards in fee; but when it became too burdensome, and could not be commodiously executed by a person of so high rank and quality, it was thought necessary to constitute a person, duely qualified,

qualified, to officiate in his room and stead; from hence he is called in Latin *Vice-comes*, as being deputy of the *Earl* or *Comes*: and Sheriff, from *Shire-reeve*, i. e. Governor of the Shire or County. He is likewise considered in our books as Bailiff to the Crown; and his county, of which he hath the care, and in which he is to execute the King's writs, is called a Bailiwick. *Dav.* 60: *Savil* 43: 1 *Rol. Rep.* 274: *Co. Lit.* 168. Vide *Pref. to* 9 *Rep.* 33.

It is said by *Coke* and by *Dalton*, that Earls, by reason of their high employments and attendance upon the King, being not able to follow all the business of the county, were delivered of all that burthen, and only enjoyed the honour as they now do, and that labour was laid upon the Sheriff; so that now the Sheriff doth all the King's business in the county; and the Sheriff, though he be still called *Vicecomes*, yet all he doth, and all his authority, is entirely independent of and not subject to the Earl, being immediately from and under the King, and not from or under the Earl; so that, at this day, the Sheriff hath all the authority for the administration and execution of justice, which the Count or Earl had; the King, by his letters-patent now committing to the Sheriff *custodiam comitatûs*. 9 *Co.* 49: *Dalt. Sher.* 2.

He is at this day considered as an officer of great antiquity, trust, and authority; having, as *Dalton* observes, from the King the custody, keeping, command, and government (in some sort) of the whole county committed to his charge and care; and, according to *Coke*, he is said to have *triplicem custodiam*, viz. *vitæ justitiæ*, *vitæ legis*, & *vitæ reipublicæ*, &c. *Vitæ justitiæ*, to serve process, and to return indifferent juries for the trial of men's lives, liberties, lands, and goods; *vitæ legis*, to execute process and make execution, which is the life of the Law; and *vitæ reipublicæ*, to keep the peace. *Co. Lit.* 168: *Dalt. Sh.* 5.

It seems that, anciently, Sheriffs were elected by the freeholders of the county, as the Coroners are at this day; and consequently that their offices did not determine by the death of the King. 2 *Inst.* 558: 2 *Brownl.* 282. See *post.* III.

And though at this day the King hath the sole appointment of Sheriffs, except in counties palatine, and where there are *jura regalia*, yet it hath been adjudged, that the office of Sheriff is an entire thing, and that therefore the King cannot apportion or divide it; that is, he cannot determine it in part, as for one town or one hundred; neither can he abridge the Sheriff of any thing incident to or belonging to his office. *Dav.* 60: 4 *Co.* 33; *Mitton*'s case: *Dalt. Sh.* 6: *Hob.* 13: *Raym.* 363.

The Lord Mayor and citizens of *London* have the Shrievalty of *London* and *Middlesex* in fee, by charter; and two Sheriffs are annually elected by them, for whom they are to be answerable: If one of these Sheriffs dies, the other cannot act till another is made; and there must be two Sheriffs of *London*, which is a city and county; though they make but one Sheriff of the county of *Middlesex*: They are several as to plaints in their respective Courts. 3 *Rep.* 72: *Show. Rep.* 289. See *post.* III.

II. It is provided by several acts of Parliament, that no man shall be Sheriff in any county, except he have sufficient lands within the same county where he shall be Sheriff, whereof to answer the King and his people, in case that any person shall complain against them; and that none that is steward or bailiff to a great lord shall be made Sheriff. *Stats.* 9 *Ed.* 2. *st.* 2: 2 *Ed.* 3. *c.* 4: 4 *Ed.* 3. *c.* 9: 5 *Ed.* 3. *c.* 4: 13 & 14 *C.* 2. *c.* 1. § 7.

This is the only qualification required from a Sheriff: That it was the intention of our ancestors, that the lands of a Sheriff should be considerable, abundantly appears from their having this provision so frequently repeated; and at the same time that they obtained a confirmation of *Magna Carta* and their most valuable liberties. As the Sheriff, both in criminal and civil cases, may have the custody of men of the greatest property in the county, his own estate ought certainly to be large, that he may be above all temptation to permit them to escape, or to join them in their flight. In ancient times, this office was frequently executed by the Nobility, and persons of the highest rank in the kingdom. *Spelm. Gloss. in v. Vicecomes.*—Bishops also were not unfrequently Sheriffs: *Richard* Duke of *Gloucester* (afterwards *Richard* III.) was Sheriff of *Cumberland* five years together.—It does not appear that there is any express law to exclude the Nobility from the execution of this office; though it has long been appropriated to Commoners. 1 *Comm.* *c.* 9. *p.* 346, *n.*

The office of Sheriff doth not determine by the party's becoming a Peer on the death of his father, but that he still remains Sheriff *ad voluntatem Regis*. *Cro. Eliz.* 12. Sir *Lewis Mordant*'s case.

It is holden that the King hath an interest in every Subject, and a right to his service; and that no man can be exempt from the office of Sheriff, but by Act of Parliament, or letters-patent. *Sav.* 43: 9 *Co.* 46.

And on this foundation, it was adjudged, in Sir *John Read*'s case, who was made High Sheriff of *Hertfordshire* at the time he was excommunicated for non-payment of alimony, that an information properly lay against him for not executing the office; though it was objected, on his behalf, that the oath and sacrament injoined by Act of Parliament are necessary qualifications for all Sheriffs, which he was disabled to take by reason of the excommunication: But the Court held, that he was punishable for not removing the disability, it being in his power to get himself absolved from the excommunication; and that therefore it could be no excuse. 2 *Mod.* 299.

Though, in the above case, it was admitted that the Subject was bound to serve the King in such capacity as he is in at the time of the service commanded, yet it was insisted upon, that he was not obliged to qualify himself to serve in every capacity; and that therefore a prisoner for debt is not bound nor compellable to be Sheriff, no more than a person is bound to purchase lands to qualify himself to be either a Coroner or Justice of the peace: And it was likewise said that, by statute, every recusant is disabled; he may conform, but he is not bound to it; for if he submits to the penalty, it is as much as is required by Law. 2 *Mod.* 301. And it is now settled that Dissenters are not compellable to serve the office of Sheriff.

riff. *Harrison* (Chamberlain of *London*) v. *Evans*, in the House of Lords, 1766. See title *Dissenters*.

If a man is disabled by a judgment in Law to bear an office, he is excused; *nam judicium redditur in invitum*; for though his fault or neglect was the occasion of such judgment, yet it is a mark set upon him by the Government. *Salk.* 168: 4 *Mod.* 273.

And as nothing but an invincible necessity can exempt a person from serving the office of Sheriff, &c. on this foundation a bye-law made in *London*, that no freeman chosen Sheriff, &c. shall be excused unless he voluntarily swears he is not worth 10,000*l.* &c. [now 15,000*l.*] and that if he openly refuses to take the office, then to forfeit the sum of 400*l.* was adjudged good. *Salk.* 142: *Carth.* 480: 5 *Mod.* 438. *City of London* v. *Vanacre*.—In the year 1748, the Corporation of *London* made a bye-law, imposing a fine of 600*l.* on persons refusing to serve the office of Sheriff.

The vast expence, which custom had introduced in serving the office of High-Sheriff, was grown such a burthen to the Subject, that it was enacted, by *stat.* 13 & 14 *Car.* 2. *c.* 21, that no Sheriff (except of *London*, *Westmorland*, and towns which are counties of themselves) should keep any table at the assizes, except for his own family, or give any presents to the Judges or their servants, or have more than forty men in livery: Yet, for the sake of safety and decency, he may not have less than twenty men in *England* and twelve in *Wales*; upon forfeiture, in any of these cases, of 200*l.*

III. The High Sheriff hath his authority given him by two patents; by the one the King commits to him the custody of the county; by the other the King commands all other his Subjects within that county to be aiding and assisting to him in all things belonging to his office. *Dalt. Sh.* 7, where see the form of such patents.

Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by *stat.* 28 *Edw.* 1. *c.* 8, that the people should have election of Sheriffs in every shire, where the Shrievalty is not of inheritance. For anciently in some counties the Sheriffs where hereditary; as it seems they were in *Scotland* till the *stat.* 20 *Geo.* 2. *c.* 43; and still continue in the county of *Westmorland* to this day: The City of *London* have also the inheritance of the Shrievalty of *Middlesex* vested in their body, by charter. 3 *Rep.* 72.

The Earl of *Thanet* is hereditary Sheriff of *Westmorland*, which office may descend to and be executed by a female, for *Anne* Countess of *Pembroke* had the office, and exercised it in person; and, at the Assizes at *Appleby*, sate with the Judges on the Bench. 1 *Inst.* 326, *n.*—The election of the Sheriffs of *London* and *Middlesex*, was granted to the citizens of *London*, in consideration of their paying 300*l.* a-year to the King's Exchequer, 1 *Comm.* *c.* 9, *n.*

The reason of these popular elections is assigned in *stat.* 28 *E.* 1. *c.* 13; "That the Commons might choose such as would not be a burthen to them." And herein appears plainly a strong trace of the democratical part of our constitution; in which form of government it is an indispensable requisite, that the people should choose their own Magistrates. This election was in all probability not absolutely vested in the Commons, but required the royal approbation. For, in the *Gothic* constitution, the Judges of the County Courts (which office is executed by our Sheriff) were elected by the people, but confirmed by the King; and the form of their election was thus managed: The people, or *incolæ territorii* chose twelve electors, and they nominated three persons, *ex quibus rex unum confirmabat.* But with us in *England* these popular elections, growing tumultuous, were put an end to by the *stat.* 9 *Edw.* 2 *st.* 2; which enacted, that the Sheriffs should from thenceforth be assigned by the Chancellor, Treasurer, and the Judges; as being persons in whom the same trust might with confidence be reposed. By *stats.* 14 *Edw.* 3. *c.* 7: 23 *Hen.* 6. *c.* 8, the Chancellor, Treasurer, President of the King's Council, Chief Justices, and Chief Baron, are to make this election; and that on the Morrow of *All Souls* in the Exchequer. And the King's letters patent, appointing the new Sheriffs, used commonly to bear date the sixth day of *November*. *Stat.* 12 *Edw.* 4. *c.* 1. The statute of *Cambridge*, 12 *Ric.* 2. *c.* 2, ordains that the Chancellor, Treasurer, Keeper of the Privy Seal, Steward of the King's House, the King's Chamberlain, Clerk of the Rolls, the Justices of the one Bench and the other, Barons of the Exchequer, and all other that shall be called to ordain, name, or make Justices of the peace, Sheriffs, and other officers of the King, shall be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they shall judge to be the best and most sufficient. And the custom now is (and has been at least ever since the time of *Fortescue*, who was Chief Justice and Chancellor to *Henry* the Sixth) that all the Judges, together with the other great officers and Privy Counsellors, meet in the Exchequer on the Morrow of *All Souls* yearly, (which day is now altered to the Morrow of *St. Martin* by the last Act for abbreviating *Michaelmas* term,) and then and there the Judges propose three persons, to be reported (if approved of) to the King, who afterwards appoints one of them to be Sheriff. See 1 *Comm.* *c.* 9. *p.* 340, 341: *Fort. de L. L.* *c.* 24.

The following is the present mode of nominating Sheriffs in the Exchequer, on the Morrow of *St. Martin*:

The Chancellor, Chancellor of the Exchequer, the Judges and several of the Privy Council assemble, and an officer of the Court administers an oath to them, in old *French*, that they will nominate no one from favour, partiality, or any improper motive: This done, the same officer, having the list of the counties in alphabetical order, and of those who were nominated the year preceding, reads over the three names, and the last of the three he pronounces to be the present Sheriff: But where there has been a *Pocket-Sheriff* (see *post*,) he reads the three names upon the list, and then declares who is the present Sheriff. If any of the Ministry or Judges has any objection to a person named, he mentions it and another gentleman is nominated in his room: If no objection is made, some one rises and says, "To the two gentlemen I know no objection, and I recommend *A. B.* Esq. in the room of the present Sheriff."

Another officer has a paper, with a number of names, given him by the Clerk of Assise for each county, which paper generally contains the names of the gentlemen upon the former list, and also of gentlemen who are likely to be nominated; and whilst the three

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are nominated, he prefixes 1, 2, or 3 to their names according to the order in which they are placed; which, for greater certainty, he afterwards reads over twice. Several objections are made to gentlemen; some perhaps at their own request; such as, that they are abroad, that their estates are small and incumbered, that they have no equipage, that they are practising barristers, or officers in the militia, *&c.*

The new Sheriff is generally appointed about the end of the following Hilary Term: This extension of the time was probably in consequence of the *stat.* 17 *E.* 4. *c.* 7, which enables the old Sheriff to hold his office over *Michaelmas* and *Hilary* Terms. 1 *Comm. c.* 9. *p.* 341, *n.*

This custom, of the twelve Judges proposing three persons, seems borrowed from the Gothic constitution before mentioned; with this difference, that, among the Goths, the twelve nominors were first elected by the people themselves. And this usage, it is suggested by *Blackstone*, was, at its first introduction, founded upon some statute, though not now to be found among our printed laws: First, because it is materially different from the direction of all the statutes before mentioned; which it is hard to conceive that the Judges would have countenanced by their concurrence, or that *Fortescue* would have inserted in his book, unless by the authority of some statute: And also, because a statute is expresly referred to in the record, which Sir *Edward Coke* says he transcribed from the *Council-Book* of 3d *March*, 34 *Hen.* VI. and which is in substance as follows:—The King had of his own authority appointed a man Sheriff of *Lincolnshire*, which office he refused to take upon him; whereupon the opinions of the Judges were taken, what should be done in this behalf: And the two Chief Justices, Sir *John Fortescue* and Sir *John Prisot*, delivered the unanimous opinion of them all; "that the King did an error, when he made a person Sheriff that was not chosen and presented to him according to the statute; that the person refusing was liable to no fine for disobedience, as if he had been one of the *three* persons chosen according to the tenor of the statute; that they would advise the King to have recourse to the *three* persons that were chosen according to the statute, or that some other thrifty man be entreated to occupy the office for this year; and that, the next year, to eschew such inconveniences, the order of the statute, in this behalf made, be observed." 1 *Comm. c.* 9.

Mr. *Christian* expresses his dissent from the foregoing opinion of the learned Commentator, that the present practice originated from a statute which cannot now be found; because, if such a statute ever existed, it must have been passed between the date of this record, 34 *H.* 6, and the *stat.* 23 *H.* 6. *c.* 8, before referred to; for that statute recites and ratifies the *stat.* 14 *E.* 3. *st.* 1. *c.* 7, which provides only for the nomination of one person to fill the office when vacant; yet the former *stat.* 9 *E.* 2. *st.* 2, leaves the number indefinite; *viz.* Sheriffs shall be assigned by the Chancellor, *&c.*; and if such a statute had passed in the course of those eleven years, it is probable that it would have been referred to by subsequent statutes. Mr. *Christian* conceives that the practice originated from the consideration, that as the King was to confirm the nomination by his patent, it was more convenient and respectful to present three to him than only one; and though this proceeding did not exactly correspond with the directions of the statute, yet it was not contrary to its spirit, or, in strictness, to its letter; and therefore the Judges might perhaps think themselves warranted in saying, that the three persons were chosen according to the tenor of the statute. 1 *Comm. c.* 9. *p.* 342, *n.*

Notwithstanding the unanimous resolution of all the Judges of *England*, entered, as before mentioned, in the *Council-Book*, and the *stat.* 34 & 35 *H.* 8. *c.* 26. § 61, which expresly recognizes this to be the Law of the land; some have affirmed that the King, by his prerogative, may name whom he pleases to be Sheriff, whether chosen by the Judges or not. *Jenk.* 229. This is grounded on a very particular case in the fifth year of Queen *Elizabeth*, when, by reason of the plague, there was no *Michaelmas* Term kept at *Westminster*, so that the Judges could not meet there *in Crastino Animarum*, to nominate the Sheriffs; whereupon the Queen named them herself, without such previous assembly, appointing for the most part one of the two remaining in the last year's list. *Dyer* 225. And this case, thus circumstanced, is the only authority in our books for the making these extraordinary Sheriffs. It is true, the Reporter adds, that it was held that the Queen by her prerogative might make a Sheriff without the election of the Judges, *non obstante aliquo statuto in contrarium*: but the doctrine of *non obstante*'s, which sets the Prerogative above the Laws, was effectually demolished by the Bill of Rights at the Revolution, and abdicated *Westminster-Hall* when King *James* abdicated the kingdom. However, it must be acknowledged, that the practice of occasionally naming what are called *Pocket-Sheriffs*, by the sole authority of the Crown, hath uniformly continued to the reign of his present Majesty; in which, few (if any) compulsory instances have occurred. 1 *Comm. c.* 9.

They were called *Pocket-Sheriffs*, who were appointed by the King, not being one of the three nominated in the Exchequer. The unanimous opinion of the Judges above referred to, from 2 *Inst.* 559, seems to preclude the possibility of a *compulsory* appointment. 1 *Comm.* 342, *n.*

The Sheriffs in every of the shires of *Wales* shall be nominated yearly by the Lord President, Council, and Justices of *Wales*, and shall be certified up by them; and after, appointed and elected by the King, as other Sheriffs be. 34 *Hen.* 8. *cap.* 26: *Dalt. Sh.* 6. See title *Wales.*

The Sheriff, before he doth exercise any part of his office, and before his patent is made out, is to give security in the King's Remembrancer's Office in the Exchequer, under pain of 100*l.* for the payment of his proffers, and all other profits of the Sheriffwick; but these securities are never sued, unless there is a deficiency in the Sheriff's effects. *Dalt. Sh.* 7.

The Sheriff, before he takes upon him the exercise of his office, must not only take the oaths of allegiance and abjuration, enjoined to all officers by divers acts of Parliament, but all Sheriffs, except those of *Wales* and the counties palatine, must take the oath appointed by *stat.* 3 *G.* 1. *c.* 15. § 18, for the due execution of their office.

If a person refused to take upon him the office of Sheriff, it was usual to punish him in the Star-chamber; and he may now be proceeded against by information in the Court of King's Bench. Also, if he refuses to take

the oaths injoined him, or officiates in the office before he hath thus qualified himself, the Court, which hath a general superintendancy over all officers and ministers of justice, will grant an information against him: And it hath been held, that a refusal of oaths injoined to be taken, amounts to a refusal of the office. *Dalt. Sh.* 15: *Dyer* 167: 3 *Lev.* 116: *Carth.* 307.

A Sheriff, at the entrance into his Shrievalty, is to go to the Remembrancer's Office in the Exchequer, and there enter into a recognizance with sureties, with conditions for payment of his proffers or accounts: Then his attorney, &c. will write him a note, signifying that he is chosen Sheriff of such a county, and hath entered a recognizance; which he must deliver to one of the Six Clerks in Chancery, to make his patent by; with the writ of assistance, and writ of discharge to his predecessor: And, in the next place, the new Sheriff is to go to a Master in Chancery, if he be in *London*, to take the oaths. *Dalt. Sher.* 291.

If the Sheriff be not in *London*, the oath may be taken by *dedimus potestatem*, directed to any two Justices of the peace of the same county, one to be of the *quorum*, or to any other commissioner or commissioners, or before one of the Judges of assise for that county, or one of the Masters in Chancery, who, it is said, may, as well as the Judge, administer such oath without any *dedimus*. *Dalt. Sher.* 13, 14.

If the commissioners return the commission or writ, and that the oaths are taken, when they are not taken, they are finable. *Dyer* 168: *Dalt. Sher.* 14.

When a Sheriff is chosen, the old Sheriff continues Sheriff of the county till the new is sworn, which completes him in his office: But the office of the old Sheriff ceases and is at an end when the writ of discharge comes to him.

IV. A Sheriff cannot be elected Knight of the Shire for that county for which he is Sheriff. 4 *Inst.* 48: *Lit. Rep.* 326. See title *Parliament*.

By *stat.* 14 *Ed.* 3. *c.* 7, no Sheriff shall tarry or abide in his office above one year, upon pain to forfeit 200*l.* a year as long as he occupieth the office; and every pardon made for such offence or forfeiture shall be void: And see *stat.* 42 *E.* 3. *c.* 9, *post.* V. *London, Middlesex*, &c. are not within these statutes. See *stat.* 3 *G.* 1. *c.* 15. § 21.

Notwithstanding these old statutes, it hath been said, 4 *Rep.* 32, that a Sheriff may be appointed *durante bene placito*, or during the King's pleasure; and so is the form of the royal writ. Therefore, till a new Sheriff be named, his office cannot be determined, unless by his own death, or the demise of the King; in which last case, it was usual for the successor to send a new writ to the old Sheriff; but now by *stat.* 1 *Ann. st.* 1. *c.* 8, all officers appointed by the preceding King may hold their offices for six months after the King's demise, unless sooner displaced by the successor. See *Dalt.* 7, 8.

By *stat.* 1 *Rich.* 2. *c.* 11, it is enacted, that none that hath been Sheriff of any county a year, shall be within two years next chosen again, or put in the same office, if there be other sufficient.

And by *stat.* 1 *H.* 5. *c.* 4, it is enacted, that they that be Bailiffs of Sheriffs one year, shall be in no such office by three years next following, except Bailiffs of Sheriffs which inherit in their office.

By *stat.* 4. *H.* 4. *c.* 5, it is enacted, that every Sheriff shall be dwelling in proper person within his bailiwick, for the time he shall be such officer; and that the Sheriff shall be sworn to do the same.

Hence it is clear that a Sheriff hath no jurisdiction in any other county, nor can he do a judicial act, in which his personal presence is required, out of his county; but it is held, that he may do a ministerial act, as make a panel, or return a writ, out of his county, unless he is beyond sea. *Dalt. Sh.* 22: 9 *H.* 4. 1.—See farther, *Plowd.* 37: *Dalt. Sher.* 23.

A Sheriff may make and deliver the return of a writ any where. 1 *Wils.* 328. A Sheriff gives out a blank warrant upon a writ which is filled up by an attorney, this is ill. 2 *Wils.* 47. See title *Commitment*.

Until a different regulation was made by *stat.* 8 *Eliz.* *c.* 16, in a great many instances two counties had one and the same Sheriff: This is still the case in the counties of *Cambridge* and *Huntingdon*.

It will appear to be of the utmost importance to have the Sheriff appointed according to Law, when we consider his power and duty. These are either as a Judge, as the Keeper of the King's Peace, as a ministerial officer of the superior Courts of justice, or as the King's Bailiff. 1 *Comm.* *c.* 9.

In his judicial capacity, he is to hear and determine all causes of 40*s.* value, and under, in his *County Court* (see that title); and he has also a judicial power in divers other civil cases. *Dalt.* *c.* 4 He is likewise to decide the elections of Knights of the Shire, (subject to the control of the House of Commons,) of Coroners, and of Verderors; to judge of the qualification of voters, and to return such as he shall determine to be duly elected. 1 *Comm.* *c.* 9.

As the Keeper of the King's Peace, both by Common Law and Special Commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office. 1 *Roll. Rep.* 237. He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the King's peace. He may, and is bound *ex officio* to pursue, and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the King's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatûs*, or power of the county: And this summons every person above fifteen years old, and under the degree of a Peer, is bound to attend upon warning, under pain of fine and imprisonment. *Stat.* 2 *Hen.* 5. *st.* 1. *c.* 8. See title *Riot*. But though the Sheriff is thus the principal conservator of the peace in his county, yet by the express directions of the great charter, (*c.* 17.) he, together with the constable, coroner, and certain other officers of the King, are forbidden to hold any pleas of the Crown; or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the Judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary Justice of the peace during the time of his office: For this

this would be equally inconfiftent; he being in many refpects the fervant of the Juftices. *Stat.* 1 *Mar. ft.* 2. *c.* 8.

In his minifterial capacity the Sheriff is bound to execute all procefs iffuing from the King's Courts of juftice. In the commencement of civil caufes, he is to ferve the writ, to arreft, and to take bail; when the caufe comes to trial, he muft fummon and return the Jury; when it is determined, he muft fee the judgment of the Court carried into execution. In criminal matters, he alfo arrefts and imprifons, he returns the Jury, he has the cuftody of the delinquent, and he executes the fentence of the Court, though it extend to death itfelf. See title *Execution*.

As the King's Bailiff, it is his bufinefs to preferve the rights of the King within his *Bailiwick*; for fo his county is frequently called in the writs: A word introduced by the Princes of the *Norman* line; in imitation of the *French*, whofe territory is divided into bailiwicks, as that of *England* into counties *Fortefc. de L. L. c.* 24. He muft feife to the King's ufe all lands devolved to the Crown by attainder or efcheat; muft levy all fines and forfeitures; muft feife and keep all waifs, wrecks, eftrays, and the like, unlefs they be granted to fome Subject; and muft alfo collect the King's rents within the bailiwick, if commanded by procefs from the Exchequer. *Dalt. c.* 9.

V. By *ftat.* 23 *H.* 6. *c.* 9, it is provided, "that no Sheriff fhall let to farm, in any manner, his county, nor any of his bailiwicks, hundreds, or wapentakes."

In the conftruction hereof it hath been holden, that this is a particular law, and muft be pleaded, otherwife the Judges cannot take notice of it. 3 *Keb.* 678.

It hath been held, that a leafe thereof, though no rent was ever received, is within the ftatute: the intent thereof being that Sheriffs fhould keep their counties in their own hands. 20 *Hen.* 7. 13. See *Dalt. Sher.* 23, 24: *Plowd.* 87: *Moor* 781.

To execute his various duties, the Sheriff has under him many inferior officers; an Under-Sheriff, Bailiffs, and Gaolers; who muft neither buy, fell, nor farm their offices, on forfeiture of 500*l*.

By *ftat.* 3 *Geo.* 1. *c.* 15, "it fhall not be lawful for any perfon to buy, fell, let, or take to farm, the office of Under Sheriff or Deputy-Sheriff, Seal keeper, County-clerk, Shire-clerk, Gaoler, Bailiff, or any other office pertaining to the office of High-Sheriff, or to contract for any of the faid offices, on forfeiture of 500*l.* one moiety to his Majefty, the other to fuch as fhall fue in any Court at *Weftminfter*, within two years after the offence." § 10.

"Provided, that nothing in this act fhall hinder any High-Sheriff from conftituting an Under-Sheriff or Deputy-Sheriff, as by Law he may; nor to hinder the Under-Sheriff in any cafe of the High-Sheriff's death, when he acts as High-Sheriff, from conftituting a Deputy; nor to hinder the receipt of, or accounting to the Sheriff, &c. for legal fees. See *Dalt.* 3, 514: *Hob.* 13: 2 *Brownl.* 281.

The High-Sheriff may execute the office himfelf; and the Under-Sheriff hath not, nor ought to have, any eftate or intereft in the office itfelf; neither may he do any thing in his own name, but only in the name of the High-Sheriff, who is anfwerable for him. *Dalt. Sher.* 3: *Salk.* 96.

By § 8 of the above ftatute, 3 *Geo.* 1. *c.* 15, it is enacted, "that if any Sheriff fhall die before the expiration of his year, or before he be fuperfeded, the Under-Sheriff fhall neverthelefs continue in his office, and execute the fame in the name of the deceafed, till another Sheriff be appointed and fworn; and the Under-Sheriff fhall be anfwerable for the execution of the office during fuch interval, as the High-Sheriff would have been; and the fecurity given by the Under-Sheriff, and his pledges, fhall ftand a fecurity to the King, and all perfons whatfoever, for the performing of his office during fuch interval."

The Under-Sheriff, before he intermeddle with the office, is to be fworn; this was firft injoined by *ftat.* 27 *Eliz. c.* 12, and the form of the oath there prefcribed. Before this ftatute the Under-Sheriff was never fworn. 1 *Rol. Rep* 274, *per Coke.* And now by *ftat.* 3 *Geo.* 1. *c.* 15. § 19, it is enacted, that all Under-Sheriffs of any counties in *South Britain*, except the counties in *Wales*, and county palatine of *Chefter*, before they enter upon their offices, fhall take an oath, appointed by that act, for the execution of their office.

A Sheriff cannot appoint two Deputy-Sheriffs extraordinary. 2 *Wilf.* 378.

The Under-Sheriff ufually performs all the duties of the office; a very few only excepted, where the perfonal prefence of the High Sheriff is neceffary. But no Under-Sheriff fhall abide in his office above one year; *ftat.* 42 *Ed.* 3. *c.* 9; and if he does, by *ftat.* 23 *Hen.* 6. *c.* 8, he forfeits 200*l* a very large penalty in thofe early days. And no Under-Sheriff or Sheriff's officer fhall practife as an attorney, during the time he continues in fuch office; for this would be a great inlet to partiality and oppreffion. *Stat.* 1 *H.* 5. *c.* 4. But thefe falutary regulations are *fhamefully evaded*, by practifing in the names of other attornies, and putting in fham deputies by way of nominal Under-Sheriffs; by reafon of which, fays *Dalton*, the Under-Sheriffs and Bailiffs do grow fo cunning in their feveral places, that they are able to deceive, and it may well be feared that many of them do deceive, both the King, the High-Sheriff, and the county. *Dalt. c.* 115.

See further, as connected with this title, this Dictionary, titles *County*; *County Court*; *Tourn*; *Execution*; *Efcape*, &c. &c.: As alfo *Vin. Abr.*; *Impey's Sheriff*, &c.

SHERIFF'S COURT IN LONDON; See title *London*.

SHERIFF'S TOURN; See *Tourn* or *Turn*.

SHERIFFALTY, *vicecomitatus*.] The Sheriff-fhip, or time of a man's being Sheriff. *Stat.* 14 *Car.* 2. *c.* 21.

SHERIFFWICK, The extent of a Sheriff's authority.

SHERIFFGELD, A rent formerly paid by the Sheriff; and it is prayed that the Sheriff in his account may be difcharged thereof. *Rot. Parl.* 50 *Ed.* 3.

SHERIFF-TOOTH, Seems to be a tenure by the fervice of providing entertainment for the Sheriff at his County Courts. *Rot. Plac. in Itin. apud Ceftr.* 14 *H.* 7. In *Derbyfhire*, the King's bailiffs anciently took 6*d.* of every bovate of land, in the name of Sheriff-tooth. *Ryl. Plac. Parl.* 653. And it is faid to be a common tax levied for the Sheriff's diet.

SHEWING, *monftratio*.] Is fpecially ufed to be quit of attachment in a Court, in plaints fhewed and not avowed. *Shep. Epitom.* 1130. See *Monftrans*.

SHIELD.

SHIELD, *scutum.*] An instrument of defence; (from the Sax. *scyldan*;) to cover, or the Greek σκυτος, a skin; Shields anciently being made with skins. And hence *Scutage* and *Escuage*. See title *Tenures*.

SHIFTING USE; See title *Use*.

SHILLING, Sax. *scilling*, Lat. *solidus.*] Among the *English Saxons* passed but for 5*d*. afterwards it contained 16*d*. and often 20*d*. In the reign of King *William* I. called the Conqueror, a Shilling was of the same denominative value as at this day. *Leg. Hen.* 1: *Domesday*.

SHILWITE, *Est emenda pro transgressione facta in nativam impregnando. Monast. Rading. MS.* See *Childwit*.

SHIP-MONEY, An imposition charged upon the ports, towns, cities, boroughs, and counties of this realm, in the time of King *Charles* I. by writs commonly called Ship-writs, under the Great Seal of *England*, in the year 1635 and 1636, for the providing and furnishing certain Ships for the King's service, &c. which was declared to be contrary to the laws and statutes of this realm, the Petition of Right, and liberty of the Subject, by *stat.* 17 *Car.* 1. *c.* 14.

SHIPPER, Is a *Dutch* word signifying the master of a ship, mentioned in some of our statutes. We use it for any common seaman; and generally say Skipper.

SHIPS AND SHIPPING; See *Navigation Acts*.

No owner of a Ship shall be liable to answer loss, by reason of imbezzling any gold, silver, jewels, &c. taken in or put on board, or for any forfeiture incurred, without the privity or knowledge of such owner, further than the value of the Ship and freight due: But other remedies, against the master and seamen of such Ships, are not taken away. *Stat.* 7 *Geo.* 2. *c.* 15. As a master or owner of a Ship may have an action for the freight; either the one or the other are answerable, where goods are damaged in the Ship. But where there are several owners, and one disagrees to the voyage, he shall not be liable to any action after for a miscarriage, &c. *Comberb.* 116. Where the owner, and not the freighter, is liable for a loss of gold sent by the Ship; See 2 *Stra.* 1251. Owners of Ships are liable for the goods on account of the freight, though robbed of them, and for default of the master. *Annaly* 86. See title *Carrier*.

An action doth not lie against a man as owner, but as he hath the benefit of the freight; for when there are several owners, and one dissents from the voyage, he shall not be liable afterwards for a miscarriage, &c. *Ann* 90: *Comb.* 117. See 2 *Strange* 816. Where it was held, that *prima facie* the repairer of a Ship has his election to sue the master who employs him, or the owners; but if he undertakes it on a special promise from either, the other is discharged.---As to further matters, see titles *Navigation Acts*; *Navy*; *Insurance*; *Quarantine*; *Wreck*; and other apposite titles.

SHIRE, *comitatus*, from the Sax. *scyran*, to part or divide.] Is well known to be a part or portion of this kingdom, called also County: The old *Latin* word was *scyra*; and *scyræ*, *provinciæ indicabantur. Brompt.* 659. King *Alfred* first divided this land; and his division was *in satrapias*, now called Shires, *in centurias*, now called Hundreds, and *decennas*, now called Tithings. *Leg. Alfred.* See *Brompton* 956, and this Dict. title *County*.

SHIRE-CLERK, He that keeps the County Court; his office is so incident to the Sheriff, that the King cannot grant it. *Mitton's* case. 4 *Rep.*

SHIRE-MAN, or SCYRE-MAN, Was anciently Judge of the county, by whom trials for land, &c. were determined before the Conquest. *Lamb. Peramb. p.* 442.

SHIREMOTE, An assembly of the County or Shire at the Assizes, &c. See *Scyregemot*; *Turn*.

SHOEMAKERS, Are to make their shoes of sufficient leather, or forfeit 3*s*. 4*d*. *stat.* 1 *Jac.* 1. *c.* 22.—And all journeymen employed in making boots, shoes, slippers, or gloves, &c. that neglect their business, by working for any other master, before they have done the work first undertaken, may be committed to the house of correction for a month; *stat.* 13 *Geo.* 2. *c.* 8. See title *Leather*; *Manufactures*.

SHOOTING. Shooting at persons in any dwelling-house, or other place, felony without clergy. *Stat.* 9 *Geo.* 1. *c.* 22. See *Black Act*.—The essence of this crime consists in *maliciously* shooting: No act of shooting therefore will amount, under this statute, to a capital offence, unless it be accompanied with such circumstances as, in construction of law, would have amounted to the crime of murder, if death had ensued from such act: For there is no species of homicide in which malice forms any ingredient, except that of murder: It follows, therefore, that a Shooting in a transport of passion, excited by such a degree of provocation as will reduce homicide to the offence of manslaughter, is not within the meaning of the statute, 4 *Comm.* 208, *n.* cites *Gastineaux*'s case: *Leach* 323.

SHOP, *Shopa.*] A place where any thing is openly sold.

SHOP-BOOKS. See title *Evidence*, *col.* 2, of the introductory matter.

SHOPLIFTERS, Those who steal goods privately out of Shops; which being to the value of 5*s*. though no person be in the Shop, is felony without benefit of clergy, by *stat.* 10 & 11 *W.* 3. *c.* 23: See title *Larceny* II 1.

SHORLING AND MORLING, or MORTLING, Words to distinguish fells of sheep; Shorling being the fells after the fleeces are shorn off the sheep's back; and Morling the fells flayed off after they die or are killed: In some parts of *England* they understand by Shorling, a sheep whose face is shorn off; and by a Morling, a sheep that dies. *stat.* 3 *Ed.* 4. *c.* 1.

SHORTFORD. The ancient custom of the city of *Exeter* is, when the Lord of the fee cannot be answered rent due to him out of his tenement, and no distress can be levied for the same, the Lord is to come to the tenement, and there take a stone or some other dead thing of the said tenement, and bring it before the Mayor and Bailiffs; and thus he must do seven quarter-days successively; and if, on the seventh quarter-day, the Lord is not satisfied his rent and arrears, then the tenement shall be adjudged to the Lord to hold the same a year and a day; and forthwith proclamation is to be made in the Court, that if any man claims any title to the said tenement, he must appear within the year and a day next following, and satisfy the Lord of the said rent and arrears: But if no appearance be made, and the rent not paid, the Lord comes again to the Court, and prays that, according to the custom, the said tenement be adjudged to him in his demesne as of fee, which is done accordingly; so as the Lord hath from thenceforth the said tenement, with the appurtenances, to him and his heirs: And this custom is called Shortford; being as much as, in *French*, to foreclose. *Izack's Antiq. Exet.* 48.

SHREWSBURY, Regulations of the drapers there. *Stat.* 8 *Eliz. c.* 7.

SHRIVED, or SHRIEVED, from the Sax. *ſcriſan.*] A penitent perſon confeſſed by a prieſt. See *Confeſſor.*

SHROWD, *ſtealing of.* If any one, in taking up a dead body, ſteals the Shrowd or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral. 3 *Inſt.* 110: 12 *Rep.* 113: 1 *Hal. P. C.* 535.

SHRUBS, Trees, Roots, Plants, &c. *Deſtroying*; See titles MISCHIEF, *Malicious*;—*Stealing*; See *Larceny.*

SIB AND SOM, Sax.] *i. e. pax & concordia. Spelm.*

SICA, SICHA, A ditch; from the Sax *ſic, lacuna. Mon. Angl.* ii. 130.

SICH, *ſichetum* and *ſikettus.*] Is a little current of water, which is dry in ſummer; a water furrow or gutter. *Mon. Angl.* ii. 426.

SICIUS, A ſort of money current among the old *Engliſh*, of the value of 2*d. Egbert in Dialogo de Eccleſiaſtica inſtitutione*, 98.

SICUT ALIAS, Another writ like the former; See titles *Alias*; *Capias*; *Proceſs*, &c.

SIDELINGS, Meers betwixt or on the ſides of ridges of arable land. *Mon. Angl.* ii. 275.

SIDESMEN; See title *Churchwardens.*

SIERRA LEONE, Settlement of; See *Slave Trade.*

SI FECERIT TE SECURUM, A ſpecies of original writ, ſo called, from the words of the writ, which directs the Sheriff to cauſe the defendant to appear in Court, without any option given him, *provided* the plaintiff *gives the Sheriff ſecurity* effectually to proſecute his claim. See title *Original.*

SIGILLUM; See *Seal.*

SIGLA, from the Sax. *ſegel.*] A ſail mentioned in the Laws of King *Etheldred, c.* 24.

SIGNET, Fr.] One of the King's ſeals, uſed in ſealing his private letters, and all ſuch grants as paſs his Majeſty's hand by bill ſigned; which ſeal is always in the cuſtody of the King's ſecretaries, and there are four clerks of the Signet office attending them. 2 *Inſt.* 556. The Law takes notice of the Sign-manual and privy Signet. See titles *Grant of the King*; *Privy Seal*

SIGNIFICAVIT, A writ iſſuing out of the Chancery, upon certificate given by the Ordinary of a man's ſtanding *excommunicate* by the ſpace of forty days, for the laying him up in priſon til he ſubmit himſelf to the authority of the church: And it is ſo called, becauſe *Significavit* is an emphatical word in the writ. *Reg. Orig.* There is alſo another writ of this name in the regiſter, directed to the Juſtices of the bench, commanding them to ſtay any ſuit depending between ſuch and ſuch parties, by reaſon of an excommunication alleged againſt the plaintiff, &c. *Reg. Orig.* 7. And in *Fitzherbert* we find writs of *Significavit* in other caſes; as *Significavit pro corporis deliberatione*, &c. *F. N. B.* 62, 66. The common writ of *Significavit* is the ſame with the writ *Excommunicato capiendo.* See that title.

SIGNING of *Deeds* and *Wills*; See thoſe titles.

SIGN-MANUAL. The ſubſcription of the King at the top of grants or letters-patent, which firſt paſs by bill, &c. By *ſtat.* 1 *Mar. ſt.* 2. *c.* 6, If any perſon ſhall falſely forge or counterfeit the Sign-Manual, Privy-ſignet, or Privy-ſeal, ſuch offences ſhall be deemed high treaſon. See title *Grant of the King.*

SIGNUM, A croſs prefixed as a ſign of aſſent and approbation to a charter or deed, uſed by the *Saxons.* See title *Seals.*

SIGNS. The citizens of *London* are to hang out Signs at their houſes, for the better finding out their reſpective dwellings, &c. *Chart. K. Char.* 1. See titles *London*; *Police.*

SILENTIARIUS, One of the Privy Council; and *ſilentium* was formerly taken for *conventus privatus. Matt. Paris, anno* 1171. According to *Littleton*, it is an uſher, who ſeeth good rule and *ſilence* kept in Court. *Lit. Dict.*

SILK. The regulation of the importation and exportation of this article, forms one of the many complicated proviſions of the *Navigation Acts*, paſſed from time to time.—The manufacture of it is in ſome meaſure ſubjected to the *Exciſe Laws.*—And the workmen therein are reſtrained from frauds by the proviſion of ſeveral acts, extending alſo (many of them) to other *Manufactures.*—See thoſe titles for general ideas on the ſubject, to develope which, more particularly, would here be uninteresting and unneceſſary.

SILK-THROWER, and THROWSTER, The trade or myſtery of thoſe who wind, twiſt, and ſpin or throw Silk, thereby fitting it for uſe: They are incorporated by ſtatute, and mention is made of Silk Winders and Doublers, who are members of the ſame trade. *Stat.* 13 & 14 *Car.* 2. *c.* 15.—None ſhall exerciſe the Silk-Throwers trade, but ſuch as have ſerved ſeven years' apprenticeſhip to it, on pain of forfeiting 40*s.* a-month. *Stat. ibid.*—Silk-Winders, &c. imbezzling or detaining Silk, delivered by Silk-Throwers, ſhall pay ſuch damage as a Juſtice ſhall order, or not doing it ſhall be whipt and ſet in the ſtocks; and the receivers are to be committed to priſon by a Juſtice of peace till ſatisfaction is made the party injured. *Stats.* 20 *Car.* 2. *c.* 6: 8 & 9 *W.* 3. *c.* 36.—See titles *Weaver*; *Manufactures.*

SILVA-CÆDUA, Wood under twenty years growth, or coppice-wood. *Stat.* 45 *Ed.* 3. *c.* 3. See title *Tithes.*

SIMILITUDE OF HAND-WRITING; See title *Evidence*, col. 6 of the Introduction, *div* 2.

SIMNEL, or SIMINELL, *ſiminellus, vel ſimnellus.*] Is mentioned in the aſſiſe of bread, and is ſtill in uſe, eſpecially in *Lent*: The *Engliſh* Simnel is *panis purior*, or the pureſt white bread. *Stat.* 51 *H.* 3. *ſt.* 1: *Ord. pro piſtor' incerti temp c.* 1.

It it ſaid to come from the Lat. *ſimila*, which ſignifies the fineſt part of the flour: *panis ſimilagineus*, Simnell-bread. It is mentioned in *ſtat. aſſiſa panis*, bread made into a Simnell ſhall weigh two ſhillings leſs than Waſtell-bread. *Cowell.*

SIMONY,

SIMONIA; *Venditio rei ſacræ.*] So called from the reſemblance it is ſaid to bear to the ſin of *Simon Magus*: Though the purchaſing of holy orders ſeems to approach nearer to this offence. See title *Parſon* II.

I. *Of Simony, generally*; *what ſhall be deemed Simony*; *and the Penalty on this Offence.*

II. *How far Bonds of Reſignation are lawful*; *and the Power exerciſed over ſuch Bonds by the Court of Chancery*; *and whether the Ordinary is obliged to accept a Reſignation on ſuch Bond.* See alſo this Dict. title *Reſignation.*

I. Simony is defined to be *Studiosa voluntas emendi vel vendendi* aliquid spirituale *aut spirituali annexum opere subsecuto.*—Also *venditio rei sacræ.* And some authors mention Simony *per munus triplex*; as *per munus à manu, i.e.* by bribery, where money is paid down for a benefice; *per munus à lingua,* by favour and flattery; *per munus ab obsequio, i.e.* by a sordid subjection to the patron, or doing him services: To which has been added, the making of presents, without taking any notice of expecting a church benefice.

Some authors tell us of a person who took off the cap of *Grosulan,* an Archbishop of *Milan,* and shaking it, told the people, *Iste* Grosulanus *qui est sub ista cappa (& non de alio dico) est Simoniacus,* &c. *per munus à manu, i.e* by bribery; *per munus à lingua, i.e.* by favour and flattery; *per munus ab obsequio, i.e.* by a sordid subjecting himself to the patron. *Cowell.*

Simony is defined by *Blackstone* to be, the corrupt presentation of any one to an ecclesiastical benefice, for money, gift, or reward [or benefit]. It was, by the Canon Law, a very grievous crime; and is so much the more odious, because, as *Coke* observes, it is ever accompanied with perjury, for the presentee is sworn to have committed no Simony. 3 *Inst.* 156, 176. However, it was not an offence punishable in a criminal way at the Common Law, it being thought sufficient to leave the Clerk to ecclesiastical censures. But as these did not affect the Simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of Parliament have been made to restrain it by means of civil forfeitures; which the modern prevailing usage, with regard to spiritual preferments, calls aloud to put in execution. 2 *Comm. c.* 18.

Simony is generally said to be the buying or selling holy orders, or some ecclesiastical benefice. An ecclesiastical benefice, in the larger sense of it, in which it is here used, comprehends not only parochial benefices, but all ecclesiastical dignities and promotions. As by this offence worthy and learned men are kept out of the church, and a door is, to the great scandal of religion and prejudice of morality, opened to persons by no means qualified to discharge the duties of the sacred function, it is of the utmost consequence to society that it be prevented. With a view to this, canons were anciently made, by which a very strict oath was injoined; and it was punished with deprivation or disability, as the case required.

Simony is mentioned as a thing so detestable in the eye of the Common Law, that a plaintiff in *quare impedit* could not, before the statute of *Westm.* 2, recover damages for the loss of his presentation, it being considered as a thing of no value; nor could a guardian in socage present to an advowson in the right of his heir, because, as he could take nothing for it, he could not bring it to account. 1 *Inst* 17, *b*; 89, *a.*

In *Cro. Ch.* 353, it is said that this has, by the law of God and of the land, been always accounted a great offence. In *Hob.* 167, it is laid down, that a bond on a Simoniacal contract is against Law, because *ex turpi causâ,* and *contra bonos mores*; nay, that it is as void as an usurious bond, which, if paid by an executor, is a *devastavit.* The same is held in *Cro. Car.* 425. In *Carth.* 252, such bonds are said to be void as being against law, although they are not so declared by the statute. But as has been already remarked, since neither the consideration of the heinousness of the offence, nor the provision made against it by the Canon or Common Law, was sufficient to put a stop to this mischief, it was at length restrained by the Statute Law.

By the *stat.* 31 *Eliz. c.* 6, it is, for avoiding of Simony, enacted, that if any patron for any corrupt consideration, by gift or promise, directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity; such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice: and the Crown shall present to it for that turn only. The words of the statute are, "that if any person or persons, Bodies-politick or corporate, shall for any sum of money, reward, gift, profit, *or benefit,* or by reason of any promise, agreement, grant, *bond,* or covenant, of or for any sum of money, reward, gift, profit, *or benefit*; present or collate any person to any benefice, &c. every such presentation, collation, &c. shall be utterly void, and it shall be lawful for the Queen, her heirs and successors, to present, &c. unto such benefice, &c. and that every person or persons, Bodies-politick or corporate, that shall give or take any such sum of money, &c. or take or make any such promise, &c. shall forfeit the double value of one year's profit of every such benefice, &c. and the person so corruptly taking, &c. such benefice, &c. shall be adjudged a disabled person in law to enjoy the same." § 5.

"If any person shall for any sum of money, reward, &c. admit, institute, instal, induct, invest, or place any person in or to any benefice, &c. every such person shall forfeit the double value of one year's profit of every such benefice, and the same shall be void; and the patron collate thereto, as if the party admitted were dead." § 6.

But if the presentee dies, without being convicted of such Simony in his life-time, it is enacted by *stat.* 1 *W.* & *M. st.* 1. *c.* 16, that the simoniacal contract shall not prejudice any other innocent patron, on pretence of lapse to the Crown or otherwise. Also by the *stat.* 12 *Ann. st.* 2. *c.* 12, if any person for money or profit shall procure, *in his own name,* or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subjected to all the ecclesiastical penalties of Simony; is disabled from holding the benefice, and the presentation devolves to the Crown.—Before this statute, it was doubted whether it was Simony for a clerk to purchase the next turn in a living for himself.

Upon these statutes many questions have arisen, with regard to what is, and what is not Simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious Simony; this being expressly in the face of the statute. *Cro. Eliz.* 788: *Moor* 914. Lord *Hardwicke* was of opinion, that the sale of an *advowson,* during a vacancy, is not within the statute of Simony, as the sale of the next presentation is: but it is void by the Common Law. *Ambl.* 268. See 2 *Comm.* 22, *in n.*

2. For a *Clerk* to bargain for *the next presentation,* the incumbent being sick and about to die, was Simony, even before the statute of Queen *Anne. Hob.* 165. And now, by that statute, to purchase, either in his own name or another's, the next presentation, and to be

thereupon

thereupon presented at any future time to the living, is direct and palpable Simony.

3. For a father to purchase such a presentation, in order to provide for his son, is not Simony; for the son is not concerned in the bargain, and the father is by nature bound to make a provision for him. *Cro. Eliz.* 686: *Moor* 916.—But where a father, *the church being void*, contracts with the grantee of the void turn to permit the grantor to present his son, and it is done, this is a simoniacal promotion. *Cro. Jac.* 533. So if a father, in consideration of a clerk's marrying his daughter, doth covenant with the father of the clerk, to procure for him a presentation to a certain church when it shall become void, and he is afterwards thereto presented, it is a simoniacal promotion. *Cro. Car.* 425.

By § 8, of the *stat.* 31 *Eliz. c.* 6, if persons also corruptly resign or exchange their benefices, both the giver and taker shall forfeit double the value of the money, or other corrupt consideration. Under this clause it has been held, that any resignation or exchange for money is corrupt, however apparently fair the transaction; as where a father, wishing that his son in orders should be employed in the duties of his profession, agreed to secure by bond the payment of an annuity exactly equal to the annual produce of a benefice, in consideration of the incumbent's resigning in favour of his son: The annuity being afterwards in arrear, the bond was put in suit, and the defendant pleaded the simoniacal resignation in bar: The Court, though they declared that it was an unconscientious defence, yet as the resignation had been made for money, determined, that it was corrupt and simoniacal, and in consequence that the bond was void. *Young* v. *Jones*, *E. T.* 1782, cited 4 *Comm. c.* 4. *p.* 62, *n.*

4. If a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the Crown as a punishment of the guilty patron; but the clerk, who is innocent, does not incur any disability or forfeiture. 3 *Inst.* 154: *Cro. Jac.* 385.

5. Bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal, provided the patron or his relations be not benefited thereby; for this is no corrupt consideration, moving to the patron. *Noy* 142: *Stra.* 534.

6. Bonds of resignation, in case of non-residence or taking any other living, are not simoniacal; there being no corrupt consideration herein, but such only as is for the good of the public. *Cro. Car.* 180. So also bonds to resign, when the patron's son comes to canonical age, are legal; upon the reason before given, that the father is bound to provide for his son. *Cro. Jac.* 248, 274: but see *post.* II. *ad finem*

7. Lastly, *General Bonds to resign* at the Patron's request, were heretofore, by frequent determinations, allowed to be legal; as they possibly might be given for one of the legal considerations before mentioned; and where there is a possibility that a transaction may be fair, the Law will not in general suppose it iniquitous without proof. *Cro. Car.* 180: *Stra.* 227: and see *post* II.—But in the case of the Bishop of *London* v. *Ffytche*, it was adjudged, by the House of Lords, that general bonds to resign at the Patron's request, are simoniacal and illegal. See *post.* II. *ad finem.*—At all times, however, if the party could prove the contract to have been a corrupt one, such proof was admitted, in order to shew the bond simoniacal, and therefore void. Neither would the patron be suffered to make an ill use of such a general bond of resignation; as by extorting a composition for tithes, procuring an annuity for his relation, or by demanding a resignation wantonly or without good cause, approved by law; as for the benefit of his own son, or on account of non-residence, plurality of livings, or gross immorality in the incumbent. 1 *Vern.* 411: 1 *Eq. Ab.* 86, 87: *Stra.* 534: 2 *Comm. c.* 18. See *post.* II.

The following determinations will further elucidate this part of the subject.

It was agreed by all the Justices, *Trin.* 8 *Jac.* that if the patron present any person to a benefice with cure, for money, that such presentation, &c. is simoniacal, though the presentee were not privy to it. 12 *Rep.* 74.—Simony may be by compact between strangers, without the privity of the incumbent or patron. 1 *Cro.* 331: *Hob.* 165: *Noy* 22: 3 *Inst.* 153.

A donative is not within the words of the statute; yet, as a corrupt presentation thereto is within the mischief intended to be thereby remedied, it is within the meaning of it. *Cro. Car.* 331. For the same reason the corrupt promoting to, or obtaining of a curacy, has been held to be Simony. *Carth.* 485.

This offence is more frequently committed when a church is void; but it may be committed when it is full. If a contract be, when a church is full, to give a sum of money for a presentation to it, when it shall become void, this is a simoniacal contract. 1 *Brownl.* 7. So the buying when a church is full, with intent to present a certain person, and the presenting that person when the living becomes void, is Simony. *Lane* 102: *Noy* 25. So the purchase of the *next avoidance* of a church when the incumbent is sick or near dying, with intent to present a certain person, and the presenting him, is Simony. *Winch* 63: *Noy* 25: *Hughes* 390. But the purchase of an *advowson in fee*, when the incumbent was on his death-bed, without any privity of the clerk afterwards presented, has been held *not* to be simoniacal; and not to vacate the next presentation. 2 *Black. Rep.* 1052.

From all these authorities it appears, that although it be lawful, except in the cases excepted, to purchase the next avoidance when a church is full, there is great danger of being guilty, at least *in foro conscientiæ*, of this offence. It is fit it should be so, else men would be for ever purchasing for their sons and friends, and the almost necessary consequence of such a traffic in livings, would be the filling the church with very improper persons. 4 *New Abr.* 469.

It is equally Simony where the presentation is by a person usurping the right to present, as if it had been by the person having a good right. 3 *Inst.* 153. So if a presentation be by one usurping the right of patronage, and pending a *quare impedit* for removing his clerk, who is after removed, the living is sold; this is Simony, for the church was never full of that clerk: And by this means the statute might be eluded, for it would only be getting an usurper to present while the living was void, and then selling it. 3 *Lev.* 115: 2 *Vent.* 32. A corrupt contract with the wife of the patron is simoniacal, although the patron is not privy to it. 1 *Rol. Rep.* 255: *Cro. Jac.* 385. If a clerk contracts to give money for being presented to a church, and is after presented *gratis*, this is Simony. *Lane* 103. In this case the clerk is an

unfit person, for having at that time been capable of intending to buy a living corruptly. It also implies some defect in him; for the presumption is, that persons well qualified will always be preferred, and have therefore no need to purchase. This offence may be by a corrupt contract between strangers, even when neither the patron nor incumbent is privy to it; for if there be a corrupt contract, it matters not by whom it is made: But in this case the presentee is not *simoniacus*, and only *simoniacè promotus*. *Cro. Car*. 331: *Sid*. 329: 3 *Lev*. 337: *Lane* 73, 103.

If a stranger, the church being void, contracts with the patron for a grant of the void turn, and presents a clerk not privy to the contract; yet, although the grant being of a chose in action, is void, as the incumbent comes in by a simoniacal contract, he is not to be considered as an usurper, but as one *simoniacè promotus*. *Cro. Eliz*. 788.

By the *stat*. 31 *Eliz*. *c*. 6, corrupt elections and resignations, in Colleges, Hospitals, and other eleemosynary Corporations, are also punished with forfeiture of double the value, vacating the place or office, and a devolution of the right of election for that turn to the Crown. §§ 2, 3.

In an action by the Incumbent for the use and occupation of his glebe, the defendant cannot give in evidence the simoniacal presentation of the plaintiff. 5 *Term Rep*. 4. But it may be given in evidence by a defendant who is sued for the tithes. *Hob*. 168. See title *Residence*.

II. Premising that it has finally been determined, that *General Bonds of Resignation* are simoniacal and illegal, in the case stated at the end of this division; it may be useful to preserve the following series of decisions and reasoning on the whole of this part of the subject.

A Bond of Resignation is a bond given by the person intended to be presented to a benefice, with condition to resign the same; and is special or general. The condition of a special one is to resign the benefice in favour of some certain person, as a son, kinsman, or friend of the patron, when he shall be capable of taking the same. By a general bond, the incumbent is bound to resign on the request of the patron. 4 *New Abr*. 470.

A bond with condition to resign within three months after being requested, to the intent that the patron might present his son when he should be capable, was held good; and the judgment was affirmed in the Exchequer Chamber; for that a man may, without any colour of Simony, bind himself for good reasons, as if he takes a second benefice, or if he be non-resident, or that the patron may present his son, to resign: But if the condition had been to let the patron have a lease of the glebe or tithes, or to pay a sum of money, it had been simoniacal. *Cro. Jac*. 248, *Jones* v. *Lawrence*.

The doctrine laid down in *Jones* and *Lawrence*, which was in the case of a special bond, was, not many years after, extended to that of a general bond; and the judgment in this last was also affirmed in the Exchequer Chamber. *Cro. Car*. 180, *Babington* v. *Wood*.

The authority of those two cases having been repeatedly recognised, at length it was considered as a point settled, that a general bond of resignation was good, and the Court have even refused to let the validity of it be called in question. *Str*. 227, *Peele* v. *Countess of Carlisle*.

If a bond of resignation, which ought only to be made use of to keep the incumbent to residence or good behaviour, be made an improper use of, the Court of Chancery will interpose. *Chan. Prec*. 513: 2 *Chan. Rep*. 399.—A perpetual injunction was granted against such a bond, because it appeared, on hearing the cause, that the patron had made use of it to prevent the incumbent from demanding his tithes. 1 *Vern*. 411.

An injunction has been granted where an ill use has been made of the bond, *i. e*. by taking an annuity from the incumbent, for the use of the nephew, for whom the living was intended. *Str*. 534.

A bill being brought to be relieved against a judgment obtained on a bond to resign upon request, it appeared to have been offered to the incumbent, that if he would give 700*l*. he should not be sued upon it. Satisfaction was ordered to be entered upon the judgment, and a perpetual injunction was granted. A new bond of resignation in penalty of 200*l*. a much less sum, was indeed decreed; but no action was to be brought on it without leave of the Court: And the Lord Keeper said, he did not know that such bonds were used before the statute; that they had been since allowed only to preserve the benefice for the patron himself, or some child or friend of his, or to prevent non-residence or a vitious course of life in an incumbent; and that though a bond be to resign generally, he would not allow it to be put in suit, unless some such reason was shewn for requiring a resignation, because a door would be thereby opened for Simony. *Eq. Cases Abr*. 86.

On a bill to be relieved against a judgment on such a bond, the defendant proved misbehaviour, and it was for that reason dismissed. *Eq. Cases Abr*. 228. So a bond to resign on request shall not be made use of to turn out the incumbent, unless there be non-residence or gross misbehaviour; and if any other use be made of it, the Court will grant an injunction. *Chanc. Prec*. 513.

Even when it seemed to be settled, that such bonds were good both in Law and Equity; a question arose, whether the Ordinary was obliged to accept a resignation on such a bond? It was said to be in the power of the Ordinary to discourage the use of such bonds, for he might refuse to accept a resignation made by constraint of one of them. *Wats. Com. Inc*. 24.

The Bishop refused to accept a resignation on such a bond, and ordered the incumbent to continue to serve the cure, declaring that he would never countenance such unjust practices. 2 *Chan. Rep*. 398. An Ordinary is not obliged to accept a resignation on such a bond, unless there be just cause to turn the incumbent out of the benefice. *Chan. Prec*. 513.

A grant was to a clerk of the two first of three livings which should fall, provided he was capable when they did fall of holding them. In order to make himself capable of taking one of these benefices, *Griffith* the clerk tendered a resignation of another benefice to the Ordinary, but he refused to accept it. One of the questions made in this case was, whether the Ordinary was obliged to accept this resignation? It was insisted on one side, that no case could be adduced to shew that the Ordinary can arbitrarily refuse to accept a resignation of a benefice. On the other side, this objection was answered, with saying, that the plainest points, having scarce ever been called in question, are supported by the fewest authorities. No decree was made as to this point; but Lord *Hardwicke* intimated it once or twice

so strongly to be his opinion, that the Ordinary ought to have accepted the resignation, that he did afterwards accept it. This was not indeed in the case of a resignation bond; but it was perhaps a stronger case. *Rockingham (Marq.)* v. *Griffith, Pasch.* 27 *Geo* 2. And see more fully, this Dictionary, title *Resignation*.

Whatever doubt was entertained as to the Ordinary's being obliged to accept a resignation on such a bond, two points were determined; that the patron could not present again till he had accepted it; and that, whether he did or not, the obligor was liable to the penalty of the bond, if he undertook, as is usually done, for the acceptance of the Ordinary. 4 *New Abr*. 473. If a presentation be made before the Bishop accepts the resignation of the last incumbent, it is void. *Noy* 147: *Cro. Jac*. 198. If the obligor binds himself to resign a benefice, it is upon him to procure the Ordinary's acceptance of his resignation. *Lutw*. 693.

To an action upon a bond, with condition so to resign on request that the patron may present again, it was pleaded, that the Ordinary would not accept the defendant's resignation. On a demurrer, this plea was held bad; and *per Cur'*, it should have been averred that the Ordinary accepted the resignation; for his acceptance being (as is laid down *Cro. Jac*. 198.) necessary to complete the resignation, it was the duty of the obligor, who undertook to resign, to procure this. So if one undertakes to enfeoff another, he undertakes to make livery as incident thereto. The Bishop, as to the obligee, is a stranger; and if an obligor undertakes for the act of a stranger, he is at his peril (as is held 1 *Saund*. 215,) to procure it. *MS. Reports, Hil*. 28 *G*. 2. *Ilescott* v. *Gray*.

The result of the whole seemed fully settled, that bonds of resignation were good in Law, and that Equity would restrain all improper use of them. The writer from whom the above abridgment is taken remarks, that tho' it is not always true, yet it is much oftener so than superficial and hasty thinkers imagine, that the Law, and particularly that part of it which is deduced from judicial determinations, is founded in solid reason; and it may perhaps be shewn that it is so in the present case. The attempting this will at least be excusable, because some great and good men have expressed their dislike of these bonds. 4 *New Abr*. 473.

The principal of the particular objections was that which is reported to have fallen from *Holt* Ch. J. (*Comb*. 394,) that a resignation-bond comes as near Simony as possible; it being easy to procure a round sum of money thereby. By making the penalty of the bond adequate to the value of the benefice, and agreeing privately that the money shall be paid, it would without doubt be an oblique way of selling it, and more than come near, for it would be downright Simony. If there was no other way, (it was argued,) or not as easy a one, to do the same thing, this objection would be insurmountable; but if there was, it could never be of much importance to stop this up. The same clerk, whose conscience would allow him to do this, might as well advance the money agreed upon at first; or, if that did not suit him, give an absolute bond to pay the money at a future day. As the same crime might still be committed, and with as much secresy, what good end would it answer to prohibit such bonds, which, as is allowed by all, may be made use of by a patron to punish neglect of duty or immoral conduct in the incumbent, and for other good purposes? 4 *New Abr*. 473, 474.

Another objection is, that when the patron takes a general bond of resignation, it is only a presentation during pleasure. Be it so (it has been answered); and suppose, which is the utmost that can be supposed, that it is not taken with a design to awe the incumbent into greater care in the discharge of his duty, but to let some friend or relation afterwards into the benefice: It by no means necessarily follows that the church, which is the grand thing to be guarded against, will therefore be filled with an unfit person. If the successor, which may be the case, is better qualified for the office, the interests of religion will be advanced by the exchange. If he be not so well qualified, it is a misfortune; but it is such a one as, in the present circumstances of things, cannot be entirely prevented. While the right of patronage, or while human nature continues as it is, there will be mistakes in judgment, and patrons will be induced by partiality to judge too well of the abilities of a relation or friend; but it makes no difference whether either of these happens when the benefice is at first void, or at any given time after; or if there be any, it is in favour of the practice, for the mischief, for so long at least as the first incumbent holds the living, is thereby postponed. 4 *New Abr*. 474.

These arguments are now however finally put at rest. For, in the great case of *the Bishop of London* v. *Ffytche*, it was determined by the House of Lords, that *a General Bond of Resignation* is simoniacal and illegal. The circumstances of that case were briefly these: Mr. *F*. the patron, presented Mr. *Eyre*, his clerk, to the Bishop of *London* for institution. The Bishop refused to admit the presentation, because Mr. *Eyre* had given a general bond of resignation. Upon this Mr. *Ffytche* brought a *Quare impedit* against the Bishop; to which the Bishop pleaded, that the presentation was simoniacal and void, by reason of the bond of resignation; and to this plea Mr. *Ffytche* demurred. From a series of judicial decisions, (many of them noticed above,) the Court of Common Pleas thought themselves bound to determine in his favour; and that judgment was affirmed by the Court of King's Bench. But these judgments were afterwards reversed by the House of Lords. The principal question was this, *viz*. whether such a bond was a *reward, gift, profit*, or *benefit*, to the patron, under *stat*. 31 *Eliz. c*. 6? If it were so, the statute had declared the presentation to be simoniacal and void. Such a bond is so manifestly intended by the parties to be a *benefit* to the patron, that it seems surprising that it should have been ever argued and decided, that it was not a *benefit* within the meaning of the statute. Yet many learned men have expressed themselves dissatisfied with this determination of the Lords, and are of opinion that their judgment would be different if the question were brought before them a second time. But it is generally understood that the Lords, from a regard to their dignity, and to preserve a consistency in their judgments, will never permit a question, which they have once decided, to be again debated in their House. See 2 *Comm. c*. 18. *p*. 280, *n*.; and *Bro. P. C.* 8vo. ed. title *Clergy*. *ca*. 3, where it appears that *Six*

 Judges

Judges delivered their opinions in favour of the bond, and only two against it. The decision of the House was made by a division of 19 to 18.

In subsequent cases it has been determined, that a bond given by an incumbent to the patron on presentation, to reside on the living, or to resign if he did not return to it after notice, and also not to commit waste, *&c.* on the parsonage-house, was good. 4 *Term Rep.* 78. And where a bond was given to resign a rectory when the patron's son came of age, and before that time to reside and keep the chancel and rectory-house in repair; it was decided by the Court of King's Bench in favour of the bond, without argument. 4 *Term Rep.* 359.—Though it is suggested that this determination was expected to be carried by appeal to the House of Lords, it is believed the parties acquiesced in it, on the ground that it essentially differed from that of the *Bishop of London* v. *Ffytche*. See 2 *Comm. c.* 18. *p.* 280, *n*: *Treat. Eq. c.* 4. § 5, *n*.

SIMPLE CONTRACT, Debt by. Debts by Simple-contract are such, where the Contract upon which the obligation arises, is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise. 2 *Comm. c.* 30. *p.* 466. See titles *Assumpsit*; *Fraud*, &c.

Simple-Larceny; See title *Larceny*.

SIMPLEX, simple, or single; as *Charta simplex* is a deed-poll, or single deed.

Simplex Beneficium, A minor dignity in a cathedral or collegiate church, or any other ecclesiastical benefice opposed to a cure of souls; and which, therefore, is consistent with any parochial cure, without coming under the name of pluralities.

Simplex Justiciarius; This style was anciently used for any puisne Judge, that was not chief in any Court: And there is a form of a writ in the *Register*, beginning thus:—I, *John Wood, a simple Judge* of the Court of Common Pleas, *&c.*

SIMUL CUM: *together with.*] Words used in indictments, and declarations of trespass against several persons, where some of them are known, and others not known: As, the plaintiff declares against *A. B.* the defendant, together with *C. D.*, *E. F.*, and divers others unknown, for that they committed such a trespass, *&c.* 2 *Lil. Abr.* 469. If a writ is generally against two or more persons, the plaintiff may declare against one of them, with a *simul cum*; but if a man bring an original writ against one only, and declares with a *simul cum*, he abates his own writ. *Comber.* 260. See titles *Action*; *Joinder in Action.*

SINE ASSENSU CAPITULI, A Writ, where a Bishop, Dean, Prebendary, or Master of an hospital, aliens the lands holden in right of his bishoprick, deanry, house, *&c.* without the assent of the chapter or fraternity; in which case his successor shall have this writ. *F. N. B.* 195. And if a Bishop or Prebendary be disseised, and afterwards he releaseth to the disseisor, this is an alienation, upon which may be brought a writ *De sine assensu capituli*: But the successor may enter upon the disseisor, if he doth not die seised, notwithstanding the release of his predecessor; for, by the release, no more passeth than he may rightfully release. A person may have this writ of lands upon demises of several predecessors, *&c. New Nat. Br.* 432.

SINE-CURE, Is where a Rector of a parish hath a Vicar under him, endowed and charged with the Cure; so that the Rector is not obliged either to duty or residence. And when a church is fallen down, and the parish becomes destitute of parishioners, it is said to be a *Sine cure. Wood's Inst.* 153. See title *Parson* I.

Sine Die, without day; See title *Day*.

SINGLE-BOND, *Simplex Obligatio.* A deed whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. See title *Bond*.

SI NON OMNES, A Writ on association of Justices, by which, *if all* in commission *cannot* meet at the day assigned, it is allowed that two or more of them may finish the business. *Reg. Orig.* 202: *F. N. B.* 185. And after the writ of association, it is usual to make out a writ of *Si non omnes*, directed to the first Justices, and also to those who are so associated to them; which, reciting the purport of the two former commissions, commands the Justices, that *if all* of them *cannot* conveniently be present, such a number of them may proceed, *&c. F. N. B.* 111. See title *Assises*, &c.

SINKING FUND; See title *National Debt*.

SIPESSOCNA, A Franchise, Liberty, or Hundred. *Leg. Hen.* 1. *cap.* 6: *Rot. Parl.* 16 *H.* 2. *Sithesoca*.

SI RECOGNOSCAT, A Writ that, according to the old Books, lay for a creditor against his debtor, who had acknowledged before the Sheriff in the County-Court, that he owed his creditor such a sum received of him. *Old Nat. Br.* 68.

SITE; See *Scite*.

SITHCUNDMAN, *Sax.*] Such a man as had the office to lead the men of a town or parish. *Leg. Ina*, *cap.* 56. *Dugdale* says, that in *Warwickshire* the Hundreds were formerly called *Sithesoca*; and that *Sithsocundman* and *Sithcundman* was the chief officer within such a division, *i. e.* the High Constable of the Hundred. *Dugd. Antiq. Warw.*

SITHESOCA; See *Sipessocna*.

SIX CLERKS IN CHANCERY; Officers in Chancery of ancient continuance; who were heretofore spiritual persons, as may appear by *stat.* 14 & 15 *Hen.* 8, which was made to enable them to marry. They transact and file all proceedings by bill and answer; and also issue some patents that pass the Great Seal, as pardons of men for chance-medley, patents for ambassadors, Sheriffs' patents, and some others. They likewise sign all office copies in order to be read in Court, and also certificates; and attend upon the Court in Term, by two at a time, at *Westminster*, and there read the pleadings. See title *Chancellor*.

SIXHINDI, Servants of the same nature with Rodknights, *viz.* bound to attend their Lord wherever he went; but they were accounted among the *English Saxons* as freemen, because they had lands in fee, subject only to such tenure. *Leg. Inæ*, *cap.* 26. See *Hindeni*.

SIZEL; Where pieces of money are cut out from the flat bars of silver, after being drawn through a mill, into the respective sizes or dimensions of the money to be made; the residue is called by this name, and is melted down again. *Lowndes's Ess. upon Coin*, *p.* 96.

SKARKALLA, Seems to be an engine for catching of fish. 2 *Inst*. 38.

SKERDA, A scar or wound. *Bract. lib.* 3.

SKERRIES (Island, or Rock). Patent granted to *William French*, Esq. for a light-house there, confirmed, *stat* 3 *Geo*. 2. *c*. 36.

SKINNERS. None shall retain any servant, journeyman, &c. to work in the trade of a Skinner, unless he himself hath served seven years as an apprentice in the same trade, on pain to forfeit double the value of his ware wrought. *Stat*. 3 *Jac*. 1. *c*. 9. See title *Leather*.

SKINS. None shall take the wool from any sheep-skin or lambskin, or buy Skins, but to make leather or parchment, &c. *Stat*. 5 *El*. *c*. 22. § 1. None but artizans skinners shall dress or export black coney-skins, 3 *Jac*. 1. *c*. 9. See further, titles *Leather*; *Navigation Acts*.

SKYVINAGE, The precincts of *Calais*. *Stat. Antiq.* 27 *H*. 6. *c*. 2.

SLADES, Sax. *Slæd*.] A long narrow piece or slip of ground. *Paroch. Antiq.* 465.

SLANDER, The maliciously defaming of a man in his reputation, profession, or livelihood, by words; as a Libel is by writing; which is actionable, &c. See titles *Action* II. 1; *Libel*.

SLAVES AND SLAVERY. Pure and proper Slavery does not, nay cannot, subsist in *England*; such, that is, whereby an absolute and unlimited power is given to the Master, over the life and fortune of the Slave. And, indeed, it is repugnant to reason, that such a state should subsist any where; and the Law of *England* abhors, and will not endure, the existence of Slavery within this nation: So that when an attempt was made to introduce it, by *stat*. 1 *Ed*. 6. *c*. 3, which ordained, that all idle vagabonds should be made Slaves, and fed upon bread and water, or small drink, and refuse meat, should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition, even in the most abandoned rogues; and therefore this statute was repealed in two years afterwards, by *stat*. 3 & 4 *E*. 6. *c*. 16. And now it is laid down, that a Slave, or Negro, the instant he lands in *England*, becomes a freeman; that is, the Law will protect him in the enjoyment of his person, and his property. *Salk*. 666. Yet, with regard to any right which the master may have *lawfully* acquired to the perpetual service of *John* or *Thomas*, this, says *Blackstone*, will remain exactly in the same state as before: [what that right is *not*, we shall presently see:] Hence too it follows, that the infamous and unchristian practice of withholding baptism from Negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The Law of *England* acts upon general and extensive principles: it gives liberty, rightly understood, that is, protection to a Jew, a Turk, or a Heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil obligation between master and servant, on account of the alteration of faith in either of the parties; but the Slave is entitled to the same protection in *England* before, as after, baptism; and, whatever service the heathen Negro owed of right to his *American* master, by general not by local law, the same (whatever it be) is he bound to render when brought to *England* and made a Christian. See 1 *Comm*. *c*. 14.

In the celebrated case of *James Somersett*, it was decided, that a heathen Negro, when brought to *England*, owes *no* service to an *American*, or any other, master. *James Somersett* had been made a Slave in *Africa*, and was sold there: from thence he was carried to *Virginia*, where he was bought, and brought by his master to *England*: Here he ran away from his master, who seized him and carried him on board a ship, where he was confined, in order to be sent to *Jamaica* to be sold as a Slave. Whilst he was thus confined, a *habeas corpus* was granted, ordering the captain of the ship "to bring up the body of *James Somersett*, with the cause of his detainer."—The above-mentioned circumstances being stated on the return to the writ, after much discussion in the Court of King's Bench, the Court were unanimously of opinion, that the return was insufficient, and that *Somersett* ought to be discharged. See Mr. *Hargrave*'s excellent argument for the Negro. 11 *St*. *Tr*. 340; and the case reported in *Lofft's Reports* 1.

In consequence of this decision, if a ship laden with Slaves was obliged to put into an *English* harbour, all the Slaves on board might (and Mr. *Christian* says *ought* to) be set at liberty. Though there are acts of Parliament which recognise and regulate the Slavery of Negroes, yet it exists not in the contemplation of the Common Law: and the reason they are not declared free before they reach an *English* harbour, is only because their complaints cannot sooner be heard and redressed by the process of an *English* Court of Justice. 1 *Comm*. *c*. 14. *p*. 425, *n*.

Liberty, by the *English* Law, depends not on the complexion; and what was said even in the time of Queen *Elizabeth* is now substantially true, that the air of *England* is too pure for a Slave to breathe in. 2 *Rushw*. 468.

By *stat*. 30 *Geo*. 3. *c*. 33, (continued and amended by *stats*. 31 *Geo*. 3. *c*. 54: 32 *Geo*. 3. *c*. 52, and subsequent acts; and explaining and amending a former statute of 29 *Geo*. 3. *c*. 66;) several humane provisions are made to restrain the cruelties practised in the *African Slave-Trade*. Bounties are given to the masters and surgeons of ships delivering the Slaves well at their destined port, &c. This, perhaps, is a happy prelude to the abolition of that detestable commerce; if it can by any means be accomplished with propriety, and safety to the general interests of the nation. See also *stat*. 35 *Geo*. 3. *c*. 90: and the Journals of the House of Commons.

AN AFRICAN COMPANY is also established by *stat*. 31 *Geo*. 3. *c*. 55, for carrying on a trade between *Great Britain* and the coasts and countries of *Africa*; and a Colony is for that purpose established on the Peninsula of *Sierra Leone*. This Company is intended to supersede, in time, the necessity of the *African* Slave-trade, by raising sugars there by native *Africans*; it being one of the conditions of the act, that the Company shall not deal in or employ Slaves. The Company is to last for thirty-one years from *July* 1, 1791.

SLEDGE. A Sledge or hurdle is generally allowed to draw offenders guilty of high treason to the gallows, to preserve them from the extreme torture of being dragged on the ground or pavement. 1 *Hal*. *P*. *C*. 82. See titles *Execution of Criminals*; *Treason*.

SLIPPA,

SLIPPA, A stirrup; and there is a tenure of land by holding the King's stirrup, in *Cambridgeshire*. *Cart*. 5. *Hen*. 7.

SLOUGH-SILVER, A rent paid to the castle of *Wigmore*, in lieu of certain days' work in harvest, heretofore reserved to the lord from his tenants. *Pat*. 43 *Eliz*.

SLUICE, *Exclusa*.] A frame to keep or let water out of a ground. By *stat*. 8 *Geo*. 2. *c*. 20, to destroy any Sluice or lock on any navigable river, is made felony without benefit of clergy. See title *Locks*.

SMAKA, A smack, or small light vessel. *Cowell*.

SMALL DEBTS, COURTS FOR. See title *Courts of Conscience*.

SMALT, Ital. *Smalto*.] That of which painters make their blue colouring; mentioned in *stat*. 21 *Jac*. 1. *c*. 3.

SMOKE-FARTHINGS, The Pentecostals or customary oblations, offered by the dispersed inhabitants within a diocese, when they made their procession to the mother cathedral church, came by degrees into a standing annual rent, called Smoke-farthings. *Cowell*.

SMOKE-SILVER. Lands were holden in some places by the payment of the sum of 6*d*. yearly to the Sheriff, called Smoke-silver. *Pat*. 4 *Ed*. 6.—Smoke-silver and Smoke-penny are to be paid to the ministers of divers parishes, as a *modus* in lieu of tithe-wood: And in some manors, formerly belonging to religious houses, there is still paid, as appendant to the said manors, the ancient *Peter-pence*, by the name of Smoke-money. *Twisd. Hist. Vindicat*. 77.

SMUGGLERS, Those persons who conceal prohibited goods, and defraud the King of his customs on the sea-coasts, by importing goods without paying the duties, imposed by the laws of *Customs* and *Excise*. See these titles, particularly the first.

SNOTTERING-SILVER. There was a custom in the village of *Wylegh*, that all the servile tenants should pay for their tenements a small duty called Snottering-silver, to the Abbot of *Colchester*. *Placit*. 18 *Edw*. 1.

SNUFF, OR SNUSH; Mixing and colouring it with oaker, umber, or fustick, yellow ebony, tobacco dust, sand, &c. incurs a penalty of 3*l*. for every pound weight. *Stat*. 1 *Geo*. 1. *st*. 2. *c*. 46. The penalties of adulterating tobacco, extended to snuff, *stat*. 5 *Geo*. 1. *c*. 11. See titles *Excise*; *Navigation-Acts*; *Tobacco*.

SOAP; See *Sopa*.

SOC; See *Soke*.

SOCAGE, OR SOCCAGE, *Socagium*; from Fr. *Soc*, *vomer*, a coulter or plough-share.]. A tenure of lands by or for certain inferior services of husbandry, to be performed to the Lord of the fee. See further, title *Tenures* III. 3.

Skene de verbor. signif. says, Socage is a tenure of lands, when a man is enfeoffed freely, without any service, ward, relief, or marriage; and pays to his lord such duty as is called petit-serjeanty, &c.

This was a tenure of so large an extent, that *Littleton* tells us, all the lands in *England*, which were not held in knights-service, were held in Socage. So that it seems the land was divided between these two tenures; and as they were of different natures, so the descent of these lands was in a different manner; for the lands held in knights-service descended to the eldest son; but these held *in villano Socagio*, equally among all the sons; yet if there was but one messuage, the eldest son was to have it, so as the rest had the value of that messuage to be divided between them. *Bracton*, *l*. 2. *c*. 35, 36. See title *Tenures* III. 3, &c.

SOCAGERS, SOCMANS, SOCMEN, OR SOKEMANS, *Socmanni*.] Such tenants as hold their lands and tenements by Socage-tenure, *Kitchin*, *fol*. 81. Sokemans of base tenures, *ibid*.; and Sokemans of ancient demesne; which last seem most properly to be styled Sockmans. *Cowell*. See title *Tenures*.

The husbandmen among our *Saxon* ancestors were of two sorts; one, that hired the Lord's outland, or tenementary land, like our farmers; the other, that tilled and manured his inland or demeans; (yielding *operam*, not *censum*, work, not rent;) and were thereupon called his Sockmen, or ploughmen. *Spelman of Feuds*, *cap*. 7. But after the Conquest, the proper *Sockmanni*, or *Sokemanni*, often mentioned in *Domesday*, were those tenants who held by no servile tenure, but commonly paid their rent as a Soke or sign of freedom to the Lord, though they were sometimes obliged to customary duties for the service and honour of their Lord. *Cowell*. See also *Britton*, *c*. 66: *Fleta*, *l*. 1. *c*. 8.

SOCNA; See *Soke*.

SOCOME, A custom of grinding corn at the Lord's mill; and Bond Socome is where the tenants are bound to it. *Blount*.

SODOMY; See *B*.

SODOR AND MAN, BISHOPRICK OF, Was formerly within the province of *Canterbury*, but annexed to that of *York*, by *stat*. 33 *H*. 8. *c*. 31. See title MAN, *Isle of*.

SOKE, SOK, SOC, SOCA; Liberty or privilege of tenants excused from customary burdens and impositions. Soka, or Soke, also signifies the power of administering justice, and the territory or precinct in which the chief Lord did exercise his Sac, Sake, or Saka, his liberty of keeping Court, or holding trials within his own Soke or jurisdiction. Sometimes it signified a payment or rent to the Lord for using his land with such liberty and privilege as made the tenant a Socman or freeholder, upon no other conditions than a quit-rent. *Cowell*. *Vide Bract*. *lib*. 3: *Lamb*. *Leg*. *H*. 1. 244: *Fleta*, *lib*. 1. *cap*. 47.

SOKEMANS; See *Socagers*; *Villenage*; *Tenures*.

SOKEMANRIES, The tenures of Socagers.

SOKE-REEVE, The Lord's rent-gatherer in the Soke or Soken. *Fleta*.

SOLARIUM, A Sollar, upper room, or garret.

SOLDIERS.

THE MILITARY STATE of the Kingdom includes the whole of the *Soldiery*; or, such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm.

In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies this is necessary for the safety of the Prince, and arises from the main principle of their constitution, which is that of governing by fear: But in free States the profession of a Soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country, and its laws; he puts not off the citizen when he

he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a Soldier. The Laws therefore and constitution of these kingdoms know no such state as that of a perpetual standing Soldier, bred up to no other profession than that of war: And it was not till the reign of *Henry* VII. that the Kings of *England* had so much as a guard about their persons.

In the time of our *Saxon* ancestors, as appears from *Edward* the Confessor's Laws, the military force of this kingdom was in the hands of the Dukes or Heretochs, who were constituted through every province and county in the kingdom; being taken out of the principal nobility, and such as were most remarkable for being "*sapientes, fideles, et animosi.*" Their duty was to lead and regulate the *English* armies, with a very unlimited power; and because of this great power they were elected by the people in their full assembly, or folkmote, in the same manner as Sheriffs were elected. But it appears from History, that this large share of power, thus conferred by the people, though intended to preserve the liberty of the Subject, was unreasonably detrimental to the prerogative of the Crown.

Upon the *Norman* Conquest the Feodal Law was introduced here in all its rigour, the whole of which is built on a military plan. It is not necessary here to enter into the particulars of that constitution; it is sufficient to observe, that, in consequence thereof, all the lands in the kingdom were divided into what were called Knights' fees, in number above sixty thousand; and, for every Knight's fee, a Knight or Soldier, *miles*, was bound to attend the King in his wars, for forty days in a year; in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious. By this means the King had, without any expence, an army of sixty thousand men always ready at his command. This personal service, however, as early as the reign of *Hen.* II. degenerated into pecuniary commutations or aids; and at length all military tenures were entirely abolished by *stat.* 12 *C.* 2. *c.* 24.

Other measures were also pursued for the internal defence of the kingdom; which terminated in the establishment of the *Militia*, as at present regulated by our Statute Law. See title *Militia*.

When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere Militia. And therefore at such times more rigorous methods were put in use for the raising of armies, and the due regulation and discipline of the Soldiery; which are to be looked upon only as temporary excrescences bred out of the distemper of the State, and not as any part of the permanent and perpetual laws of the kingdom. Martial Law has been said to be, in truth and reality, no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the King's Courts are open for all persons to receive justice according to the laws of the land. Wherefore, *Thomas* Earl of *Lancaster* being condemned at *Pontefract*, 15 *Edw.* II. by martial law, his attainder was reversed (1 *Ed.* 3.) because it was done in time of peace. The Petition of Right (3 *Car.* 1.) enacted, that no Soldier shall be quartered on the Subject without his own consent; and that no commission should issue to proceed within this land according to martial law. And after the Restoration, King *Charles* II. kept up about five thousand regular troops, by his own authority, for guards and garrisons; which King *James* II. having by degrees increased to no less than thirty thousand, all paid from his own civil list; it was made one of the articles of the Bill of Rights, that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law. *Stat.* 1 *W.* & *M. st.* 2. *c.* 2.

But, as the fashion of keeping standing armies has of late years universally prevailed over *Europe*, it has also, for many years past, been annually judged necessary by by our Legislature, to maintain, even in time of peace, a standing body of troops, under the command of the Crown; who are, however, *ipso facto* disbanded at the expiration of every year, unless continued by Parliament. And it was enacted by *stat.* 10 *W.* 3. *c.* 1, that not more than twelve thousand regular forces should be kept on foot in *Ireland*, though paid at the charge of that kingdom; which permission is extended by *stat.* 8 *Geo.* 3. *c.* 13, to 16,235 men, in time of peace.

To prevent the Executive Power from being able to oppress, says *Montesquieu*, it is requisite that the armies with which it is entrusted should consist of the people, and have the same spirit with the people. Nothing then, according to these principles, ought to be more guarded against in a free State, than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people. Like ours, it should wholly be composed of natural Subjects; it ought only to be enlisted for a short and limited time; the Soldiers also should live intermixed with the people; no separate camp, no barracks, no inland fortresses, should be allowed. And perhaps it might be still better, if, by dismissing a stated number, and enlisting others at every renewal of their term, a circulation could be kept up between the army and the people, and the citizen and the Soldier be more intimately connected together. 1 *Comm. c.* 13.

It has been well remarked, that since the above was written with a genuine love of liberty by the Author, experience has proved that the most formidable enemy the people of *England* have to dread, is their own *lawless mobs.* Care ought, therefore, to be taken that Soldiers may not become too familiar with the people in great towns, lest they should be more inclined to join, than to quell a riot. *Christian's Note on* 1 *Comm. ub. sup.*—As to the principles of Martial Law, as modified to the state of present times, see this Dictionary, title *Court Martial.*

To keep this body of troops in order, an annual act of Parliament passes, "to punish mutiny and desertion, and for the better payment of the army, and their quarters." This regulates the manner in which they are to be dispersed among the several innkeepers and victuallers throughout the kingdom; and establishes a law martial for their government. By this, among other things, it is enacted, that if any Officer or Soldier shall excite, or join any mutiny, or, knowing of it, shall not give notice to the commanding officer; or shall desert, or list in any other regiment, or sleep upon his post, or leave it before

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he is relieved, or hold correspondence with a rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands: such offender shall suffer such punishment as a Court Martial shall inflict, though it extend to death itself. See title *Court Martial*.

However expedient the most strict regulations may be in time of actual war, yet, in times of profound peace, a little relaxation of military rigour would not, one should hope, be productive of much inconvenience. And, upon this principle, though by our statute laws (still remaining in force, though not attended to) desertion in time of war is made felony, without benefit of clergy, and the offence is triable by a Jury, and before Justices at the Common Law; yet by our militia laws, a much lighter punishment is inflicted for desertion in time of peace. But our Mutiny Act makes no such distinction: for any of the faults above-mentioned are, equally at all times, punishable with death itself, if a Court Martial shall think proper. This discretionary power of the Court Martial is indeed to be guided by the directions of the Crown; which, with regard to military offences, has almost an absolute Legislative power. "His Majesty, says the act, may form articles of war, and constitute Courts Martial, with power to try any crime by such articles, and inflict penalties by sentence or judgment of the same." A vast and most important trust! an unlimited power to create crimes, and annex to them any punishments, not extending to life or limb! These are indeed forbidden to be inflicted, except for crimes declared to be so punishable by this act; which crimes, have been just enumerated, and, among which, any disobedience to lawful commands is one. 1 *Comm. c.* 13.

Blackstone observes, that one of the greatest advantages of our *English* Law is, that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious; nothing is left to arbitrary discretion: the King by his Judges dispenses what the Law has previously ordained; but is not himself the legislator: The learned Commentator then expresses his regret, that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced, to what he terms, *a state of servitude* in the midst of a nation of freemen! The policy of his observations, at least in the strong manner in which he enforces them, may perhaps be a little doubted, when the absolute necessity of preserving discipline, and of guarding against seduction and disloyalty in this powerful body of men, is fully considered. See *ante*; and further, title *Court Martial*.

But as Soldiers, by this annual act, are thus put in a worse condition than any other Subjects, so by the humanity of our standing laws, they are in some cases put in a much better. By *stat.* 43 *Eliz. c.* 3, a weekly allowance is to be raised in every county, for the relief of Soldiers that are sick, hurt, and maimed; and the Royal Hospital at *Chelsea* is established for such as are worn out in their duty. Officers and Soldiers, that have been in the King's service, are, by several statutes enacted at the close, or during the continuance of wars, at liberty to use any trade or occupation they are fit for, in any town in the kingdom, (except the two Universities,) notwithstanding any statute, custom, or charter to the contrary. And Soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expences, which the Law requires in other cases. *Stats.* 29 *Car.* 2. *c.* 3: 5 *W.* 3. *c.* 21. § 6. See title *Wills*.

The following statutes seem most of them in force; though in a great measure, if not entirely, superseded by the provisions of the Mutiny Act, and other acts before alluded to.

The *stat.* 7 *Hen.* 7. *cap.* 1, enacts, that if a captain shall not have the whole number of his Soldiers, or not pay them their due wages within six days after he hath received it, he shall forfeit all his goods and chattels, and suffer imprisonment. The *stat.* 1 *Jac.* 1. *cap.* 4, ordains, that if any person go beyond sea, to serve any foreign Prince as a Soldier, and he do not take the oath of allegiance before he goes, it is felony; and if he is a gentleman or officer that is going to serve a foreign Prince, he is to be bound with two sureties not to be reconciled to the See of *Rome*, &c. or it will be felony.

By *stat.* 31 *Car.* 2. *c.* 1, no Soldiers shall be quartered on any persons without their consent; and inhabitants of places may refuse to quarter any Soldier, notwithstanding any order whatsoever.

By *stat.* 3 *Geo.* 1. *c.* 2, no Soldier shall be taken out of the service by any process, except it be for some criminal matter, or for a real debt amounting to 10*l.* of which affidavit is to be made; and if any Soldier be otherwise arrested, a Justice of peace, by warrant under his hand, shall discharge him: Yet the plaintiff may file an appearance in an action of debt, upon notice thereof given, and proceed to judgment and execution, other than against the body of such Soldier. A serjeant in the guards cannot be arrested under 10*l.* 1 *Wils.* 216.

By *stat.* 5 *Geo.* 1. *cap.* 5, [not now in force] when an officer or Soldier was accused of a capital crime, the commanding officer, on application made to him, was to use his utmost endeavours to deliver over the criminal to the civil Magistrate; and he was not to be tried by a Court Martial in eight days, within which time application was to be made; but after that the criminal might be tried by a Court Martial. See title *Court Martial*.

If any Subject, here or in *Ireland*, shall list or enter himself, or any one procure him, to go beyond the seas, with an intent to be enlisted as a Soldier to serve any foreign Prince or State, without leave of his Majesty, he shall be guilty of felony; but if such person listed, in fourteen days after, discover, upon oath before any Justice, &c. the person by whom he was drawn in, so as he may be apprehended and convicted, the party discovering is to be indemnified. *Stat.* 9 *Geo.* 2. *c.* 30. See *stat.* 23 *Geo.* 3. *c.* 50, as to issuing money for army services, and the duty of the Paymaster-general.

SOLE CORPORATIONS; See *Corporation*.

SOLET ET DEBET; Vide *Debet et Solet*.

SOLE TENANT, *solus tenens*.] He that holds land by his own right only, without any other joined; and if a man and his wife hold lands for their lives, with remainder to their son for life; here the man dying, the Lord shall not have an heriot, because he dies not sole Tenant. *Kitch.* 134.

SOLICITOR, *Solicitator*.] A person employed to follow and take care of suits depending in Courts of Equity.

Equity. Solicitors are to be sworn and admitted by the Judges, like unto attornies, before they shall practise in the Common Law Courts; and attornies may be admitted Solicitors in the Courts of Equity, &c. *Stat.* 2 *Geo.* 2. *cap.* 23. See title *Attorney*.

There is also a Solicitor General to the King, who is a great officer next the Attorney General. See title *Precedence*.

SOLIDATUM, Used in the neuter gender, is taken for that absolute right or property which a man hath in any thing. *Malmsb. lib.* 1.

SOLINUS TERRÆ. In *Domesday* book, this word is only used in *Kent*, and no other county. *Septem solini terræ sunt* 17 *Carucatæ*. 1 *Inst.* fol. 15. According to this computation *solinus terræ* is about 160 acres, and 7 *solini* are about 1120 acres, which is less than 17 *carucatæ*, for at the lowest *carucata terræ* is 100 acres. But Lord *Coke* was of opinion, that it did not consist of any certain number of acres. This word *solinus* was probably from the Sax. *sulk* a plough, but what quantity of land this *solin*, *sulling*, or *swoling* did contain, is not so easily determined. It seems to have been the same with a plough land; so that in *Domesday*, *Se defendit pro uno solino*, is, it is taxed for one *carucate* or plough-land. *Cowel*.

SOLLER, or SOLAR, *solarium*.] A chamber or upper room. *Cowel*.

SOLVENDO ESSE, A term of art, signifying that a man hath wherewith to pay, or is a person *solvent*.

SOLVERE PŒNAS, To pay the penalty; or undergo the punishment inflicted for offences. 3 *Salk.* 32.

SOLVIT AD DIEM, A plea in an action of debt on bond, &c. that the money *was paid at the day* limited. See titles *Bond*; *Payment*.

SOLUTIONE *feodi militis Parliamenti*, and *Solutione feodi Burgens. Parliamenti*, Writs whereby Knights of the Shire and Burgesses might recover their wages or allowance, if it were denied. *Stat.* 35 *H.* 8. *c.* 11. See title *Parliament*.

SOMERSET-HOUSE, Assured to Queen *Charlotte* for life. *Stat.* 2 *Geo.* 3. *c.* 1. See title *Queen*.

SOMERSETSHIRE, Its fishery how preserved. *Stat.* 1 *Jac.* 1. *c.* 23.

SON ASSAULT DEMESNE, A justification in an action of Assault and Battery; because the plaintiff made the first Assault, and what the defendant did was in his own defence. 2 *Lil. Abr.* 523. See titles *Assault*; *Pleading*.

SONTAGE, A tax of forty shillings heretofore laid upon every Knight's fee. *Stow, p.* 284.

SOPE, Is one of the many articles liable to the duty of *Excise*. See that title.

SOPHIA, (*Princess*,) Naturalized, *stat.* 4 *Ann. c.* 1 & 4. See title *King* I.

SORCERY; See *Conjuration*.

SORS, In sums of money lent upon usury, the principal was anciently called Sors, to distinguish it from the interest. *Pryn's Collect.* ii. 161.

SORUS ACCIPITER, A sor, or soar hawk: King *John* granted to *Robert de Hose*, land in *Berton* of the honour of *Nottingham*, to be held by the service of yielding the King yearly one soar-hawk, &c. *Cartular. S. Edmund. MS.*

SOTHAIL, or SOTHALE, Is conceived to be mistaken for Scotale. *Bract. lib.* 3.

SOTHSAGA, or SOTHSAGE, An old word signifying history: From the Sax. *soth*, *verum*, and *saga testimonium*; for all histories should be true, or true sayings; from hence we derive our *English* word soothsayer. *Cowell*.

SOVERAIGN, or SOVEREIGN, A chief or supreme person, one highest of all; as a King, &c.

SOVEREIGN, a piece of gold coin current at 22 *s.* *anno* 1 *H.* 8. when, by indenture of the *Mint*, a pound weight of gold of the old standard was to be coined into twenty-four Sovereigns: *Anno* 34 *H.* 8, Sovereigns were coined at 20 *s.* a-piece, and half Sovereigns at 10 *s.* But *anno* 4 *Ed.* 6, the Sovereign of gold passed for 24 *s.* and *anno* 6 *Ed.* 6, at 30 *s.*

SOVEREIGN POWER, or SOVEREIGNTY. By this is truly meant, the power of making laws; for, wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the Legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases. And all the other powers of the State must obey the legislative power in the execution of their several functions, or else the constitution is at an end. 1 *Comm.* 49. In our constitution the Law ascribes to the King the attribute of Sovereignty, but that is to be understood in a qualified sense, *i. e.* as supreme magistrate, not as sole legislator, as the legislative power is vested in the King, Lords, and Commons, not in any one of the three estates alone. See this Dict. title *Parliament*.

SOUL-SCOT, A mortuary is so called in the laws of King *Canute*, *c.* 13. See title *Mortuary*.

SOUND, A narrow sea; as *Mare Balticum*, the Sound; and to sound is to make trial how many fathom a sea is deep. *Merch. Dict.*

SOUTH-DOOR; See *Suthdure*.

SOUTH-SEA ANNUITIES; See *South-Sea Company*.

SOUTH-SEA BONDS, Stealing them made felony, *stat.* 2 *Geo.* 2. *c.* 25. *sect.* 3.

SOUTH-SEA COMPANY, A Company of Merchants trading to the *South-Sea*. They were incorporated, on lending the Government ten millions of money towards paying the debts of the army, &c. They may purchase lands not exceeding 1000 *l.* *per annum*; and besides an interest for the money advanced the Government, 8000 *l.* a-year is to be paid them out of the funds towards the management of this Company: But see *stat.* 24 *Geo.* 2. *c.* 11. The Corporation shall have the sole trade from the river *Oroonoko* (called *Aranoka* in the act) on the east side of *America* to the southermost part of *Terra del Fuego*, and from thence through the *South-Sea*, &c. And the Company to be owners of all islands, ports, &c. they can discover. *Stat.* 9 *Ann. c.* 21. See also *stat.* 10 *Ann. c.* 30: 1 *Geo.* 1. *st.* 2. *c.* 21: 3 *Geo.* 1. *c.* 9: 5 *Geo.* 1. *c.* 19: 6 *Geo.* 1. *c.* 4: 7 *Geo.* 1. *c.* 5: 8 *Geo.* 1. *c.* 22, as to the establishment of the Company, and regulation of its stock. And further, *stat.* 24 *Geo.* 2. *c.* 11, for reducing the interest upon the capital stock of the *South-Sea* Company, from the time, and upon the terms therein mentioned, and for preventing of frauds committed by the officers and servants of the said Company; and *stat.* 26 *Geo.* 2. *c.* 16, for reducing the number of directors

directors of the said Company, and for regulating the election of the governors and directors of the said Company.

Creation of the old *South-Sea* Annuities—*Stats.* 9 *Geo.* 1. *c.* 6. § 3: 3 *Geo.* 2. *c.* 16.—Redemption of *South-Sea* annuities out of sinking fund, *stats.* 4 *Geo.* 2. *c.* 5: 6 *Geo.* 2. *c.* 25: 9 *Geo.* 2. *c.* 34: 10 *Geo.* 2. *c.* 17. § 35.—New *South-Sea* annuities created, *stat.* 6 *Geo.* 2 *c.* 28.—Restrained from issuing bonds without a General Court, *stats.* 6 *Geo.* 2. *c.* 28. § 26: 7 *Geo.* 2. *c.* 17. The Company continued till the annuities shall be redeemed, *stat.* 24 *Geo.* 2. *c.* 2. § 31. The first and second subscribed *South-Sea* annuities to be consolidated, *stat.* 25 *Geo.* 2. *c.* 27. § 26. See further, title *Taxes*.

SOUTHWARK. King *Edward* III. by charter granted to the City of *London* the village of *Southwark*, paying at the Exchequer the farms thereof due: Also the manor and *Borough* were granted; except the capital messuage called *Southwark place*, by Chart. *Ed.* VI.—The Inhabitants of the stews there, not to be returned on Juries, *stat. antiq.* 11 *Hen.* 6. *c.* 1.—No market to be held in the high-street of *Southwark*, nor hackney-coaches, &c. to ply there, *stat.* 28 *Geo.* 2. *c.* 9.—Instead thereof a market to be held in a place called the *Triangle*. *Stats.* 28 *Geo.* 2. *c.* 23: 30 *Geo.* 2. *c.* 31. See title *London*.

SOWLEGROVE, An old name of the month of *February*, so called by the inhabitants of *South Wales*.

SOWNE, From the Fr. *Souvenus*, remembered. A word of art used in the Exchequer, where estreats that sowne not, are those that the Sheriff cannot levy, *viz.* Such estreats and casualties are not to be remembered, and run not in demand; and estreats that sowne, are such as he may gather, and are leviable. *Stat.* 4 *Hen.* 5. *c.* 2: 4 *Inst.* 107.

SPADARIUS, for *Spatharius*, A sword-bearer. *Blount*.

SPATÆ PLACITUM, A Court for the speedy execution of justice on military delinquents. *Brad. Append. Hist. Engl.* 45.

SPATULARIA, Is numbered among the holy vestments, &c. in *Mon. Ang.* iii. 331.

SPAWN AND FRY OF FISH; See title *Fish*.

SPEAKER OF THE PARLIAMENT; See title *Parliament* VII.

SPEAKING WITH PROSECUTOR. It is not uncommon when a person is convicted of a misdemeanor, which principally and more immediately affects some individual, as a battery, imprisonment, or the like, for the Court to permit the defendant to speak with the Prosecutor, before any judgment is pronounced; and, if the Prosecutor declares himself satisfied, to inflict but a trivial punishment. It is usual, on satisfaction made to the Prosecutor, for him to give the person convicted a release, the execution of which being proved, is tantamount to the Prosecutor's acknowledgment of being satisfied. See 4 *Comm. c.* 27. *ad finem*, as to guarding against the probable abuse of this indulgence of the Court.

SPECIALTY, *Specialitas*,] A bond, bill, or such like instrument; a writing or deed, under the hand and seal of the parties. *Litt.* These are looked upon as the next class of debts after those of record; being confirmed by special evidence under seal. 2 *Comm. c.* 30. *p.* 465. See titles *Bond*; *Deed*; *Executor* V. 6.

SPECIFIC LEGACIES; See title *Legacy* 2.

SPECIFIC RELIEF IN EQUITY; See titles *Chancery*; *Equity*.

SPELEUM, The cell of a monk. *Malmsb. lib.* 3.

SPICES, Are among the numerous articles liable to duties of *Customs*; and subject to regulations, to avoid frauds both in payment of the duty and manufacturing the article: by a variety of statutes.

SPIGURNEL, *Spigurnellus*.] The sealer of the King's writs, from the Sax. *Spicurran*, to shut up or inclose: but the following original has been given of this word; that *Galfridus Spigurnel* being by King *Hen.* III. appointed to be sealer of his writs, was the first in that office; and therefore in after-times the persons that enjoyed the office were called Spigurnels. *Pat.* 11 *H.* 3: 4 *Edw.* 1. This office was also known by the name of *Spicurnantia* or *Espicurnantia*; and *Oliver de Standford* held lands in *Nettlebed in Com. Oxon. per Serjantiam* Spicurnantiæ *in Cancellariâ Domini Regis*. 27 *Ed.* 1.

SPINACIUM, A sort of vessel which we now call a Pinnace. *Knight. Ann.* 1338.

SPINDULÆ, Were those three golden pins which were used about the archiepiscopal pall; and from thence *Spindulatus* signified to be adorned with the pall. *Du Cange*.

SPINSTER, An addition in law proceedings usually given to all unmarried women; and it is a good addition for the estate and degree of a woman. See title *Abatement* I. 3. (*c*).

SPIRITS AND STRONG WATERS; See *Brandy*.

SPIRITING AWAY MEN AND CHILDREN; See *Kidnapping*.

SPIRITUAL CORPORATIONS; See *Corporations*.

SPIRITUAL COURTS; See title *Courts Ecclesiastical*.

SPIRITUALTIES OF A BISHOP; See *Guardian of the Spiritualties*.

SPIRITUALTY, The Clergy of *England*.

SPIRITUOUS LIQUORS; See title *Excise*.

SPITTLE-HOUSE, A corruption from Hospital; or it may be taken from the Teuton. *Spital*, an hospital or alms-house: It is mentioned in *stat.* 15 *Car.* 2. *c.* 9.

SPOLIATION, *spoliatio*.] A writ or suit for the fruits of a church, or the church itself, to be sued in the Spiritual Court, and not in the temporal; that lies for one incumbent against another, where they both claim by one patron, and the right of patronage doth not come in question: As if a parson be created a Bishop, and hath dispensation to hold his benefice, and afterwards the patron presents another incumbent, who is instituted and inducted; now the Bishop may have a Spoliation in the Spiritual Court against the new incumbent, because they both claim by one patron, and the right of patronage doth not come in debate; and for that the other incumbent came to the possession of the benefice, by the course of the Spiritual Law, *viz.* by institution and induction; for otherwise, if he be not instituted and inducted, a Spoliation lies not against him, but writ of trespass, or assise of Novel disseisin. *F. N B.* 36, 37.—So it is where a parson that hath a plurality accepts of another benefice, by reason whereof the patron presents another clerk, who is instituted and inducted; in this case one of them may have Spoliation against the other, and then shall come in question, whether he hath a sufficient plurality, or not: And it is the same of deprivation, &c. *Terms de Ley*. And see 3 *Comm. c.* 7. *p.* 90.

SPONTE-

SPONTE-OBLATA, A free gift or present to the King.

SPORTULA, Gifts and gratuities, forbidden to be received by the clergy.

SPOUSALS; See *Espousals*.

SPOUSE-BREACH, Adultery, as opposed to simple fornication: The Lady *Katharine* was accused to the King of incontinent living before her marriage, and of Spouse-breach after the marriage. *Fox Act. Mon.* ii. 540.

SPRINGING USES, or Contingent uses; See title *Uses*.

SPULLERS OF YARN, Persons that work at the spole or wheel; or triers of Yarn to see that it be well spun, and fit for the loom. *Stat.* 1 *Mar. st.* 1. *c.* 7.

SPUR-ROYAL, *Spurareum aureum.*] An ancient gold coin. *Paroch. Antiq.* 321.

SQUALLEY, A faultiness in the making of cloth. *Stat.* 43 *Eliz. c.* 10. See *Rowey*.

SQUIBS; See *Fire-works*.

STABBING; See title *Homicide* III. 2.

STABILIA, A writ called by that name, on a custom in *Normandy*, that where a man in power claimed lands in the possession of an inferior, he petitioned the Prince that it might be put into his hands till the right was decided; whereupon he had this writ, *Breve de Stabilia*: To this a charter of King *Hen.* I. alludes in *Pryn's lib. Angl. tom.* i. *pag.* 1204.

STABILITIO VENATIONIS, The driving deer to a Stand. *Stabilitas*, the place where one ought to stand in hunting. *Leg. H.* 1. *c.* 17.

STABLE-STAND, *Stabilis statio, vel stans in stabulo.*] Is where a man is found at his Standing in the forest, with a cross or long bow bent, ready to shoot at any deer; or standing close by a tree, with greyhounds in a leash, ready to slip: And it is one of the four evidences or presumptions, whereby a person is convicted of intending to steal the King's deer in the forest: the other three are dog-draw, back-bear, and bloody-hand. *Manwood, par.* 2. *cap.* 18.

STACK, A quantity of wood three feet long, as many feet broad, and twelve feet high. *Merch Dict.*

STADIUM, A furlong of land; the eighth part of a mile. *Domesday*.

STAFF-HERDING, The following of cattle within a forest: And where persons claim common in any forest, it must be inquired by the ministers whether they use Staff-herding, for it is not allowable of common right; because by that means the deer, which would otherwise come and feed with the cattle, are frighted away, and the keeper or follower will drive the cattle into the best grounds, so that the deer shall only have their leavings: Therefore if any man who hath right of common, under colour thereof use Staff-herding, it is a cause of seizing his common till he pay a fine for the abuse. 1 *Jon. Rep.* 282.

STAGE-COACHES; See *Coaches*.

STAGE PLAYS; See *Playhouse*.

STAGIARIUS, A resident; as J. B. *Canonicus & Stagiarius Sancti Pauli*, a canon-residentiary of St. *Paul's* church. *Hist. Eccl. S. Paul.* But this distinction was made between *residentiarius*, and *Stagiarius*: Every canon installed to the privileges and profits of residence, was *residentiarius*; and while he actually kept such stated residence, he was *Stagiarius*. *Statut. Eccles. Paulin. MS.* 44. *Stagiaria*, the residence to which he was obliged; *Stagiari*, to keep residence.

STAGNES, *Stagna.*] Pools of standing water. *Stat.* 5 *Eliz. c.* 21. A pool consists of water and land; and therefore, by the name of *Stagnum*, the water and land shall pass also. *Inst.* 5.

STAL-BOAT, A kind of fishing boat, mentioned in *stat.* 27 *Eliz. c.* 21.

STALKING, The going gently step by step, under cover of a horse, &c. to take game; none shall stalk with bush or beast to any deer, except in his own forest or park, under the penalty of 10 *l.* *Stat.* 19 *H.* 7. *c.* 11.

STALKERS, Certain fishing-nets. See *stat.* 13 *R.* 2. *c.* 19.

STALLAGE, *Stallagium*, from the Sax. *stal.* i. e. *stabulum statio.*] The liberty or right of pitching and erecting Stalls in fairs or markets: or the money paid for the same. *Kennet's Gloss.*

STALLARIUS, Is mentioned in our historians, and signifies *præfectus stabuli*; it was the same officer which we now call master of the horse. *Spelm.* Sometimes it hath been used for him who hath a Stall in a market. *Fleta, lib.* 4. *c.* 28.

STAMP-DUTIES, A branch of the perpetual revenue of this kingdom. (See title *Taxes*.) They are a tax imposed upon all parchment and paper whereon any legal proceedings, or private instruments of almost any nature whatever, are written: and also upon licences for retailing wines, letting horses to hire, and numerous other purposes: And upon all almanacks, news-papers, advertisements, cards, dice, and pamphlets containing less than six sheets of paper. These imposts are very various, according to the nature of the thing stamped or taxed, rising gradually from *one penny* to *ten pounds*; (and indeed in many cases, as *legacies, administrations*, &c. to an amount proportioned to the property conveyed.) The first institution of the Stamp-duties was by *stat.* 5 & 6 *W. & M. c.* 21; and they have since been increased to an amount which nothing but the absolute necessity of their being imposed could prevent us from styling enormous. These Duties are managed by Commissioners appointed for the purpose. They now extend to such an astonishing variety of articles, and depend on such a multiplicity of statutes, which are continually varying (by increasing) the amount, that no table or *compendium* which could be framed would probably be of any service to the reader after one Session of Parliament; nor would it be consistent with the general nature of this Work to enter into any further elucidation of the subject.

STAND, A weight from two hundred and a half to three hundred of pitch. *Merch. Dict.*

STANDARD, From the Fr. *Estandart*, &c. *signum, vexillum*,] In the general signification, is an Ensign in War. And it is used for the *standing measure* of the King, to the scantling whereof all the measures in the land are or ought to be framed, by the clerks of markets, aulnagers, or other officers, according to *Magna Charta* and divers other statutes. This is not without good reason called a Standard, because it standeth constant and immoveable, having all measures coming towards it for their conformity; even soldiers in the field have their Standard or colours, for their direction in

their march, &c. to repair to. *Britton, c.* 30. There is a Standard of Money, directing what quantity of fine silver and gold, and how much allay, are to be contained in coin of old Sterling, &c. And Standard of Plate, and silver manufactures. *Stat.* 6 *Geo.* 1. *c.* 11. See titles *Gold*; *Money*; *Allay*; *Weights and Measures*, &c.

STANDARDUS, True Standard, or legal weight or measure. *Cartular S. Edmund MS.* 268.

STANDEL, A young store oak tree, which in time may make timber; and twelve such young trees are to be left standing in every acre of wood, at the felling thereof, by *stat.* 35 *H.* 8. *c.* 17—And see *stat.* 13 *Eliz. c.* 25. § 18; and this Dict. title *Wood*.

STANDING-ARMY, Not to be kept in time of peace without consent of Parliament. *Stat.* 1 *W. & M. sess.* 2. *c.* 2. See title *Soldiers*.

STANLAW, A stony hill. *Domesd.*

STANNARIES, *Stannaria*, from the Lat. *stannum*, tin.] The mines and works where Tin metal is got and purified; as in *Cornwall* and *Devonshire*, &c. *Camden Britt.* 199. The tinners are called Stannary-men.

The Stannary Courts in *Devonshire* and *Cornwall*, for the administration of justice among the Tinners therein, are *Courts of Record*, but of a private and exclusive nature. They are held before the Lord Warden and his substitutes; in virtue of a privilege granted to the workers in the tin-mines there; to sue and be sued only in their own Courts, that they may not be drawn from their business, which is highly profitable to the public, by attending their law-suits in other Courts, 4 *Inst.* 232. The privileges of the tinners are confirmed by a charter 33 *Ed.* I; and fully expounded by a private statute, (given at length in 4 *Inst.* 232,) 50 *Ed.* 3, which has since been explained by a public act, *stat.* 16 *Car.* 1. *c.* 15.

All tinners and labourers in and about the Stannaries shall, during the time of their working therein, *bona fide*, be privileged from suits of other Courts, and be only impleaded in the Stannary Court; in all matters, excepting pleas of land, life, and member. No Writ of Error lies from hence to any Court in *Westminster hall*: But an appeal lies from the Steward of the Court to the Under Warden, and from him to the Lord Warden; and thence to the Privy Council of the Prince of Wales, as Duke of *Cornwall*, when he hath had livery or investiture of the same; and from thence the appeal lies to the King himself in the last resort. 3 *Comm. c.* 6. *p.* 79, 80. cites 4 *Inst.* 230, 231: 3 *Bulst.* 183: *Dodr. Hist. Cornw.* 94.

Transitory actions between tinner and tinner, &c. though not concerning the Stannaries, or arising therein, if the defendant be found within the Stannaries, may be brought into these Courts, or at Common Law; but if one party alone is a tinner, such transitory actions which concern not the Stannaries, nor arise therein, cannot be brought in the Stannary-Courts. 4 *Inst.* 251. Labourers in the Stannaries may recover their wages before Justices of peace. *Stat.* 27 *Geo.* 2. *c.* 6.

STANNARIUS, A pewterer or dealer in tin; of or belonging to tin. *Lat. Dict.*

STAPLE, *Stapulum*.] From the Fr. *estape*, i. e. *forum vinarium*, a market or Staple for wines, which formed the principal commodity of *France*; or rather from the Germ. *stapulen*, which signifieth to gather, or heap any thing together: in an old *French* book it is written *à Calais Estape de la Laine*, &c. *i. e.* the Staple for wool: And with us, it hath been a public mart appointed by Law to be kept at the following places, *viz. Westminster*, *York*, *Lincoln*, *Newcastle*, *Norwich*, *Canterbury*, *Chichester*, *Winchester*, *Exeter*, and *Bristol*, &c. A Staple Court was held at the Wool Staple in *Westminster*, the bounds whereof began at *Temple-Bar* and reached to *Tuthill*; in other cities and towns, the bounds are within the walls; and where there are no walls, they extend through all the towns, and the Court of the Mayor of the Staple is governed by the Law merchant in a summary way, which is the Law of the Staple. 4 *Inst.* 235. See *stat.* 27 *Ed.* 3. *st.* 2. The Staple goods of *England* are wool, woolfels, (or skins,) leather, lead, tin, cloth, butter, cheese, &c. as appears by the statute 14 *R.* 2. *c.* 1. Though some allow only the five first; and yet of late Staple goods are generally understood to be such as are vendible, of any kind, and not subject to perish. See *Statute Staple*; *Customs on Merchandise*.

STAR, *Starrum*, a contraction from the Hebr. *shetar*, a deed or contract.] All the deeds, obligations, &c. of the *Jews*, were anciently called Stars, and written for the most part in *Hebrew* alone, or in *Hebrew* and *Latin*; one of which yet remains in the treasury of the *Exchequer*, written in *Hebrew*, without points, the substance whereof is expressed in *Latin* just under it, like an *English* condition under a *Latin* obligation: This bears date in the reign of King *John*; and many Stars, as well of grant and release, as obligatory, and by way of mortgage, are pleaded and recited at large in the Plea rolls. *Pasch.* 9 *Ed.* 1. See *Star-Chamber*.

In one of the statutes of the University of *Cambridge*, the antiquity of which is not known, the word *starrum* is twice used for a schedule or inventory. 4 *Comm. c.* 19. *p.* 266, *n.*

STAR AND BENT; See title *Sea Banks*.

STAR-CHAMBER, *Camera stellata*, otherwise called *Chambre des estoylles*.] A Chamber at *Westminster* so called, (as Sir *Thomas Smith, de Rep. Anglor. lib.* 2. *c.* 4. conjectures,) because at first the cieling thereof was adorned with images of gilded Stars. And in the *stat.* 25 *Hen.* 8. *c.* 1, it is written the *Starred* Chamber. It was ordained by *stat.* 3 *Hen.* 7. *c.* 1, and 21 *Hen* 8. *c.* 2, That the Chancellor, assisted by others there named, should have power to punish routs, riots, forgeries, maintenances, embraceries, perjuries, and other such misdemeanors as were not sufficiently provided for by the Common Law, and for which the inferior Judges were not so proper to give correction.

But by *stat.* 16 *Car.* 1. *c.* 10, this Court, commonly called the Star-chamber, and all jurisdiction, power, and authority thereto belonging, are abolished. *Cowell.*

Molloy and *Blackstone* seem to think it was called the Star-chamber, because the recognizances which the Jews formerly entered into, to the Crown, and which were called Stars, were kept in that Chamber. See *ante*, *Star*.

See 4 *Comm. c.* 19, in the notes, for some particulars relative to this Court. *Hudson's* Treatise of the Court of Star-chamber, there referred to, is now published at the beginning of the second volume of *Collectanea Juridica*.

STARCH AND STARCH POWDER. Are articles subject to the duties and control of the *Excise*, and liable to

to several regulations accordingly, by various statutes. Thus, *Starchmakers* are to make use of square or oblong boxes only, for boxing and draining green Starch, before it is dried in the stove, under the penalty of 10*l.* and shall give notice to the officers for the duties, when they box and dry their Starch; and not remove the Starch made, before it is weighed, and an account taken thereof, on pain of forfeiting 50*l.* Officers may search for Starch concealed, by virtue of a Justice's warrant, and seize the same, &c. A penalty is likewise inflicted on makers of hair-powder, perfumers, peruke-makers, barbers, &c. mixing any powder of alabaster, chalk, lime, &c. with Starch-powder, or making hair-powder of any other materials than powder of Starch. And makers of powder for hair, are to make entries of their workhouses at the office of *Excise*, &c. &c.

STATED DAMAGES; See titles *Damages*; *Bonds*; *Covenant*, &c.

STATICKS, *Statice, scientia ponderum.*] Knowledge of weights and measures; or the art of balancing or weighing in scales. *Merch. Dict.*

STATIONARIUS; The same as *Stagiarius.*

STATUARIUM, A tomb adorned with Statues. *Ingulph.* 853.

STATUS DE MANERIO, The state of a manor: All the tenants within the manor, met in the Court of their Lord to do their customary suit, and enjoy their rights and usages, were termed *omnis Status de manerio. Paroch. Antiq.* 456.

STATUTE,

STATUTUM,] Has divers significations: First, It signifies an act of Parliament; and Secondly, it is a short writing called a *Statute-Merchant*, or *Statute-Staple*, (see those titles,) which are in the nature of bonds, &c. and called Statutes, as they are made according to the form expressly provided in certain Statutes.

THE ACTS OF PARLIAMENT, STATUTES or *Edicts*, made by the King's Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in Parliament assembled, compose the *Leges Scriptæ*, the written laws of the kingdom. The oldest of these now extant, and printed in our Statute-books, is the famous *Magna Charta*, as confirmed in Parliament 9 *Hen.* 3: though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old Common Law.

The making of these Statutes has been already considered under title *Parliament*, Div. VII.—To what is there said we may here only add, that the Royal assent, when given, is indorsed upon the several acts. That till the reign of *Rich.* III, all the Statutes were either in *French* or *Latin*, generally *French*: And that by *stat.* 33 *Geo.* 3. *c.* 13, it is enacted, that when the operation of an act of Parliament is not directed to commence from any time specified within it, the clerk of the Parliaments shall indorse upon it the day upon which it receives the Royal assent: (and which, since this act, is added, in the printed Statutes immediately after the title:) And that day shall be the date of its commencement.—This Statute has obviated much inconvenience (not to say injustice) which arose from the former maxim, that an act of Parliament operated from the first day of the Session; the whole Session, like the whole term, being considered as one day; and thus many Statutes had the force of *ex post facto* laws.

The method of citing these acts of Parliament is various. Many of our antient Statutes are called after the name of the place where the Parliament was held that made them; as the Statutes of *Merton* and *Marlebrge* (*Marlborough*), of *Westminster*, *Gloucester*, and *Winchester*. Others are denominated entirely from their subject; as the Statutes of *Wales* and *Ireland*, the *Articuli Cleri*, and the *Prærogativa Regis*. Some are distinguished by their initial words, a method of citing very antient: As the Statute of *Quia Emptores*, and that of *Circumspecte Agatis*. But the most usual method of citing them, especially since the time of *Edward* II. is by naming the year of the King's reign in which the Statute was made, together with the chapter, or particular act, according to its numeral order, as, 9 *Geo.* 2. *c.* 4. For all the acts of one Session of Parliament taken together make properly but one Statute: And therefore when two Sessions have been held in one year, we usually mention *stat.* 1 or 2. Thus the Bill of Rights is cited, as 1 *W.* & *M. st.* 2. *c.* 2; signifying that it is the second chapter or act, of the second Statute, (or the Laws made in the second Session of Parliament,) in the first year of King *William* and Queen *Mary*.

We are now to consider,

I. *The different Kind of Statutes.*

II. *Some general Rules with regard to their Construction.*

I. STATUTES are either general or special, public or private. A general or public act is an universal rule, that regards the whole community: And of this the Courts of Law are bound to take notice judicially and *ex officio*; without the Statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns: And of these (which are not promulgated with the same notoriety as the former) the Judges are not bound to take notice, unless they be formally shewn and pleaded. Thus, to shew the distinction, the Statute 13 *Eliz. c.* 10, to prevent Spiritual Persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of Spiritual Persons in the nation: but an act to enable the Bishop of *Chester* to make a lease to *A. B.* for sixty years, is an exception to this rule; it concerns only the parties and the Bishop's successors; and is therefore a private act. 1 *Comm. Introd.* § 3. *p.* 85, 86.

Some Statutes (says another authority) are general, and some are special: And they are called general from the *genus*, and special from the *species*; as for instance: The whole body of the Spiritualty is the genus, but a Bishop, Dean, and Chapter, &c. is the species: Therefore Statutes which concern all the Clergy, are general laws; but those which concern Bishops only are special. 4 *Rep.* 76. The Statute 21 *H.* 8. *c.* 13, which makes the

the acceptance of a second living by clergymen, an avoidance of the first, is a general law, because it concerns all spiritual persons.

All Statutes concerning mysteries and trades in general, are general or public acts; though an act which relates to one particular trade is a private Statute. *Dyer* 75. A Statute which concerns the King is a public act; and yet the *stat.* 23 *H.* 8, concerning Sheriffs, &c. is a private act. *Plowd.* 38; *Dyer* 119.—It is a rule in Law, that the Courts at *Westminster* ought to take notice of a general Statute, without pleading it; but they are not bound to take notice of particular or private Statutes unless they are pleaded. 1 *Inst.* 98.

Statutes are also either declaratory of the Common Law, or remedial of some defects therein; or, to speak more strictly, they are either declaratory of the old law, or introductory of a new law. Remedial Statutes being generally mentioned in contradistinction to penal Statutes. *Declaratory*, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the Parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the Common Law is and ever hath been. Thus the Statute of Treasons, 25 *Edw.* 3. *st.* 5. *c.* 2, doth not make any new species of treasons; but only, for the benefit of the Subject, declares and enumerates those several kinds of offence, which before were treason at the Common Law. *Remedial*, or Introductory, Statutes, are those which are made to supply defects, and abridge such superfluities, in the Common Law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) Judges, or from any other cause whatsoever. And this being done, either by enlarging the Common Law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division, of these remedial introductory acts of Parliament, into *Enlarging* and *Restraining* Statutes. To instance again in the case of treason. Clipping the current coin of the kingdom was an offence not sufficiently guarded against by the Common Law; therefore it was thought expedient by *stat.* 5 *Eliz. c.* 11, to make it High Treason, which it was not at the Common Law: So that this was an enlarging Statute. At Common Law also Spiritual Corporations might lease out their estates for any term of years, till prevented by the Statute 13 *Eliz. c.* 10, before mentioned: This was therefore a restraining Statute. 1 *Comm.* 86, 87.

It is remarked by Mr. *Christian*, that the *stat.* 5 *Eliz. c.* 11, above referred to, hardly corresponds with the general notion either of a remedial, or an enlarging Statute. In ordinary legal language, remedial Statutes are (as has been already noticed) contradistinguished to penal Statutes. An enlarging or an enabling Statute is one which increases, not restrains, the power of action: As *stat.* 32 *H.* 8. *c.* 28, which gave Bishops and all other sole Ecclesiastical Corporations, except parsons and vicars, a power of making leases which they did not possess before, is always called an enabling Statute. The *stat.* 13 *Eliz. c.* 10, which afterwards limited that power, is, on the contrary, styled a restraining or disabling Statute. 1 *Comm.* 87, *n.* See also 2 *Comm. c.* 20: and this Dictionary, title *Lease* II.

II. The rules to be observed with regard to the construction of Statutes are principally these which follow:

1. There are three points to be considered in the construction of all remedial Statutes; the old law, the mischief, and the remedy: that is, how the Common Law stood at the making of the act; what the mischief was for which the Common Law did not provide; and what remedy the Parliament hath provided to cure this mischief. And it is the business of the Judges so to construe the act, as to suppress the mischief and advance the remedy, 3 *Rep.* 7: *Co. Litt.* 11, 42. Let us instance again in the same restraining Statute, 13 *Eliz. c.* 10: By the Common Law, Ecclesiastical Corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors: The remedy applied by the Statute was, by making void all leases by Ecclesiastical Bodies, for longer terms than three lives or 21 years. Now in the construction of this Statute it is held, that leases, though for a longer term, if made by a Bishop, are not void during the Bishop's continuance in his See; or, if made by a Dean and Chapter, they are not void during the continuance of the Dean; for the act was made for the benefit and protection of the successor. *Co. Litt.* 45: 3 *Rep.* 60: 10 *Rep.* 58. The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors; but the leases, during the continuance of that interest, being not within the mischief, are not within the remedy. 1 *Comm.* 87.

2. A Statute, which treats of things or persons of an inferior rank, cannot, by any general words, be extended to those of a superior. So a Statute, treating of "Deans, Prebendaries, Parsons, Vicars, and others having spiritual promotion," is held not to extend to Bishops, though they have spiritual promotion; Deans being the highest persons named, and Bishops being of a still higher order. 2 *Rep.* 46.

3. Penal Statutes must be construed strictly. Thus the Statute 1 *Edw.* 6. *c.* 12, having enacted that those who are convicted of stealing horses should not have the benefit of clergy, the Judges conceived that this did not extend to him that should steal but one horse, and therefore procured a new act for that purpose in the following year, *stat.* 2 & 3 *Ed.* 6. *c.* 33: *Bac. Elem. c.* 12. Tho' Lord *Hale* states the true reason of the difficulty to have arisen from the circumstance of a doubt, as to the benefit of clergy attaching where only one horse was stolen, on account of the words in the old *stat.* 37 *H.* 8. *c.* 8, respecting stealing a horse. 2 *H. P. C.* 365. To mention a more modern and more applicable instance; by the Statute 14 *Geo.* 2. *c.* 6, stealing sheep, or other cattle, was made felony without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next Sessions, it was found necessary to make another Statute, (15 *Geo.* 2. *c.* 34,) extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs by name.

4. Statutes against frauds are to be liberally and beneficially expounded. These are generally called remedial Statutes. And it is a fundamental rule of construction, that penal Statutes shall be construed strictly, and these remedial statutes liberally. See 1 *Comm.* 88, & *n.* This may seem a contradiction to the last rule, most Statutes against frauds being in their consequences penal. But this difference is here to be taken: where the Statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; But when the Statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing, the *stat.* 13 *Eliz. c.* 5. which avoids all gifts of goods, &c. made to defraud creditors and others, was held to extend, by the general words, to a gift made to defraud the Queen of a forfeiture. 3 *Rep.* 82. It has also been held, that the same words of the same Statute will bear different determinations, according to the nature of the suit or prosecution instituted upon them. For example; the *stat.* 9 *Ann. c.* 14, against gaming, enacts, that if any person shall lose at any one time or sitting 10*l.* and shall pay it to the winner, he may recover it back within three months; and if the loser does not within that time, any other person may sue for it, and treble the value besides: In a case where an action was brought to recover back 14 guineas which had been won and paid after a continuance at play, except an interruption during dinner; the Court held the Statute was remedial, as far as it prevented the effects of gaming, without inflicting a penalty; and therefore, in this action, they considered it one time or sitting: But they said, if an action had been brought by a common informer for the penalty, they would have construed it strictly, in favour of the defendant, and would have held that the money had been lost at two sittings. 2 *Black. Rep.* 1226: 1 *Comm.* 88, 89, & *n.*

5. One part of a Statute must be so construed by another, that the whole may, if possible, stand; *ut res magis valeat, quam pereat.* As if land be vested in the King and his heirs by act of Parliament, saving the right of *A.*; and *A.* has at that time a lease of it for three years: Here *A.* shall hold it for his term of three years, and afterwards it shall go to the King. For this interpretation furnishes matter for every clause of the Statute to work and operate upon. But, 6, A saving, totally repugnant to the body of the act, is void. If, therefore, an act of Parliament vests land in the King and his heirs, saving the right of all persons whatsoever; or vests the land of *A.* in the King, saving the right of *A.*: In either of these cases, the saving is totally repugnant to the body of the Statute, and (if good) would render the Statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the King. 1 *Rep.* 47: 1 *Comm.* 89.

7. Where the Common Law and a Statute differ, the Common Law gives place to the Statute; and an old Statute gives place to a new one. And this upon a general principle of universal Law, *Leges posteriores priores contrarias abrogant.* But this is to be understood only when the latter Statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have 20 pounds a-year; and a new Statute afterwards enacts that he shall have 20 marks; here the latter Statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if 20 marks be made qualification sufficient, the former Statute which requires 20 pounds is at an end. *Jenk. Cent.* 2, 73. But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If, by a former Law, an offence be indictable at the Quarter Sessions, and the latter Law makes the same offence indictable at the Assises; here the jurisdiction of the Sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either; unless the new Statute subjoins express negative words, as, that the offence shall be indictable at the Assises, and not elsewhere. 11 *Rep.* 63: 1 *Comm.* 89, 90.

8. If a Statute, that repeals another, is itself repealed afterwards, the first Statute is hereby revived, without any formal words for that purpose. So when the Statutes of 26 *H.* 8. *c.* 1: 35 *Hen.* 8. *c.* 3, declaring the King to be the Supreme Head of the Church, were repealed by a Statute 1 & 2 *P.* & *M.* and this latter Statute was afterwards repealed by an act of 1 *Eliz.* there needed not any express words of revival in Queen *Elizabeth's* Statute, but these acts of King *Henry* were impliedly and virtually revived. 4 *Inst.* 325: 1 *Comm.* 90.

9. Acts of Parliament derogatory from the power of subsequent Parliaments bind not. So the Statute 11 *Hen.* 7. *c.* 1, which directs, that no person for assisting a King *de facto* shall be attainted of treason by act of Parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder. 4 *Inst.* 43. Because the Legislature, being in truth the Sovereign Power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior Legislature must have been, if its ordinances could bind a subsequent Parliament. 1 *Comm.* 90.

Statutes against the power of subsequent Parliaments are not binding; notwithstanding the Statute 42 *Ed.* 3. *c.* 3, declares that any Statute made against *Magna Charta* shall be void: and this is evident, seeing many parts of *Magna Charta* have been repealed and altered by subsequent acts. *Read. on Stat. Vol.* 4. *p.* 340. And the Law has been mistaken in this point; for the Statutes which intervene between the 9 *Hen.* 3, and 42 *E.* 3, are not repealed, though they vary from, and are contrary to, *Magna Charta*: *Jenk. Cent.* 2.

10. Lastly, Acts of Parliament that are impossible to be performed are of no validity: and if there arise out of them *collaterally* any absurd consequences, manifestly contradictory to common reason, they are, *with regard to those collateral consequences*, void. *Blackstone* lays down the rule with these restrictions; though he allows it is generally laid down more largely, that acts of Parliament contrary to reason are void. But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power (says the Commentator) in the ordinary forms of the Constitution, that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a Statute is unreasonable, the Judges are at liberty to reject it; for that

that were to set the judicial power above that of the Legislature, which would be subversion of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the Judges are in decency to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the Statute by equity, and only *quoad hoc* disregard it. [or, to state it perhaps more correctly, it will not be presumed that any construction can be agreeable to the intention of the Legislature, the consequences of which are unreasonable.] Thus, if an act of Parliament gives a man power to try all causes, that arise within his manor of *Dale*; yet if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. 8 *Rep.* 118. But, if we could conceive it possible for the Parliament to enact, that he should try as well his own causes as those of other persons, there is no Court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the Legislature or no. 1 *Comm.* 91, and *n.*

The following notes will still further assist the student in his researches on this subject; though perhaps some few lines in them may seem a little tautologous, compared with the foregoing copious extracts from *Blackstone*.

It is the general rule, that to Statutes enacted in Parliament, there must be the assent of the King, Lords, and Commons, without which there can be no good act of Parliament; but there are many acts in force, though these three assents are not mentioned therein, as *Dominus Rex Statuit in Parliamento*, and *Dominus Rex in Parliamento suo Statuta edit*, and *de communi concilio Statuit*, &c. *Plowd.* 97: 2 *Bulst.* 186. And Sir *Edw. Coke* says, that several Statutes are penned like charters in the King's name only: though they were made by lawful authority. 4 *Inst.* 25. Before the invention of printing, all Statutes were proclaimed by the Sheriff in every county, by virtue of the King's writ. 2 *Inst.* 526, 644.

Statutes continue in force although the records of them are destroyed, by the injury of time, &c. 2 *Inst.* 587.

Statutes consist of two parts, the words, and the sense; and it is the office of an expositor, to put such a sense upon the words of the Statute, as is agreeable to equity and right reason: Equity must necessarily take place in the exposition of Statutes; but explanatory acts are to be construed according to the words, and not by any manner of intendment; for it is incongruous for an explanation to be explained. *Plowd.* 363, 465: *Cro. Car.* 23.

The preamble of a Statute, which is the beginning thereof, going before, is, as it were, a key to the knowledge of it, and to open the intent of the makers of the act; it shall be deemed true, and therefore good arguments may be drawn from the same. 1 *Inst.* 11. It is the most natural and genuine exposition of a Statute, to construe one part by another part of the same Statute, for that best expresses the meaning of the makers: the words of an act of Parliament are to be taken in a lawful and rightful sense; and though, as has been already said, the construction of Statutes in general must be made in suppression of the mischief, and for the advancement of the remedy, intended by the Statute; but so that no innocent person by a literal construction shall receive any damage. 1 *Inst.* 24, 381.

The best way to expound a Statute, is to consider what answer the lawgivers would probably have given to the question made, if proposed to them. *Plowd.* 465: 3 *Nels. Abr.* 245.

Where a Statute gives a remedy for any thing, it shall be presumed there was no remedy before at Common Law: And the rules to construe acts of Parliament are different from the strict rules of the Common Law; though, in the construction of a Statute, the reason of the Common Law gives great light. *Raym.* 191, 355: 2 *Inst.* 301. If an act of Parliament is dubious, long usage may be good to expound it by; and the meaning of things spoken and written must be as hath been constantly received; but where usage is against the obvious meaning of a Statute, by the vulgar and common acceptation of words, then it is rather an oppression than an exposition of the Statute. *Vaugh.* 169, 170. An Election Committee refused to admit evidence of usage to explain the words of a Stamp Act; on the question, whether deeds were valid, which conveyed several freeholds to several voters, which had only one stamp. *Tomlins's Election Cases* 155. See 3 *Lud.* 177.

A Statute which alters the Common Law, shall not be strained beyond the words, except in cases of public utility, where the end and design of the act appears to be larger than the words themselves. *Vaugh.* 179. Relative words in any Statute, may make a thing pass as well as if particularly expressed; and cases of the same nature shall be within the same remedy. *Raym.* 54.

Such Statutes as are beneficial to the People, shall be expounded largely, and not with restriction. *Style* 302. The exposition of Statutes concerning the Ecclesiastical Courts, belongs to the Common Law Courts: And a Statute made in imitation of the Common Law, is to be expounded by it. *Hob.* 83, 97. The affirmative words of Statutes do not change the Common Law, without negative words added therein: Thus the Statute of Wills, being in the affirmative, doth not take away the custom to devise land in places where it existed before the Statute. *Jenk. Cent.* 212: *Dyer* 155: 1 *Inst.* 111. If a Statute be made only in affirmance of the ancient Common Law, and doth not enact any thing new, but what was before provided for, it is nevertheless a Statute, and may be pleaded; but the defendant hath a plea at Common Law. *Style's Reg.* 301. An act of Parliament in affirmance of the Common Law, extends to all times after, though it mentions only to give remedy for the present; and where a thing is granted by Statute, all necessary incidents are granted with it. 1 *Inst.* 235.

Wherever a Statute gives or provides a thing, the Common Law supplies all manner of requisites. *Hard.* 62. Every Statute made against an injury, gives a remedy by action, expressly or implicitly. 2 *Inst.* 55, 74. And besides an action upon the Statute, as the Subject's private remedy, the offender may be punished for contempt at the King's suit, by fine, &c. 2 *Co. Inst.* 131, 163.

Statutes made for the public good are to be expounded so as to attain their end. 1 *Strange* 253, 258. *Keble*'s edition of the Statutes and *Raftal*'s differed, and they who were for adhering to *Keble*, proved they had examined

examined him with the Parliament-roll. The Chief Justice ruled it was enough, and *Keble* was read. 1 *Str.* 446. Where an act of Parliament only gives a remedy to the party grieved, it shall not be considered as a penal Statute. *Wilson, par.* 1. *fol.* 412.

STATUTE OF AGREEMENT BETWEEN THE KING, LORDS, AND COMMONS, in Parliament. 51 *Hen.* 3.

STATUTE MERCHANT, A Bond of record, acknowledged before the Clerk of the Statutes-Merchant, and Lord Mayor of the city of *London*, or two merchants assigned for that purpose; and before the Mayors of other cities and towns, or the Bailiff of any borough, &c.; sealed with the seal of the debtor and the King; upon condition that, if the obligor pays not the debt at the day, execution may be awarded against his body, lands, and goods, and the obligee shall hold the lands to him, his heirs and assigns, till the debt is levied. *Terms de Ley.*

Estates by Statute-Merchant and Statute-Staple are classed by *Blackstone* among the species of estates defeasible on condition subsequent; and are said to be very nearly related to the *vivum vadium*, or estate held till the profits thereof shall discharge a debt liquidated or ascertained: For both the Statute-Merchant and Statute-Staple are securities for money; the one entered into before the Chief Magistrate of some trading town, pursuant to the Statute 13 *Edw.* 1. *stat.* 3. *de mercatoribus*, and thence called a Statute-Merchant; the other pursuant to the Statute 27 *Edw.* 3. *c.* 9, before the Mayor of the Staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of Parliament in certain trading towns; from whence this security is called a Statute-Staple. They are both securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied: And, during such time as the creditor so holds the lands, he is tenant by Statute-Merchant or Statute-Staple. There is also a similar security, the recognizance, in the nature of a Statute-Staple, acknowledged before either of the Chief Justices, or (out of Term) before their substitutes, the Mayor of the Staple at *Westminster*, and the Recorder of *London*; whereby the benefit of this mercantile transaction is extended to all the King's Subjects in general, by virtue of the Statute 23 *Hen.* 8. *c.* 6, amended by *stat.* 8 *Geo.* 1. *c.* 25; which direct such recognizances to be enrolled and certified into Chancery. But these, by the Statute of Frauds, 29 *Car.* 2. *c.* 3, are only binding upon the lands in the hands of *bonâ fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record. 2 *Comm. c.* 10. *p.* 160. See further, titles *Recognizance*; *Execution.*

These estates, though sometimes referred to in argument, seem now nearly unknown in practice; but as the law relating to them is in force, and as it may serve to elucidate other subjects by analogy, the following information on the subject has been preserved, as useful to the Student, if not to the Practitioner.

The Statute of *Acton Burnel*, 11 *Ed.* 1, and *Stat. de Mercatoribus*, 13 *Ed.* 1. *stat.* 3, enact, that the merchant shall cause his debtor to appear before the Mayor of the city of *London*, or other city or town, and there acknowledge the debt, &c. by recognizance, which is to be enrolled; the roll whereof must be double, one part to remain with the Mayor, and the other with the clerk appointed by the King; and then one of the clerks is to write the obligation, which shall be sealed with the debtor's seal, and that of the King, &c.

By these Statutes, if the debt be not paid at the day upon the merchant's account, the Mayor is to cause the debtor to be imprisoned, if to be found, and in prison to remain until he hath agreed the debt; and if the debtor cannot be found, the Mayor shall send the recognizance into the Chancery, from whence a writ shall issue to the Sheriff of the county where the debtor is, to arrest his body, and keep him in prison till he agree the debt; and, within a quarter of a year, his lands and goods shall be delivered to him to pay the debt; but if the debtor do not satisfy the debt within that time, all his lands and goods shall be delivered to the merchant by a reasonable extent, to hold until the debt is levied thereby; and in the mean time he shall remain in prison; but when the debt is satisfied, the body of the debtor is to be delivered, together with his lands. If the Sheriff return a *non est inventus*, &c. the merchant may have writs to all the Sheriffs where he hath any land; and they shall deliver all the goods and lands of the debtor by extent; and the merchant shall be allowed his damage, and all reasonable costs, &c.

All the lands in the hands of the debtor, at the time of the recognizance acknowledged, are chargeable; (but see *stat.* 29 *C.* 2. *c.* 3. before referred to;) though, after the debt is paid, they shall return to grantees, if they are granted away, as shall the rest to the debtor: The debtor or his sureties dying, the merchant shall not take the body of the heir, &c. but shall have his lands until the debt is levied. If the debtor have sureties, they shall be proceeded against in like manner as the debtor; but so long as the debt may be levied of the goods of the debtor, the sureties are to be without damage. Also the merchant shall, besides the payment of his debt, be satisfied for his stay and detainer from his business. In *London*, out of the commonalty two merchants are to be chosen and sworn by this Statute, and the seal shall be opened before them, whereof one piece is to be delivered to the said merchants, and the other remain with the clerk; and before these merchants, &c. recognizances may be taken. A fee of 1*d. per* pound is allowed to the clerk for fixing the King's seal; and a seal is to be provided that shall serve for fairs, &c.; but the Statute extends not to *Jews*. *Cro. Car.* 440, 457.

Statutes-Merchant were contrived for the security of merchants only, to provide a speedy remedy to recover their debts; but at this day they are used by others who follow not merchandize, and are become one of the common assurances of the kingdom. *Bridg.* 21: *Owen* 82. And all obligations made to the King are of the nature of these Statutes-Merchant. 12 *Rep.* 2, 3.

STATUTE-STAPLE, A Bond of record, acknowledged before the Mayor of the Staple, in the presence of all or one of the Constables; to this end, says

the Statute, there shall be a seal ordained, which shall be affixed to all obligations made on such recognizance acknowledged in the Staple: This seal of the Staple is the only seal the Statute requires to attest this contract; but it is no more under the power or disposal of the Mayor, than that appointed by the Statute-Merchant; for though the Statute appoints him the custody of it, yet it is in such a manner, that he cannot affix it to any obligation without their consent, it being to remain in the Mayor's hands, under the security of their own seals. 2 *Rol. Abr.* 466: *Stat.* 27 *Ed.* 3. *c.* 9. See title *Statute-Merchant.*

To understand a little of the original and constitution of the Staple, and the advantage the nation had by this establishment, we must observe, that the place of residence, whither the merchants resorted with their Staple commodities, was anciently called *Estaple*, which signifies no more than mart or market; and this was formerly appointed out of the realm, as at *Calais*, *Antwerp*, &c. and other ports on the Continent, which were nearest to us, and whither the merchants might with safety coast it. 4 *Inst.* 238.

But besides these Staple ports appointed abroad, there were others appointed at home; whither all the Staple commodities were carried in order to their exportation, such as *London*, *Westminster*, *Hull*, &c. This was found to be of great use and consequence to the Prince in particular, and to the interest and credit of the nation in general; for at these Staple ports were the King's customs easily collected, and were by the officers of the Staple, at two several payments, returned into the Exchequer; besides, at these Staples, all Merchants' goods were carefully viewed and marked by the proper officers of the Staple; and this necessarily avoided the exportation of decayed goods, or ill-wrought manufactures, and consequently fixed a stamp of credit on the merchandizes exported, which, upon the view, always answered the expectation of the buyer. *Maline's Lex Merc.* 337, 338.

The Staple merchandizes, according to Lord *Coke*, are only wool, woolfells, leather, lead, and tin; others, butter, cheese, and cloths; but, whatever they were, the Mayor and Constables had not only conusance of all contracts and debts relating to them, but they had likewise jurisdiction over the people, and all manner of things touching the Staple; this power was given them, lest the merchants should be diverted and drawn from their business and trade, by applying to the Common Law, and running through the tedious forms of it, for a determination of their differences; and for the greater encouragement of merchants, that they might have all imaginable security in their contracts and dealings, and the most expeditious method of recovering their debts, without going out of the bounds of the Staple. 4 *Inst.* 238: *Maline's Lex Mer.* 337.

By this it appears, that this security was only designed for the merchants of the Staple and for debts only on the sale of merchandizes brought thither; yet in time others began to apply it to their own ends, and the Mayor and Constable would take recognizances from strangers, surmising it was made for the payment of money for merchandizes brought to the Staple. To prevent this mischief, the Parliament, in 23 *H.* 8, reduced the Statute-Staple to its former channel, and laid a penalty of 40 *l.* on the Mayor and Constables who should extend the benefit of the Statute to any but those of the Staple. But though the *stat.* 23 *H.* 8. *c.* 6, deprived them of this benefit, yet it framed the new sort of security known by the name of a Recognizance, *in the nature* of a Statute-Staple; so called because this act limits and appoints the same process, execution, and advantage, in every particular, as is set down in the Statute-Staple. *Co. Lit.* 290.

A Recognizance, therefore, *in nature of a Statute-Staple*, as the words of the act declare, is the same with the former, only acknowledged under other persons; for, as the Statute runs, the Chief Justices of the King's Bench and Common Pleas, or, in their absence, out of Term, the Mayor of the Staple at *Westminster*, and the Recorder of *London*, jointly together, shall have power to take Recognizances for payment of debt in the form set down in the Statute. In this, as in the former cases, the King appoints a seal to attest the contract. *Co. Lit.* 290, *a*: 4 *Inst.* 238: 2 *Rol. Abr.* 466: *Co. Ent.* 12.

Debt lies as well upon a Statute-Staple as upon a bond: And a Statute acknowledged on lands is a present duty, and ought to be satisfied before an obligation; a debt due on an obligation being but a *chose in action*, and recoverable by law, and not a present duty by law, as a debt upon a Statute, judgment, or recognizance is, upon which present execution is to be taken without farther suit. *Cro. Eliz.* 355, 461, 494: 2 *Lil. Abr.* 536.

But a judgment in a Court of record shall be preferred, in case of execution, before a Statute: Though, if one acknowledge a Statute, and afterwards confess judgment, if the land be extended thereon, the cognisee shall have a *scire facias* to avoid the extent upon the judgment. It is otherwise as to goods, for there, he that comes first shall be first served. 6 *Rep.* 45: 1 *Brownl.* 37. The cognisor of a Statute grants his estate to the cognisee; by this the execution of the Statute will be suspended. 2 *Cro.* 424. But if the cognisee, before execution of a Statute, release to the cognisor all his right to the land; it will not be a discharge of the whole execution: for, notwithstanding, he may sue execution of his body and goods. 3 *Shep. Abr.* 326. Upon a Statute-Staple, a *Capias* and extent of lands, goods, and chattels, are contained in one writ; but it is not so on a Statute-Merchant. *Jenk. Cent.* 163. In Chancery, the proceedings on a Statute-Staple are in the Petty-bag Office; and Statutes-Staple are suable in the King's Bench or Common Pleas, as well as in Chancery. *Cro. Eliz.* 208. On a Statute's being satisfied, it is to be vacated by entering satisfaction, &c. Statutes-Staple and Statutes-Merchant are to be entered within six months, or shall not be good against purchasers. *Stat.* 27 *Eliz.* *c.* 4. See *stat.* 16 & 17 *Car.* 2. *c.* 5, for preventing delays in extending Statutes.

He that is in possession of lands on a Statute Merchant, or Staple, is called *Tenant by Statute-Merchant*, or *Statute-Staple*, during the time of his possession: And creditors shall have freehold in the lands of debtors, and recovery by *novel disseisin*, if put out; but if tenant by Statute-Merchant or Statute-Staple hold over his term, he that hath right may sue out a *Venire facias ad computand'*, or enter, as upon an *elegit*. *Stat.* 27 *Ed.* 3. *c.* 9.

Statutes of a Corporation, See *Corporation.*

Statuto Mercatorio, The ancient writ for imprisoning him that had forfeited a Statute-Merchant bond, until the debt were satisfied: And of these writs, one was against lay-persons, and another against persons ecclesiastical. *Reg. Orig.* 146, 148.

Statuto Stapulæ, The ancient writ that lay to take the body to prison, and seize upon the lands and goods of one who had forfeited the bond called Statute-Staple. *Reg. Orig.* 151.

Statutum de Laborariis, An ancient writ for the apprehending of such labourers as refused to work according to Statute. *Reg. Judic.* 27.

Statutum Sessionum, The Statute-Sessions; a meeting, in every Hundred, of constables and householders, by custom, for the ordering of servants, and debating of differences between the masters and servants, rating of servants' wages, &c. See *stat.* 5 *Eliz. cap.* 4.

STAURUM, Any store or standing stock of cattle, provision, &c. *Mat. Westm. anno* 1259.

STEALING; See Larceny; Robbery.

Stealing an Heiress; See title *Marriage.*

STEEL; See *Iron.*

STEORESMAN, *Sax.* A pilot.

STERLING, *Sterlingum.*] Was the epithet for silver money current within this kingdom, and took its name from this; that there was a pure coin stamped first in *England* by the *Easterlings*, or merchants of *East Germany*, by the command of King *John*; and *Hoveden* writes it *Esterling*. Instead of the pound Sterling, we now say so many pounds of lawful *English* money; but the word is not wholly disused, for though we ordinarily say lawful money of *England*, yet in the Mint they call it Sterling Money; and when it was found convenient, in the fabrication of monies, to have a certain quantity of baser metal to be mixed with the pure gold and silver, the word Sterling was then introduced; and it has ever since been used to denote the certain proportion or degree of fineness, which ought to be retained in the respective coins. *Lowndes's Essay on Coins* 14. See title *Coin.*

STEWARD, *Seneschallus*; compounded of the Sax. *Steda*, i. e. Room, or *Stead*, and *Weard*, a ward or keeper; *i. e.* a man appointed in my place or stead.] The term hath many applications, but always denotes an officer of chief account within his jurisdiction. The greatest of these officers is, The Lord High Steward of *England*, who anciently had the supervising and regulating, next under the King, the administration of justice, and all other affairs of the realm, whether civil or military; and the office was hereditary, belonging to the Earls of *Leicester*, till forfeited to King *Henry* III. But the power of this officer being very great, of late the office of High Steward of *England* hath not been granted to any one, only *pro hac vice*, either for the trial of a Peer of the realm on an indictment for a capital offence; or for the determination of the pretensions of those who claim to hold by grand serjeanty, to do certain honourable services to the King at his coronation, &c. for both which purposes he holds a Court, and proceeds according to the laws and customs of *England*; and he to whom this office is granted must be of nobility and a Lord of Parliament. 4 *Inst.* 58, 59: *Crompt. Jur.* 84: 13 *Hen.* 8. 11: 2 *Hawk. P. C. c.* 2. See titles *Peers of the Realm* IV.; *Parliament.* Of the nine great officers of the Crown, the Lord High Steward is the first; but when the special business, for which he is appointed, is once ended, his commission expires. The first Lord High Steward, that was created for the solemnizing of a Coronation, was *Thomas*, second son of *Henry* IV.; and the first Lord Steward, for the trial of a Peer, was *Edward* Earl of *Devon*, on the arraignment of *John Holderness*, Earl of *Huntingdon*, in the same reign. *Lex Constitution.* 170.

There is a Lord Steward of the Household mentioned *stat.* 24 *Hen.* 8. *c.* 13; whose name was changed to that of Great Master of the Household, *anno* 32 *Hen.* 8. But this statute was repealed by 1 *Mar. c.* 4, and the office of Lord Steward of the Household revived. He is the chief officer of the King's Court, to whom is committed the care of the King's house: he has authority over all officers and servants of the household, except those belonging to the chapel, chamber, and stable; and the palace royal is exempted from all jurisdiction of any Court, but only of the Lord Steward, or, in his absence, of the Treasurer and Comptroller of the Household, with the Steward of the Marshalsea; who, by virtue of their offices, without any Commissioner, hear and determine all treasons, murders, felonies, breaches of the peace, &c. committed in the King's palace: Besides the Treasurer and Comptroller, the Lord Steward hath under him a Cofferer, several Clerks of the Green Cloth, &c. He attends the King's person at the beginning of Parliaments; and is a white staff officer, which he breaks over the hearse on the death of the King, and thereby discharges all officers under him. Of this officer's antient power, read *Fleta, lib.* 2; and *F. N. B.* 241. See titles *Court of Marshalsea*; *Court of the Lord Steward.*

In the liberty of *Westminster*, an officer is chosen and appointed, called High Steward, and there is a Deputy Steward of *Westminster*. See title *Police.* The word Steward is of so great diversity, that in most Corporations, and all houses of honour, an officer is found of this name and authority. So there are Stewards of *Copyhold Courts, Manors*, &c. See the several titles.

STEWS, Places anciently permitted in *England* to women of professed incontinency. See *Bawdy-House.*

STICA, A brass *Saxon* coin, of the value of half a farthing, four of them making a helfing.

STICK OF EELS, A quantity or measure of twenty-five. A bind of Eels contains ten Sticks, and each Stick twenty-five Eels. *Stat. of Weights and Measures.*

STICKLER, An inferior officer who cuts wood within the King's parks of *Clarendon. Rot. Parl.* 1 *H.* 6.

STILE; See *Style.*

STILYARD, or STEELYARD; Otherwise called the Style-house, in the parish of *Allhallows* in *London*, was by authority of Parliament assigned to the merchants of the *Hanse*; and to *Almaine* or *Easterling* merchants, to have their abode in for ever, with other tenements, rendering to the Mayor of *London* a certain yearly rent. *Stat.* 14 *Ed.* 4. In some records it is called *Gildhalda Teutonicorum*; and it was at first denominated Stilyard, of a broad place or court where Steel was sold, upon which that house was founded. See *stats.* 19 *H.* 7. *c.* 32: 22 *H.* 8. *c.* 8: 1 *Ed.* 6. *c.* 13.

STINT, Common without, See title *Common.*

STIPULA, Stubble left standing in the field after the corn is reaped and carried away. *Cart. Antiq.*

STIPULATION IN THE ADMIRALTY COURTS. The first process in these Courts is frequently by arrest of the defendant's person; when they take recognizances or Stipulation of certain fidejussors in the nature of bail, and, in case of default, may imprison both them and their principal. 3 *Comm.* 108. See title *Admiral.*

STIREMANNUS, *sturemannus*, Sax. *steer-man.*] A pilot of a ship, or Steers-man. *Domesday.*

STIRPES, Distribution *per*; See title *Executor* V. 9.

STIRPES, Succession in; See titles *Descent*; *Canon* IV.

STOCK AND STOVEL, A forfeiture where any one is taken carrying *stipites & pabulum* out of the woods; for *stoc* signifies sticks, and *Stovel* pabulum. *Antiq. Chart.*

STOCK, or STOKE, Syllables added to the names of places, from the Sax. *Socce*, i. e. *Stipes*, *Truncus*; as *Woodstock*, *Basingstoke*, &c.

STOCK AND FAMILY. If lands were devised generally to a Stock or Family; it shall be understood of the heir principal of the house. *Hob.* 33. See *Tylwith*; and titles *Will*; *Descent.*

STOCKJOBBERS, in *Exchange Alley*. All Stock-jobbing not authorized by act of Parliament, or by charter, or used by obsolete charters, shall be void, and the undertakings are declared Nusances. *Stat.* 6 *Geo.* 1. *c.* 18.—All *præmiums* to deliver or receive, accept or refuse any public Stock, or share therein, and contracts in nature of wagers, putts and refusals relating to the value of the Stock, shall be void; and the *præmiums*, shall be returned, or may be recovered by action, with double costs; and the persons entering into or executing any such contract, shall forfeit 500*l.* No money shall be given to compound any difference, for not delivering or transferring Stock, or not performing contracts; but the whole money agreed, is to be paid, and the Stock transferred, on pain of 100*l.* Persons buying, on refusal or neglect to transfer at the day, may buy the like quantity of Stock, of any other person, and recover the damage of the first contractor: And contracts for sale of any Stock, where contractors are not actually possessed of or entitled unto the same, to be void; and the parties agreeing to sell, *&c.* incur a penalty of 500*l.* Brokers making agreements, *&c*, and acting contrary, are also liable to penalties. But this act not to hinder lending money on Stocks, or contracts for re-delivering or transferring thereon, so as no *præmium* be paid for the loan more than legal interest. *Stat.* 7 *Geo.* 2. *c.* 8; made perpetual by *stat.* 10 *Geo.* 2. *c.* 8. It is to be lamented, that these acts of Parliament are openly and impudently transgressed, by gambling in the Public Funds: The bargains are understood to be *upon honour*: It has been in contemplation of the gamblers, who have for years been in the daily habit of violating the laws of their country, ever since the passing of the above statutes, to attempt a repeal of these statutes; and obtain a law by which their iniquitous bargains should be rendered binding. An insolence, however, which has hitherto received very little encouragement.

STOCKS, or *Public Funds*; See titles *National Debt*; *Taxes.*

STOCKS, *cippus.*] A wooden engine to put the legs of offenders in, for the securing of disorderly persons, and by way of punishment in divers cases ordained by statute, *&c.* And it is said that every vill within the precinct of a torn is indictable for not having a pair of Stocks, and shall forfeit 5*l.* *Kitch.* 13. See title *Drunkenness.*

STOCKLAND (or STOKELAND) AND BONDLAND. In the manor of *Wadhurst* in *Sussex*, there are two sorts of copyhold estates, called *Stokeland* and *Bondland*, descendible by custom in several manors: As if a man be first admitted to *Stockland*, and afterwards to *Bondland*, and dies seised of both, his eldest son and heir shall inherit both estates; but if he be admitted first to *Bondland*, and after to the other, and of these dieth seised, his youngest son shall inherit: And *Bondland* held alone, descends to the youngest son. 2 *Leon.* 55.

STOLA, A garment or hood formerly worn by priests. Sometimes it is taken for the archiepiscopal pall. *Eadmer*, *c.* 188. Also a vestment which matrons wore. *Cowell.*

STOLEN GOODS; See titles *Larceny*; *Restitution*; *Rewards.*

STONE, A weight of 14 pounds, used for weighing of wool, *&c.* The Stone of wool ought to weigh 14 pounds; but in some places, by custom, it is less, as 12 pounds and a half: A Stone of wax is eight pounds; and in *London* the Stone of beef is no more. 11 *Hen.* 7. *c.* 4: *Rot. Parl.* 17 *Ed.* 3. See tit. *Weights and Measures.*

STORES OF WAR; See *Naval Stores.*

STOTARIUS, He who had the care of the Stud or breed of young horses. *Leg. Alfred. c.* 9.

STOW, *Sax.* A place; it is often joined to other words; as *Godstow* is a place dedicated to *God.*

STOWAGE, Money paid for a room where goods are laid. See *Housage.*

STRAITS, A narrow sea between two lands, or an arm of the sea. Also there is a narrow coarse cloth anciently so called. *Stat. Antiq.* 18 *Hen.* 6. *c.* 16.

STRAND, *Sax.* Any shore or bank of a sea or great river. Hence the street in the west suburbs of *London*, which lay next the shore or bank of the *Thames*, is called the *Strand.* An impunity from custom, and all impositions upon goods or vessels, by land or water, was usually expressed by Strand and stream. *Mon. Angl. tom.* 3. *p.* 4.

STRANDED Goods; See this Dictionary, titles *Wreck*; *Insurance* II. 1.

STRANGER, from the Fr. *estranger*, alienus.] Born out of the realm, or unknown: An *Alien.* In law it hath also a special signification, for him that is not *privy* to an act: As a Stranger to a judgment, is he whom a judgment doth not affect; and in this sense it is directly contrary to party or privy. *Old Nat. Br.* 128. Strangers to deeds shall not take advantage of conditions of entry, *&c.* as parties and privies may; but they are not obliged to make their claims on a *fine* levied till five years; whereas privies, such as the heirs of the party that passed the fine, are barred presently. 1 *Inst.* 214: 2 *Inst.* 516: 3 *Rep.* 79. Strangers have either a present or future right; or an apparent possibility of right, growing afterwards, *&c.* *Wood's Inst.* 245. See titles *Privies*; *Fines*; *Judgments*, &c.

STRAW; See *Hay.*

STRAY; See *Estray.*

STREAM-WORKS, A kind of Works in the *Stannaries*, mentioned in *stat.* 27 *H.* 8. *c.* 23.

STREEMAN, Sax.] *Robustus, vel potens vir. Leland*, vol. 2. p. 188.

STREETS

STREETS of *London*. See titles *London*; *Police*; *Robbery*; *Assault*.

STREPITUS JUDICIALIS, The circumstances of noise and crowd, and other turbulent formalities at a process or trial in a public Court of Justice. And therefore our wise ancestors did in many cases provide, that right and justice should be done in a more private and quiet manner. *Cowell. Paroch. Antiq. p.* 344.

STRETWARD, An officer of the Streets; of old, like our surveyor of the highways, or rather a scavenger. *Mon. Ang. tom.* 2. *p.* 187.

STRIKING in the King's superior Courts of Justice, in *Westminster Hall*, or at the Assizes, whether blood be drawn or not; or even assaulting the Judge sitting in the Court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of the offender's lands during life. *Staundf. P. C.* 38: 3 *Inst.* 140, 141: 4 *Comm.* 125: And see title *Rescue*. Maliciously Striking in the King's palace, wherein his Royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment, and fine at the King's pleasure; and also with loss of the offender's right hand, the solemn execution of which sentence is described at length in the *stat.* 33 *H.* 8. *c.* 12. This offence is triable in the Court of the *Lord Steward* of the Houshold; by a Grand and Petit Jury, as at Common Law, taken out of the officers and sworn servants of the King's Houshold. 4 *Comm.* 276. As to Striking in *Churches*, see title *Church*. See also title *Assault*.

STRIP; See *Estrepement*.

STROND, *Saxon*.] Strand.

STRUMPET, *meretrix*.] A whore, harlot, or courtesan: This word was heretofore used for an addition. *Plac. apud Cestr.* 6 *Hen.* 5.

STRYKE, The eighth part of a seam or quarter of corn, a Stryke or bushel. *Cartular. Rading MS.* 116.

STUD of Mares; A company of Mares kept for breeding of colts; from the Sax. *stod-mare*, i. e. *equa ad fœtum*.

STULTIFYING ONE'S SELF; See title *Idiots and Lunaticks*.

STURGEON. The King shall have Sturgeon taken in the sea, or elsewhere within the realm, except in certain places privileged by the King. See title *King*; and *stat.* 17 *E.* 2. *st.* 1. *c.* 11.

STYLE, *appello*.] To call, name, or intitle one; as, the Style of the King of *England* is *George* the Third, by the Grace of God, King of *Great Britain*, *France*, and *Ireland*, Defender of the Faith, &c.

There is an Old and New Style of the Calendar. See title *Year*.

SUB-DEACON, An ancient officer in the church, made by the delivery of an empty platter and cup by the Bishop, and of a pitcher, bason, and towel by the Archdeacon: His office was to wait on the Deacon with the linen on which the body, &c. was consecrated, and to receive and carry away the plate with the offerings at sacraments, the cup with the wine and water in it, &c. He is often mentioned by the Monkish historians, and particularly in the *Apostolical Canons*, 42, 43.

SUBJECTS, *subditi*.]. The members of the Commonwealth under the King their Head. *Wood's Inst.* 22.

SUBINFEUDATION; See *Feoffment*; Was where the inferior lords, in imitation of their superiors, began to carve out and grant to others minuter estates than their own, to be held of themselves, and were so proceeding downwards, *in infinitum*, till stopped by various legislative provisions. See this Dict. title *Manor*; and also title *Tenures*.

SUBJUGALIS, Any beast carrying the yoke. *Matt. Paris*, 1249.

SUBLEGERIUS, from Sax. *sybleger*, *incestus*.] One who is guilty of incestuous whoredom.

SUB-MARSHAL, An officer in the *Marshalsea*, who is Deputy to the Chief Marshal of the King's House, commonly called the Knight Marshal, and hath the custody of the prisoners there. He is otherwise termed Under Marshal. *Cromp. Jurisf.* 104.

SUBMISSION to award; See title *Award*.

SUBNERVARE, To ham-string, by cutting the sinews of the legs and thighs: And it was an old custom in *England*, *meretrices & impudicas mulieres* subnervare.

SUBORNATION, *subornatio*] A secret underhand preparing, instructing, or bringing in a false witness; and from hence Subornation of Perjury is the preparing or corrupt alluring to perjury. Subornation of Witnesses we read of in *stat* 32 *Hen.* 8. *c.* 9. See title *Perjury*.

SUBPŒNA, A writ whereby common persons are called into Chancery, in such cases where the Common Law hath provided no ordinary remedy; the name of which proceeds from the words therein, which charge the party called to appear at the day and place assigned, *sub pœnâ centum librarum*, &c (under penalty of 100*l.*) *West. Symb par.* 2: *Cromp. Jurisdict.* 33. The Subpœna is the leading process in the Courts of Equity. There are several of these writs in Chancery; as the *Subpœna ad respondend'*, *Subpœna ad replicand' & ad rejungend'*, *Subpœna ad testificand' & ad audiend' judicium*, &c. which writs are to be made out by the proper clerks of the Subpœna Office. Subpœnas to answer must be personally served by being left with the defendant, or at his house with one of the family, on affidavit whereof, if the defendant do not answer, attachment shall be had against him, &c. As to the origin of the writ of Subpœna in Chancery, see this Dict. title *Equity*: And as to *stats.* 4 & 5 *Ann. c.* 16: 5 *Geo.* 2. *c.* 25, see title *Chancery*.

SUBPOENA AD TESTIFICANDUM lies for the calling in of witnesses to testify in any cause, not only in Chancery, but in all other Courts; and in that Court, and in the Exchequer, it is made use of in Law and Equity. The two chief writs of Subpœna are to appear and to testify; and the latter issues out of the Court where the issue is joined, upon which the evidence is to be given. 2 *Lill. Abr.* 536. As to which, see this Dict. title *Evidence*, Introd. Col. 2. and II. 2.

SUBPOENA DUCES TECUM, A writ or process of the same kind with the *Subpœna ad testificandum*, including a clause of requisition, for the witness *to bring with him* and produce books and papers, &c. in his hands, belonging to, or wherein the parties are interested; or tending to elucidate the matter in question. 3 *Comm.* 382.

SUBSCRIPTION OF WITNESSES; See titles *Will*; *Evidence*; *Deed*.

SUBSEQUENT CONDITIONS; See title *Condition*.

SUBSEQUENT EVIDENCE; See titles *Attaint*; *Decree*; *New Trial*; REVIEW, *Bill of*.

SUBSIDY, *subsidium.*] An aid, tax, or tribute, granted to the King for the urgent occasions of the kingdom, to be levied on every Subject of ability, according to the value of his lands or goods.

History does not mention that the *Saxon* Kings had any Subsidies after the manner of ours at present; but they had both levies of money and personal services towards the building and repairing of cities, castles, bridges, military expeditions, *&c.* which they called *Burgbote, Brigbote, Hereyfare, Heregeld,* &c. But when the *Danes* harrassed the land, King *Ethelred* submitted to pay them for redemption of peace several great sums of money yearly. This was called *Danegeld*, for the levying of which every hide of land was taxed yearly at twelve pence, lands of the church only excepted; and thereupon it was after called, *hydagium*, and that name remained afterwards upon all taxes and Subsidies imposed upon lands; but sometimes it was laid upon cattle, and then was termed *horngeld.* The *Normans* called these sometimes *taxes*, sometimes *tallages*, otherwise *auxilia & subsidia.* The Conqueror had these taxes, and made a Law for the manner of their levying, as appears in *Emendationibus ejus, pag.* 125. *sect. Volumus & firmiter,* &c. Many years after the Conquest they were levied otherwise than now, as every ninth lamb, every ninth fleece, and every ninth sheaf. See *stat. antiq.* 14 *E.* 3. *st.* 1. *c.* 20. Of which you may see great variety in *Rastall's Abridgment*, titles *Taxes*; *Tenths*; *Fifteenths*; *Subsidies*, &c. and 4 *Inst.* 26, 33. Whence we may gather there is no certain rate, but as the Parliament shall think fit. Subsidy is in our statutes sometimes confounded with customs. 11 *H.* 4. *c.* 7. *Cowell.* See this Dict. titles *Taxes*; *Customs on Merchandize.*

SUBSTITUTE, *Substitutus.*] One placed under another person to transact some business, *&c.* See *Attorney*; *Militia.*

SUBTRACTION OF CONJUGAL RIGHTS; See *Marriage.*

SUBTRACTION OF LEGACIES; See *Legacy.*

SUBTRACTION OF RENTS AND SERVICES, *&c.* This happens, when any person, who owes any suit, duty, custom, rent, or service to another, withdraws or neglects to perform or pay it, *&c.* See 3 *Comm. c.* 15: and this Dictionary, titles *Rent*; *Distress*, &c.

SUBTRACTION OF TITHES; See title *Tithes.*

SUBURBANI, Husbandmen. *Monasticon*, ii. 461.

SUCCESSION *to the Crown*; See title *King* I.

SUCCESSION AB INTESTATO; See *Executor* V. 8.

SUCCESSION TO GOODS AND CHATTELS; Vide *Successor.*

SUCCESSOR, *Lat.*] He that followeth or cometh in another's place. Sole Corporations may take a fee-simple estate to them and their Successors; but not without the word Successors: And such a Corporation cannot regularly take in succession goods and chattels; and therefore if a lease for a hundred years be made to a person and his Successors, it hath been adjudged only an estate for life: Nor may a Sole Corporation bind the Successors. 4 *Rep.* 65; 1 *Inst.* 8, 46, 94: 4 *Inst.* 249. An Aggregate Corporation may have a fee-simple estate in succession without the word Successors; and take goods and chattels in action or possession, and they shall go to the Successors. *Wood's Inst.* 114. See further, titles *Corporation*; *King.*

SUCCISIONES ARBORUM. The cuttings and croppings of trees. *Chart.* 2 *Hen.* 5.

SUFFERANCE. Tenant at Sufferance, is he who holdeth over his term at first lawfully granted. *Terms de Ley.* A person is Tenant at Sufferance that continues after his estate is ended, and wrongfully holdeth against another, *&c.* 1 *Inst.* 57.

An Estate at Sufferance, is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will, and dies, the estate at will is thereby determined; but if the tenant continueth possession, he is Tenant at Sufferance. *Co. Litt.* 57. But a lease at will being now considered as a lease from year to year, which cannot be vacated without half a year's notice to quit, the tenant cannot be ejected at the death of the lessor without half a year's notice from his heir. 2 *Term Rep.* 159. And it is also necessary, in case of the death of the tenant, to give that notice to his personal representative. 3 *Wils.* 25.

No man can be Tenant at Sufferance against the King, to whom no laches or neglect, in not entering and ousting the tenant, is ever imputed by Law; and his tenant, so holding over, is considered as an absolute intruder. 1 *Inst.* 57. But, in the case of a Subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant; for, before entry, he cannot maintain an action of trespass against the tenant by Sufferance as he might against a stranger; and the reason is, because the tenant being once in by a lawful title, the Law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful, unless the owner of the land, by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful. 1 *Inst.* 57: 2 *Comm. c.* 9. *p.* 150.

Thus stands the Law with regard to Tenants by Sufferance; and landlords are obliged, in those cases, to make formal entries upon the lands, and recover possession by the legal process of ejectment: And at the utmost, by the Common Law, the tenant was bound to account for the profits of the land so by him detained. But now, by *stat.* 4 *Geo.* 2. *c.* 28, in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, *and demand made and notice* in writing given by *the landlord*, or him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person, so holding over or keeping the other out of possession, shall pay, for the time he detains the lands, at the rate of double their yearly *value.* And, by *stat.* 11 *Geo.* 2. *c.* 19, in case any *tenant*, having power to determine his lease, *shall give notice* of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent* for such time as he continues in possession. See also *stat.* 6 *Ann. c.* 18. § 1, against holding over by guardians or trustees of infants, and by husbands seised in right of their wives, and by all others having particular estates determinable on any life or lives, by which they are considered as *trespassers.* These statutes have

have almost put an end to the practice of tenancy by Sufferance, unless with the tacit consent of the owner of the tenement. 2 *Comm. c.* 9. *ad fin.*

Where a tenant has a lease for a term certain, and holds over after the expiration of it, it is not necessary for the landlord to give him any notice to quit, in order to recover possession by ejectment. 1 *Term Rep.* 53, 162. But if the landlord afterwards receives rent, or does any act by which he proves his assent to the continuance of the tenant, this turns the estate at Sufferance into a tenancy from year to year. The notice under *stat.* 4 *Geo.* 2. *c.* 28, may be given previous to the end of the Term. *Black. Rep.* 1075. And it seems that it may also be given afterwards; though the double value can only be recovered from the delivery of the notice and demand of the possession. This notice by the landlord must be in writing; but that by the tenant, under *stat.* 11 *Geo.* 2. *c.* 19, may be by parol. 3 *Burr.* 1603. The *double value* can only be recovered by action of debt; but the *double rent* may be recovered by distress or otherwise, like single rent. 1 *Black. Rep.* 535. No length of time is necessary to the validity of these notices, under the statutes, to entitle the landlord to double value or double rent. 2 *Comm. c.* 9. *ad fin. in n.*

SUFFERENTIA PACIS, A grant or sufferance of peace or truce, *Clauf.* 16 *Ed.* 3.

SUFFRAGAN, *Suffraganus, Chorepiscopus, Episcopi vicarius.*] A Titular Bishop, ordained to aid and assist the Bishop of the diocese in his spiritual function; or one who supplieth the place instead of the Bishop. Some writers call these Suffragans by the name of Subsidiary Bishops, whose number is limited by the *stat.* 26 *H.* 8. *c.* 14: by which statute it was enacted, That it should be lawful for every Bishop, at his pleasure, to elect two honest and discreet spiritual persons within his diocese, and to present them to the King, that he might give to one of them such title, style, and dignity of such of the Sees in the said statute mentioned, as he should think fit: And that every such person should be called Bishop Suffragan of the same See, &c. This act sets forth at large for what places such Suffragans were to be nominated by the King; and if any one exercise the jurisdiction of a Suffragan, without the appointment of the Bishop of the diocese, &c. he shall be guilty of a *præmunire.* See *Kennet's Paroch. Antiq.* 639: and this Dictionary, title *Bishops.*

SUGAR, Is liable to certain duties of *Customs* on its importation; which is regulated by the *Navigation Acts*, and other statutes. See the respective titles.

SUGGESTION, *suggestio.*] A surmise, or representing of a thing: By *Magna Charta* no person shall be put to his law on the Suggestion of another, but by lawful witnesses. 9 *H.* 3. *c.* 28.—Suggestions upon record are grounds to move for prohibitions to suits in the Spiritual Courts, &c. See title *Prohibition* III. Though matters of record ought not to be staid upon the bare Suggestion of the party; there ought to be an affidavit made of the matter suggested, to induce the Court to grant a rule for staying the proceedings upon the record, 2 *Lill.* 537. There are Suggestions in replevin, for a *returno habendo*; which, it is said, are not traversable; as they are for prohibitions to the Spiritual or Admiralty Courts. 1 *Plowd.* 76. Breaches of covenants and deaths of persons must be suggested upon record, &c. *Stat.* 8 & 9 *W.* 3. *c.* 10. See titles *Abatement*; *Amendment. Blackstone* terms the proceeding by *Information*, a prosecution by Suggestion. See title *Information.*

SUICIDE; See title *Homicide* III. 1.

SUIT, *secta*, Fr. *suite*, i. e. *consecutio, sequela.*] Signifies a following another; but in divers senses. The first is a Suit in Law, and is divided into Suit real and personal; which is all one with action real and personal. See titles *Action*; *Chancery.*—2. *Suit of Court*, an attendance which the tenant owes to the Court of his Lord. 3. Suit covenant, when a man hath covenanted to do Suit in the Lord's Court. 4. Suit custom, where I and my ancestors owe Suit time out of mind. 5. Suit is the following one in chase, as fresh suit: See title *Hue Cry.*—And this word is used for a petition made to the King, or any great personage.

Suit and Service. When the tenant had professed himself to be the man of his superior or Lord, the next consideration was concerning the Service, which, as such, he was bound to render for the land he held. This, in pure, proper, and original feuds, was only twofold: To follow, or do Suit to, the Lord in his Courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. 2 *Comm.* 54. See title *Tenures.*

Suit of Court, That is, Suit to the Lord's Court, is that service which the feudary tenant was bound to do at the Lord's Court. At first it was expresly mentioned in the grant how often these Courts should be held. This appears by *Fleta, l.* 2. *c.* 71. *p.* 14. Sometimes one or more, but never exceeding three, in a year. *Thorn* mentions two, *viz. Michaelmas* and *Easter.* But all the Lord's tenants were not bound to attend his Courts, but only those to whom their estates were granted upon that condition: Every man was, however, bound to attend the Sheriff's turn twice in every year. See *Tourn.* And if the inheritance, by reason whereof the tenant was bound to attend only at one Court, did descend to coheirs, he who had *capitalem partem*, was bound to attend the Lord's Court both for himself and all his coheirs. *Cowell.*

None to be distrained for Suit of Court, but they who are bound to it by charter or prescription. Joint-tenants and parceners shall make but one Suit. The remedy against the Lord distraining for it, where it is not due, and against the tenant withholding it, where it is due. *Stat. Marleb.* 52 *H.* 3. *c.* 9. This is not taken away, by *stat.* 12 *Car.* 2. *c.* 24. See this Dictionary, title *Tenures.*

Suit of the King's Peace, The pursuing a man for the breach of the peace. See *stat antiq.* 6 *R.* 2. *c.* 1.: 5 *H.* 4. *c.* 15.; and this Dictionary title *Surety of the Peace.*

Suit-Silver, A small rent or sum of money paid, in some manors, to excuse the appearance of freeholders at the Courts of their Lords.

SULCUS AQUÆ, A little brook or stream of water; otherwise called *fika*; and in *Essex*, a *doke.* *Paroch. Antiq.* 531.

SULLERY, From the Sax. *Sulh, Aratrum.*] A plough-land. 1 *Inst.* 5.

SULLINGA, See *Swoling.*

SUMAGE, Toll for carriage on horseback. *Charta de Foresta, c.* 14: *Cromp. Juris.* 191.

SUMMARY, *summarium.*] An abridgment. *Law Lat. Dict.*

Summary Convictions. See title *Conviction.*

SUMMER-HUS-SILVER. A payment to the Lord of the wood in the *Wealds* of *Kent*, who used to visit those places in Summer-time, when their under-tenants were bound to prepare little Summer-houses for their reception, or else pay a composition in money. *Custum. de Sittingburn, MS.*

SUMMONEAS, A writ judicial of great diversity, according to the divers cases wherein it is used. *Tabl. Reg. Judic.* See title *Process*.

SUMMONERS, *summonitores*.] Petty officers that cite and warn men to appear in any Court; and these ought to be *boni homines*, &c. *Fleta, lib.* 4. The *summonitores* were properly the apparitors, who warned in delinquents at a certain time and place, to answer any charge or complaint exhibited against them: And in citations from a superior Court, they were to be equals of the party cited; at least the Barons were to be summoned by none under the degree of Knights. *Paroch. Antiq.* 177 See title *Process*.

SUMMONITORES SCACCARII, Officers who assisted in collecting the King's revenues, by citing the defaulters therein, into the Court of Exchequer.

SUMMONS, *summonitio*.] In the *English* Law, is as much as *vocatio in jus*, or *citatio* among the Civilians. *Fleta, lib.* 6. *c.* 6. In general, it is a writ to the Sheriff, to warn one to appear at a day; and must be by certain Summoners on the tenant's land, not his goods, &c. And, if against an heir, shall be on the lands that did descend; or making default, at the *grand cape* he may wage his law of Non-Summons. 6 *Rep.* 54. As to the Summons in real actions, see title *Process* I.

SUMMONS AND SEVERANCE. This title is distinguished in the books by the name of Summons and Severance; but the proper name is Severance; for the Summons is only a process, which must, in certain cases, issue before judgment of Severance can be given. 4 *New Abr.* 660. Severance is a judgment, by which, where two or more are joined in an action, one or more of these is enabled to proceed in such action without the other or others. 4 *New Abr.* 660. See *Severance*.

It is a principle of Law, where two or more have a joint right to a thing, they must join in an action for the recovery thereof. 4 *New Abr.* 660. Joint-tenants must implead jointly; for they claim under one and the same title. 1 *Inst.* 180. So Parceners, who make but one heir, must, in order to recover the possession of their ancestor, be joined *in præcipe*. 1 *Inst.* 163, 164. So Executors, because the right of their testator devolves on all of them, must likewise all join in an action for the recovery thereof. *Salk.* 3: *Carth.* 61.

And wherever the right of action is in two or more persons, and they have not all joined in any action that is brought, the defendant may plead in abatement: for, if one could recover in such case singly, every other might do the same; and by this means a defendant would be liable to answer in divers actions for the same thing. *Cro. Eliz.* 554: 9 *Rep.* 37: *Salk.* 3, 32: 2 *Lev.* 113: 1 *Bro.* 354: 1 *Mod.* 102. See title *Abatement*.

It is indeed in the power of any one or more, where two or more have a joint right of action, to commence a suit in the name of all whose such right is: but, notwithstanding that a plea in abatement would be thereby prevented, it would still be in the power of any one of them, by neglecting to appear, or refusing to proceed afterwards in such suit, to render it fruitless. 1 *Inst.* 139. —*Bro. Summ. & Sev. pl.* 17. For if two or more join in bringing an action, and one makes default, the nonsuit of him is the nonsuit of them all. *Bro Summ. & Sev. pl.* 5, 7. So, if divers join in a writ of error, the assignment of errors cannot be by one without the others. *Cro. Eliz.* 192.

To prevent the great inconvenience, and the failure of justice, which would be, if persons, in whom there is a joint right of action, should be precluded, by the negligence or collusion of any one of them, from having the effect of a suit for the recovery of such right; the law has provided, that if any one of those persons, in whose name a joint action is commenced, does not appear, or after appearance makes default, the other or others may have judgment *ad sequendum solum*, or, in other words, a judgment of Severance. *Hard.* 48: *Bro. Summ. & Sev. pl.* 4, 16. And see *ib. pl.* 18: *F. N. B.* 128: 1 *Inst.* 139.

The consequence of this judgment is, that, notwithstanding the Severance of one or more who did not appear, or who made default, the other plaintiff or plaintiffs in the action may proceed in the suit. 4 *New Abr.* 661.

Where two or more are plaintiffs in an action, and one of these has not appeared, he must be summoned before judgment of Severance can be given against him: For it is a general rule, that a nonsuit is in no case peremptory before appearance, because a writ may have been purchased in the plaintiff's name without his privity. 1 *Inst.* 139: *Bro. Summ. & Sev. pl.* 10: 2 *Rol. Abr.* 488.

But if two joint plaintiffs have both appeared, and afterwards one makes default, the Court may, without issuing any Summons, immediately give judgment of Severance. *Bro. Summ. & Sev. pl.* 10: 10 *Rep.* 135: *Hard.* 317. No judgment of Severance can be given in a writ of error, unless it is prayed before the defendant has pleaded *in nullo est erratum*. *Cro. Jac.* 117. But such judgment may be after joinder in the assignment of error. 2 *Lil. Pr. Reg.* 663.

For more learning on this subject, see *Vin. Abr.* and 4 *New. Abr.* title *Summons and Severance*; and this Dict. titles *Abatement*; *Error*, &c.

SUMMONS TO PARLIAMENT; See title *Parliament*.

SUMMONS AD WARRANTIZANDUM, *Summoneas ad warrantizand'*; The process whereby the vouchee in a common recovery is called. *Co. Lit.* 101: See title *Recovery*.

SUMPTUARY LAWS, *Sumptuaria Lex, from Sumptuarius*, of or belonging to expences.] Are laws made to restrain excess in apparel, and prohibit costly clothes, of which heretofore we had many in *England*; but they are all repealed by *stat.* 1 *Jac.* 1. *c.* 25: 3 *Inst.* 199. See title *Luxury*.

SUNDAY, *Dies Dominicus*.] The Lord's Day; set apart for the service of God, to be kept religiously, and not be profaned.

Profanation of the Lord's Day, vulgarly (but improperly) called Sabbath-breaking, is classed by *Blackstone* amongst offences against God and religion, punished by the Laws of *England*. For, besides the notorious indecency and scandal, of permitting any secular business to be publicly transacted on that day, in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in seven holy, as a time of relaxation and refreshment,

as well as for public worship, is of admirable service to a State, considered merely as a civil institution. The Laws of King *Athelstan* forbade all merchandizing on the Lord's Day, under very severe penalties. And by the *stat.* 27 *Hen* 6. c. 5, no fair or market shall be held on the principal festivals, *Good Friday*, or any *Sunday*, (except the four *Sundays* in harvest,) on pain of forfeiting the goods exposed to sale. And, by the *stat.* 1 *Car.* 1. c. 1, no person shall assemble, out of their own parishes, for any *sport* whatsoever, upon this day; nor, in their parishes, shall use any bull or bear baiting, interludes, plays, or other unlawful exercises, or pastimes; on pain that every offender shall pay 3s. 4d. to the poor. This statute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their respective parishes, even on the Lord's Day, after divine service is over. But by *stat.* 29 *Car.* 2. c. 7, no person is allowed to do any worldly labour on the Lord's Day, (except works of necessity and charity,) or to use any boat or barge, or expose any goods to sale; except meat in public houses, and milk before nine in the morning, and after four in the afternoon, on forfeiture of 5s. Nor shall any drover, carrier, or the like, travel upon that day, under pain of 20s. *Stat.* 3 *Car.* 1. c. 2.

The goods exposed to sale on a *Sunday*, to be forfeited to the poor, &c. on conviction before a Justice of the Peace, who may order the penalties and forfeitures to be levied by distress; and may allow one third to the informer: But this is not to extend to dressing meat in families, inns, cook-shops, or victualling-houses.

Mackarel may be sold on *Sundays*, before and after divine service; *stat.* 10 & 11 *W.* 3. c. 24.—Forty watermen are permitted to ply on the *Thames*, between *Vauxhall* and *Limehouse*, on *Sundays*; *stat.* 11 & 12 *W.* 3. c. 21.—Fish carriages are allowed to travel on *Sundays*, either laden or returning empty; *stat.* 2 *Geo.* 3. c. 15.—Bakers were permitted to dress dinners on a *Sunday*, as a work of a necessity. 5 *Term Rep.* 449. But, by *stat.* 34 *Geo.* 3. c. 61, every baker shall be subject to a penalty of 10s. to the use of the poor, for exercising his business in any manner as a baker on the Lord's Day: except that he may sell bread between nine in the morning and one in the afternoon; and may also, within that time, bake meat, puddings, and pies for any person who shall carry or send the same to be baked.

By *stat.* 21 *Geo.* 3. c. 49, passed to restrain an indecent practice which had become very prevalent, it is enacted, That any house or place opened for public entertainment, or for publicly *debating* on any subject, upon the Lord's Day, and to which persons shall be admitted by money or tickets sold, shall be deemed a disorderly house. And the keeper (or person acting as such) shall forfeit 200*l*, and be punished as in the case of keeping a disorderly house. And the person managing such entertainment, or acting as President, &c. of any public debate, shall forfeit 100*l*. And every servant receiving money or tickets from the persons coming, or delivering out tickets of admission, shall forfeit 50*l*. §§ 1, 2. And every person advertising, or printing an advertisement, of such meeting, shall also forfeit 50*l*. Actions to be brought within six months. § 5.

An indictment for exercising the trade of a butcher must be laid to be *contra formam statuti*; for it was no offence at Common Law. 1 *Strange* 702.

Persons exercising their calling on a *Sunday* are only subject to one penalty; for the whole is but one offence, or one act of exercising, though continued the whole day. *Cowp* 640.

Law processes are not to be served on *Sunday*, unless it be in cases of treason or felony; or on an escape, by virtue of *stat* 5 *Ann.* c. 9. See title *Escape*. *Sunday* is not a day in Law for proceedings, contracts, &c. And hence it is, that a sale of goods on this day in a market overt is not good: And if any part of the proceedings of a suit in any Court of Justice, be entered and recorded to be done on a *Sunday*, it makes it all void. 2 *Inst.* 264: 3 *Bulstr.* 102. The service of a citation on a *Sunday* is good, and not restrained by the *stat.* 29 *Car.* 2. c. 7. And, by two Judges, the delivery of a declaration upon a *Sunday* may be well enough, it not being a process; but *Holt*, Ch. J. thought it ill, because the act intended to restrain all sorts of legal proceedings. 2 *Ld. Raym.* 706. A writ of inquiry cannot be executed on a *Sunday*. 1 *Strange* 387. See titles *Arrest*; *Process*, &c.

SUPERCARGO, A person employed by merchants to go a voyage, and oversee their cargo, and dispose of it to the best advantage. *Merch. Dict.*

SUPER-INSTITUTION, *super-institutio*.] One Institution upon another; as where *A. B.* is admitted and instituted to a benefice upon one title, and *C. D.* is admitted and instituted on the title or presentment of another. 2 *Cro.* 463. See title *Institution*.

SUPER-JURARE, A term used in our ancient Law, when a criminal endeavoured to excuse himself by his own oath, or the oath of one or two witnesses, and the crime objected against him was so plain and notorious, that he was convicted by the oaths of many more witnesses. This was called *super-jurare*. *Leg. Hen.* 1. c. 74: *Leg. Athelstan.* c. 15.

SUPERONERATIONE PASTURÆ, A judicial writ that lies against him who is impleaded in the County-Court for the surcharging or overburthening a common with his cattle, in a case where he was formerly impleaded for it in the same Court, and the cause is removed into one of the Courts at *Westminster*. *Reg. Judic.* See title *Common* III.

SUPER PRÆROGATIVA REGIS, A writ which formerly lay against the King's tenant's widow for marrying without the King's licence. *F. N. B.* 174.

SUPERSEDEAS, A writ that lies in a great many cases; and signifies in general a command to stay some ordinary proceedings at Law, on good cause shewn, which ought otherwise to proceed. *F. N. B.* 236. A *supersedeas* is used for the staying of an execution, after a writ of error is allowed, and bail put in: But no *supersedeas* can be made out on bringing writ of error, till bail is given, where there is judgment upon verdict, or by default, in debt. *Stat.* 3 *Jac.* 1. c. 8. Nor in actions for tithes, promises for payment of money, trover, covenant, detinue, and trespass. *Stat.* 13 *Car.* 2. *st.* 2. c. 2. And execution shall not be staid in any judgment after verdict (except in the case of executors) by writ of error or *supersedeas* thereon, unless bail be put in. *Stat.* 16 & 17 *Car.* 2. c. 8. § 3. See title *Error* Introd. & II. 2.

A writ of error is said to be in judgment of Law a *supersedeas*, until the errors are examined, &c. that is to the execution; not to action of debt on the judgment at law. From the time of the allowance, a writ of error is a *super*

a *fuperfedeas*: And if the party had notice of it before the allowance, it is a *fuperfedeas* from the time of fuch notice; but this muft be where execution is not executed, or begun to be executed. *Cro. Jac.* 534: *Raym.* 100: *Mod. Ca.* 130: 1 *Salk.* [illegible]

If, before execution, the defendant bring a writ of error, and the Sheriff will [illegible] a *fieri facias* and levy the money, the Court will [illegible] a *fuperfedeas, quia erronice emanavit*, and [illegible] reftitution of the money. *Stile* 414. After an [illegible] there was a *fuperfedeas, quia executio* [illegible], &c. iffued; and there being no claufe of reftitution in the *fuperfedeas*, it was infifted that the execution was executed before the *fuperfedeas* awarded; and that a faulty *fuperfedeas* is no *fuperfedeas*; but the Court ordered another *fuperfedeas*, with a claufe of reftitution. *Mod.* 466.

The *fuperfedeas, quia erronice emanavit*, lies to reftore a poffeffion, after an *habere facias feifinam*, when fued out erroneoufly; fo of a *fuperfedeas* after execution upon a *capias ad fatisfaciend.* if it be immediately delivered to the Sheriff. *Jenk. Cent.* 58, 92. It appearing, upon affidavit, that there were two writs of execution executed upon one judgment; the party moved for a *fuperfedeas*, becaufe there cannot be two fuch executions, but where the plaintiff is hindered either by the death of the defendant, or by fome act in Law, that he can have no benefit of the firft; and fo it was adjudged. *Stile* 255. A *fuperfedeas* is grantable to a Sheriff to ftay the return of an *habeas corpus*; and if he return it afterwards, and the parties proceed to trial, it is error; and fo are all the proceedings in an inferior Court, after an *habeas corpora* delivered, unlefs a *procedendo* is awarded, in which cafe a *fuperfedeas* is not to be granted. *Cro. Car.* 45, 350.

When a *certiorari* is delivered, it is a *fuperfedeas* to inferior Courts below; and being allowed, all their proceedings afterwards are erroneous; and they may be punifhed. If a Sheriff holds plea of 40*s.* debt in his County-Court, the defendant may fue forth a *fuperfedeas*, that he do not proceed, &c. Or, after judgment, he may have a *fuperfedeas* directed to the Sheriff, requiring him not to award execution upon fuch judgment; and upon that an *alias*, a *pluries*, and an *attachment*, &c. *New Nat. Br.* 432. See title *Certiorari*.

Superfedeas may be granted by the Court for fetting afide an erroneous judicial procefs, &c. Alfo a prifoner may be difcharged by *fuperfedeas*; as a perfon is imprifoned by the King's writ, fo he is to be fet at liberty; and a *fuperfedeas* is as good a caufe to difcharge a perfon, as the firft procefs is to arreft him. *Finch* 453: *Cro. Jac.* 379. If a privileged perfon is fued in any jurifdiction foreign to his privilege, he may bring his *fuperfedeas*. *Plowd.* [illegible]. It is falfe imprifonment to detain a man in cuftody after a *fuperfedeas* delivered, for the *fuperfedeas* is to be obeyed; and in fuch cafe it is a new caption without any caufe. [illegible] There is a *fuperfedeas* where an *audita querela* is fued; and out of the Chancery, to fet a perfon at liberty, taken upon an exigent, on giving fecurity to appear, &c. And in cafes of furety of the peace and good behaviour, where a perfon is already bound to the peace in the Chancery, &c. *New Nat. Br.* 524, [illegible]. [illegible] warrant iffues againft a man, on an indictment found againft him, for a mifdemeanor, or other bailable offence, and he, having notice of it, doth, before caption, duly put in bail, to appear and traverfe the indictment, &c. he is entitled to a *fuperfedeas*, to prevent a caption. See further 4 *New Abr.* and 20 *Vin. Abr.* title *Superfedeas*: this Dictionary, titles *Error*; *Execution*, &c. and the Books of Practice.

SUPERSEDING A COMMISSION OF BANKRUPT. See title *Bankrupt*.

SUPER STATUTO 1 *Ed.* 3. *cap.* 12, 13. A writ that lay againft the King's tenants holding in chief, who aliened the King's land without his licence. *F. N. B. fol.* 175. See title *Tenures*.

SUPER STATUTO DE ARTICULIS CLERI, *Cap.* 6. A writ againft the Sheriff or other officer that diftrains in the King's highway, or in the lands anciently belonging to the church. *F. N. B.* 173.

SUPER STATUTO FACTO POUR SENESCHAL ET MARSHAL DE ROY, &c. A writ againft the Steward, or Marfhal, for holding plea in his Court, of freehold, or for trefpafs or contracts not made and arifing within the King's houfehold. *F. N. B.* 241.

SUPER STATUTO VERSUS SERVANTES ET LABORATORES, A writ againft him who keeps Servants departed out of their fervices contrary to Law. *F. N. B.* 167.

SUPER STATUTO DE YORK, QUE NULL SERRA VITELLER, &c. A writ againft a perfon that ufes victualling, either in grofs, or by retail, in a city or borough-town, during the time he is mayor, &c. *F. N. B.* 172.

SUPERSTITIOUS USES; See title *Mortmain*.

SUPERVISOR, *Lat.*] A Surveyor or Overfeer: It was formerly and ftill is a cuftom, in cafes of great concern, to make a *Supervifor* of a will, to *fupervife* and overfee the executors that they punctually perform the will of the teftator; but this office is of late very carelefsly executed, fo as to be to little purpofe or ufe.—*Supervifor* (now Surveyor) of the Highways is mentioned in the *ftat.* 5 *Eliz. c.* 13. See title *Highways*.

SUPPLEMENTAL BILL IN EQUITY. A fuit in Equity, imperfect in its frame, (or become fo by accident, before its end has been obtained,) may in certain cafes be rendered perfect by a new Bill which is not confidered as an original Bill, but merely as an addition to, or continuance of, the former Bill; or both. A Bill of this kind may be, 1ft, *A Supplemental Bill*, which is merely an addition to the original Bill—2d, A Bill of Revivor, which is a continuance of the original Bill: See title *Revivor*—3d, A Bill both of Revivor and Supplement, which continues a fuit upon abatement, and fupplies defects arifen from fome event fubfequent to the inftitution of the fuit. *Mitford's Treatife on Chanc. Plead.* 53. And fee further *pp.* 59—67; and this Dict. title *Revivor*.

If the intereft of a plaintiff or defendant, fuing or defending in his own right, wholly determines, and the fame property becomes vefted in another perfon, not claiming under him; as in the cafe of an ecclefiaftical perfon fucceeding to a benefice, or a remainder-man in a fettlement becoming entitled upon the death of a prior tenant under the fame fettlement: The fuit cannot be continued by Bill of *Revivor* (fee that title); nor can its defects be fupplied by a Supplemental Bill: For though the fucceffor in the firft cafe, and the remainder-man in the fecond, have the fame property which the predeceffor or prior tenant enjoyed; yet they are not, in many cafes, bound by his acts, nor have they, in fome cafes, precifely the fame rights: But in general, by an original Bill, *in the nature of a Supplemental Bill*, the benefit

benefit of the former proceedings may be obtained. If the party, whose interest is thus determined, was not the sole plaintiff or defendant, or if the property, which occasions a Bill of this nature, affects only part of a suit, the Bill, as to the other parties, and as to the rest of the suit, is supplemental merely.—There seems to be this difference between an original Bill in the nature of a Bill of Revivor, and an original Bill in the nature of a Supplemental Bill: Upon the first, the benefit of the former proceedings is absolutely obtained; so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause; and if any decree has been made in the first cause, the same decree shall be made in the second: But in the other case, a new defence may be made; the pleadings and depositions cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage, than as it may be an inducement to the Court to make a similar decree. *Mitford's Treatise* 67, 68, and the authorities there cited; and see this Dictionary, title *Revivor*.

A Supplemental Bill must state the original Bill and the proceedings thereon; and if it is occasioned by an event subsequent to the original Bill, it must state that event, and the consequent alteration with respect to the parties; and, in general, the Supplemental Bill must pray, that all the defendants may appear and answer to the charges it contains. For if the Supplemental Bill is not for a discovery merely, the cause must be heard upon it at the same time that it is heard on the original Bill, if it has not been before heard: And if the cause has been before heard, it must be further heard upon the supplemental matter.—If, indeed, the alteration or acquisition of interest happens to a defendant, or a person necessary to be made a defendant, the Supplemental Bill may be exhibited by the plaintiff in the original suit against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only; unless, which is frequently the case, the interests of other defendants may be affected by that decree. Where a Supplemental Bill is merely for the purpose of bringing formal parties before the Court as defendants, the parties, defendants to the original Bill, need not, in any case, be made parties to the Supplemental Bill. *Mitford's Treatise* 69, 70.

A Bill in the nature of a Supplemental Bill, in the cases above mentioned, must state the original Bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former Bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then shew the ground upon which the Court ought to grant the benefits of the former suit to or against the person so become entitled; and pray the decree of the Court, adapted to the case of the plaintiff in the new Bill. This Bill, though partaking of the nature of a Supplemental Bill, is not an addition to the original Bill, but another original Bill, which, in its consequences, may draw to itself the advantage of the proceedings on the former Bill. *Mitford's Treatise* 90.

SUPPLETORY OATH. See 3 *Comm.* 270; and this Dictionary, title *Evidence*.

SUPPLICAVIT, A writ issuing out of *Chancery*, for taking surety of the peace, when one is in danger of being hurt in his body by another; it is directed to the Justices of the Peace and Sheriff of the county, and is grounded upon the *stat.* 1 *Ed.* 3. *st.* 2. *c.* 16, which ordains, that certain persons shall be assigned by the Chancellor to take care of the peace, &c. *F. N. B.* 80, 81. When a man hath purchased a writ of *supplicavit*, directed to the Justices of the Peace, against any person, then he, against whom the writ is sued, may come into the Chancery, and there find sureties that he will not do hurt or damage unto him that sueth the writ; and upon that he shall have a writ of *supersedeas*, directed to the Justices, &c. reciting his having found sureties in Chancery, according to the writ of *supplicavit*; and also reciting that writ, and the manner of the security that he hath found, &c. commanding the Justices, that they cease to arrest him, or to compel him to find sureties, &c. And if the party who ought to find sureties cannot come into the Chancery to find sureties, his friend may sue a *supersedeas* in Chancery for him; reciting the writ of *supplicavit*, and that such a one and such a one are bound for him in the Chancery in such a sum, that he shall keep the peace according to it; and the writ shall be directed to the Justices, that they take surety of the party himself according to the *supplicavit*, to keep the peace, &c. and that they do not arrest him; or if they have arrested him for that cause, that they deliver him. *New Nat. Br.* 180.

Sometimes the writ of *supplicavit* is made returnable into the Chancery at a certain day; and if so, and the Justices do not certify the writ, nor the recognizance, and the security taken, the party who sued the *supplicavit* shall have a writ of *certiorari* directed unto the Justices of Peace to certify the writ of *supplicavit*, and what they have done thereupon, and the security found, &c. *New N. B.* 180. If a recognizance of the peace be taken in pursuance of a writ of *supplicavit*, it must be wholly governed by the directions of such writ; but if it be taken before a Justice of Peace below, the recognizance may be at the discretion of such Justice. *Lamb.* 100: *Dalt.* c. 70.

At the Common Law it was sufficient, in order to obtain this process for surety of the peace from the Court of Chancery, if the party who demanded it made oath, that he was in fear of some corporal hurt, and that he did not crave the same out of malice, but for the safety of his body. *F. N. B.* 79, 80.

But by *stat.* 21 *Jac.* 1. c. 8, all process of the peace shall be void, unless granted on motion in open Court on affidavit in writing.

When articles of the peace are exhibited in the Court of Chancery, and oath is made that the surety of the peace is not craved by the party through malice, but for the safety of his life, a writ of *supplicavit* issues, directed to the Justices of the peace generally, or to some one Justice of the peace, or to the Sheriff, commanding them or him to take security in the sum thereon indorsed; and, if the party refuses to find such security, to commit him to the next gaol, until he does find such security. *F. N. B.* 80. Vide *Bro. Off. pl.* 39: *F. N. B.* 81: *Bro. Peace, pl.* 9: *Lamb.* 101, 107.

If there be no proceedings on a *supplicavit* within a year, the recognizance is of course discharged; and if the party be committed after the expiration of that time, he shall be discharged upon very slight security. *Fitz.* 268. If taken below, and the party appear pursuant

ant to the condition, no indictment being lodged, he must be discharged. *Harow. Ca.* But the Court in discretion may refuse to discharge a recognizance, even though the exhibitant appear and consent; for a breach against any other person is equally a forfeiture. 11 *Mod.* 109. See title *Surety of the Peace.*

SUPPLIES, Extraordinary grants to Government, by Parliament, to supply the exigencies of the State. See title *Taxes.*

SUPREMACY, Sovereign dominion, authority, and pre-eminence; the highest estate. King *Henry* VIII. was the first Prince that shook off the yoke of *Rome* here in *England*, and settled the Supremacy in himself, after it had been long held by the Pope. See *stats.* 25 *H.* 8. cc. 19, 20: 26 *H.* 8. c. 1: 1 *Eliz.* c. 1. By these laws the great power of *Rome* was suppressed; and the act of 1 *Eliz.* Sir *Edward Coke* says, was an act of restitution of the ancient jurisdiction ecclesiastical, which always belonged of right to the Crown of *England*; and that it was not introductory of a new law, but declaratory of the old; and that which was, or of right ought to be, by the fundamental laws of this realm, parcel of the King's jurisdiction; by which laws, the King, as Supreme Head, had full and entire power in all causes ecclesiastical as well as temporal: And as, in temporal causes, the King doth judge by his Judges in the Courts of Justice, by the temporal laws of *England*; so, in causes ecclesiastical, they are to be determined by the Judges thereof, according to the King's ecclesiastical laws. 5 *Rep.* 9: *Cawdrey's* case. And in this case it was resolved by all the Judges, that, by our ancient laws, this kingdom is an absolute empire and monarchy; consisting of one head, which is the King, and of a body politic, made up of many well-agreeing members; all which the Law divides into two several parts, the Clergy and the Laity, both of them, immediately under God, subject and obedient to the head. And the kingly head of this politic body, is furnished with prerogative and jurisdiction, to render justice and right to every part and member of this body, of what estate or degree soever, otherwise he would not be at the head of the whole. 5 *Rep.* 8.

There are several instances of ecclesiastical jurisdiction exercised by the Kings of *England* in former ages; and, in this respect, the King is said to be *persona mixta* & *unita cum sacerdotibus.* The King is the supreme Ordinary, and by the ancient laws of the land might, without any act of Parliament, make ordinances for the government of the Clergy; and if there be a controversy between spiritual persons concerning jurisdiction, the King is arbitrator, and it is a right of his Crown to declare their bounds, &c. *Moor* 755: 1043: *Hob.* 17. See titles *King* V. 3: *Papists*; *Præmunire.*

SURCHARGE, An over-charge, beyond what is just and right. *Merch. Dict.*

SURCHARGE OF COMMON; See title *Common* III.

SURCHARGE OF THE FOREST, *Superoneratio Forestæ.*] Is when a commoner puts on more beasts in the forest than he has a right to. *Manwood, part.* 2. c. 14. *num.* 7. And is taken from the writ *De secunda superoneratione Pasturæ*, in the same sense where the Commoner surchargeth. 3 *Inst. fol.* 293. See title *Forest.*

SUR CUI IN VITA; See *Cui in Vita.*

SURETY, *Vas Vadis.*] A Bail that undertakes for another man in a criminal case, or action of trespass, &c.

SURETY OF THE PEACE,

AND GOOD BEHAVIOUR.

SECURITAS PACIS.] Either because the party who was in fear, is thereby secured; or for that the suspected party gives such security.

I. *What this Security is.*

II. *Who may take or demand it.*

1. *As relates both to the Peace and good Behaviour.*
2. *As to the Peace only.*
3. *As to good Behaviour, or good Abearance, only; which includes Security for the Peace, and somewhat more.*

III. *How it may be forfeited; or discharged.*

1. *As to both Peace and good Behaviour.*
2. *As to the Peace.*
3. *As to the good Behaviour.*

I. THIS is considered by *Blackstone* as a species of preventive justice; by obliging persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with, and to give full assurance to the Public, that such offence as is apprehended from them shall not happen; through the means of Pledges or Sureties for keeping the peace, or for their good behaviour. 4 *Comm.* c. 18.

By the *Saxon* constitution these Sureties were always at hand, by means of King *Alfred's* wise institution of decennaries or frankpledges; wherein the whole neighbourhood or tithing of freemen, were mutually pledges for each other's good behaviour. But this great and general security being now fallen into disuse, and neglected, there hath succeeded to it the method of making suspected persons find particular and special Securities for their future conduct: of which we find mention in the Laws of King *Edward* the Confessor; "*tradat fidejussores de pace et legalitate tuenda.*" *Cap.* 18.

This security, therefore, at present consists in being bound, with one or more Sureties, in a recognizance or obligation to the King, entered on record, and taken in some Court, or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the Crown in the sum required, (for instance 100*l.*) with condition to be void and of none effect, if the party shall appear in Court on such a day, and in the mean time shall keep the peace; either generally, towards the King, and all his liege people; or particularly, also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well, (or be of good behaviour,) either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a Justice of the Peace, must be certified to the next Sessions, in pursuance of the *stat.* 3 *Hen.* 7. c. 1: and if the condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance becomes forfeited or absolute; and, being estreated or extracted, (taken out from among the other records,) and sent up to the Exchequer, the party and his Sureties, having

having now become the King's absolute debtors, are sued for the several sums in which they are respectively bound. 4 *Comm. c.* 18.

II. 1. Any Justices of the Peace, by virtue of their commission, or those who are *ex officio* conservators of the peace, may demand such Security according to their own discretion: But a Secretary of State or Privy Counsellor are not, *ex officio*, such conservators, and therefore they cannot bind to the peace or good behaviour. 11 *St. Tr.* 317. Or it may be granted at the request of any Subject, upon due cause shewn, provided such demandant be under the King's protection; for which reason it has been formerly doubted, whether Jews, Pagans, or persons convicted of a *præmunire*, were entitled thereto. 1 *Hawk. P. C. c.* 60. § 3. Or, if the Justice is averse to act, it may be granted by a mandatory writ, called a *supplicavit*, issuing out of the Court of King's Bench or Chancery; which will compel the Justice to act, as a ministerial and not as a judicial officer; and he must make a return to such writ, specifying his compliance, under his hand and seal. *F. N. B.* 80. 2 *P. Wms.* 202. See title *Supplicavit*. But this writ is seldom used; for, when application is made to the superior Courts, they usually take the recognizances there, under the directions of the *stat.* 21 *Jac.* 1. *c.* 8. And indeed a Peer or Peeress cannot be bound over in any other place, than the Courts of King's Bench or Chancery; though a Justice of the Peace has a power to require Sureties of any other person, being *compos mentis*, and under the degree of nobility, whether he be a fellow Justice or other magistrate, or whether he be merely a private man. 1 *Hawk. P. C. c.* 60. § 5. Wives may demand it against their husbands; (so Peeresses against their Lords;) or husbands, if necessary, against their wives. But femecoverts, and infants under age, ought to find Security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, is the nature of these recognizances or acknowledgments. See title *Recognizance*; & 4 *Comm.* 253, 4.

If the person against whom it is demanded, be present, the Justice of the Peace may commit him immediately, unless he offers Sureties; and *à fortiori* he may be commanded to find Sureties, and be committed for not doing it. *Bro. Mainp. pl.* 39: 1 *Hawk. P. C. c.* 60. But if he is absent, a warrant for committing him cannot be granted, till a warrant is issued commanding him to find Sureties; and this warrant, which must be under seal, ought to shew the cause for which it is granted, and at whose suit. *Lamb.* 85: 1 *Hawk. P. C. c.* 60.

The Justice of the Peace who grants this last-mentioned warrant, may in this case make it special for bringing the party before himself only; for, as he has most knowledge of the matter, he is best qualified to do justice in it. 5 *Co.* 59: *Foster's case*; 1 *Hawk. P. C. c.* 60. But if the warrant be in general terms to carry the party before any Justice of the Peace, the officer who executes it has his election to carry him before what Justice he pleases; and may carry him to gaol, by virtue of the same warrant, if he refuses to find Sureties before such Justice; for the warrant has these words in it, if he shall refuse to find Surety, &c. *Bro. Fals Impris. pl.* 11: 1 *Hawk. P. C. c.* 60: 5 *Co.* 59.

If one, however, who apprehends that the Surety of the Peace will be demanded against him, finds Sureties before any Justice of the peace of the same county, either before or after a warrant is issued against him, he may have a *supersedeas* from such Justice; and this shall prevent or discharge him from an arrest, under the warrant of any other Justice, at the suit of the same party, for whose security he has found such Sureties. *Lamb.* 95, 96: 1 *Hawk. P. C. c.* 60.

The recognizance for keeping the peace, which a Justice of the Peace takes upon complaint below, is to be regulated, as to the number and sufficiency of the Sureties, the largeness of the sum, and the time it is to continue in force, by the discretion of such Justice. *Lamb.* 100: 1 *Hawk. P. C. c.* 60. It has been said that a recognizance taken by a Justice of Peace, to keep the peace as to *A. B.* for a year, or for life, or without expressing any certain time, which shall be intended to be for life, although no time or place is fixed for the party's appearance, or he is not bound to keep the peace as to all the King's liege people, is good. 1 *Hawk. P. C. c.* 60: *Lamb.* 100. But it seems to be the safest way to bind the party to appear at the next Sessions of the Peace, and in the mean time to keep the peace as to the King and all his liege people, and especially as to the party who has demanded the Surety of the Peace. *Lamb.* 105: 1 *Hawk. P. C. c.* 60.

If one of the Sureties of a man who is bound to keep the peace dies, he shall not be obliged to find a new Surety; for the executors or administrators of him who is dead are bound by the recognizance. *Lamb.* 113: *Bro. Peace, pl.* 17: 1 *Hawk. P. C. c.* 60.

2. Any Justice of the Peace may, *ex officio*, bind all those to keep the peace, who, in his presence, make any affray; or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the People; and all such as he knows to be common barretors; and such as are brought before him by the Constable for a breach of the peace in his presence; and all such persons as, having been before bound to the peace, have broken it and forfeited their recognizances. Also wherever any private man hath just cause to fear that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him; or that he will procure others so to do; he may demand Surety of the Peace against such person: And every Justice of the Peace is bound to grant it, if he who demands it will make oath that he is actually under fear of death or bodily harm; and will shew that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also farther swear, that he does not require such Surety out of malice or for mere vexation. This is called *Swearing the Peace* against another: And, if the party does not find such Sureties as the Justice in his discretion shall require, he may immediately be committed till he does. 1 *Hawk. P. C. c.* 60.

Surety of the Peace may be demanded by a wife, if her husband gives her unreasonable correction. *Mow* 874: *Godb.* 215: *F. N. B.* 80. Surety of the Peace ought not to be granted to a man for fear of danger to his servant or cattle. *Lamb.* 83. It hath however

ever been said, that a man may have the Surety of the Peace against one who threatens to hurt his wife or child. *Dalt.* 266. The Surety of the Peace ought not to be granted for any past battery, unless there is a fear of some present or future danger; But the offender must, in such case, be punished by action or indictment. *Dalt.* 266. The demand of the Surety of the Peace ought to be soon after the cause of fear; for the suffering much time to pass before it is demanded, shews that the party has been under no great terror. 6 *Mod.* 132.

It is said, the fear of one cannot be the fear of another; and therefore every recognizance must be separate. But in *Mich.* 23 *Geo.* 2. *B. R.* the Court allowed three women to file joint articles of the peace against three men, *R.* v. *Nettle*, cited 1 *Hawk. P. C.* c. 60. § 5. *Leach's note.* Although the fact from which the fear arises be pardoned, the Court of *K. B.* will receive it as a ground to grant the Security upon. *Stra.* 473.

At the Common Law, the oath of the party was a sufficient ground for the Court of King's Bench to grant the Surety of the Peace; but this cannot be done since the *stat.* 21 *Jac.* 1. c. 8. unless Articles of the Peace are exhibited in Court, upon motion in open Court. *F. N. B.* 79. 80.

Where Articles of the Peace are exhibited in the Court of King's Bench, and oath is made that the party does not crave the Security of the Peace out of hatred or malice, but merely for the preservation of his life and person from danger, an attachment of the peace issues to the Sheriff, commanding him to take bond for the appearance of the party at the return of the writ, to put in bail to the articles in this Court: and, if such bond is not given, to commit the party to the next gaol, *Comb.* 429; *Russel's* case: *F. N. B.* 79. Where the party, against whom Articles of the Peace are exhibited, comes into Court to put in bail, the Articles must be read to him. 6 *Mod.* 132. An affirmation is not sufficient on which to grant Surety of the Peace. *Stra.* 527: 12 *Mod.* 243.

The Court will not permit the truth of the allegations to be controverted by the defendant, but will order Security to be taken immediately, if no objections arise upon the face of the Articles themselves. *Stra.* 1202. But if, on application for the assistance of the Court to enforce the subsequent process, the Articles should manifestly appear, from the corroborated affidavit of the defendant, to have been a *malicious, voluntary,* and *gross* perjury, the Court will resist the application, and commit the offender. 2 *Burr.* 806: 3 *Burr.* 1922.

Robert Parnel having exhibited Articles of the Peace against Sir *Thomas Allen*, Bart. and three others, an attachment of the peace issued against them. Before bail was put in, *Parnel*, in a petition to the Court, recited some of the facts sworn to in the Articles, and endeavoured to explain them. Hereupon the counsel for the defendants moved for a rule to review the Articles, and some affidavits were read to contradict the facts therein charged. Upon reading the petition and these affidavits, in which the facts were flatly contradicted by five or six persons, a rule was made to shew cause why the Articles should not be reviewed, and that *Parnel* should appear upon the day for shewing cause. He did attend; and the Court was, upon the whole, so satisfied of his having been guilty of perjury, that he was immediately committed for wilful and corrupt perjury; and a rule was made, that all farther proceedings upon the Articles should stay. The rule was pronounced in these terms; "and not to take the Articles off the file; in order to give the defendants an opportunity, which could not otherwise have been done, of prosecuting *Parnel* for perjury." *MS. Rep. Rex* v. Sir *Thomas Allen*, Bart. and others, *Hil.* 32 *Geo.* 2.

Articles of the Peace having been exhibited by *John Brown* against *Hannah Bennett* and three others, a rule was made, upon reading the affidavits of the defendants, to shew cause why these Articles should not be reviewed. In these affidavits it was sworn, that the defendants did not know any such person as *Brown* the Articulant; and, besides other strong facts sworn to, it was suggested, that this was a contrivance of the defendant, *Bennett's* husband, to oppress her. No cause being shewn, the Articles were ordered to be taken off the file. *MS. Rep. Rex* v. *Bennett* and others, *East.* 32 *Geo.* 2.

If a defendant, through infirmity of age or sickness, be unable to attend the Court, a *mandamus* will be granted to the Justices in the country, to take such Security. See *Stra.* 835: *Comb.* 427. But, that this is a singular instance, see *Say.* 253.

The Court will not receive Articles of the Peace, if the parties live at a distance in the country, unless they have previously made application to a Justice in the neighbourhood. 2 *Burr.* 780. And if the Court do receive them, the Secondary may indorse the attachment in the form required, and order a Justice of the County to take the security. 2 *Burr.* 1039: 1 *Bl.* 233.

When Surety of the Peace is granted by the Court of King's Bench, if a *supersedeas* comes from the Court of Chancery, to the Justices of that Court, their power is at an end; and the party as to them discharged. *Bro. Peace, pl.* 17. *Sed. qu.?*

3. Justices of Peace are empowered by the *stat.* 34 *Edw.* 3. c. 1. to bind over *to the good behaviour* towards the King and his People, all them that be not of good fame, wherever they be found; to the intent that the People be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril, which may happen by such offenders. Under the general words of this expression, *that be not of good fame*, it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*; as, for haunting bawdy-houses with women of bad fame; or for keeping such women in his own house; or for words tending to scandalize the Government, or in abuse of the Officers of Justice, especially in the execution of their office. Thus also a Justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day and wake in the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame; an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the Magistrate himself. But, if he

commits

commits a man for want of Sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one. 1 *Hawk. P. C. c.* 61: 4 *Comm.* 256.

III. 1. A Recognizance may be discharged, either by the demise of the King, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the Court to which such recognizance is certified by the Justices, (as the Quarter-Sessions, Assizes, or King's Bench,) if they see sufficient cause: Or, in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued. 1 *Hawk. P. C. c.* 60.

2. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or menace, to the person of him who demanded it, if it be a special recognizance; or, if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many species of offences against the public peace; or by any private violence committed against any of his Majesty's Subjects. But a bare trespass, upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance. Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, so as to forfeit one's recognizance, (being looked upon to be merely the effect of unmeaning heat and passion,) unless they amount to a challenge to fight. 1 *Hawk. P. C. c.* 60: 4 *Comm.* 255, 6.

By the *stat.* 3 *H.* 7. *c.* 1, before-mentioned, it is enacted, "That if the party who is called at a Sessions of the Peace, upon a recognizance for keeping the peace, makes default, his default shall be then and there recorded, and the same recognizance, with the record of the default, be sent and certified into the Chancery, or before the King in his Bench, or into the King's Exchequer."

He who is bound to keep the peace, and to appear at the Sessions, must appear there, and record his appearance, otherwise his recognizance is forfeited. And although the party who craved the Surety of the Peace, comes not to pray that it may be continued, the Justices may in their discretion order it to be continued till another Sessions. *Bro. Peace, pl.* 17: *Lamb.* 106.

But if an excuse, which is judged by the Court to be a reasonable one, is given for the non-appearance of a party, it seems that the Court is not bound peremptorily to record his default, but may discharge the recognizance, or respite it till the next Sessions. 1 *Hawk. P. C. c.* 60. A recognizance for keeping the peace may be forfeited by any actual violence to the person of another, whether it be done by the party bound, or others by his procurement. *Lamb.* 115, 127: *Bro. Peace, pl.* 2: 1 *Hawk. P. C. c.* 60. In support of a rule to stay proceedings in a *scire facias*, upon a recognizance for keeping the peace, it was said, that the assault, which had been made, was not upon him at whose request the Surety of the Peace was granted, but upon another person. It was held that this makes no difference; and the rule was discharged. *MS. Rep. Rex.* v. *Stanley and his bail, Trin.* 27 *Geo.* 2. But a recognizance for keeping the peace is not forfeited, where an officer, having a warrant against one who will not suffer himself to be arrested, beats or wounds him in the attempt to take him. *Lamb.* 128: 1 *Hawk. P. C. c.* 60.

So it is not forfeited, if a parent in a reasonable manner chastises his child; a master his servant, being actually in his service at the time; a schoolmaster his scholar; a gaoler his prisoner: a husband his wife. 1 *Sid.* 176, 177: *Lamb.* 127, 128: *Hetl.* 149, 150: 1 *Hawk. P. C. c.* 60: *F. N. B.* 80.

And, without enumerating all the actual assaults, which a man may make upon the person of another, and not forfeit his recognizance for keeping the peace, it may be laid down as a principle, that such a recognizance is not forfeited by any assault which could have been justified in an action, or upon an indictment, for the assault. 4 *New Abr.* 694.

It has been held, that a recognizance for the peace may be forfeited by any treason against the person of the King, or by an unlawful assembly *in terrorem populi*. *Lamb.* 115; 1 *Hawk. P. C. c.* 60. Words which tend directly to a breach of the peace, as challenging a man to fight, or threatening to beat one who is present, amount to a forfeiture of such recognizance. *Lamb.* 115: 1 *Hawk. P. C. c.* 60: *Cro. Eliz.* 86. A recognizance is likewise forfeited by threatening to beat a person who is absent, if the party, who has so threatened, does afterward lie in wait to beat him. *Lamb.* 115.

A man shall not forfeit a recognizance for keeping the peace, who does a hurt to another in playing at cudgels, or such like sport, by consent; for these sports, which tend to promote activity and courage, are lawful. *Dalt.* 284: 1 *Hawk. P. C. c.* 60. But he who wounds another in fighting with naked swords, forfeits his recognizance; because no consent, nor even the command of the King, can make so dangerous a diversion lawful. *Cro. Car.* 229: 1 *Hawk. P. C. c.* 60. If a soldier hurts another soldier, by discharging his gun in exercising without sufficient caution, it is no forfeiture of a recognizance for keeping the peace: For although he would be liable in an action for the damage occasioned by his negligence, this, it not being a wilful breach of the peace, is not within the purport of the recognizance. 1 *Hawk. P. C. c.* 60: *Hob.* 134: 2 *Rol. Abr.* 548.

A Court of Quarter Sessions cannot in any case proceed against the parties, for a forfeiture of a recognizance for keeping the peace; but the recognizance must be sent into some of the King's Courts in *Westminster-Hall*. 1 *Hawk. P. C. c.* 60. All proceedings upon a forfeited recognizance must be by *scire facias*, and not by indictment; because, where a *scire facias* is brought, the parties have an opportunity of pleading any matter in their discharge. 1 *Roll. Abr.* 900, *Perrow's* case: *Cro. Jac.* 598: 1 *Hawk. P. C. c.* 60.

The demise of the King is a discharge of a recognizance for keeping the peace: For the condition being *servare pacem nostram*, his successor cannot take advantage of a breach thereof. *Bro. Peace, pl.* 15: 1 *Hawk. P. C. c.* 60.

After such a recognizance is forfeited, the King may pardon the forfeiture: But he cannot release the condition before

before it is broken; because the party, at whose complaint it was taken, has an interest therein. *Bro. Recogn. pl* 22: *Bro. Chart de Pardon* [illegible].

If no time for the continuance of a recognizance for keeping the peace is therein mentioned, it is perhaps in the power of the Court, in which it was taken, or to whom it has been certified, to discharge it at their discretion. 4 *New Abr.* [illegible].

The usual practice of a Court of Quarter Sessions is to continue a recognizance for keeping the peace from Sessions to Sessions, until the Court thinks proper to discharge it. It is the constant course of the Court of King's Bench, to take a recognizance for twelve months, and, if no indictment is within that time preferred against the party bound to keep the peace, it may, at the expiration thereof, be discharged. 12 *Mod.* [illegible]; *Str.* 835. This seems also to be the practice of the Court of Chancery; for, upon a motion to discharge a writ of *supplicavit*, it was refused: And by my Lord *Macclesfield*, Chancellor—This application is too early; let the party stay till the year is out, and behave himself quietly all that time. 2 *P. Wms.* 202, *Clavering*'s case: See title *Supplicavit*; and further on this subject, *Sav.* 53: 1 *Lev.* 235: 1 *Hawk. P. C.* c. 60: *Bro. Peace, pl.* 17. *Lamb.* 111: 11 *Mod.* 109: *Cro. J.* 282: *Dalt.* 207.

3 A recognizance for the Good Behaviour may be forfeited by all the same means as one for the Security of the Peace may be; and also by some others; as by going armed with unusual attendance, to the terror of the people, by speaking words tending to sedition; or by committing any of those acts of misbehaviour which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen; for though it is just to compel suspected persons to give Security to the Public against misbehaviour that is apprehended, yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance. 1 *Hawk. P. C.* c. 61: 4 *Comm.* 257.

SURGEON, *Chirurgus*, from the *Fr. Chirurgien*; Signifying him that dealeth in the mechanical part of physic, and the outward cures performed with the hand; originally compounded of the two *Greek* words Χείρ *manus*, Ἔργον *opus*, and for this cause Surgeons are not allowed to administer any inward medicines. By the *stat.* 32 *H.* 8. c. 42. the Barbers and Surgeons of *London* were incorporated and made one Company; and it was directed that there should be chosen yearly four Masters for the said Company, of which two were to be expert in Surgery, and the other two in Barbery, who should have power to punish and correct all defaults; and the Company, and their successors, were to have the oversight and correction, as well of freemen as foreigners, for such offences as they should commit against the good order of barbery and surgery: They were exempted from bearing armour, serving on juries, and all matters of watch [illegible] to pay scot and lot, and other charges, as formerly; and the said Company had free liberty to take four persons condemned for felony, for anatomical [illegible]. No barber in *London*, or within one mile thereof, was to practise Surgery, letting of blood, or any other thing relating thereto, except drawing of teeth; nor was any person who practised Surgery within those limits, to exercise the craft of a Barber: Though any man, not being a barber or Surgeon, might retain in his house, as a servant, a barber or Surgeon, who might exercise his art in his master's house, or elsewhere, &c. All persons practising Surgery in *London*, were to have an open sign in the street where they dwell, that people might know where to resort to them when wanted: And every person offending in any of the articles contained in this statute, were to forfeit 5 *l.* a month, one moiety to the King, and the other to him who would sue for the same, &c. By the *stat.* 18 *Geo.* 2. c. 15, the Surgeons of *London*, and the Barbers of *London*, are made two separate and distinct Corporations, reserving the privileges each were entitled to under *stat* 32 *H.* 8. to each Company separately.—By the latter act, Examiners are appointed to admit Surgeons, &c.

SUR LUI JUR, *i. e.* Upon his oath. *Leg. W.* 1 c 16.

SURMISE, Something offered to a Court, to move it to grant a prohibition, *Audita Querela*, or other writ grantable thereon. See title *Suggestion*.

SURPLUSAGE, *Fr. Surplus*, Lat. *Superfluagium*, *Corollarium*,] A superfluity or addition more than needful, which sometimes is the cause that a writ abates, but, in pleading, many times it is absolutely void, and the residue of the plea shall stand good. *Broke. Plow.* 63. See titles *Amendment*, *Pleading*.

If a Jury find the substance of the issue before them to be tried, other superfluous matter is but Surplusage. 6 *Rep.* 46. And where a verdict or judgment is complete, if there be any other matter repugnant or uncertain, &c. it shall be rejected as Surplusage 3 *Nelf.* 262.

SURPLUSAGE OF ACCOUNTS, Signifies a greater disbursement than the charge of the accountant amounts unto. In another sense, Surplusage is the remainder or overplus of money left. *Litt. Dict.*

SURPLUSAGE OF INTESTATES' EFFECTS. See title *Executor* V. 8.

SURREBUTTER, The replication or answer of the plaintiff to the defendant's Rebutter. See this Dict. titles *Pleading*; *Rebutter*.

SURREJOINDER, A second defence (as the replication is the first) of the plaintiff's Declaration in a cause, and is an answer to the Rejoinder of the defendant. *West. Symb. par.* 2. As a Rejoinder is the defendant's answer to the replication of the plaintiff, so a Surrejoinder is the plaintiff's answer to the defendant's Rejoinder. *Wood's Inst.* 586. Where a plaintiff in his Surrejoinder is to conclude to the country, and not with an averment, see *Raym.* 94. After Rejoinder and Surrejoinder, and Rebutter, &c. there may be a demurrer. See *Pleading*.

SURRENDER, *Sursum-Redditio*.] A deed or instrument testifying that the particular tenant for life or years, of lands and tenements, doth yield up his estate to him that hath the immediate estate in remainder or reversion, that he may have the present possession thereof; and whereby the estate for life or years may merge or drown by the mutual agreement of the parties. *Co. Litt.* 337.

A Surrender is of a nature directly opposite to a release; for as that operates by the greater estate's descending upon the less, a Surrender is the falling of a less estate into a greater. It is made by these words, *Hath surrendered, granted, and yielded up.* 2 *Comm.* c. 20. *p.* 326.

Of Surrenders there are three kinds: A Surrender, properly taken, at Common Law; a Surrender of copyhold or customary estates; and a Surrender, improperly taken, as of a deed, a patent, rent newly created, *&c.*

The Surrender at Common Law is the usual Surrender, and is of two sorts; *viz.* A Surrender in Deed, or by express words in writing, where the words of the lessee to the lessor prove a sufficient assent to give him his estate back again; and a Surrender in Law, being that which is wrought by operation of Law, and not actual; as if a lessee for life or years take a new lease of the same land, during the term, this will be a Surrender in Law of the first lease. 1 *Inst.* 338: 5 *Rep.* 11: *Perk.* 601. And, in some cases, a Surrender in Law is of greater force than a Surrender in Deed; for if a man makes a lease for years, to begin at a day to come, this future interest cannot be surrendered by deed, because there is no reversion wherein it may drown; but if the lessee, before the day, take a new lease of the same land, it is a good Surrender in Law of the former lease: And this Surrender in Law, by taking a new lease, holds good, though the second lease is for a less term than the first; and, it is said, though the second lease is a voidable lease, *&c.* 5 *Rep.* 11: 6 *Rep.* 69: 10 *Rep.* 67: 1 *Inst.* 218: *Cro. Eliz.* 873.

If lessee for life do accept of a lease for years, this is a Surrender in Law of his lease for life; if it should be otherwise, the lease for years would be made to no purpose, and both the leases cannot stand together in one person. 2 *Lill. Abr.* 544. Lessee for twenty-one years takes a lease of the same lands for forty years, to commence after the death of *A. B.*, it is not any present Surrender of the first term; but if *A. B.* dies within the first term, it is. 4 *Leon.* 83. A lessee for years took a second lease, to commence at *Michaelmas* ensuing: Adjudged this was an immediate Surrender in Law of the first; and that the lessor might enter and take the profits, from the time of the acceptance of the second lease, until *Michaelmas* following. *Cro. Eliz.* 605. If the lessor make, and lessee accept, a new lease, and it is upon condition; this shall be a Surrender in Law: And if an assignee of tenant for years take a new lease, *&c.* the first lease will be by Law surrendered. 1 *Inst.* 218, 338. If a woman lessee for years marries, and afterwards she takes a new lease for life without her husband, this is a Surrender and extinguishment of the term; but if the husband disagree, then it is revived: Though if the new lease had been made to the husband and wife, then, by acceptance thereof, the first lease had been gone. *Hutt.* 7. A lessor takes the lessee to wife, then the term is not drowned or surrendered; but he is possessed of the term in her right, during the coverture. *Wood's Inst.* 285.

A Surrender may be of any thing grantable, either absolute or conditional; and may be made to an use, being a conveyance tied and charged with the limitation of an use: But it may not be of an estate in fee; nor of rights and titles only to other estates for life or years; or for part of such an estate; nor may one termor regularly surrender to another termor; nor can a tenant at will surrender any more than he can grant. *Perk.* 615: *Noy's Max.* 73: *Cro. Eliz.* 688: 1 *Leon.* 303. Where things will not pass by Surrender, the deed may enure to other purposes, and take effect by way of grant, having sufficient words. *Perk.* 588, 624.

To the making of a good Surrender in Deed of Lands, the following things are requisite: The Surrenderor is to be a person able to grant and make a Surrender, and the Surrenderee a person able to receive and take it; the Surrenderor must have an estate in possession of the thing surrendered, and not a future right; and the Surrender is to be made to him that hath the next estate in remainder or reversion, without any estate coming between; the Surrenderee must have a higher or greater estate in his own right, and not in the right of his wife, *&c.* in the thing surrendered, than the Surrenderor hath, so that the estate of the Surrenderor may be drowned therein; (so that lessee for life cannot surrender to him in remainder for years;) there is to be a privity of estate between the Surrenderor and Surrenderee; and the Surrenderee must be sole seised of his estate in remainder or reversion, and not in joint-tenancy; and the Surrenderee agree to the Surrender, *&c.* 1 *Inst.* 338: *Perk.* 584, 588: 2 *Roll. Abr.* 494: *Noy's Max.* 73.

A man who hath a fee-simple estate cannot surrender it, because it cannot be drowned in another estate. 12 *H.* 4. 21. And if a lease be made for life or years to *A.*, the remainder for life to *B.*, remainder in fee-tail to *C.*, and the first tenant surrenders to *C.*; this will not take effect as a Surrender, by reason of the intervening estate. *Dyer* 112. The lessee for life or years may surrender to him that is next in remainder in fee-simple or fee-tail. And if lessee for life surrenders his estate to one in remainder, that is tenant for his own life, it is a good Surrender; for a man's estate for his own life, in judgment of Law, is greater than that for another's. And where an estate is surrendered for life, there needs no livery and seisin, as in a grant. 1 *Inst.* 338: *Dyer* 251, 280.

Yet, in some cases, an estate, *&c.* may have continuance, though it be surrendered; as where lessee for life makes a lease for years, and after doth surrender, the term for years doth continue; and so of a rent-charge granted by such lessee, *&c.* *Bro.* 47: 1 *Inst.* 338. If the lessee for years, rendering rent, surrenders his estate to the lessor, hereby the rent is extinct: But if the rent were granted away before the Surrender, it would be otherwise. 8 *Rep.* 145: *Bro. Surrend.* 42. Tenant for life is disseised, or for years ousted; and before entry, or possession gained, he surrenders to him in reversion; this Surrender is void: And yet if lessee for years, after his term is begun, before he enters, and when nobody doth keep from him the profits, surrenders, it will be good. *Perk.* § 600.

If there be lessee for years, the remainder for life, remainder in fee; the lessee for years may surrender to the lessee during life, and so may he to him in the remainder in fee. *Perk.* § 605.

In case of tenant for life, the remainder for life, reversion in fee; it was a question formerly, whether the remainder-man for life, by and with the consent of the tenant for life, could surrender to him in reversion without deed, only by coming on the land and saying, that he did surrender to him in reversion: The Court were divided; but two Judges held, that if tenant for life, and he in remainder for life, surrendered to the reversioner, it should pass as several Surrenders, *viz.* first of him in remainder to the tenant for life, and then by the tenant for life to him in reversion. *Poph.* 137.

If tenant for life grant his estate to him in reversion, this is a Surrender; and it must be pleaded according to the operation it hath in Law, or it will not be good. 4 *Mod.* 151. Though if lessees for life or years grant their estates to him in remainder or reversion, and a stranger, it shall enure as a Surrender of the one half to him in reversion, and as a grant of the other moiety to the stranger. 1 *Inst.* 335.

In a Surrender there is no occasion for Livery of Seisin; for there is a privity of estate between the Surrenderor and Surrenderee: The particular estate of the one, and the remainder of the other, are one and the same estate. (See titles *Remainder*; *Reversion*.) And livery having been once made at the creation of it, there is no necessity for having it afterwards. 1 *Inst.* 50. And for the same reason it is that no livery is required on a release, or confirmation in fee, to tenant for years or at will, though a freehold thereby passes; since the reversion of the Relessor or Confirmor, and the particular estate of the Relessee or Confirmee, are one and the same estate: And where there is already a possession derived from such a privity of estate, any further delivery of possession would be vain and nugatory. 2 *Comm.* 326. See this Dict. titles *Release*; *Livery of Seisin*.

By *stat.* 29 *C.* 2. *c.* 3, no estates of freehold, or of terms for years, shall be granted or surrendered, but by deed in writing, signed by the parties, or unless by operation in Law, &c. And by *stat.* 4 *Geo.* 2. *c.* 28. § 6, leases may be renewed without Surrender of under-leases. By *stat.* 29 *Geo.* 2. *c.* 31, infants, lunaticks, and femes-covert, may surrender leases in order to renew them, under the direction of a Court of Equity. See further, 20 *Vin Abr.* 119—146; and this Dictionary, title *Leases*.

A Surrender of a Prebendary's lease, upon condition that if the then Prebendary did not, within a week after, grant a new lease for three lives, the Surrender shall be void: Held to be a good Surrender within the statute. 2 *Strange* 1201.

SURRENDER OF A BANKRUPT; See tit. *Bankrupt*.

SURRENDER OF COPYHOLDS, Is the yielding up of the estate by the tenant into the hands of the Lord, for such purposes as in the Surrender are expressed. This method of conveyance is so essential to the nature of a Copyhold Estate, that it cannot properly be transferred by any other assurance. But Courts of Equity will, in some particular cases, supply the want of a Surrender. See 2 *Comm.* *c.* 22; and this Dictionary, title *Copyhold*.

SURRENDER OF LETTERS PATENT, AND OFFICES. A Surrender may be made of Letters Patent to the King, to the end he may grant the estate to whom he pleases, &c.; and a second Patent for years to the same person, for the same thing, is a Surrender in Law of the first Patent. 10 *Rep.* 66. Letters Patent for years were delivered into Chancery to be cancelled, and new Letters Patent made for years; but the first were not cancelled: It was held that the second were good, because they were a Surrender in Law of the first, and the not cancelling was the fault of the Chancery, which ought to have done it. 10 *Rep.* 66, 67: 2 *Lil. Abr.* 545. If an Officer for life accepts of another grant of the same Office, it is in Law a Surrender of the first grant; but if such an Officer takes another grant of the same Office to himself and another, it may be otherwise. 1 *Ventr.* 297: 3 *Cro.* 198. See *Dyer* 167, 198: *Godb.* 415; and this Dict. titles *Grant of the King*; *Office*.

SURROGATE, *Surrogatus*.] Is one that is substituted or appointed in the room of another; as the Bishop or Chancellor's Surrogate, &c.

SURSISE, *Supersisa*.] A word especially used in the Castle of *Dover*, for penalties and forfeitures laid upon those that pay not the duties or rent of Castle-ward, at their days limited. It probably comes from the Fr. *Sursis*, i. e. forborn or neglected. *Brit.* 52. And *Bracton* hath it so in a general signification. *Bract. lib.* 5.

SURVEY, To measure, lay out, or particularly describe a manor, or estate in lands; and to ascertain not only the bounds and royalties thereof, but the tenure of the respective tenants, the rent and value of the same, &c. On the falling of an estate to a new Lord, consisting of manors, where there are tenants by lease, and copyholders, a Court of Survey is generally held; and at certain other times, to apprise the Lord of the present terms and interests of the tenants, and as a direction on making further grants, as well as in order to improvements, &c. In this Court, a *Survey*, or Particular in the nature of a Rent-roll, is made out, specifying the tenants, and terms of their tenure, &c. See *Comp. Court-Keep.*

SURVEYOR, from Fr. *Sur*, i. e. *Super*, and *Voir*, *Cernere*.] One that has the overseeing or care of some person's lands or works. A Court of Surveyors was erected by *stat.* 33 *H.* 8. *c.* 39, for the benefit of the Crown.

SURVEYOR OF THE KING'S EXCHANGE, An ancient officer belonging to the Mint and Coinage, mentioned in the *stat.* 9 *H.* 5. *c.* 4.

SURVEYOR-GENERAL OF THE KING'S MANORS AND LANDS, Is mentioned in *Cromp. Jurisd.* 106.

SURVEYORS OF THE HIGHWAYS; See title *Highways*.

SURVEYOR OF THE NAVY, An officer appointed over all stores; and to survey hulls and masts of ships, &c. *Chamberl.*

SURVEYOR OF THE KING'S ORDNANCE. This officer surveys the Ordnance and provisions of war, allows bills of debt, and keeps the checks on labourers' works, &c.

SURVEYORS OF THE WARDS AND LIVERIES. This office was abolished, with the Court of Wards and Liveries, by *stat.* 12 *Car.* 2. *c.* 24.

SURVIVOR, from Fr. *Survivre*, Lat. *Supervivo*.] The longer liver of two joint-tenants, or of any two persons joined in the right of a thing. He that remaineth alive, after others be dead, &c. *Broke* 33. See title *Joint-tenant*.

SUSANA TERRA, Land worn out with ploughing. *Thorn.*

SUSPENSE, *Suspensio*.] A temporal stop, or hanging up, as it were, of a man's right, for a time; and, in legal understanding, is taken to be where a rent, or other profit out of lands, by reason of the unity of possession of the rent, &c. and the land out of which it issues, is not *in esse* for a certain time, *et tunc dormiunt*, but may be revived or awaked: And it differs from extinguishment, which is when it dies or is gone for ever. *Co. Litt.* 213. A Suspension of rent is, when either the rent

rent or land is so conveyed, not absolutely and finally, but for a time, after which the rent will be revived again. *Vaugh.* 109. A rent may be suspended by unity for a time; and if a lessor does any thing which amounts to an entry on the land, though he presently depart, yet the possession is in him sufficient to suspend the rent, until the lessee do some act which amounts to a re-entry. *Vaugh.* 39: 1 *Leon.* 110. As rent is not issuing out of a common, the lessor's inclosing the common cannot suspend his rent. *Cro. Jac.* 679. If part of a condition is suspended, the whole condition, as well for payment of the rent, as doing a collateral act, is suspended. 4 *Rep.* 52. And a thing or action personal once suspended, is for ever suspended, &c. *Cro. Car.* 373. See title *Extinguishment*.

SUSPENSION, Is also used for a censure, whereby ecclesiastical persons are forbidden to exercise their office, or take the profits of their benefices; or where they are prohibited for a certain time, in both of them, in the whole or in part: Hence is *suspensio ab officio*, or *suspensio à beneficio*, and *ab officio & beneficio*. *Wood's Inst.* 510. There is likewise a Suspension which relates to the Laity, i. e. *suspensio ab ingressu ecclesiæ*, or from the hearing of divine service, &c. In which case it is used, as in the Canon Law, *pro minore excommunicatione*. *Stat.* 24 *Hen.* 8. *c.* 12. See title *Excommunication*.

Suspension of the Habeas Corpus Act; See titles *Habeas Corpus*; *Government*.

Suspension from Offices; See titles *Mandamus*; *Office*.

SUS. PER COLL. On the trial of criminals, the usage (at the Assises) is for the Judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the Sheriff. As for a capital felony, it is written opposite to the prisoner's name, "Hanged by the neck;" formerly, in the days of *Latin* and abbreviation, *Sus. per coll.* for *Suspendatur per collum*. 4 *Comm. c.* 32. See title *Execution of Criminals*.

SUSPICION, A person may be taken up on Suspicion, where a felony is done, &c. but those who are imprisoned for a light Suspicion of larceny, or robbery, are bailable by *stat. Westm.* 1. *c.* 15: 2 *Hawk. P. C. c.* 15. § 49. And the party being a private person, that takes up one on Suspicion of felony, must do it of his own Suspicion, not upon that of another; and he must have reasonable cause of it, &c. *Hale's Hist. P. C.* 78. See titles *Arrest*; *Vagrant*; *Bail*; *Commitment*, &c.

SUSPIRAL, from Lat. *Suspirare*, i. e. *ducere Suspiria.*] Is used for a spring of water, passing under ground towards a conduit or cistern. See *stat.* 35 *H.* 8. *c.* 10.

SUTHDURE, *Sax.*] The south door of a church; it was the place where canonical purgation was performed; that is, if the fact charged upon a person could not be proved by sufficient evidence, the party accused came to the south door of the church, and there, in the presence of the people, made oath, that he was innocent: And plaints, &c. were heard and determined at the *Suthdure*; for which reason large porches were anciently built at the south doors of churches. *Gervas. Dorob. de Reparation. Ecclesiæ Cantuar'*.

SWAN, *Cygnus.*] A noble bird of game; and a person may prescribe to have game of Swans within his manor, as well as a warren or park. 7 *Rep.* 17, 18. A Swan is a bird royal; and all white Swans not marked, which have gained their natural liberty, and are swimming in an open and common river, may be seized to the use of the King, by his prerogative: But a Subject may have a property in white Swans not marked; as any man may have such Swans in his private waters, and the property of them belongs to him, and not to the King; and if they escape out of his private waters, into an open and common river, he may retake them; though it is otherwise if they have gained their natural liberty, and swim in open rivers, without such pursuit. *Game Law*, *par.* 2. *p.* 152. Stealing Swans marked and pinioned, or unmarked, if kept in a mote, pond, or private river, and reduced to tameness, is said to be felony. *H. P. C.* 68. See title *Larceny* I. 1. And he that steals the eggs of Swans out of their nests, shall be imprisoned a year and a day, and be fined at the King's pleasure, *stat.* 11 *Hen.* 7. *c.* 17. No person may have a Swan-mark, except he have lands of the yearly value of five marks, and unless it be by grant of the King, or his officers lawfully authorised, or by prescription. *Stat.* 22 *E.* 4. *c.* 6.

No fowl can be a stray, but a Swan. 4 *Inst.* 280.

SWANHERD. The King's Swanherd, *magister deductus cygnorum*. *Pat.* 16 *R.* 2.

SWANIMOTE, or SWAINMOTE; See titles *Sweinmote*; *Forest*.

SWARF-MONEY, Is mentioned among customs and services: And this Swarf-money is one penny halfpenny, paid before the rising of the sun; the party must go three times about the cross, and say the Swarf-money, and then take witness and lay it in the hole; and he is to look well that his witness do not deceive him; for if it be not so paid, he shall pay a great forfeiture, *viz.* xxx s. and a white bull. This account was found in an old *MS.* containing the rents due to the *Catesbys* in *Ladbroke*, and other places in *Warwickshire*. It seems to be a corruption from *Warth-money*, and that again from *Gard-money*; money paid in lieu of the service of Castle guard.

SWATH, Sax. *swatha.*] A Swathe; or, as in *Kent*, a *Sweath*, and in some parts a Sworth; a strait row of cut grass or corn, as it lies after the scythe at the first mowing of it. *Paroch. Antiq.* 399.

SWEARING, *Imprecatio.*] Is an offence against God and religion, and a sin, of all others, the most extravagant and unaccountable, as having no benefit or advantage attending it. Several good laws and statutes have been made for punishing this crime: By *stat.* 21 *Jac.* 1. *c.* 20, it was enacted, that if any person shall profanely swear or curse in the presence of a Justice of Peace, or the same shall be proved before a Justice, he shall forfeit 1*s.* for every offence, to the use of the poor, to be levied by distress; and for want of a distress, the offender to be set in the stocks, &c. By the *stat.* 19 *Geo.* 2. *c.* 21, which repeals all former statutes, if any person shall profanely curse or swear, and be convicted by the oath of any one witness before any Justice of Peace, &c. he shall forfeit as follows, *viz.* Every day-labourer, common soldier, common sailor, and common seaman, 1*s.* (Sailors are also punishable for this offence by a Court-Martial.) Every other person under the degree of a gentleman, 2*s.* Every person of or above the degree of a gentleman, 5*s.* a second offence double, and every other offence treble. If the offence be committed in the hearing of a Magistrate,

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he may convict without further proof.* If the offence be committed in the hearing of a constable, if the offender be unknown to him, he shall secure him, and carry him before a Justice of Peace; but if the offender be known to the constable, he shall make information against him before a Justice of Peace.

On information, a Justice is to order the offender to appear, and if on conviction he do not pay or give security for the penalty, he shall be sent to the house of correction for ten days; or, being a common soldier or sailor, be set in the stocks. On default of duty, Justices to forfeit 5*l.* and constables 40*s.* All convictions are to be written on parchment, and returned to the next Sessions. The penalties to go to the poor of the parish, and the offender to pay all charges of conviction, or be committed to the house of correction for six days extraordinary. All prosecutions to be within eight days. This act to be read in all churches four times a-year, under the penalty of 5*l.* The Justice's clerk may take for the information, summons, and conviction, 1*s.* and no more. Each oath or curse being a distinct or complete offence, a person may incur any number of penalties in one day. 4 *Comm.* 60, *n.* Though the conviction cannot be removed by *certiorari*, yet an information will lie against a Magistrate *corruptly* convicting under it, without hearing the defendant's witnesses. *Burn. J.* title *Swearing.*—Conviction for swearing 100 oaths, *viz.* "*by G—,*" and 100 curses, *viz.* "*G— d—— you,*" is good, without repeating them 100 times in the conviction. 2 *Ld. Raym.* 1376: *Stra.* 608.

SWEARING THE PEACE; See tit. *Surety of the Peace.*

SWEEPAGE, The crop of hay got in a meadow, called also the Swepe in some parts of *England. Co. Litt. fol.* 4.

SWEETS, or Sweet Wines; Made in *Great Britain* for sale, are liable to a duty of excise, &c. See *Excise.*

SWEINMOTE, *Court of the Swains or Countrymen.* One of the Forest Courts; which is to be holden before the Verderors as Judges, by the Steward of the Sweinmote, thrice in every year, the swains and freeholders within the forest composing the Jury. The principal jurisdiction of this Court is, first, to inquire into the oppressions and grievances committed by the officers of the forest; and secondly, to receive and try presentments, certified from the Court of Attachments, against offenders in vert and venison. *Stat.* 34 *Ed.* 1. *st.* 5. *c.* 1. And this Court may not only inquire, but convict also; which conviction shall be certified to the Court of Justice-seat, under the seals of the Jury; for this Court cannot proceed to judgment. 4 *Inst.* 289. See title *Forest.*

SWINE, Shall not go unringed in woods, *stat.* 35 *H.* 8. *c.* 17. § 17. See titles *Hogs*; *London*; *Police.*

SWOLING OF LAND, *Solinga* vel *Swolinga Terræ*; Sax. *Sulung*, from *Sul, aratrum*, as to this day, in the west country, a plough is called a Sul.] So much land as one plough can till in a year. A hide of land; though some writers say it is an uncertain quantity.

SWORN BROTHERS, *Fratres Jurati.*] Persons who, by mutual oath, covenanted to share each other's fortune: Formerly, in any notable expedition, to invade and conquer an enemy's country, it was the custom for the more eminent soldiers to engage themselves, by reciprocal oaths, to share the reward of their service: So, in the expedition of *William* Duke of *Normandy* into *England*, *Robert de Oily*, and *Roger de Ivery*, were Sworn Brothers and copartners in the estate, which the Conqueror allotted them. *Paroch. Antiq.* 57. This practice gave occasion to our proverb of Sworn Brothers, or Brethren in Iniquity; because of their dividing plunder and spoil. See *Ward on the Law of Nations.*

SYLVA CÆDUA, Wood under twenty years growth: coppice-wood. *Stat.* 45 *E.* 3. *c.* 3. It is otherwise called in Law-french *subbois.* 2 *Inst. fol.* 642. See titles *Tithes*;

SYMBOLUM, A Symbol, or sign in the Sacrament; the Creed of the Apostles is often called by this name by our historians.

SYNDICUS, An advocate or patron; a burgess or recorder of a town, &c. *Matt. Paris, anno* 1245.

SYNGRAPH, *Syngraphus.*] A deed, bond, or writing, under the hand and seal of all the parties. See *Chirograph.*

SYNOD, *synodus.*] A meeting or assembly of ecclesiastical persons, concerning religion; being the same thing in *Greek*, as Convocation in *Latin*: Of Synods there are four kinds: 1st, A general or universal Synod or Council, where Bishops of all nations meet. 2dly, A national Synod, of the Clergy of one nation only. 3dly, A provincial Synod, where ecclesiastical persons of a province only assemble. 4thly, A diocesan Synod, of those of one diocese, &c. Our *Saxon* Kings usually called a Synod or mixed Council, consisting of ecclesiastics and the nobility, three times a-year; which is said to have been the same with our Parliament. See titles *King* V. 3, *ad fin*: *Convocation.*

SYNODICAL, *synodale.*] A tribute or payment in money, paid to the Bishop or Archdeacon, by the inferior Clergy, at *Easter* visitation; it is called *synodale* or *synodicum, quia in synodo frequentius dabatur. Right. Clerg.* 59. They are likewise termed *Synodies*, in the *stat.* 34 *H.* 8. *c.* 16. And sometimes *Synodale* is used for the Synod itself; and Synodals provincial, the canons or constitutions of a provincial Synod. *Stat.* 25 *Hen.* 8. *c.* 19.

SYNODALES TESTES, Synods-men; thence corrupted to *Sidesmen.*] Were the Urban and Rural Deans, whose office at first was to inform and attest the disorders of the Clergy and People, in the Episcopal Synod; and for which a solemn oath was given them to make their presentments. But when they sunk in this authority, the synodical witnesses were a sort of impanelled Grand Jury, composed of a priest and two or three laymen of every parish, for the informing of or presenting offenders: and at length two principal persons for each diocese were annually chosen; till, by degrees, this office of inquest and information was devolved upon the *Churchwardens.* (See that title.) *Paroch. Antiq.* 649.

T.

EVERY Person convict of any felony, save murder, and admitted to the benefit of his clergy, shall be marked with a T. upon the brawn of his thumb. *Stat.* 4 *H.* 7. *c.* 13. See title CLERGY, *Benefit of*, I.

TABACUM; See *Tobacco*.

TABARD, TABARDER; The bachelor scholars on the foundation of *Queen's* College, *Oxford*, are called Tabitars or Tabarders; and these scholars were named Tabiters, from a gown wore by them, called a Tabert, Tabarr, or Tabard: For *Verstegan* tells us, that Tabert anciently signified a short gown that reached not farther than the middle of the leg; and it remains for the name of such in *Germany* and other countries, which, with the *Teutonic* and *Saxon* Taber, signify all a kind of garment, &c.

TABARDUM, A garment like a gown; and used for an herald's coat, but generally taken for the gown of Ecclesiastics. *Matt. Paris* 164.

TABELLION, *Tabellio*.] A notary public. *Matt. Paris, anno* 1236.

TABLE-RENTS, *redditus ad mensam*.] Rents paid to Bishops, &c. reserved and appropriated to their Table or house-keeping. See *Bord-land*.

TABLING OF FINES; See title *Fine of Lands* I. 1.

TABULA; Vide *Ebdomadarius*.

TACFREE, Is used, in old charters, as an exemption from payments, &c.—*Cum housbold & haybold & tac-free de omnibus propriis porcis suis infra omnes metas de* C. that is, they paid nothing for their hogs running within that limit. *Blount*.

TACTARE, For *confirmare*. *Fleta, lib.* 2. *c.* 61.

TAIL; FEE-TAIL.

FEODUM TALLIATUM; from the Fr. *tailler* to cut; either because the heirs general are by this means cut off; or because this estate is a part *cut* out of the whole. See title *Tenures* III. 6.

An Estate in Fee-tail, is a limited Fee, as opposed to a Fee-simple: It is that inheritance whereof a man is seised *to him and the heirs of his body*, begotten or to be begotten; limited at the will of the donor. He that giveth lands in Tail, is called the *Donor*; and he to whom the gift is made, the *Donee*. *Litt.* § 18. Estates in Fee-tail are the (comparatively modern) offspring of the conditional Fees at Common Law. Before the statute *de donis*, if lands were given to a man and the heirs of his body, it was interpreted to be a Fee-simple presently by the gift, *upon condition* that he had issue; and if he had issue, the condition was supposed to be performed for three purposes, *viz.* to alien and disinherit the issue; and by the alienation to bar the donor or his heirs of all possibility of the reversion; to forfeit the estate for treason or felony; and to charge it with rent, &c. But, by the statute *de donis*, the will and intention of the donor is to be observed; as that the tenant in Tail shall not alien after issue had, or before, or forfeit or charge the lands longer than for his own life, &c. and the estate shall remain to the issue of the donee, or to the donor or his heirs, where there is no issue; so that whereas the donee had a Fee-simple before, now he has but an Estate-tail, and the donor a reversion in Fee expectant upon that Estate-tail. *Co. Litt.* 19. See *post*. III.

In this place, without further entering into the origin of these estates, (for which see title *Tenures*, above referred to,) we shall consider,

I. *What Things may or may not be entailed, under the Statute* De donis: *Westm.* 2. (13 *E.* 1. *st.* 1.) *c.* 1.

II. *The several* Species *of Estates Tail: And further, how they are respectively created.*

III. *The* Incidents *to an Estate-Tail: And the Effect of the various Statutes relating thereto.*

I. TENEMENTS is the only word used in the statute: and this *Coke* expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savour of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as rents, estovers, commons, and the like. 1 *Inst.* 19, 20. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed. 7 *Rep.* 33. But mere personal chattels, which savour not at all of the realty, cannot be directly entailed. Neither can an office, which merely relates to such personal chattels; nor an annuity, which charges only the person, and not the lands, of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a Fee conditional at Common Law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner. 1 *Inst.* 19, 20. An estate to a man and his heirs for another's life cannot be directly entailed: For this is strictly no estate of inheritance, and therefore not within the statute *de donis*. 2 *Vern.* 225. Neither can a copyhold estate be entailed by virtue of the statute; for that would tend to encroach upon and restrain the will of the Lord: But, by the special custom of the manor, a copyhold may be limited to the heirs of the body; for here the custom ascertains and interprets the Lord's will. 3 *Rep.* 8.

If a term for years, or any personal chattel, (except an *Annuity*, see that title, and title *Rents*,) be granted or devised by such words as would convey an Estate-tail in real property, the grantee or devisee has the entire and absolute interest, without having issue; and as soon as such interest is vested in any one, all subsequent limitations, of consequence, become null and void. 1 *Bro. C. R.* 274: 1 *Inst.* 20: *Fearne*. See *post*.

Two things seem essential to an entail, within the statute *de donis*. One requisite is, that the *subject* be land, or

or some other thing of a *real* nature. The other requisite is, that the *estate* in it be an inheritance. Therefore neither estates *pur autre vie* in lands, though limited to the grantee and his heirs during the life of *cestui qui vie*, nor *terms for years*, are entailable any more than personal chattels; because, as the latter, not being either interests in things real, or of inheritance, want both requisites; so the two former, though interests in things real, yet, not being also of inheritance, are deficient in one requisite.

However, estates *pur autre vie*, terms for years and personal chattels, may be so settled as to answer the purposes of an entail, and be rendered unalienable for almost as long a time, as if they were entailable in the strict sense of the word. Thus estates *pur autre vie* may be devised or limited in strict settlement, by way of remainder, like estates of inheritance; and such as have interests in the nature of Estates-tail may bar their issue, and all *remainders* over, by alienation of the estate *pur autre vie*, as those who are, strictly speaking, tenants in Tail may do by fine and recovery; but then the having of issue is not an essential preliminary to the power of alienation, in the case of an estate *pur autre vie*, limited to one and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed.

The manner of settling terms for years and personal chattels is different from the above; for in them no *Remainders* can be limited; but they may be entailed by *Executory Devise*, or by deed of trust, as effectually as estates of inheritance; if it is not attempted to render them unalienable beyond the duration of lives in being, and twenty-one years after, and perhaps, in the case of a posthumous child, a few months more: A limitation of time, not arbitrarily prescribed by our Courts of Justice, but wisely and reasonably adopted, in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder, as to postpone a complete bar of the entail by fine or recovery for a longer space. See titles *Executory Devise*; *Remainder*; *Limitation*.

It is also proper to observe, that in the case of terms of years and personal chattels, the very *vesting* of an interest, which in realty would be an Estate-tail, bars the issue and all the subsequent limitations as effectually as fine and recovery, in the case of estates entailable within the statute *de donis*, or a simple alienation in the case of conditional fees and estates *pur autre vie*; and further, that if the executory limitations of personalty are on contingencies too remote, the whole property is in the first taker.

Upon the whole, by a series of decisions, within the two last centuries, and after many struggles, in respect to personalty, it is at length settled, that every species of property is, *in substance*, equally capable of being settled in the way of *entails*, and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the entail is circumscribed *almost* as nearly within the same limits as the difference of property will allow.

As to the entail of estates *pur autre vie*, see 2 *Vern.* 184, [illegible]: 3 *P. Wms.* 262: 1 *Atk.* 524: 2 *Atk.* 259, 376: 3 *Atk.* [illegible] and 2 *Vef.* 681.—As to the entail of terms for [illegible] and personal chattels, see *Manning's case*, 8 *Co.* 94: *Lampett's case*, 10 *Co.* 46, *b*: *Child* v. *Baily*, *W. Jo.* 15: *Duke of Norfolk's case*, 3 *C. C.* 1.—See also *Carth.* 267: 1 *P. Wms.* 1. And, on the whole subject, *Fearne's Essay on Contingent Remainders and Executory Devises*: & 1 *Inst.* 20, *in n.*

II. Estates-tail are either general or special.

Tail-general is where lands and tenements are given to one, and the heirs of his body begotten: which is called Tail-general, because, how often soever such donee in Tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the Estate-tail, *per formam doni*. *Litt.* §§ 14, 15.

Tenant in Tail-special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways. One is, where lands and tenements are given to a man, and the heirs of his body, on *Mary* his now wife to be begotten: Here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called Special Tail. And here we may observe, that the words of inheritance (to him and his heirs) give him an estate in Fee; but they being heirs to be by him begotten, this makes it a Fee-tail; and the person being also limited, on whom such heirs shall be begotton, (viz. *Mary* his present wife,) this makes it a Fee-tail-special. See *Litt.* §§ 16, 27, 28, 29.

Estates, in general and special Tail, are farther diversified by the distinction of sexes in such entails; for both of them may either be in Tail-male or Tail-female. As if lands be given to a man, and his heirs male of his body begotten, this is an estate in *Tail-male-general*; but if to a man and the heirs female of his body on his present wife begotten, this is an estate in *Tail-female-special*. And, in case of an entail-male, the heirs female shall never inherit, nor any derived from them; nor *è converso*, the heirs male, in case of a gift in Tail-female. *Litt.* §§ 21, 22. Thus, if the donee in Tail-male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the Estate-tail; for he cannot deduce his descent wholly by heirs male. *Litt.* § 24. And as the heir-male must convey his descent wholly by males, so must the heir-female wholly by females. And therefore if a man hath two Estates-tail, the one in Tail-male, and the other in Tail-female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates: For he cannot convey his descent wholly either in the male or female line. 1 *Inst.* 25.

There are other Estates-tail within the equity of the statute; as if lands are given to a man and his heirs, males or females, of his body begotten; the issue male or female shall only inherit according to the limitation. By virtue of the statute, here the daughter may be heir by descent, though there be a son. But in the case of a purchase, Lord *Coke* says, there cannot be an heir-female where there is a son who is right heir at law. 1 *Inst.* 24, 164. But this doctrine is now disputed, if not over-ruled. See title *Heir* II. *ad fin.* And where there is no heir to take according to the gift, as when issue fails, the land shall revert to the donor, or descend to him that is to have it after the Estate-tail is spent. 1 *Inst.* 25.

As the word Heirs is necessary to create a fee, so in farther limitation of the strictness of the feodal donation, the

the word Body, or some other words of procreation, are necessary to make it a Fee-tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an Estate-tail. As, if the grant be to a man and his issue of his body, to a man and his seed, to a man and his children, or offspring; all these are only estates for life, there wanting the words of inheritance, *his heirs*. 1 *Inst*. 20. So, on the other hand, a gift to a man, and his heirs male, or female, is an estate in Fee-simple, and not in Fee-tail; for there are no words to ascertain the body out of which they shall issue. *Litt*. § 31: 1 *Inst*. 27. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an Estate-tail may be created by a devise to a man and his seed, or to a man and his heirs male; or by any words which shew an intention to restrain the inheritance to the descendants of the devisee. 1 *Inst*. 9, 27. See title *Will*.

Further, as to the effect of particular words in creating Estates-tail.

If lands are given to the husband and wife, and to the heirs of their bodies, both of them have an estate in special Tail; by reason of the word Heirs, for the inheritance is not limited to one more than the other: Where lands and tenements are given to a man and his wife, and to the heirs of the body of the man, the husband hath an estate in general Tail, and the wife an estate for life; as the word Heirs relates generally to the body of the husband: And if the estate is made to the husband and wife, and to the heirs of the body of the wife by the husband begotten; there the wife hath an estate in special Tail, and the husband for term of life only; because the word Heirs hath relation to the body of the wife, to be begotten by that particular husband: If an estate be limited to a man's heirs which he shall beget on his wife, it creates a special Tail in the husband; but the wife will be entitled to nothing, &c. *Litt*. § 26, 28: *Co. Litt*. 22, 26.

Lands given to a man and woman unmarried, and to the heirs of their bodies, will be an estate in special Tail; for they may marry. 1 *Inst*. 25: 10 *Rep*. 50. And though lands are given to a married man and another man's wife, and the heirs of their two bodies, it may be a good Estate-tail, for the possibility of their intermarrying. 15 *Hen*. 7.

A general Tail, and a special Tail, may not be created at one and the same time; if they are, the general, which is greater, will frustrate the special. 1 *Inst*. [illegible].

It is the word Body, or other words amounting to it, make the entail: And a gift to the heirs male, or heirs female, without any thing further, is a fee-simple estate, because it is not limited of what body: And hence a Corporation cannot be seised in Tail. 1 *Inst*. 13, 20, 27.

In a devise or last will, an Estate-tail may be created without the word Body; also begotten shall be supplied and necessarily intended. *Noy's Max*. 101: 1 *Inst*. 26. If one gives lands to a man and his issue, or children of his body, without the words, "his heirs," to convey the inheritance, he has but an estate for life: Though such words may be good enough to convey the inheritance in a will; as Estates-tail by devise are always more favoured in Law, than Estates-tail created by deeds. 1 *Inst*. 20.

The word Heirs is necessary to create an Estate-tail and inheritance by deed; and where an use was limited to *A. B.* and to his heirs male, lawfully to be begotten; these last words imply that it must be heirs male of his body, because no other heir male can inherit by virtue of his grant, but such who are lawfully begotten by the grantor. 7 *Rep*. 41. If a man makes a feoffment to the use of himself for life, remainder to the heirs male of his body, this is an Estate-tail executed in him; and so it is if he covenanted to stand seised in the same manner. 1 *Mod*. 159.

By a marriage settlement and fine levied, &c. to the use of the husband and wife, for their joint lives; remainder to the heirs of the body of the wife by the husband to be begotten, remainder (the wife surviving the husband) to her for life, remainder to the right heirs of the husband: This was held to be an Estate-tail, executed in the wife. *Raym*. 127: 3 *Salk*. 338. Land is conveyed to the use of a man and his wife for their lives, and after to their next issue male in Tail, then to the use of the husband and wife, and of the heirs of their bodies begotten, they having no male issue; by this conveyance, husband and wife are tenants in special Tail executed, and when they have issue male, they will be tenants for life, remainder to their son in Tail, the remainder to them in special Tail. 1 *Inst*. 28.

Where a person having an estate in fee, conveys it by lease and release to the use of himself for life, with remainder to trustees for their lives, and remainder to the heirs of his body; he hath an Estate-tail in him; but he is only tenant for life in possession: It would be otherwise if there had been no intermediate estate in the trustees for their lives. 2 *Ld. Raym*. 855.—A man seised of land in fee, makes a gift of it in Tail, or lease for life, remainder to the right heirs male of the body of the donor; this remainder, it is said, will be a fee-simple, and not an Estate-tail. *Dyer* 156. See title *Remainder*. If the gift or grant of the land be to *J. S.* and his heirs, to hold to him and the heirs of his body, &c. here he will have an estate in Tail, and a fee-simple upon it. *Lit*. *ch*. 2: 1 *Inst*. 21. Lands are given to two brothers, &c. and to the heirs of their bodies begotten; during their lives they shall have joint estates, so that the survivor will have all for his life; and, after their deaths, their heirs have estates in general Tail, by moieties in common one with another. 1 *Inst*. 25: 1 *Rep*. 140.

When a remainder is limited to two, and the heirs male of their bodies, they have not joint but several Estates-tail: And between baron and feme, it is said, several moieties may be of an Estate-tail, as well as of a fee-simple. *Cro. Eliz*. 220: *Moor* 228: 2 *Lil. Abr*. 551. A feoffment was made to the use of the feoffor for life, remainder to *W. R.* his son and his heirs; and for want of issue of him, remainder to the right heirs of the feoffor; adjudged, *W. R.* hath only an estate in Tail; for though the first words of the sentence, *viz*. to his son and his heirs, make a fee-simple, the subsequent words in the same sentence, *i. e.* and for want of issue of him, make an Estate-tail, by qualifying and abridging the same. 5 *Mod*. 266: 3 *Salk*. 337. See *Hetl*. 57: *Dyer* 334: and this Dict. title *Remainder*.

If a person gives land to *A.* for life, and after his death without issue, then to another person; though here is an express

express estate for life given to *A.* the subsequent words make an Estate-tail. But where lands are devised to *A.* during life, the remainder to trustees, remainder to his first son, *&c.* and if *A.* dies without issue, then, *&c.*; the limitation upon the devisee's death, it is said, will not give an estate in Tail to *A.* but it shall be here intended, that if he dies without having a son. 1 *P. Wms.* 605. A father, having two sons, devised his lands to his youngest son, and if he died without heirs, then to his eldest son and his heirs; the youngest son had an Estate-tail, because the devise to him, and if he died without heirs, is the same as if the testator had devised it in these words, *viz.* If he die without heirs of his body; for otherwise the remainder limited to the eldest son had been void, as the youngest son cannot die without heirs, so long as the eldest is living. 1 *Rol. Abr.* 836. See titles *Remainder*; *Executory Devise*.

In ejectment the case was, the father, having three sons, devised his lands to his second son, and his heirs for ever; and for want of such heirs, then to the right heirs of the father; then the father died, and his second son entered, and died without issue, living the eldest son: It was resolved, that the second son had but an Estate-tail, and that the devise over by these words, "and for want of such heirs," is void in point of limitation, for the testator's intent was that the lands should descend from himself, and not from his second son; and the words "want of such heirs" could import no other than want of issue, *&c.* so that the eldest son takes by descent in this case, and not by the will. 1 *Salk.* 233. See title *Executory Devise*.

A person devised land to his wife for life, remainder to his son, and his heirs for ever; and if he died without heirs, the same to remain to his two daughters: In this case it was held in Equity, that the rule is, where a remainder over is to one, who may be the devisee's heir at Law, such limitation will be good, and the first construed an Estate-tail; for the generality of the word Heirs shall be restrained to heirs of the body, since the testator could not but know that the devisee would not die without an heir, while the remainder-man, or any of his issue, continued: But where the second limitation is to a stranger, it is merely void, and the first is a fee-simple. *Talbot's Chan. Cas.* 2. See title *Remainder*.

There is also another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in Law; which are estates *in libero maritagio*, or Frank-marriage. These are defined to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage. *Litt.* § 17. Now by such gift, though nothing but the word Frankmarriage is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special Tail. For this one word, Frankmarriage, does *ex vi termini* not only create an inheritance, like the word Frankalmoign, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frankmarriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee. *Litt.* §§ 19, 20. See title *Frank-marriage*.

III. The Incidents to a Tenancy in Tail, under the *stat. Westm.* 2, are chiefly these. 1. That a tenant in Tail may commit waste on the Estate-tail, by felling timber, pulling down houses, or the like, without being impeached or called to account for the same. 2. That the wife of the tenant in Tail shall have her dower, or thirds, of the Estate-tail. 3. That the husband of a female tenant in Tail may be tenant by the curtesy of the Estate-tail. 4. That an Estate-tail may be barred, or destroyed by a Fine, by a Common Recovery, or by lineal warranty descending with assets to the heir. 1 *Inst.* 224: 10 *Rep.* 38.

The establishment of this Family Law (as the statute *de donis* is properly styled by *Pigott*) has occasioned, from time to time, infinite difficulties and disputes. Children grew disobedient when they knew they could not be set aside: Farmers were ousted of their leases made by tenants in Tail; for, if such leases had been valid, then, under colour of long leases, the issue might have been virtually disinherited: Creditors were defrauded of their debts; for, if tenant in Tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: Innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full: And treasons were encouraged; as Estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions, and mischiefs unknown to the Common Law; and almost universally considered as the common grievance of the realm. *Co. Litt.* 19: *Moor* 156: 10 *Rep.* 38. But as the Nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the Legislature; and therefore, by the connivance of an active and politic Prince, a method was devised to evade it. 2 *Comm. c.* 7.

About two hundred years intervened between the making of the statute *de donis*, and the application of common recoveries to this intent, in the twelfth year of *Edward* IV.; which were then openly declared by the Judges to be a sufficient bar of an Estate-tail. 1 *Rep.* 131: 6 *Rep.* 40. For though the Courts had, so long before as the reign of *Edward* III., very frequently hinted their opinion that a bar might be effected upon these principles, yet it never was carried into execution; till *Edward* IV., observing (in the disputes between the Houses of *York* and *Lancaster*) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered *Taltarum's* case to be brought before the Court; wherein, in consequence of the principles then laid down, it was in effect determined, that a Common Recovery suffered by tenant in Tail should be an effectual destruction thereof. *Year-Book*, 12 *Edw.* 4. 14, 19: *Fitz. Abr.* tit. *Faux Recov.*: 20 *Bro. Abr.*; *Ibid.* 30; tit. *Recov. in Value*, 19; tit. *Taile*, 36. See further, this Dictionary, titles *Recovery*; *Fine of Lands*.

This expedient having greatly abridged Estates-tail, with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by Recoveries,

Recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious Prince then reigning, finding them frequently re-settled in a similar manner to suit the convenience of families, had address enough to procure a statute, (*stat.* 26 *H.* 8. *c.* 13,) whereby all estates of inheritance (under which general words Estates-tail were covertly included) are declared to be forfeited to the King upon any conviction of High Treason. 2 *Comm* *c.* 7.

The next attack which they suffered in order of time, was by *stat.* 32 *Hen.* 8. *c.* 28, whereby certain leases made by Tenants in Tail, which do not tend to the prejudice of the issue, were allowed to be good in Law, and to bind the issue in Tail. See title *Lease* II. But they received a more violent blow, in the same session of Parliament, by the construction put upon the statute of Fines, (4 *H.* 7. *c.* 24,) by *stat.* 32 *Hen.* 8. *c.* 36; which declares a fine duly levied by Tenant in Tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable to the intention of *Henry* VII. whose policy it was (before Common Recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his Nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the Judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving Fines so extensive a power by mere implication, when the statute *De Donis* had expresly declared, that they should *not* be a bar to Estates-tail. But the statute of *Henry* 8, when the doctrine of alienation was better received, and the will of the Prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the Crown from any danger of infringement, all Estates-tail created by the Crown, and of which the Crown has the reversion, are excepted out of this statute. And the same was done with regard to Common Recoveries, by *stat.* 34 & 35 *Hen.* 8. *c.* 20, which enacts, that no feigned Recovery had against Tenants in Tail, where the estate was created by the Crown, and the remainder or reversion continues still in the Crown, shall be of any force and effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary Estates-tail, where the royal prerogative is not concerned. 1 *Inst.* 372: 2 *Comm.* *c.* 7.

Lastly, by *stat.* 33 *H.* 8. *c.* 39. § 75, all Estates-tail are rendered liable to be charged for payment of debts due to the King by record or special contract; as since, by the Bankrupt Laws, they are also subjected to be sold for the debts contracted by a bankrupt. See *stat.* 21 *Jac.* 1. *c.* 19; and this Dict. title *Bankrupt*. And, by the construction put on the *stat.* 43 *Eliz.* *c.* 4, an appointment by Tenant in Tail of the lands entailed, to a charitable use, is good; without Fine or Recovery. See title *Charitable Uses*.

Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at Common Law, after the condition was performed, by the birth of issue. For, first, the Tenant in Tail is now enabled to alien his lands and tenements by Fine, by Recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the Crown: Secondly, he is now liable to forfeit them for High Treason: And, lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the Crown on specialties, or have been contracted with his Fellow-subjects in a course of extensive commerce. 2 *Comm.* *c.* 7.

An Estate-tail cannot merge by the accession of the fee-simple to it: But it has been adjudged, that two fees immediately expectant upon one another, (as where a man is Tenant in Tail, and remainder in fee to the Tenant in Tail,) cannot subsist in the same person; and the statute *De Donis* having made Estates-tail a kind of particular estates, they must, like all other such estates, be subject to merger and extinguishment, when united with the absolute fee. 8 *Rep.* 74: 1 *Salk.* 338. If there be Tenant in Tail, remainder in Tail, and Tenant in Tail enfeoffs the reversioner in fee, it is a discontinuance: And Tenants in Tail can make no greater estate than for their own lives, unless it be by lease, &c. according to the *stat.* 32 *H.* 8. *c.* 28: 1 *Rep.* 140.

If Tenant in Tail bargain and sell lands to another and his heirs, or make a lease and release to the use of himself for life, with remainder over to another, &c. these estates may be avoided by entry of the issue in Tail. 7 *Mod.* 23, 28. Estates-tail are usually created upon settlements: Though an agreement to entail is no entail; for no agreement shall bind the issue in Tail, where there is a first entail, without a Fine. *Ch. Rep.* 236.

Tail after Possibility of Issue extinct, Is where lands and tenements are given to a man and his wife in Special Tail, and either of them dies without issue had between them, the survivor hath an estate in Tail after possibility of issue, &c. Also if they have issue, and the issue dies without issue, whereby there is none left who may inherit by force of the entail, the survivor of the donees hath an Estate-tail after possibility. *Litt.* § 32. The estate of this tenant must be created by the act of God, *viz.* by the death of either party without issue; none can have this estate but one of the donees, or a donee in Special Tail; for a donee in General Tail may by possibility have issue. *Litt.* § 32: 1 *Inst.* 28: 11 *Rep.* 80. And if one gives lands to a man and his wife, and the heirs of their two bodies in Special Tail, and they live till each of them are 100 years old, and have no issue, yet doth the Law see no impossibility of having children, and they continue Tenants in Tail: But if the wife die without issue, there the Law seeth an apparent impossibility. 1 *Inst.* 28. See this Dict. title *Tenures* III. 7.

This estate is considered, by *Blackstone*, as an estate for life of the legal kind, contradistinguished from such as are conventional. See this Dict. title *Life-Estates*. *Blackstone* also shews the propriety of the long *periphrasis* which the Law makes use of, as absolutely necessary to give an adequate idea of the nature of this estate. 2 *Comm.* *c.* 8. *p.* 124.

This estate is, by the learned Commentator, said to be of an amphibious nature, partaking partly of an Estate-tail, and partly of an Estate for Life. The Tenant is in truth only Tenant for Life, but with many of the privileges

of a Tenant in Tail; or he is Tenant in Tail, with many of the restrictions of a Tenant for Life; as to forfeit his estate if he aliens it in fee-simple; whereas such alienation by Tenant in Tail, though voidable by the issue, is no forfeiture of the estate to the reversioner, who is not concerned in interest till all possibility of issue be extinct. But, in general, the Law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made of estates that are equal in their nature. See title *Exchange of Lands*. And although, like Tenant in Tail, he is not punishable for waste if he cut down trees, yet they are not his property, but will belong to the first person living at the time when they are cut, who has an estate of inheritance. See title *Waste*. 2 *Comm*. c. 8. & *n*. See also 1 *Inst*. 27, 28, and the notes there; and 2 *P. Wms*. 240.

TAINT; See *Attaint*.

TAKING, *felonious* or *unlawful*; See titles *Felony*; *Fraud*; *Larceny*.

TALE; See *Count*; *Declaration*; *Pleading*.

TALENT, A weight of 62 pounds; also a sum of money among the *Greeks*, of about 100*l*. value. *Merch. Dict*.

TALES, *Lat*.] A supply in case of a jury not appearing, or challenged as not indifferent, &c. of one or more *such* persons present in Court as are equal in reputation to those that were impanelled, in order to make up a full jury. See title *Jury*.

TALES, The name of the book in the King's Bench Office, of *such* persons as are admitted of the *Tales*. 4 *Inst*. 93.

TALLAGE, *Tallagium*, from the Fr. *Taille*.] Is metaphorically used for a part or a share of a man's substance, carved out of the whole, paid by way of tribute, toll, or tax. *Stat. de Tallagio non concedendo temp. Edw*. I: *Stow's Ann*. 445. And, according to Sir *Edw. Coke*, Tallage is a general word for all taxes. See title *Taxes*. 2 *Inst*. 532.

TALLAGERS, Tax or toll gatherers mentioned by *Chaucer*.

TALLAGIUM FACERE, To give up accounts in the Exchequer, where the method of accounting was by Talleys. *Mem. in Scacc. Mich*. 6 *Edw*. 1.

TALLEY, *Tallea*; Fr. *Taille*; Ital. *Tagliare*, i. e. *Scindere*.] A stick cut in two parts, on each whereof is marked, with notches or otherwise, what is due between debtor and creditor; as now used by brewers, &c. And this was the ancient way of keeping all accounts, one part being kept by the creditor, the other by the debtor, &c. Hence the Tallier of the Exchequer, whom we now call the Teller. There were two kinds of Tallies formerly used in the Exchequer; the one termed Tallies of Debt, which were in the nature of an acquittance for debts paid to the King, on the payment whereof these Tallies were delivered to the debtors, who, carrying them to the Clerk of the Pipe-office, had there an acquittance in parchment for their full discharge. *Stat*. 1 *R*. 2. *c*. 5. The other, Tallies of Reward or Allowance, being made to Sheriffs of counties, as a recompence for such matters as they had performed to their charge, or such money as was cast upon them in their accounts of course, but not leviable, &c. *Stats*. 27 *H*. 8. *c*. 11: 33 & 34 *H*. 8: 2 & 3 *Ed*. 6. *c*. 4. These Tallies are now abolished by *stat*. 23 *Geo*. 3. *c*. 82; which see under title *Exchequer*.

TALLOW is subject to certain duties and regulations on importation and exportation, by various statutes. See title *Navigation Acts*.

TALLYMAN, A person that sells or lets goods, clothes, &c. to be paid by so much a week. *Merch. Dict*.

TALWOOD, *Talliatura*.] Fire-wood cleft and cut into billets of a certain length; otherwise written Talgwood, and Talshide, in the ancient *stats*. 34 & 35 *H*. 8. *c*. 3: 7 *Ed*. 6. *c*. 7: 43 *Eliz*. *c*. 14.

TAM QUAM; See titles ACTIONS, *Popular*; *Information*.

TANGIER, An ancient city of *Barbary*, formerly part of the dominions of the Crown of *England*, as *Gibraltar* is at present; mentioned in the *stat*. 15 *Car*. 2. *c*. 7. *Tangier* deemed not to be a Plantation, *stat*. 22 & 23 *Car*. 2. *c*. 26.

TANISTRY Seems to be derived from *Thanis*; and is a law or custom in some parts of *Ireland*; on which see *Dav. Rep*. 28: *Antiq. Hibern*. *p*. 38: 1 *Inst*: and this Dict. title *Gavelkind*, *ad fin*.

TANNARE, To dress or tan leather. *Plac. Parl*. 18 *Edw*. 1.

TANNERS. No person shall tan leather unless he hath been an apprentice for seven years with a Tanner, or he be the son of a Tanner, &c. on pain of forfeiting the leather tanned, or the value. *Stat*. 1 *Jac*. 1. *c*. 22.—Tanners over-liming hides, or using in tanning any thing but oak bark, ash-bark, culver-dung, &c. incur a forfeiture of the leather; and hastening the tanning of the leather by unkind heats, &c. are liable to a penalty of 10*l*. and to stand in the pillory. Hides for sole-leather are to lie in the wooze twelve months, and upper-leather nine months, or shall be forfeited, &c. *Stat. ibid*. Tanners shall not shave their hides, 13 & 14 *Car*. 2. *c*. 7.

By *stat*. 9 *Ann*. *c*. 11, it is ordained that collar makers, glovers, bridle-cutters, and others who dress skins in allum, &c. and cut the same into wares, shall be accounted Tawers, and subject to the penalties for frauds and concealments relating to the duty on *Leather*. See that title.

TAR; See *Pitch*; *Stores*.

TARE AND TRET. The first is an allowance in merchandise, made the buyer for the weight of the box, bag, or cask, wherein goods are packed; and the last is a consideration in the weight, for waste in emptying and re-selling the goods, by dust, dirt, breaking, &c. *Book Rates*.

TARGET, From Lat. *Targus*.] A shield, originally made of leather, wrought out of the back of an ox. *Blount*.

TARGIA, *Tarida*.] Was a ship of burden, since called a Tartan, and Tarita. *Knighton*, *anno* 1385.

TARIFF. Custom, duties, toll, or tribute, payable upon merchandise exported and imported, are so called. See title *Customs on Merchandise*.

TARTARON, A sort of fine cloth or silk. *Stat. Antiq*. 4 *Hen*. 8. *c*. 6.

TAS, *Fr*.] A Cock, heap, stack, or rick of hay or corn. *Law Fr. Dict*.

TASSALE, for *Casula*, A priest's garment covering him over.

TASSUM, A mow of corn or hay, from the Fr. *Tasser*, to pile up. *Tasser*, to mow, or heap up; *ad tassum furcare*, to pitch to the mow. *Rot. Hill.* 25 *Edw.* 3.

TATH. In the counties of *Norfolk* and *Suffolk*, the Lords of Manors claimed the privilege of having their tenants' flocks or sheep brought at night upon their own demesne lands, there to be folded for the improvement of the ground; which liberty was called by the name of Tath. *Spelm.*

TAVERN; See titles *Inns*; *Drunkenness.*

TAU, By *Seldon* in his notes upon *Eadmerus*, signifies a cross. *Mon. Angl.* iii. 121.

TAURI LIBERI LIBERTAS, In ancient charters, is used for a common bull; so called, because he is free and common to all the tenants within such a manor or liberty, &c.

TAWERS; See *Tanners.*

TAXES.

TAX, *Taxa*, from the Gr. Τάξις, i. e. *Ordo, Tributum.*] A tribute or imposition laid upon the Subject, which being certainly and orderly rated, was wont to be yearly paid into the King's Exchequer. It differs from what is commonly called a Subsidy, in this, That it is always certain as it is set down in the Exchequer-book, and levied in general of every town, and not particularly of every man, &c. See *Rastall's Abridgment*, titles *Taxes*; *Tenths*; *Fifteenths*; *Subsidies*, &c. and 4 *Inst.* 26, 33.

A Tax may now be defined to be a certain aid, subsidy, or supply, granted by the Commons of *Great Britain* in Parliament assembled; constituting the King's Extraordinary Revenue, and paid yearly towards the expences of Government. 1 *Comm. c.* 8: See *Highmore on Excise, Introd.* § 2.

It is said, that in ancient times, Taxes were imposed by the King at his pleasure; but King *Edw.* I. bound himself and his successors, in the 25th year of his reign, that from that time forward no Tax should be laid upon the Subject, without the assent of the Lords and Commons in Parliament. *Stat.* 25 *Ed.* 1. *c.* 5, 6: See title *Liberty*. But although Taxes, which are for the defence of the Realm, cannot be imposed but by Act of Parliament; yet the Crown has a right to ask them upon any emergency, and therefore it is held they have a virtual existence always, though no actual one. *Dict.*

The Revenue, which must defray not only the expence of defending a Society, and of supporting the dignity of its Chief Magistrate, but also all the other necessary expences of Government, for which the Constitution of the State has not provided any particular Revenue, may be drawn either, first, from some fund which peculiarly belongs to the Sovereign or Commonwealth, and which is independent of the Revenue of the People; or, secondly, from the Revenue of the People. *Smith's Wealth of Nations*, iii. 241.

The resources, arising from public stock and public lands, being insufficient for these purposes, in any great and civilised State, it remains that this expence must, the greater part of it, be defrayed by Taxes, of one kind or another: The People contributing a part of their own private Revenue in order to make up a public Revenue. *Ibid.* 254.

The expence of Government to the individuals of a great nation, is like the expence of management to the joint-tenants of a great estate, who are all obliged to contribute in proportion to their respective interests. For it is certain, that there can be no State whatsoever, subject to the government of many, or of one, without Taxes: For, though we should suppose it content with the power it possesses, and without endeavouring to acquire more, it is impossible but that, from time to time, it must have outrages to revenge; discontents to repress: And the innumerable necessities, arising within itself, must indispensably incur regular expences, sometimes greater, sometimes less. See *Highmore on Excise, Introd.* § 1.

The nature of the King's *ordinary Revenue*, as also something respecting the origin and application of that which *Blackstone* terms his *extraordinary* Revenue, particularly as relates to the Civil List, has been laid before the Reader under title *King*, V. 4. Some further particulars, as to the latter, apply to the subject now under consideration.

The Taxes which are raised upon the Subject, are either *annual* or *perpetual.*—The usual *annual* Taxes are those on *Land* and *Malt*: The *perpetual* Taxes consist of the *Customs*, paid immediately by the merchant. The *Excise* duties, paid sometimes upon the consumption, and frequently upon the retail sale, which is the last stage before the consumption—the duties on *Salt*—on the *Postage* of *Letters*—on *Stamps*—*Houses* and *Windows*—*Licenses* to *Hackney Coaches* and *Chairs*, in *London* and the parts adjacent—to *Hawkers* and *Pedlars*—duties on *Offices* and *Pensions*—on *Servants*—*Horses*—*Coaches*—*Dogs*, and a great variety of other articles: Many of these Taxes seem to be termed *perpetual*, as being granted for no limited time: But they are, from time to time, altered and enlarged; and some, formerly imposed, have been repealed.—Many of the late imposed Taxes are under the control of the Commissioners of *Excise* and *Stamps*; the Law relating to which branches of the Revenue, as well as that concerning the *Customs*, might well form separate Volumes; not very easy to be compiled, or well understood.

Some of these Taxes are termed *Assessed Taxes*: under which denomination the *Land-Tax* is generally included; that being raised by an assessment: But in strictness, Assessed Taxes are those which are under the management of the Commissioners for the affairs of Taxes; and these at present are the duties on *Houses* and *Windows*; *Waggons, Carts, Coaches* and other carriages; *Servants, Horses*, and *Dogs*.

The several amounts of all these Taxes, and the Acts of Parliament by which they are imposed, it would be next to useless to state in a work of this nature; since they are continually varying with almost every Session of Parliament: A fact exemplified very fully in the course of printing this Work, and by which the particulars stated, as to some of those Taxes, under former titles, are now become erroneous. The general principle of these Taxes may be seen, however, by the references to the several titles *Customs*; *Excise*, &c. &c. And some few further particulars, of a national or historical nature, shall also be stated under the present Head.

The Revenue, arising from these Taxes, and which has been rapidly increasing for a series of years, may be

ſtated at preſent, in round numbers, at *Twenty Millions* ſterling; after all charges of collection and management paid. The average expence of collecting the whole Revenue, is computed by *Sir J Sinclair*, at 7½ *per cent.* and of that of the Exciſe, at 5½ *per cent.*; which is leſs than any other branch of the Revenue. Of this Revenue, the Land and Malt Tax produce from 2,500,000*l.* to 3,000,000*l.*—The whole Revenue is firſt depoſited in the Exchequer, and is thence iſſued out to the reſpective Officers for payment: The chief purpoſe to which it is applied, being the payment of the Intereſt of the National Debt; and the fund for decreaſing that Debt; beſides the Civil Liſt of the Crown; and other National charges, annually accounted for to Parliament, at what is commonly called the *opening of the Budget*: That is the ſtatement of the National Revenue and Expenditure, by the Chancellor of the Exchequer, who, at the ſame time, calls for a Supply, if neceſſary.

When the *Houſe of Commons* have voted a Supply to his Majeſty, and ſettled the *quantum* of that Supply, they uſually reſolve themſelves into a Committee of Ways and Means, to conſider the ways of raiſing, and the means for paying the intereſt, of the Supply ſo voted. And in this Committee every Member (though it is looked upon as the peculiar province of the Chancellor of the Exchequer) may propoſe ſuch ſcheme of Taxation as he thinks will be leaſt detrimental to the Public. The reſolutions of this Committee, when approved by a Vote of the Houſe, are in general eſteemed to be (as it were) final and concluſive. For though the Supply cannot be actually raiſed upon the Subject, till directed by an Act of the whole Parliament; yet no monied man will ſcruple to advance to the Government, any quantity of ready caſh, on the credit of a bare Vote of the Houſe of Commons, though no Law be yet paſſed to eſtabliſh it. 1 *Comm. c.* 8. *p.* 307, 8.

The reſpective produces of the Taxes before noticed, were originally ſeparate and diſtinct funds; being ſecurities for the ſums advanced on each ſeveral Tax, and for them only. But at laſt it became neceſſary, in order to avoid confuſion, as they multiplied yearly, to reduce the number of theſe ſeparate funds, by uniting and blending them together; ſuperadding the faith of Parliament for the general ſecurity of the whole. They were therefore reduced to three capital funds:—*The Aggregate Fund, The General Fund*, ſo called from ſuch union and addition; and *The South Sea Fund*, being the produce of the Taxes appropriated to pay the Intereſt of ſuch part of the National Debt as was advanced by that Company and its Annuitants. All theſe are now united together in *The Conſolidated Fund*, eſtabliſhed by *ſtat.* 27 *Geo* 3. *c.* 13. § 47, *&c.* The ſeparate Funds, thus united, are become mutual ſecurities for each other, and the whole produce of them, thus aggregated and conſolidated, is liable to pay ſuch intereſt or annuities as were formerly charged upon each different fund: the faith of the Legiſlature being moreover engaged to ſupply any caſual deficiency; and though ſome of the Taxes may have, now and then, proved leſs productive than was expected, the ſum total has generally been more than ſufficient to anſwer the charges upon them: and the ſurplus, in conſequence, formed the *Sinking Fund*, originally deſtined to ſink and lower the National Debt: and now enlarged and ſecured, by the proviſions of *ſtat.* 26 *Geo.* 3. *c.* 31, and other ſtatutes. See this Dictionary, title *National Debt*.

The Conſolidated Fund, above mentioned, ſtands mortgaged by Parliament, to raiſe an annual ſum for the maintenance of the King's Houſehold and Civil Liſt. For this purpoſe, in the late Reigns, the produce of certain branches of the Exciſe and Cuſtoms, the Poſt Office, the duties on Wine Licences, the Revenues of the remaining Crown Lands, the Profits ariſing from Courts of Juſtice, (which articles include all the hereditary Revenues of the Crown,) and alſo a clear Annuity of 120,000*l.* were ſettled on the King for life, for the ſupport of his Houſehold and the honour and dignity of his Crown. And as the amount of theſe ſeveral branches was uncertain, (though in the laſt Reign they ſometimes raiſed almoſt one million,) if they did not ariſe annually to 800,000*l.* the Parliament engaged to make up the deficiency. But King *George* III., having, ſoon after his acceſſion, ſpontaneouſly ſignified his conſent, that his own hereditary Revenue might be ſo diſpoſed of as might beſt conduce to the utility and ſatisfaction of the Public, and graciouſly accepted of the limited ſum of 800,000*l.* *per ann.* for the ſupport of his Civil Liſt, the ſaid hereditary and other Revenues were carried into, and made a part of the Aggregate Fund, and afterwards of the Conſolitated Fund, which is charged with the payment of the whole Annuity to the Crown.

This ſum being found inſufficient, application was, from time to time, made to Parliament to diſcharge debts contracted on the Civil Liſt: And, at length, the annual amount was increaſed to 900,000*l.* by *ſtat.* 17 *Geo.* 3. *c.* 21. See further, this Dict. title *King* V. 4.

To ſtate ſomething further, in addition to what has been ſaid under title *Land-tax*, and other titles in this Work, on the ſubject of ſome of theſe Taxes, conſidered individually:

The LAND-TAX, in its modern ſhape, has ſuperſeded all the former methods of rating either property, or perſons in reſpect of their property; whether by *tenths*, or *fifteenths*, *ſubſidies* on land, *hydages*, *ſcutages*, or *talliages*: A ſhort explanation of which, however, (extracted from 1 *Comm c.* 8,) will greatly aſſiſt the Student in underſtanding our ancient Laws and Hiſtory.

Tenths, and *Fifteenths* were temporary aids iſſuing out of perſonal property, and granted to the King by Parliament. 2 *Inſt.* 77: 4 *Inſt.* 34. They were formerly the real tenth or fifteenth part of all the moveables belonging to the Subject; when ſuch moveables, or perſonal eſtates, were a very different and a much leſs conſiderable thing than what they uſually are at this day. Tenths are ſaid to have been firſt granted under *Henry* II., who took advantage of the faſhionable zeal for Croiſades to introduce this new taxation, in order to defray the expence of an expedition to *Paleſtine*; which he really, or ſeemingly, had projected againſt *Saladine*, Emperor of the *Saracens*; whence it was originally denominated the *Saladine* Tenth. *Hoved. A. D.* 1188: *Carte*, i. 719: *Hume*, i. 329. But afterwards Fifteenths were more uſually granted than Tenths. Originally the amount of theſe Taxes was uncertain, being levied by aſſeſſments newly made at every freſh grant of the Commons; a commiſſion for which is preſerved by *Matthew Paris*. (*A. D.* 1232.) But it was at length reduced to a certainty, in the eighth year

year of *Edward* III.; when, by virtue of the King's commission, new taxations were made of every township, borough, and city in the kingdom, and recorded in the Exchequer; which rate was, at the time, the fifteenth part of the value of every township; the whole amounting to about 29,000*l.* and therefore it still kept up the name of a Fifteenth, when, by the alteration of the value of money, and the increase of personal property, things came to be in a very different situation. So that, when, of later years, the Commons granted the King a Fifteenth, every parish in *England* immediately knew their proportion of it; that is, the same identical sum that was assessed by the same aid in the eighth of *Edward* III.; and then raised it by a rate among themselves, and returned it into the royal Exchequer.

The other ancient levies were in the nature of a modern Land-tax: For we may trace up the original of that charge as high as to the introduction of our military tenures; when every Tenant of a Knight's fee was bound, if called upon, to attend the King in his army for forty days in every year. But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it, by first sending others in their stead, and, in process of time, by making a pecuniary satisfaction to the Crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every Knight's fee, under the name of *Scutages*; which appear to have been levied for the first time in the fifth year of *Henry* II., on account of his expedition to *Toulouse*; and were then, it seems, mere arbitrary compositions, as the King and the Subject could agree. But this precedent being afterwards abused into a means of oppression, (in levying scutages on the landholders by the royal authority only, whenever our Kings went to war, in order to hire mercenary troops and pay their contingent expences,) it became thereupon a matter of national complaint; and King *John* was obliged to promise in his *Magna Carta*, that no scutage should be imposed, without the consent of the Common Council of the Realm. This clause was indeed omitted in the Charters of *Henry* III., where we only find it stipulated, that scutages should be taken as they were used to be in the time of King *Henry* II. (*c.* 37.) Yet afterwards, by a variety of statutes under *Edward* I., and his grandson, it was provided, that the King shall not take any aids or tasks, any talliage or Tax, but by the common assent of the great men and Commons in Parliament. See title *Liberty*.

Of the same nature with scutages upon Knights-fees were the assessments of *Hydage* upon all other lands, and of *Talliage* upon cities and burghs. *Madox. Hist. Exch.* 480.—But they all gradually fell into disuse upon the introduction of *Subsidies*, about the time of King *Richard* II. and King *Henry* IV. These were a Tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4*s.* in the pound for lands, and 2*s.* 8*d.* for goods; and for those of aliens in a double proportion. But this assessment was also made according to an ancient valuation; wherein the computation was so very moderate, and the rental of the kingdom was supposed to be so exceeding low, that one Subsidy of this sort did not, according to *Coke*, amount to more than 70,000*l.*: 4 *Inst.* 33: Whereas a modern Land-tax, at the same rate, produces two millions. It was anciently the rule never to grant more than one Subsidy and two Fifteenths at a time: But this rule was broken through for the first time on a very pressing occasion, the *Spanish* Invasion in 1588; when the Parliament gave Queen *Elizabeth* two Subsidies and four Fifteenths. Afterwards, as money sunk in value, more Subsidies were given; and we have an instance in the first Parliament of 1640, of the King's desiring twelve Subsidies of the Commons, to be levied in three years.

The grant of Scutages, Talliages, or Subsidies by the Commons did not extend to spiritual preferments; those being usually taxed at the same time by the Clergy themselves in Convocation; which grants of the Clergy were confirmed in Parliament, otherwise they were illegal, and not binding. A Subsidy granted by the Clergy was after the rate of 4*s.* in the pound according to the valuation of their livings in the King's books; and amounted, as *Coke* states, to about 20,000*l.* 4 *Inst.* 33. While this custom continued, Convocations were wont to sit as frequently as Parliaments; but the last Subsidies, thus given by the Clergy, were those confirmed by *stat.* 15 *Car.* 2. *c.* 10; since which another method of Taxation has generally prevailed, which takes in the Clergy as well as the Laity: In recompence for which the beneficed Clergy have from that period been allowed to vote at the election of Knights of the Shire; and thenceforward also the practice of giving ecclesiastical subsidies hath fallen into total disuse. *Dalt. of Sheriffs*, 418: *Gilb. Hist. Exch. c.* 4.

The Lay Subsidy was usually raised by Commissioners appointed by the Crown, or the great officers of State; and therefore, in the beginning of the civil wars between *Charles* I. and his Parliament, the latter having no other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly assessments of a specific sum upon the several counties of the kingdom; to be levied by a pound rate on lands and personal estates; which were occasionally continued during the whole Usurpation, sometimes at the rate of 120,000*l.* a month, sometimes at inferior rates. After the Restoration, the ancient method of granting Subsidies, instead of such monthly assessments, was, as it seems once, and once only, renewed; *viz.* in 1663, when four Subsidies were granted by the Temporalty, and four by the Clergy; which was, in fact, the last time of raising supplies in that manner. For the monthly assessments being now established by custom, being raised by Commissioners named by Parliament, and producing a more certain revenue; from that time forwards we hear no more of Subsidies, but occasional assessments were granted as the national emergencies required. These periodical assessments, the Subsidies which preceded them, and the more ancient Scutage, Hydage, and Talliage, were to all intents and purposes a Land tax: and the assessments were sometimes expresly called so. Though a popular opinion has prevailed, that the Land-tax was first introduced in the reign of King *William* III. See title *Land tax*.

The learned Commentator is of opinion, that the last time of raising Supplies by way of Subsidy was in 1670; and he seems to have been misled by the title of *stat.* 22 & 23 *C.* 2. *c.* 3, *viz.* "An act to grant *A Subsidy* to his Majesty for supply of his extraordinary occasions."

But

But although among a great variety of other Taxes, 1*s.* in the pound is to be raised upon land, yet the mode of collecting it is totally different from the former subsidy assessment; it is to be levied by exactly the same plan and arrangement as were afterwards adopted in *stat.* 4 *W.* & *M. c.* 1. All the material clauses in *stat.* 22 & 23 *C.* 2. *c.* 3, are copied *verbatim* into *stat.* 4 *W.* & *M. c.* 1. The act of *Charles* II, is not printed in the common edition of the Statutes at large; but is given at length in *Keble*'s Edition. See 1 *Comm. c.* 8, *in n.*

The Malt-tax is a sum of 750,000*l.* raised every year by Parliament ever since 1697, by a duty on every bushel of malt, and a proportional sum on certain liquors, such as Cyder and Perry, which might otherwise prevent the consumption of malt. This is under the management of Commissioners of Excise; and is indeed itself no other than an annual excise.

As to the Customs and Excise, see those titles in this Dictionary.

The duty on Salt consists in an excise, imposed, *per* bushel, by several statutes. This is not generally called an Excise, because under the management of different Commissioners. But the Commissioners of the Salt duties have, by *stat.* 1 *Ann. st.* 1. *c.* 21, the same powers, and must observe the same regulations, as those of other excises. See further, title *Salt.*

As to the duty on the carriage of Letters, see this Dictionary, title Post-Office.

As to the Stamp duties, see this Dict. title *Stamps.*

As to the duty on Houses and Windows.

As early as the Conquest, mention is made in *Domesday-Book* of fumage or fuage, vulgarly called smoke farthings; which were paid by custom to the King for every chimney in the house. And we read that *Edward* the Black Prince, (soon after his successes in *France*,) in imitation of the *English* custom, imposed a tax of a florin upon every hearth in his *French* dominions. But the first parliamentary establishment of it in *England* was by *stat.* 13 & 14 *Car.* 2. *c* 10; whereby an hereditary revenue of 2*s.* for every hearth, in all houses paying to Church and Poor, was granted to the King for ever. And, by subsequent statutes for the more regular assessment of this Tax, the constable and two other substantial inhabitants of the parish, to be appointed yearly, (or the surveyor, appointed by the Crown, together with such constable or other public officer,) were, once in every year, empowered to view the inside of every house in the parish. But, upon the Revolution, by *stat.* 1 *W.* & *M. st.* 1. *c.* 10, hearth-money was declared to be "not only a great oppression to the poorer sort, but a badge of slavery upon the whole people; exposing every man's house to be entered into, and searched at pleasure, by persons unknown to him; and therefore, to erect a lasting monument of their Majesties' goodness in every house in the kingdom, the duty of hearth-money was taken away and abolished." This monument of goodness remains among us to this day; but the prospect of it was somewhat darkened, (says *Blackstone*,) when, in six years afterwards, by *stat.* 7 *W.* 3. *c.* 18, a Tax was laid upon all houses (except cottages) of 2*s.* now advanced to 3*s. per annum*; and a Tax also upon all windows, if they exceeded nine, in such house. Which rates have been, from time to time, varied, being now extended to all Windows exceeding six; and power is given to surveyors, appointed by the Crown, to inspect the outside of houses, and also to pass through any house two days in the year, into any court or yard, to inspect the windows there. A duty from 6*d.* to 1*s.* in the pound, is also imposed on every dwelling house inhabited, together with the offices and gardens therewith occupied (farm houses and cottages excepted): which duty, as well as the former, is under the direction of the Commissioners of the Land-tax. See 1 *Comm. c.* 8.

The Duty imposed on Male Servants, retained or employed in the several capacities specifically mentioned in the statute for that purpose, extends to almost every sort of male domestic, except such as are actually employed only in husbandry or manufacture. This is under the management of the Commissioners of Land-tax and Window-tax.

The Revenue arising from the duty imposed on licences to Hackney Coaches and Chairs in *London* and parts adjacent, is governed by Commissioners of its own, and is, in truth, a benefit to the Subject: For the particulars, see this Dictionary, title *Coaches.*

The Duty on Offices and Pensions consists of an annual payment of 1*s.* in the pound, (over and above all other duties,) out of all salaries, fees, and perquisites of Offices, and out of all pensions and gratuities payable by the Crown, exceeding 100*l. per annum.* This highly popular Taxation was imposed by *stat.* 31 *Geo.* 2. *c.* 22, and is under the direction of the Commissioners of Land tax.

For the further particulars relative to the above Taxes, as also to the many others from time to time imposed, it will be necessary, for every person interested, to refer to the statutes, by which they are regulated: And it may be a good caution not to trust too implicitly to Abridgments or tables; which, though frequently highly useful, are yet inevitably liable to mistakes.

It is considered as a rule of construction of Revenue acts, in ambiguous cases, to lean in favour of revenue: This rule will be found to be agreeable to good policy and the public interests; particularly when it is considered that disputes as to the meaning and effect of Revenue laws most generally arise in consequence of attempts, often wholly unjustifiable, to evade them. Beyond this, which may be regarded as established Law, no one can ever be said to have an undue advantage in the Courts of Justice. See 1 *Comm. c.* 8, *in n.*

TAXATIO BLADORUM, A Tax or imposition laid upon corn. *Cowell.*

Taxatio Norwicensis, The valuation of ecclesiastical benefices made through every diocese in *England*, on occasion of the Pope's granting to the King the tenth of all spirituals for three years. Which Taxation was made by *Walter* Bishop of *Norwich*, delegated by the Pope to this office in 38 *Hen.* III., and obtained till the 19 of *Edw.* I. when a new Taxation, advancing the value, was made by the Bishops of *Winchester* and *Lincoln. Cowell.*

TAXERS, Two officers yearly chosen in *Cambridge* to see the true gauge of all weights and measures; though the name took rise from taxing or rating the rents of houses, which was anciently the duty of their offices.

TAYLORS, Contracts entered into with journeymen Taylors, for advancing their wages, are declared void; and Taylors, in *London*, giving greater wages than allowed, shall forfeit 5*l.* and journeymen accepting the same,

same, or refusing to work for the settled stated wages, the hours appointed, may be sent to the House of Correction for two months, &c. *Stat.* 7 *Geo.* 1. *c.* 13.

By *stat.* 8 *Geo.* 3. *c.* 17. Certain new regulations are established as to Master-Taylors and their journeymen. Their hours and price for working are limited within *London* and five miles thereof. The Justices are empowered to call witnesses before them on suspicion that the regulation is broken through, and, on conviction, to commit the offenders. Also the Quarter Sessions, in *London*, are enabled to make new regulations, if requisite, as to wages and hours of work. Masters, within the limits, employing men out of the limits, to evade the act, are to forfeit 500*l.* a moiety to the King, the other to the informer. See also title *Buttons*.

TEA, A pleasant sort of liquor, now much used in *England*, and introduced from *China* and the *East Indies*, being made of the product of a shrub growing in those parts: It seems to have been first noticed in the *stat.* 12 *Car.* 2. *c.* 15. It now forms a considerable article of commerce under the direction of the *East India* Company. By the Consolidation Act, *stat.* 27 *Geo.* 3. *c.* 13, it is liable to a duty of 5 *per cent.* on importation.—Dealers in Tea must take out an annual licence.—And various statutes have been passed to guard against frauds in smuggling this article; to regulate its importation and exportation; and to prevent frauds in mixing it with prejudicial drugs, &c. &c.

TEAM; THEAME, From the Sax. *Tyman, propagare*, to Teem or bring forth.] A royalty or privilege granted by the King's charter to the Lord of a Manor, for the having, restraining and judging of bondmen and villeins, with their children, goods, and chattels, &c. *Glanvil, lib.* 5. *c.* 2.

TECHNICAL WORDS, in Indictments; See title *Indictments* III. See also titles *Deed*; *Conveyance*, &c.

TEDING-PENNY; *Tething-penny, Tithing penny*; A small duty or payment to the Sheriff from each Tithing, towards the charge of keeping courts, &c. from which some of the Religious were exempted by charter from the King. *Chart. Hen.* 1.

TEENAGE, From Sax. *Tynan*, to inclose or shut.] Is used in many parts of *England* for wood for fences and inclosures.

TEINLAND, *Tainland*, or *Thainland*; See *Thane-Land*.

TELLER, A considerable officer in the Exchequer, of which officers there are four; whose office is to receive all money due to the King, and to give the Clerk of the Pells a bill to charge him therewith: They also pay to all persons any money payable by the King, and make weekly and yearly books of their receipts and payments, which they deliver to the Lord Treasurer. See titles *Exchequer*; ACCOUNTS, *Public*.

TELLIGRAPHIÆ, From Sax. *Tellan, dicere*, Gr. γράφω, *Scribo*; *quasi* a telling any thing by writing.] Written evidences of things past. *Blount.*

TELLWORC, That work or labour which the tenant was bound to do for his Lord, for a certain number of days; from the *Saxon* word *Tellan*, numerare, & *worc*, opus. *Thorn. Ann* 1364.

TEMENTALE or TENEMENTALE, A tax of two shillings upon every plough-land. *Hov. Hist. f.* 419. A Decennary. *Leg. Ed. Conf.*

TEMPLARS, or KNIGHTS OF THE TEMPLE, *Templarii.*] A religious order of Knighthood, instituted about the year 1119, and so called because they dwelt in part of the buildings belonging to the Temple at *Jerusalem*, and not far from the sepulchre of our Lord. They entertained Christian strangers and pilgrims charitably, and in their armour led them through the *Holy-Land*, to view the sacred monuments of Christianity, without fear of infidels; for at first their profession was to defend travellers from highwaymen and robbers. This order continuing and increasing for near two hundred years, was far spread in *Christendom*, and particularly here in *England*. But at length, some of them at *Jerusalem* falling away (as some authors report) to the *Saracens* from Christianity, or rather because they grew too potent and rich, the whole order was suppressed by *Clement* V., *anno* 1307, by the Council of *Vienna* 1312; and their substance given partly to the Knights of St. *John* of *Jerusalem*, and partly to other Religious. *Cassan de Gloria Mundi, par.* 9. *Consid.* 4. These flourished here in *England* from the time of *Henry* II., till they were suppressed. They had in every nation a particular governor, whom *Bracton, lib.* 1. *cap.* 10, calls *Magistrum Militiæ Templi*. The Master of the Temple here was summoned to Parliament, 49 *H.* 3. *m.* 11. *in Schedula*. And the chief Minister of the Temple Church in *London*, is still called Master of the Temple. Of these Knights read Mr. *Dugdale's Antiquities of Warwickshire, fol.* 706. In ancient records they were also called *Fratres Militiæ Templi Solomonis*. *Mon. Angl.* ii. 554, *b.* About nine years after their institution, they were ordered by a Council held at *Triers*, to wear a white garment; and afterwards, in the pontificate of Pope *Eugenius*, they wore a red cross on their garments. The Temples, which we now call the Inns of Court, was the place where they dwelt, and in the Middle Temple the King's treasure was kept. *Cowell.* Templars' land shall be forfeit for erecting their crosses, *stat. Westm.* 2; 13 *Edw.* 1. *c.* 33 The jurisdiction of the conservators of their privileges restrained, *stat. Westm.* 2, 13 *Edw.* 1. *c.* 43. The lands of the Templars given to the hospitals of *Jerusalem*, *stat. de terr. temp.* 17 *Edw.* 2. *st.* 3

TEMPLE. *Dugdale* and *Stow* both tell us that the Temple in *London* is a place of privilege from arrests, by the grant of the King; but this hath been denied by the Court of *B. R. Dugd.* 317, 320: 3 *Salk. Rep.* 45. See title *Arrest*.

TEMPORALTIES OF BISHOPS, The lay-revenues, lands, tenements, and lay-fees belonging to the see of Bishops or Archbishops, as they are Barons and Lords of Parliament; (including their Baronies.) All things which a Bishop hath by livery from the King, as manors, lands, tithes, &c. 1 *Rol. Abr.* 881: 1 *Comm. c.* 8. It was a custom formerly, that when Bishops received from the King their Temporalties, they did by a solemn form, in writing, renounce all right to the same by virtue of any provision from the Pope, and acknowledged the receipt of them only from the King; which custom continued from the reign of *Edw.* I. to the time of the Reformation: And this practice began by occasion of a Bull of Pope *Gregory* VIII., wherein he conferred the See of *Worcester* on a certain Bishop, and committed to him *administrationem spiritualium & temporalium episcopatûs prædict'.* *Anno* 31 *Edw.* 1.

The

The custody of these Temporalties is stated, by *Blackstone*, as part of the King's ordinary revenue: (See title *King*, V. 4.) This, upon the vacancy of the Bishopric, is immediately the right of the King, as a consequence of his prerogative in church matters; whereby he is considered as the founder of all Archbishoprics and Bishoprics, to whom during the vacancy they revert. And for the same reason, before the dissolution of Abbeys, the King had the custody of the Temporalties of all such Abbeys and Priories as were of Royal foundation, (but not of those founded by Subjects,) on the death of the Abbot or Prior. 2 *Inst.* 15. Another reason may also be given, why the policy of the Law hath vested this custody in the King; because as the successor is not known, the lands and possession of the See would be liable to spoil and devastation, if no one had a property therein. Therefore the Law has given the King, not the Temporalties themselves, but the custody of the Temporalties, till such time as a successor is appointed; with power of taking to himself all the intermediate profits, without any account of the successor; and with the right of presenting, (which the Crown very frequently exercises,) to such benefices and other preferments as fall within the time of vacation. *Stat.* 17 *E.* 2. *st.* 1. *c.* 14: *F. N. B.* 32. This revenue is of so high a nature, that it could not be granted out to a Subject, before, or even after, it accrued: But by *stat.* 14 *Edw.* 3. *st.* 4. *cc.* 4, 5. the King may, after the vacancy, lease the Temporalties to the Dean and Chapter; saving to himself all advowsons, escheats, and the like. Our ancient Kings, and particularly *William Rufus*, were not only remarkable for keeping the Bishoprics a long time vacant, for the sake of enjoying the Temporalties, but also committed horrible waste on the woods and other parts of the estate; and to crown all, would never, when the See was filled up, restore to the Bishop his Temporalties again, unless he purchased them at an exorbitant price. To remedy which, King *Henry* I. granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take any thing from, the domains of the Church, till the successor was installed. And it was made one of the articles of the Great Charter, that no waste should be committed in the Temporalties of Bishoprics, neither should the custody of them be sold. *Stat.* 9 *H.* 3. *c.* 5. The same is ordained by the *stat. Westm.* 1; 3 *E.* 1. *c.* 21; and the *stat.* 14 *Edw.* 3. *st.* 4. *c.* 4, (which permits, as we have seen, a lease to the Dean and Chapter,) is still more explicit in prohibiting the other exactions. It was also a frequent abuse, that the King would, for trifling or no causes, seize the Temporalties of Bishops, even during their lives, into his own hands: But this is guarded against by *stat.* 1 *Edw.* 3. *st.* 2. *c.* 2.

This revenue of the King, which was formerly very considerable, is now by a customary indulgence almost reduced to nothing: For, at present, as soon as the new Bishop is consecrated and confirmed, he usually receives the restitution of his Temporalties quite entire, and untouched, from the King; and at the same time does homage to his Sovereign; and then, and not sooner, he has a fee simple in his Bishopric, and may maintain an action for the profits. 1 *Inst.* 67, 341. See 1 *Comm.* cap. 8.

TEMPTATIO or TENTATIO, A trial or proof. *Chart.* 20 *Ed.* 1.

TEMPUS PESSONIS, Mast-time in the Forest, which is from about *Michaelmas* to *St. Martin's Day, November* 11.

TEMPUS PINGUEDINIS ET FIRMATIONIS; The season of killing the buck and the doe. *MS. Temp. H.* 3.

TENA, A coif worn by Ecclesiastics. *Counc. Lambeth. anno* 1281.

TENANCIES, Houses or places for habitation, held of another. *Stat.* 23 *Eliz. c.* 4.

TENANT, *Tenens*, from the Lat. *tenere*, to hold.] One that holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will. The word in Law is used with divers additions; thus, Tenant in dower, is she that possesses land by virtue of her dower.—Tenant by statute-merchant, he that holds land by virtue of a statute forfeited to him.—Tenant in frank-marriage, he that holds lands or tenements by virtue of a gift thereof made to him upon marriage between him and his wife.—Tenant by the curtesy, he that holds for his life, by reason of a child begotten by him of his wife, being an inheritrix, and born alive.—Tenant by *elegit*, that holds by virtue of the writ called an *Elegit*.—Tenant in mortgage, that holds by means of a mortgage.—Tenant by the verge in ancient demesne, who is admitted by the rod in the Court of Ancient Demesne.—Tenant by copy of court-roll, who is admitted tenant of any lands, &c. within a manor, which, time out of mind, had been demisable according to the custom of the manor.—Tenant by charter, that holdeth by feoffment in writing, or other deed.—There were also Tenants by Knights-service, Tenant in burgage, Tenant in socage, Tenant in frank-fee, Tenant in villeinage: So there is Tenant in fee-simple; Tenant in fee-tail; Tenant at the will of the Lord, according to the custom of the manor; Tenant at will by the Common Law; Tenant upon sufferance; Tenant of estate of inheritance; Tenant in chief, that holdeth of the King in right of his crown; Tenant of the King's, he that holds of the person of the King, or has some honour; very Tenant, that holds immediately of his Lord, *Kitch. fol.* 99.; Tenant peravail.

So there are also Joint-tenants, that have equal right in lands and tenements by virtue of one title; Tenants in common, that have equal right, but hold by divers titles; particular Tenant, as Tenant for years, for life, &c. that holds only for his term; sole Tenant, he that hath no other joined with him; several Tenant, as opposite to Joint-tenant, or Tenant in common.

So there is Tenant to the *præcipe*, in case of Fines and Recoveries; Tenant in demesne, which is he that holdeth the demesnes of a manor for a rent, without service; Tenant on service, he that holdeth by service; Tenants by execution, that hold lands by virtue of an execution upon any statute, recognizance, &c. with divers others. *Cowell.* See this Dict. under the several titles relative to the estates of such Tenants; and this Dict. title *Tenure*.

TENANTS IN COMMON, Are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously. *Litt.* § 292. This tenancy therefore happens, where there is a unity of possession merely, but perhaps an entire disunion of interest,

interest, of title, and of time. For, if there be two Tenants in Common of lands, one may hold his part in fee simple, the other in tail, or for life; so that there is no necessary unity of interest: One may hold by descent, the other by purchase; or the one by purchase from *A.*, the other by purchase from *B.*; so that there is no unity of title: One's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this *Littleton* gives the true reason, because no man can certainly tell which part is his own: otherwise, even this would be soon destroyed. 2 *Comm. c.* 12.

Tenancy in Common may be created, either by the destruction of two estates, in joint-tenancy and co-parcenary, or by special limitation in a deed. By the destruction of the two estates, mentioned, is intended such destruction as does not sever the unity of possession, but only the unity of title or interest: As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are Tenants in Common; for they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. *Litt.* § 293.—So, if one joint-tenant gives his part to *A.* in tail, and the other gives his to *B.* in tail, the donees are Tenants in Common, as holding by different titles and conveyances. *Litt.* § 292.—If one of two parceners alienes, the alienee and the remaining parcener are Tenants in Common; because they hold by different titles, the parcener by descent, the alienee by purchase. *Litt.* § 309.—So likewise, if there be a grant to two men, or two women, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to a man and a woman, and the heirs of their bodies begotten: And in this and the like cases, their issues shall be Tenants in Common; because they must claim by different titles, one as heir of *A.*, and the other as heir of *B.*; and those too not titles by purchase, but descent. See *Litt.* § 283. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a Tenancy in Common. 2 *Comm. c.* 12.

A Tenancy in Common may also be created by express limitation in a deed: But here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a Tenancy in Common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an Estate in Common; and, if one grants to another half his land, the grantor and grantee are also Tenants in Common: Because, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint interest in the whole of the tenements. But a devise to two persons to hold jointly and severally, has been held to be a joint-tenancy; because that is necessarily implied in the word "jointly;" the word "severally" perhaps only implying the power of partition: And an estate given to *A.* and *B.*, equally to be divided between them, though in deeds it hath been said to be a joint-tenancy, (for it implies no more than the Law has annexed to that estate, *viz.* divisibility,) yet in wills it is certainly a Tenancy in Common; because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. See 1 *Eq. Ab.* 291: 1 *P. Wms.* 17: 3 *Rep.* 39; 1 *Vent.* 32. And this nicety in the wording of grants makes it the most usual as well as the safest way, (in them as well as in Wills,) when a Tenancy in Common is meant to be created, to add express words of exclusion as well as description, and limit the estate to *A.* and *B.*, to hold as Tenants in Common, and not as Joint-tenants.

It is noticed under title *Joint-tenants*, that their tenure, though formerly favoured in Law, is now considered as odious. In consequence of this, *in Wills*, the expressions, *equally to be divided*, *share and share alike*, *respectively between and amongst*, have been held to create a Tenancy in Common. 2 *Atk.* 121: 2 *Bro. C. R.* 15: 1 *P. Wms.* 14. And there seems but little doubt that the same construction would now be put even upon the word *severally*: But these words certainly are only evidence of intention, and will not create a Tenancy in Common, where the contrary, from the other parts of the will, appears to be the manifest intention of the testator. 3 *Bro. C. R.* 215.

The words, *equally to be divided*, make a Tenancy in Common in surrenders of copyholds, and also in deeds which derive their operation from the statute of Uses. 1 *P. Wms.* 14: 1 *Wils.* 341: 2 *Ves.* 257. And though it has formerly been suggested (see 1 *Ves.* 165: 2 *Ves.* 257,) that these words are not sufficient to create a Tenancy in Common, in Common Law conveyances, yet there seems but little doubt that, in such a case, nothing but invincible authority would now induce the Courts to adopt that opinion, and to decide in favour of a Joint-tenancy. 2 *Comm. c.* 12. *p.* 194, *n.* See title *Joint-tenants*.

As to the incidents attending a Tenancy in Common: Tenants in Common (like Joint-tenants) are compellable by statute to make partition of their lands; which they were not at Common Law. See title *Joint-tenants* III. They properly take by distinct moieties, and have no entierty of interest; and therefore there is no survivorship between Tenants in Common. Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to Joint-tenants merely upon that account: Such as being liable to reciprocal actions of waste, and of account, by the *stats. Westm.* 2. *c.* 22: 4 *Ann. c.* 16.—For by the Common Law, no Tenant in Common was liable to account with his companion for embezzling the profits of the estate; though, if one actually turns the other out of possession, an action of ejectment will lie against him. 1 *Inst.* 199, 200. See 2 *Comm. c.* 12.

Adverse possession, or the uninterrupted receipt of the rents and profits, is now held to be evidence of an actual ouster. And where one Tenant in Common has been in undisturbed possession for 20 years, in an ejectment brought against him by the Co-tenant, the Jury will be directed to presume an actual ouster, and consequently to find a verdict for the defendant. *Cowp.* 217.

As for other incidents of Joint-tenants, which arise from the privity of title, or the union and entierty of interest,

interest, (such as joining or being joined in actions, unless in the case where some entire or indivisible thing is to be recovered,) these are not applicable to Tenants in Common, whose interests are distinct, and whose titles are not joint but several. *Litt.* § 311: 1 *Inst.* 197: 2 *Comm.* c. 12.

Estates in Common can only be dissolved two ways: 1. By uniting all the titles and interests in one Tenant, by purchase or otherwise; which brings the whole to one severalty: 2. By making partition between the several Tenants in Common, which gives them all respective severalties. For indeed Tenancies in Common differ in nothing from sole estates, but merely in the blending and unity of possession. As to Tenancy in Common of things personal, see title *Joint-tenancy in Things personal.*

TENDE, To tender, or offer: it is mentioned in our old books; as, to tend a traverse, an averment, &c. *Britton*, c. 76: *Staundf. Prærog.* 16.

TENDER, Fr. *Tendre.*] The offering of money or any other thing in satisfaction; or circumspectly to endeavour the performance of a thing: as a Tender of rent is, to offer it at the time and place when and where it ought to be paid: Also it is an act done to save the penalty of a bond before action brought, &c. *Terms de Ley* 557. See titles *Pleading*, particularly I. 4; *Money into Court*. As to Tender of rent, see title *Rents*.

There are several statutes which authorise a *Tender of amends*, where otherwise it would not have been allowable. As *stat.* 11 *Geo.* 2. c. 19. § 20, in cases of distress for rent.—*Stat.* 17 *Geo.* 2. c. 38. § 10, in cases of distress for poor's rates.—*Stat.* 24 *Geo.* 2. c. 44, in actions against Justices of the Peace.—*Stat.* 23 *Geo.* 3. c. 70. § 30, in actions against Excise Officers: And *stat.* 24 *Geo.* 3. c. 47. § 35, in actions against Custom-House Officers.

Tender of money on a bond is to be made to the person of the obligee at the day appointed, to save the penalty and forfeiture of the bond, and it ought to be done before witnesses; though, if the obligor be sued afterwards, he must still pay it: But if the obligor be to do any collateral thing, or which is not part of the obligation, as to deliver a horse, &c. and the obligor offer to do his part, and the obligee refuseth it, the condition is performed, and the obligation discharged for ever. 1 *Inst.* 207, 208.

By *stat.* 4 & 5 *Ann.* c. 16. § 12, the plea of *solvit post diem* is granted to an action on bond; but a Tender and refusal of principle and interest at a subsequent day cannot be pleaded, as not being within the equity of the statute: For such construction would be prejudicial; as it would empower the obligor, at any time, to compel the obligee to take his money without notice. *Bull. Ni. Pri.* 171: *Sellon's Pract.*, *Tender*.

If *A.*, *B.*, and *C.*, have a joint demand, and *C.* has a separate demand, on *D.*; and *D.* offers *A.* to pay him both the debts, which *A.* refuses, without objecting to the form of the Tender, on account of his being only entitled to the joint demand, *D.* may plead this Tender in bar of an action for the joint demand; and should state it as a Tender to *A.*, *B.*, and *C.* 1 *Term Rep.* 684.

On award, that the defendant should pay money on such a day, and at such a place; the defendant pleaded that he tendered the money at the day and place; and because he did not set forth that he continued there ready to pay it at the last instant of the day till after sun-setting, &c. it was held ill. 2 *Cro.* 243.

Every Tender at the Common Law, or which is given by statute, must be made before the writ sued out.

If a Tender be in fact made before the bringing of the action, though, by the *teste* of the writ, it may appear to have been afterwards, (as if Tender in vacation and *teste* of preceding term,) the exact time when the writ was in fact sued out may be shewn in pleading, or sometimes given in evidence contrary to the *teste*: But if a bill be filed on the same day the Tender is made, though subsequent thereto, it seems that the defendant can no way avail himself by pleading the prior Tender; as there is no fraction of a day in Law. See *Sellon's Pract.*, *Tender*; and this Dictionary, titles *Pleading*; *Latitat*; *Process*.

A right to damages, on account of the non-payment of a debt, or non-performance of a duty, may, after being taken away by a Tender and refusal, be revived again by a demand subsequent to the Tender and refusal; a new cause of action arises from the non-payment or non-performance thereof upon such demand: And therefore the plaintiff may reply such subsequent demand and refusal by the defendant, which, if proved, the plaintiff must have a verdict. *Brownl.* 7: *Impey, K. B.*

In case of a plea of Tender as to part, and *non-assumpsit* as to the residue, and the issue on the Tender being found for the defendant, the balance proved is under 40*s.*, yet the defendant, though within the jurisdiction of the County Court of *Middlesex*, is not entitled to costs, under *stat.* 23 *Geo.* 2. c. 33. § 19. Nor in case of a set-off having the same effect. *Doug.* 448: See *Impey, K. B.*

Wherever the debt or duty arises at the time of the contract, and is not discharged by a Tender and refusal, it is not enough for the party who pleads the Tender, to plead a Tender and refusal, and *uncore prist*, (that he is still ready,) but he must also plead *tout temps prist* (that he was always ready). *Salk.* 622: 12 *Mod.* 152: *Carth.* 413. In what cases Tender and refusal shall discharge the debt, see 1 *Wils.* 117.

Every requisite which is in a particular case necessary to the validity of a Tender, must, in pleading such Tender, be shewed to have been complied with; else the plea is not good. *Salk.* 624. A defendant cannot be permitted to plead *non assumpsit* as to the whole, and a Tender as to part; because, if the general issue be found for the defendant, it will appear on record that no debt is due, though something is admitted by the defendant. 4 *Term Rep.* 194. But a Tender to the whole declaration is good; and it is usual to plead, as to all, except the sum tendered, *non assumpsit*; and as to that sum, a Tender. And a defendant may plead, not guilty, and a Tender of amends, in trespass. 2 *Black Rep.* 1089: *Sellon's Pract.* A Tender is pleadable on a *quantum meruit.* 1 *Stra.* 576: *Salk.* 622. And a Tender may be pleaded after a Judge's order to plead issuably. 1 *Burr.* 59.

To an avowry for rent, the plaintiff in replevin may plead a Tender and refusal, without bringing money into Court; because, if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. *Salk.* 584. But if the distress were rightfully taken, the plaintiff cannot plead Tender of rent and costs in bar of an avowry for rent in any case, unless the distress was made of corn, grass, &c. growing on the premises, and then such plea is given by *stat.* 11 *Geo.* 2. c. 19. § 9. The money cannot be taken out by the defendant, though he has a verdict. *Stra.* 1027.

On a Tender being pleaded, and the money paid into Court, the plaintiff replied a subsequent demand and refusal, whereupon issue being joined and tried, a verdict was found for the defendant. Whereupon he moved to have the money paid into Court returned, in part of his costs; but the Court was of opinion it could not be done. *Hardw.* 206.

Though a Tender is made, and the plaintiff refuses the money, yet the Tender cannot be pleaded in bar of *the action*, either in *debt* or *assumpsit*, but in bar of the damages only; for the debtor shall nevertheless pay his debt. *Ld. Raym.* 254.

There is a difference in pleading a Tender in action of debt, and in action on the case: In an action of debt, the defendant ought to conclude his plea by praying judgment, if the plaintiff ought to have or maintain his action to recover *any* damages against him; for, in this action, the debt is the principal, and the damages are only accessary. But, in *assumpsit*, the damages are the principal; and therefore, in pleading a Tender, the defendant ought to conclude his plea with a prayer of judgment, if the plaintiff ought to have or maintain his action, to recover any *more* or *greater damages* than the sum tendered, or *any* damages by reason of the non-payment thereof. 2 *Salk.* 622: 1 *Lord Raym.* 254: 3 *Salk.* 344, 5.

The plaintiff may either admit the Tender or not: if the latter, he should not take the money out of Court; for, by taking it, he admits the same to be right, and judgment is given for the defendant to go quit as to that plea: But if he admits it, and goes for further damages, on the ground that the Tender was not sufficient to cover his demand, he may take the money out of Court, enter an acquittal as to the Tender, or confess the same in his replication, and proceed on the general Issue for the residue. *Ld. Raym.* 1774.—If he admits the Tender and enters an acquittal, without going for further damages, he must pay the defendant his costs. *Barnes* 337. See *Sellon's Practice, Tender.*

Tender may be of money in bags, without shewing or telling it, if it can be proved there was the sum to be tendered; it being the duty of him that is to receive the money, to put out and tell it. 5 *Rep.* 115. Though where the person held the money on his arm in a bag, at the time of offering, this was adjudged no good Tender, for it might be counters or base money. *Noy* 74. A Tender in Bank-notes is sufficient, unless the creditor expresly refuses to receive notes, and insists upon cash. 3 *Term Rep.* 554. See 1 *Burr.* 459: 2 *Eq. Ab.* 319. If a Tender is made of more than is due, it is good; and the party to whom tendered ought to take out what belongs to him. 5 *Rep.* 114. Tender of the money is requisite on contracts for goods sold, &c. to entitle to action of trover. See title *Trover.* And a Tender of Stock sold for so much money, if it be well made, though not accepted, will entitle the party to the sum agreed to be paid. 3 *Salk.* 343: *Stra* 777, 832. See title *Bond.*

TENEMENT, *Tenementum.*] Signifies properly a house, or home-stall; but, more largely, it comprehends not only houses, but all corporeal inheritances which are *holden* of another, and all inheritances issuing out of or exercisable with the same. *Co. Litt.* 6, 19, 154. A Tenement may be said to be any house, land, rent, or other such like thing, that is any way held or possessed; but being a word of a large and ambiguous meaning, and not so certain as messuage, therefore it is not fit to be used to express any thing which requires a particular description. 2 *Lill. Abr.* 566.

Tenement, in its original, proper, and legal sense, signifies any thing which may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial and ideal kind. Thus *liberum Tenementum*, Frank-tenement or Freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like. 1 *Inst.* 6. And as lands and houses are Tenements, so is an advowson a Tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, Tenements. 1 *Inst.* 19, 20.

TENEMENTARY LAND, Was the outland of manors granted out to tenants by the *Saxon* Thanes, under arbitrary rents and services. *Spelm.*

TENEMENTIS LEGATIS, An ancient writ, lying to the city of *London* or any other Corporation, (where the old custom was, that men might devise by will lands and Tenements as well as goods and chattels,) for the hearing and determining any controversy touching the same. *Reg. Orig.* 244.

TENENDUM, That clause in a deed wherein the tenure of the land is created and limited. The office of a *Tenendum* in a deed is, to limit and appoint the tenure of the land which is held, and how, and of whom it is to be held. Before the statute called *Quia emptores terrarum*, 18 *Ed.* 1. *st.* 1, the *Tenendum* was usually of the feoffor and his heirs, and not of the chief Lord of the fee, whereby Lords lost their escheats, forfeitures, &c. But since the said statute, the *Tenendum*, where the fee-simple passes, must be of the chief Lord of the fee, by the customs and services whereby the feoffor held; yet this statute does not extend to a gift in tail, for the donee shall hold of the donor. *Co. Litt.* 6, *a*: 2 *Inst.* 66, 67, 500, 501, 502, 505. See titles *Tenures*; *Tail.*

The *Tenendum* seems now to be incorporated with the *Habendum*, for we say, *To have and to hold*, in which clause the estate is limited, &c. See title *Deed* II. 4.

TENENTIBUS IN ASSISA NON ONERANDIS, A writ for him to whom a disseisor hath alienated the land whereof he disseised another, that he be not molested in assise for the damages, if the disseisor had wherewith to satisfy them. *Reg. Orig.* 214.

TENHEDED, or TIENHEOFED, *Saxon.*] *Decanus, Caput vel Princeps Decaniæ sive Decuriæ.* *Leg. Edw. Conf. c.* 29.

TENMENTALE; See *Tamentale*.

TENOR, *Lat.*] Of writs, records, &c. is the substance or purport of them; or a transcript or copy. Tenor of a libel hath been held to be a transcript, which it cannot be if it differs from the libel; and *juxta tenorem* imports it, but not *ad effectum*, &c. for that may import an identity in sense, but not in words. 2 *Salk.* 417. In action of debt brought upon a judgment in an inferior Court, if the defendant pleads *nul tiel record*, the Tenor of the record only shall be certified; and by *Holt*, Chief Justice, it may be the same on *certiorari's*. 3 *Salk.* 296.

 A return

A return of the Tenor of an indictment from *London*, on a *certiorari* to remove the indictment, is good by the city charter; but in other cases it is usual to certify the record itself. 2 *Hawk. P.C. c.* 27. §§ 26, 76.

TENORE INDICTAMENTI MITTENDO, Is a writ whereby the record of an Indictment, and the process thereupon, is called out of another Court into the King's Bench. *Reg. Orig.* 69. See *Certiorari*.

TENORE PRÆSENTIUM, The Tenor of These Presents, is the matter contained therein, or rather the intent and meaning thereof; as, to do such a thing according to the Tenor, is to do the same according to the true intent of the deed or writing.

TENTATES PANIS, The essay or assay of bread. *Blount.*

TENTER, A stretcher or trier of cloth, used by dyers and clothiers, *&c.* mentioned in the statutes 1 *R.* 3. *c.* 8; 39 *Eliz. c.* 20.

TENTHS, *Decimæ.*] The tenth part of the annual value of every Spiritual Benefice, according to the valuation in the King's books; being that yearly portion or tribute which all ecclesiastical livings formerly paid to the King. They were anciently claimed by the Pope, to be due to him *jure divino*, as High Priest, by the example of the High Priest among the *Jews*, who had Tenths from the *Levites*: But they had been often granted to the King by the Pope upon divers occasions, sometimes for one year, and sometimes for more; and were annexed perpetually to the Crown by *stats.* 26 *H.* 8. *c.* 3: 1 *Eliz. c.* 4. And at last granted, with the first fruits, towards the augmentation of the maintenance of poor clergymen. *Stat.* 2 *Ann. c.* 11. See title *First Fruits*. Collectors of this revenue are to be appointed by the King, by Letters-patent, instead of the Bishops; and an office is to be kept for management of the same, in some part of *London* or *Westminster*, &c. *stat.* 3 *Geo.* 1. *c.* 10.—Tenths likewise signified a tax on the Temporalty. See title *Taxes*.

TENTS, Robbing of, in fairs and markets, is felony without benefit of Clergy, *stat.* 5 & 6 *Ed.* 6. *c.* 9. See title *Larceny* II. 1.

TENURE,

TENURA, from the Latin *Teneo*.] The manner whereby lands or tenements are holden; or the Service that the Tenant owes to his Lord. There can be no Tenure without some Service, because the Service makes the Tenure. 1 *Inst.* 1, 93. A Tenure may be of houses, and land or tenements; but not of a rent, common, &c.

Under the word *Tenure* is included every Holding of an Inheritance; but the signification of this word, which is a very extensive one, is usually restrained by coupling other words with it; this is sometimes done by words which denote the duration of the tenant's estate; as, if a man holds to himself and his heirs, it is called Tenure in *fee-simple*. At other times, the Tenure is coupled with words pointing out the instrument by which an inheritance is held; thus, if the holding is by copy of court-roll, it is called Tenure by copy of court-roll. At other times, this word is coupled with words that shew the *principal* service by which an inheritance is held; as, where a man held by *Knight-Service*, it was called Tenure by Knight-Service. 5 *New Abr.*

TENURES.

Almost all the real property of the kingdom is, by the policy of our Laws, supposed to be granted by, dependent upon, and holden of, some superior Lord; by and in consideration of certain Services to be rendered to the Lord by the Tenant or possessor of this property. The thing holden is therefore styled a *Tenement*; the possessors thereof, *Tenants*; and the manner of their possession, a *Tenure*. Thus, all the land in the kingdom is supposed to be holden, mediately or immediately, of the King, who is styled the Lord paramount, or above all.—Those that held immediately under him in right of his crown and dignity, were called his Tenants *in capite*, or in chief; which was the most honourable species of Tenure, but at the same time subjected the tenants to greater and more burthensome services than inferior Tenures did; a distinction which runs through all the different sorts of Tenure. 2 *Comm. c.* 5.

The above maxim, and the whole of the doctrine of Tenures, being founded on the *Feudal System*, some knowledge of that is absolutely necessary, in order to comprehend the nature of Tenures, as they relate either to the ancient or present state of the *English* Law.—These subjects are admirably and clearly treated in Chapters IV, V, and VI of the 2d book of the *Commentaries*. The following abridgment from Sir *Martin Wright's Introduction to the Law of Tenures*, (frequently referred to by the learned Commentator,) with some extracts from the *Commentaries*, are submitted to the Reader: Having been arranged in the following order, by the Editor of this Work, very early in the progress of his labours, it is now inserted, (not without some hesitation,) principally because references are made to and from this Title in very many Titles throughout the Dictionary. An acquaintance with this part of our Law is so intimately connected with all that concerns real property, that even an imperfect attempt at thus presenting it, in one arranged and connected view, must be attended with advantage to the Student; and will, in a small degree at least, obviate the inconvenience arising from the disjointed nature of the information conveyed, under the several Heads, scattered through the Dictionary in alphabetical order.

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III. *The*

III. *The Principles, Qualities, and Rules of* TENURE

Principles.	8. *Dower.*
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6. *Fee-tail.*	13. *Copyholds.*
7. *For Life.*	

I. 1. FEUD, according to *Somner*, is a *German* compound, consisting of *feh, feo,* or *feoh*, (a salary, stipend, or wages,) and *hade, head,* or *hode* (quality, kind, or nature).—*Feudum,* [*Fief,* or] Fee, or land holden in fee, is, therefore, (considered in its primary acceptation,) what was holden in *fee hode*, by contraction, *feod* or *feud*; *i. e.* in a *stipendiary, conditional,* mercenary way and nature; with the acknowledgment of a Superior, and a condition of returning him some service for it; upon the withdrawing whereof, the land was revertible unto the Lord. *Somn. on Gav.* 106, 111.—Allodial lands were such as the Proprietor had the absolute property in; the term being derived from the *Northern*, *odhal*, right; so called from *odh*, *proprietas*, and *all*, *totum*; the syllables being transposed. See 2 *Comm.* 44, & *n.* Others derive this word from *an* and *lot*, allotment; the mode of dividing what was not granted as stipendiary property. *Robertf. Cha.* V.

Feuds, or *Feuda,* says *Selden*, are the same which, in our Laws, we call *Tenancies*, or *Lands held*; *Feuda*, also, are possessions so given and held, that the possessor is bound to do service to him from whom they were given. *Seld. Tit. Hon.* 273.

This service was originally purely military; and the possessor or Feudatary's homage or fealty was, (as it seems,) in the infancy of feuds, a kind of military engagement, rather implied than expressed; to be faithful to his benefactor, and also assistant unto him. *Spelman* therefore calls a feud, *prædium militare*; and *Somner* says that every inheritance is improperly and corruptly called a *fief* or *fee*, that is not holden *militiæ gratiâ*, the ground of all fees. *Spelm. Feuds* 6: *Id. Gloss. in n*: *Somn. Gav.* 49.

2. Feuds were originally a military policy of the *Northern* conquering nations, devised as the most likely means to secure their new acquisitions; and were large districts, or parcels of land, given or allotted by the conquering General to the superior Officers of his army; and by them dealt out, in less parcels, to the inferior Officers and most deserving Soldiers. Thus a proper military subordination was, naturally and rationally enough, inferred and established; and an army of Feudataries were as so many Stipendaries, always on foot, ready to muster and engage *in the defence of their country*. So that the feudal returns of *fealty*, or *mutual fidelity and aid*, seem originally to have been political, or rather natural, consequences, drawn from the apparent necessity these warlike people were under of maintaining their ground, with the same spirit, and by the same means, they had got it. *Wright's Law of Tenures* 7—10.

As the Princes of *Europe* were every day more and more alarmed by the progress of the *Northern* standard, many of them (and by degrees *all*) went into this or a like policy, as the strongest intrenchment; and, in imitation of it, they, reserving the *dominium* or property of the lands they gave, parcelled out some of their own possessions or territories under an *express fealty*; engaging their Beneficiaries or Feudataries to make them the like returns of fidelity and aid, as followed from the nature and design of an *original* feud. From hence, probably, the feudal obligations began to be considered as *renders*, or *services of render*, calculated for the benefit of the Proprietary; who was, in respect of the *dominium* remaining in him, thenceforth called *Dominus*; and military aid or service (as now called) was understood to be the real or fictitious terms or conditions of all propriety or possession in *Europe*. *Wright* 10—13.

3. Feuds were originally precarious, and held at the will of the Lord; they next became certain for one year; and were, some time after, given for life. But though feuds were not at first hereditary, yet the vassals or feudal tenants were called *nativi*, as if born such; and it was unusual, and even thought hard, to reject the heir of the former Feudatary, provided he was able to do the services of the feud, and the Lord had no just objection against him. But though the Lord did not remove the heir from the feud, yet it is not likely that he succeeded absolutely as of course, but that he paid a fine, or made some acknowledgment in the nature of *relief* for the renewal of the feud; and though that reason ceased, yet the fine was continued afterwards, became hereditary, and is well known at this day (though by several names) in most countries. *Wright* 13—15: See *post*. II. 5.

Feuds were afterwards extended, beyond the life of the first vassal or feudal tenant, to his sons, or some or one of them whom the Lord should name. In process of time, grandchildren succeeded to sons, and brothers also succeeded to brothers, if the Feud was *antiquum aut paternum*; but not if it was *novum*, *i. e.* newly purchased or acquired; not having descended from the father to the brother first dying. At length, not only descendants in the direct line succeeded *in infinitum*, but collaterals also, without regard to their degree, provided they were descended from, and were of the blood, of the first Feudatary. *Wright* 15—18, and the authorities there cited.—See the next division.

Spelman says, that these several conditions of feuds had their several denominations; while precarious, they were called *munera*; when for life, *beneficia*; and were first called *feuda*, when they began to be granted in perpetuity, and not before. *Spelman on Feuds* 4, 6, 9. *Somner* says, Feudum was a word not known until about *A. D.* 1000. *Somner on Gav.* 102.

4. Feuds being thus originally in the hands of military persons, who were under frequent incapacities to cultivate their own lands, they found it necessary to commit part of them to persons who, having no feudal possessions of their own, were glad to possess them on any terms. To such persons small portions were let, reserving such returns of service, corn, cattle, or money, as might enable the proprietors to attend to the feudal duties uninterruptedly. By this means the feudal policy was considerably extended; as all persons accepting a feud were, under an express or implied fealty, obliged to answer the stipulated renders, and to promote the peace and welfare of the *feudal society*. From hence therefore

therefore arose the distinctions made by the feudists, of Feuds *proper* and *improper*, and the many subdivisions of these terms. *Wright* 19—26.

Proper Feuds are such, and such only, as are purely military; and, at this time, hereditary; and such as in all respects preserve the nature of an original feud, as before explained. It was the military nature of these feuds that first rendered women and monks incapable of receiving or succeeding to feuds of this sort; and that restrained the alienation, devising, or incumbering of the feud by the Feudatary, without the consent of the Lord; and of the seigniory by the Lord, without the consent of the Tenant; the obligations of the superior and inferior being *mutual* and *reciprocal*. The feudal course of succession, in all proper feuds, belonged to the sons only, (exclusive of daughters,) and to them equally; until, by a constitution of the Emperor *Frederic*, honorary feuds became indivisible; and, as such, they (and, in imitation of them, *military* feuds in most countries) began to descend to the eldest son only. *Wright* 27—32.

5. All feuds, sold or bartered for any immediate or contracted equivalent; or that are granted free of all service; or in consideration of one or more *certain* services, whether military or not; or upon a *cens*, or *rent*, in lieu of service; and all such feuds as are, by express words in their creation or constitution, alienable, or allowed to descend indifferently to males or females; are *improper* feuds. *Wright* 32. Of which sort most feuds are at this day.

They are distinguished from *proper* feuds, by such qualities only as are varied from or superadded to the feud by *express* provision of the parties: They must appear to be so from the words of the *investiture*; which solemnity is as necessary to this as to a proper feud: And the custom of the country where the feud lies must be accurately observed.

6. Few of the feudal obligations are, as such, of force with us. First mentioning *Fealty*, those of *Eviction* and *Aid* may deserve some notice; as our Laws of *Warranty* and *Aid* may be supposed to depend on them.

Fealty, *the essential feudal bond*, is so necessary to the very notion of a feud, that it is a downright contradiction to suppose the most improper feud to subsist without it. *Craig de Jure Feud.* 45—7, 223: 1 *Inst.* 129, *a*: *Seld. Tit. Hon.* 273. See title *Fealty*.

7. The feudal obligation upon Eviction, *ut vel feudum aliud, ejusdem bonitatis, restituat Dominus vel estimationem praestet*, if considered as a penalty upon the Lord for refusing or neglecting, when required, to protect or defend the Feudatary's title to the fee, might be always reasonable; otherwise, it rather seems to have prevailed upon the reason of *contracted* and *improper* feuds, than by the nature of a *pure original* feud. And though none of the ancient feudists make any strict distinction, yet they must be understood to speak of the times in which they wrote; in which such improper feuds chiefly prevailed; nay, when almost all feuds were alienable and saleable as matters of merchandise. *Wright* 39, 40.

8. Aid, as understood to import an obligation upon the feudal Tenant to contribute to the private necessities or occasions of the Lord, was not of direct feudal obligation; the original feudal aid seeming to have been purely military, binding the Feudatary merely to concur with, and to assist his Superior or Lord, in defence of the feud, or *feudal society*. On this ground it can hardly be made out, that the several different Aids which have been exacted, are to be inferred from the reason of feuds; but they rather seem to depend upon the usage or custom of the several countries where they are established. *Wright* 40, 42. See *post*. II. 6.

II. 1. It is difficult to determine precisely the time *when Feuds or Tenures were first brought into* England: Some have thought that they were planted here long before the Conquest; others, that they were introduced by *William* I. soon after. The authorities on both sides this question are numerous. See 1 *Inst.* 76, *b*: *Pref. by Bp. Gibson to Spelman on Feuds*: *Seld. Tit. Hon.* 510: *Bacon Hist. Eng. Gov.* 161: *Temple's Introd.* 171: *Hale Hist. Com. Law* 107, 223: *Craig de Jure Feud.* 29: *Somn. on Gav.* 100: *Camden*: *Bract. lib.* 2. *c.* 16. § 7; and a vast variety of authorities, quoted and compared together, in *Wright's Tenures*, *p.* 46, *& seq.*

One observation may be of service in deciding this question; that *William* I. about the 20th year of his reign, just when the general Survey of *England*, called *Domesday Book*, is supposed to have been finished, and not till then, summoned all the great men and landholders in the kingdom to *London* and *Salisbury*, to do their homage and to swear their fealty to him. Hence we may reasonably suppose, 1st, That this general homage and fealty was done at this time in consequence of something *new*; or else, that engagements so important to the maintenance and security of a new establishment, would have been required long before. 2dly, That as this general homage and fealty was done about the time that *Domesday-Book* was finished, and not before, it may be supposed that that survey was taken upon or soon after our ancestors' consent to *Tenures*, in order to discover the quantity of every man's fee, and to fix his homage. *Wright* 52—56.

On the whole, therefore, it seems, that it may safely be assumed, that Tenures first became a principal branch of the national policy in the time of *William* I.; for, even in the *Saxon* times, particular proprietors of large tracts of land, which they could not cultivate and manure themselves, might let some part of them to their neighbours, under various acknowledgments or returns of service, not altogether unlike some of the feudal returns: Especially as our *Saxon* ancestors may be supposed to have had some notion of such returns, they being a colony or branch of the ancient *Goths*, who first brought the feudal policy into *Europe*. *Wright* 57, *n.*

2. The establishment of Tenures in *England* may be called an extraordinary alteration of the national policy; not only because it was such in many of its consequences, but likewise because it originally and immediately defeated all supposition or possibility of propriety in any other person than the King; insomuch that it became a fundamental necessary maxim, principle, or fiction of our *English* Law of Tenures, (alluded to in the introduction to this Title,) that the King is universal Lord of his whole territories; and that no man doth, or can possess

possess any part thereof, or lands therein, but *as either mediately or immediately* derived from him. *Wright* 58. See also 1 *Inst*. 65, *a*.

According to this position, of which the truth is undeniable, all the lands in *England*, except those in the King's hands, are feudal. This universality of Tenures, if not quite peculiar to *England*, certainly does not prevail in several countries on the Continent of *Europe*, where the feudal system has been established; and it seems there are some few portions of *allodial land* in the Northern part of our own island. As to *Scotland*, Ld. *Stair* expresses himself rather ambiguously on the subject; for he says, that there remains *little of allodial land* in *Scotland*; but in a few lines after, observes, that the glebes of the Clergy, which seem to come nearest to allodials, are more properly *mortified*, or, as we should call them, Mortmain Fees. *Stair, Inst*. See 1 *Inst*. 65, *a. in n*.

As *William* I. however, notwithstanding the monkish relations, and the misapprehensions of some modern writers, did not claim or possess himself of the lands of *England*, as the spoils of conquest; so neither did he tyrannically and arbitrarily subject them to a feudal dependence; but as the feudal law was at that time the prevailing law in *Europe*, *William*, who had always governed by this policy, might probably recommend it to our ancestors, as the most obvious and ready way to put them upon a foot with their neighbours; and to secure the nation against any future attempts from them. We find accordingly, among the laws of *William* I. a law *enacting the feudal law itself*; not indeed *eo nomine*, but in effect; as it requires from all persons the same engagement to, and introduces the same dependence upon, the KING, as *Supreme Lord* of all the lands in *England*, as were supposed to be due to a supreme Lord by the feudal law. The Law meant, is the 52d law of *William* I. (See *Wright* 65); the terms of which are absolutely feudal, and are apt and proper to establish that policy with all its consequences: for it requires, "that all owners of land should expresly engage and swear that they would become *Vassals* or *Tenants*, and as such be faithful to *William* as their Lord; and that they would, in consequence thereof, every where faithfully maintain and defend his, their Lord's, territories and title, as well as person, and give him all possible aid and assistance against his enemies foreign and domestic." See also the 55th, 58th, 68th, and 69th laws of this King; and Sir *M. Wright*'s ingenious observations upon the whole, in his book, *p*. 69, *& seq*.

3. Although it is certain that WARDSHIP could be no part of the law of feuds before they became hereditary, yet then, as they often descended on infants who were incapable of performing or engaging for the services of the feud, *Wardships of the Land*, i. e. the custody of the feud itself, was retained by the Lord; that out of the profits he might provide a fit person to supply the infant heir's defect of services until he came of age to perform them. *Wright* 89.

With respect to the custody or *Wardship of the Body*, there is no clear feudal reason to be given for it; and therefore we may suppose that our *Norman* ancestors might think it reasonable, rather in regard to the infant heir, than to the Lord himself, that the Lord who had the custody of the feud, should likewise have the care and maintenance of the infant Feudatary; who would thus be most likely to be qualified for the services of the feud. *Fortesc. de Ll. Ang. c*. 44: *Smith de Rep Ang*. 264: *Cowel*, *Inst. lib* 1. *tit*. 17. § 2: 1 *Inst*. 75, *b*: *Bacon. Hist. Eng. Gov*. 148: See 2 *Comm. c*. 5. *p* 67; *c*. 6. *p*. 87; and this Dictionary, title *Guardian*.

4. As for MARRIAGE, the Lords of our *English* fees might possibly take the hint from *Normandy*: though, in the sense of our law, in which it meant the interest of the Guardian in bestowing a Ward in marriage, and was understood to be a beneficial perquisite of Tenure, no express notices of it can be found earlier than the statute of *Merton*, *c*. 6, 7, (20 *H*. 3.) By the charter of *Henry* I., a daughter of any of the King's tenants was not, even in the life-time of her father, to be married without the King's privity; because otherwise she might marry a public enemy. But the King was to take nothing for his consent; nor could he restrain the father from marrying her to any that was not such enemy: but this charter says nothing of the marriage of *males*, nor does it give the least colour or countenance to any private profit from the marriage of females. Our *English* Lords, however, by an extraordinary construction of *Magna Charta*, took upon them, not only the absolute marriage of female wards, but of males too, which at length became one of the great feudal grievances. See *Ll. H*. 1. *c*. 1: *Spelman on Feuds* 29: *Glanv. lib*. 7. *c*. 12. *p*. 55, *a*: *Bract. lib*. 2. *c*. 37. § 6. *p*. 188, *a*: 2 *Comm. c*. 5. *p*. 70; *c*. 6. *p*. 88.

5. RELIEF; [*Relevamen*, *relevatio*, *relevium*; intimating, that the inheritance, which, by the death of the former tenant, became *jacens*, or *caducum*, was thus *relevatus*, lifted or raised up again. See *Bracton*, *lib*. 2. *c*. 36: *Britton*, *c*. 69: *Spelm. Relevamen*:] was not a service, but a fruit of feudal tenure. 2 *Roll. Abr*. 514. *D*. 3: 3 *Rep*. 66: 1 *Inst*. 83, *a*. These were not arbitrarily introduced by *William* I., but brought into *England* with feuds according to the custom of the feudal law, and other nations: And although Lord *Coke* (2 *Inst*. 7, 8; but see 1 *Inst*. 176, *a*,) supposes Reliefs to have been certain at the Common Law, yet they were probably with us originally uncertain as by the feudal law; and were, no doubt, on this account, another of the great grievances of Tenure; to remedy which, several laws were made, fixing them at certain sums for all lands held by Knight-service, till the expiration of that Tenure, under the *stat*. 12 *Car*. 2. *c*. 24. See *Ll. W*. 1. *c*. 22: *Ll. H*. 1. *c*. 14: *Magna Charta*, *c*. 2: *ante* I. 3, and *Wright's Tenures*.

The Relief of *Socage lands*, was fixed by the 40th law of *William* I. at one year's rent, and remains the same to this day; although it is not taken notice of in any of the charters of *Hen*. I., *John*, or *Hen*. III. *Glanv. lib*. 9. *c*. 4: *Fleta*, *lib*. 3. *c*. 17. § 11: *Litt*. §§ 126, 7: 2 *Inst*. 232: and see 1 *Inst*. 93, *a. in n*.; and title *Relief* in this Dictionary, and 2 *Comm. c*. 5. *p*. 65; *c*. 6. *p*. 87.

6. AIDS, (see *ante* I. 8,) called by *Spelman*, (*Treatise Feuds* 59,) *Tribute*, and by our old authors *Auxilia*, were mere *benevolences*, rendered by a tenant to his Superior or Lord, in times of difficulty and distress. *Bracton*, *lib*. 2. *c*. 16. § 8: *Fleta*, *lib*. 3. *c*. 14. § 9. These were not of direct feudal obligation; but first obtained out of a regard to the person and occasions of the Lord. The kind and quantum therefore of every *aid* was originally as various and uncertain as the occasion of the Lord and the

the abilities of the Tenant. But as Aids grew frequent, they became, in many countries, established *renders of duty*: Thus, in *Normandy*, the *three* most usual and frequent Aids; 1st, To make the Lord's eldest son a Knight; 2dly, To marry his eldest daughter; and, 3dly, To ransom his person; became fixed and established. Besides these, there was one of an inferior nature, respecting only inferior Lords, *viz.* An Aid to enable the Lord to pay his relief; therefore called *aid de relief*. To all these our ancestors were liable, and thus far went into the *Norman* notions on this subject, nay they even went farther; for in the time of King *John*, inferior Lords took Aids to pay their debts, and in the time of King *Hen.* II. it was doubted whether Lords might not require Aids towards their military expeditions; but at length these inferior Aids, together with the *aid de relief*, and other illegal Aids imposed by the King himself, were effectually abolished by a charter of King *John*, revived and restored by *stat.* 25 *E.* 1. *c.* 5, 6: and the two first of the usual aids before-mentioned were fixed, (by *stat. Westm.* 1. *c.* 36, extended by *stat.* 25 *Ed.* 3. *c.* 11, to aids required by the King,) as follows, *viz.* The Aid of a Knight's fee at 20*s.* and of socage lands of 20*l. per annum*, at 20*s.* and so *pro rata*. These statutes do not regulate the 3d Aid for ransom of the Lord's person; this was less frequent, and by no means capable of certainty; it being of the highest consequence, with regard especially to the *Supreme Lord*, that he should *at any rate* be ransomed as often as he was taken prisoner of war. *Wright* 105—115. See 2 *Comm. c.* 5. *p.* 63, &c.; *c.* 6. *p.* 86.

7. When a fee determines for want of heirs or *propter delictum tenentis*, the land falling back to the Lord is called an ESCHEAT [*Escaeta*]; and is as such reckoned by our *English* Lawyers among the fruits or perquisites (though it might properly be considered as the absolute *determination*) of Tenure. *Spelman on Feuds* 37.

Spelman (*ubi supra*) divides Escheats into regal and feudal; (in which he is followed by *Coke*, 3 *Inst.* 111;) agreeable enough to the import of the word escheat (from the French *eschevir*, to happen). But, strictly speaking, such lands as are not held *immediately* of the King, and yet happen to him upon the commission of any treason, are not Escheats, but *Forfeitures*; which were given to the King by the Common Law, and do not depend upon the law of feuds or Tenures, but upon *Saxon* Laws, made long before their introduction, and which prevail even now. *Lambard. Ll. Alf.* c. 4: *Ll. Canuti. c.* 54. See title *Forfeiture*.

Though this forfeiture to the King may seem severe on the mesne Lord, in defeating his seigniory, yet it seems a punishment inflicted on him, for his want of caution in the choice of his tenant.—The Law having inflicted a similar penalty on the Lord, where the tenant is guilty of felony only; the King, in this latter case, having the land a year and day, to the prejudice of the immediate Lord, to whom the estate in that case escheats. See *Mag. Charta. c.* 22, 31: 1 *Inst.* 18. *b. in n*: 2 *Inst.* 36, 7: 3 *Inst.* 111: *St. de Prærog. Regis.* 17 *E.* 2. *c.* 16: *Staundford, P. C. l.* 3. *c.* 30: And for further matter, 2 *Comm. c.* 5, 6; and this Dictionary, title *Escheat*.

If lands be held of the King, as of an honour come to him by a common escheat, as the tenant's dying without heir, or committing felony, these lands are part of the honour; otherwise, if forfeited for treason, for then they come to the King by reason of his person and crown; and if he grants them over, &c. the patentee shall hold of the King in chief. 2 *Inst.* 64.

It was found by special verdict, That the Prior of *Merton* was seised of a house in *Southwark*, held of the Archbishop of *Canterbury*, as of his borough of *Southwark*; and (*an.* 30 of his reign) surrendered it to *Hen.* VIII., who granted it and other lands to *J. S.* and his heirs, to hold of him *in libero burgagio*, by fealty, for all services and demands, and not *in capite*; and afterwards Queen *Mary* granted the manor and borough of *Southwark* to the Mayor and Commonalty of *London*; and the tenant of the messuage died without issue; and the question was, whether Queen *Eliz.* or the patentees of the borough should have the escheat? and adjudged for the Queen; for the first patentee of the messuage held it of the Queen in socage *in capite*, as of a seigniory in gross; and the words *in libero burgagio* are merely void; for the land out of the borough cannot be held *in libero burgagio*; and there shall not be several Tenures, for one Tenure was reserved by the King for all; therefore of necessity it shall be a Tenure in socage of the King. *Cro. Eliz.* 120.

8. ESCUAGE is reckoned by Lord *Hale*, among the perquisites of Tenure; and, whether so or not, seems one of its most obscure and unintelligible branches.

Escuage, considered as a Service, or species of Tenure, was not, as *Littleton* intimates, (§§ 95, 96,) a direct personal service of attendance upon the King in his wars; nor was it due upon all military occasions, as *Knight-Service* was: But it was a pecuniary *aid*, or *contribution*, reserved by particular Lords instead, or in lieu, of personal service; the better to enable them to bear the extraordinary expence of their own attendance and warfare, when the King made war on *Scotland* or *Wales*, or upon any foreign country, if the Tenure was so expressed. *Bract. l.* 2. *c.* 16: *Litt.* §§ 95, 97, 100, 103, 155, 158: *Mad. Hist. Exc.* 452: *Seld. Notes ad Hengham* 113.

As the Lord's service abroad was thus uncertain, the *quantum* of this aid was seldom ascertained by reservation; but was usually proportioned to the fine received by the King from his tenants *in capite*, failing to attend in such expeditions. *Fleta, lib.* 3. *fol.* 198.

This aid and fine were both of them called Escuage *à scuto quod assumitur ad servitium militare (Bract. ubi suprà)*; in respect of the *scutum* which ought to be borne both by Lord and tenant in such wars.

In this view Escuage was a specific service, (of a different kind from Knight-Service,) in respect whereof only, the tenant, on account of its subserviency to the military policy of the nation, was esteemed as a Knight, or rather as a military tenant. *Wright* 126, 7.

Escuage, however, it must be allowed, was anciently, as it is at this day, more generally understood to denote a mulct or fine for a military tenant's defect of service; as the feudal severities began to abate. *Mad. Hist. Exc.* 438, 454, 7, 8, 462: 2 *Rol. Abr.* 509. § 1: *Litt.* § 102:

Our Kings anciently taking advantage of, or perhaps complying with, this humour of their tenants, which made their actual services precarious, did sometimes, on occasion of war, without summons, assess a moderate sum upon each Knight's fee, as a *Scutage* or *Escuage*, by which they might be enabled to provide Stipendiaries. But as Escuage of this sort was a previous commutation

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for service really *imposed* at the King's will, and not incurred as a fine, it was not long submitted to: In the time of King *John*, it was not only insisted upon as an undoubted right of the King's tenants, but the Barons urged, and the King, by his charter, declared, that no Escuage should be imposed or assessed *nisi per commune concilium Regni*. See *Litt.* § 97: 1 *Inst.* 72, *a*: *Mag. Charta, cap.* 37.

Escuage thus becoming the only penalty for defect of service, many Lords, by agreement between them and their tenants, fixed it at a certain sum, to be paid as often as Escuage should be granted, without regard to the rate assessed by Parliament. Thus ascertained, it was called *Escuage certain*; and because it did *in effect* discharge the tenant from all military service, the persons who held by such Escuage were looked upon as *socage* tenants, and no longer esteemed as tenants by Knight-service. *Litt.* §§ 98, 120: 1 *Inst.* 87, *a*.

As to Escuage, see also the notes on 1 *Inst.* 73, 74.—And now Escuage is expressly taken away by the *stat.* 12 *Car.* 2. *c.* 24. (See *post*, III. 3.); and had fallen into disuse long before; for there is no instance of Parliament assessing it since the reign of *Edward* II. See further 2 *Comm. c.* 5. *p.* 74. *&c.*

III. 1. It is so absolute a maxim, principle, or fiction of the Law of *Tenures*, *that all lands are holden either mediately or immediately of the King*, that even the King himself cannot give lands in so absolute and unconditional a manner, as to set them *free* from Tenure.—And therefore, if the King should grant lands without reserving any particular service or Tenure, or if he should in express words declare, that his patentee should have lands *absque aliquo inde reddendo*; yet the Law or established policy of the kingdom would create a Tenure; and the patentee should anciently (before the *stat.* 12 *Car.* 2. *c.* 24.) have held of him *in capite* by *Knight-service*. 1 *Inst.* 1, 65: 2 *Inst.* 501: *Sullivan Lect.* 126: 6 *Rep.* 6: 9 *Rep.* 123: *Bro. Tenures*, [illegible]. And now, in such case, or if the King release the services to his tenant, it will not extinguish the Tenure; but the tenant shall, notwithstanding, *hold by fealty*, which, as was before observed, (I. 6.) is an incident inseparable to every Tenure, and therefore cannot be released. 9 *Rep.* 123: *Law of Tenures*, 196: 2 *Comm. c.* 6. *&c.*

Lands, thus *holden*, are called TENURES; which were principally divided, according to their services, into Tenures by *Knight Service* and in *Socage*.

According to *Blackstone*, there seem to have subsisted among our ancestors four principal species of lay Tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the Lords from their tenants. The Services, in respect of their *quality*, were either free or base services; in respect of their *quantity* and the time of exacting them, were either certain or uncertain. Free Services were such as were not unbecoming the character of a soldier, or a freeman to perform; as, to serve under his Lord in the wars, to pay a sum of money, and the like. Base Services were such as were fit only for peasants, or persons of a servile rank; as, to plough the Lord's lands, to make his hedges, to carry out his dung, or other mean employments. The certain Services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The uncertain depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the *Scots* invaded the realm; which are free services: Or to do whatever the Lord should command; which is a base or villein service. 2 *Comm. c.* 5.

From the various combinations of these services have arisen the four kinds of Lay Tenure which subsisted in *England* till the middle of the last century; and three of which subsist to this day. Of these, *Bracton* (who wrote under *Henry* the Third) seems to give the clearest and most compendious account, of any author, ancient or modern; of which the following is the outline or abstract: "Tenements are of two kinds, frank-tenement, and villenage. And, of frank-tenements, some are held freely in consideration of homage and Knight-service; others in free-socage with the service of fealty only." And again, "Of villenages some are pure, and others are privileged. He that holds in pure villenage shall do whatsoever is commanded him, and always be bound to an uncertain service. The other kind of villenage is called villein socage; and these villein-socmen do villein services, but such as are certain and determined." See *Bract. l.* 4. *tr.* 1. *c.* 28. Of which the sense seems to be as follows: First, where the service was free, but uncertain, as military service with homage, that Tenure was called the Tenure in Chivalry, *per servitium militare*, or by Knight-service. Secondly, where the service was not only free, but also certain, as by fealty only, by rent and fealty, *&c.* that Tenure was called *liberum socagium*, or free socage. These were the only free holdings or tenements; the others were villenous or servile: As, thirdly, where the service was base in its nature, and uncertain as to time and quantity, the Tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was base in its nature, but reduced to a certainty, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called Socage, (from the certainty of its services,) but degraded by their baseness into the inferior title of *villanum socagium*, villein-socage.

2. Tenures by Knight Service differed very little from proper feuds; but being now abolished by *stat.* 12 *Car.* 2. *c.* 24, and turned into free and *common socage*, inquiry shall be made at some length into that existing Tenure. See *ante* I. 1: II. 1, 2: And 2 *Comm. c.* 5. *&c.*

3. Tenures in Socage, are holdings by any certain conventional services that are *not military*; the word Socage, according to *Somner*, being derived of the Saxon word *Soc*, (a liberty, privilege, or immunity,) and *agium*, a legal termination, signifying service or duty. *Somner Gav.* 134, 143, 141: *Litt.* § 117: 1 *Inst.* 86, *a*: *Britt.* *c.* 66. § 418: *Fleta, lib.* 1. *c.* 8.

It seems, however, more probable and consistent to derive Socage from *soca* a *plough*; the ancient services conferred on this Tenure being *to plough the Lord's lands*; but which is now changed into many other kinds of service. In this sense the Tenure in socage is denominated, (like the Tenure by Knight-service) simply from the name or nature

nature of the service at first reserved. *Wright* 141, 4: 1 *Inst.* 86, (*b*): *Craig de jure Feud.* 63: 2 *Comm. c.* 6, and the notes there.

By the degenerating of Knight-service, or personal military duty, into escuages, or pecuniary assessments, all the advantages (either promised or real) of the feodal constitution were destroyed, and nothing but the hardships remained. These may be collected from the foregoing detail, and are very justly and feelingly stated in 2 *Comm. c.* 5. *p.* 75, 76.

Palliatives were from time to time applied by successive Acts of Parliament, which assuaged some temporary grievances. Till at length the humanity of King *James* I. consented, in consideration of a proper equivalent, to abolish them all, though the plan proceeded not to effect; in like manner as he had formed a scheme, and began to put it in execution, for removing the feodal grievance of heritable jurisdictions in *Scotland*; which has since been pursued and effected by the statute 20 *Geo.* 2. *cc.* 43, 50. King *James*'s plan for exchanging our military Tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the Crown and other Lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the Crown, and assured to the inferior Lords, payable out of every Knight's fee within their respective seignories;—an expedient, seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military Tenures, with all their heavy appendages (having, during the Usurpation, been discontinued) were destroyed at one blow by the *stat.* 12 *Car.* 2. *c.* 24, which enacts, "That the Court of Wards and Liveries, and all wardships, liveries, primer-seisins, and ouster-le-mains, values and forfeitures of marriage, by reason of any Tenure of the King or others, be totally taken away. And that all fines for alienations, Tenures by homage, Knight's-service, and escuage, and also aids for marrying the daughter or knighting the son, *and all Tenures of the King in capite*, be likewise taken away. And that all sorts of Tenures, held of the King or others, be turned into Free and Common Socage; save only Tenures in *Frankalmoigne*, *Copyholds*, and the honorary services of *Grand Serjeanty*." A statute, which was a greater acquisition to the civil property of this kingdom than even *Magna Charta* itself: Since that only pruned the luxuriances that had grown out of the military Tenures, and thereby preserved them in vigour; but the statute of King *Charles* extirpated the whole, and demolished both root and branches. 2 *Comm. c.* 5. *ad fin.*

The above expression, in the title and body of the Act, as to *Tenures in Capite*, and which was also repeated by the Speaker of the House of Commons, in his address to the King on presenting the Bill, is an inaccuracy of a very extraordinary nature.—*Tenure in Capite* signifies nothing more than that the King is the immediate Lord of the land-owner; and this might always have been either by a Military or Socage Tenure. See 2 *Comm.* [illegible] *Mod. Rep.* [illegible] *Ley* 238 [illegible] and this [illegible]

The several changes made in the Tenure of Socage by the *stat.* 12 *Car.* 2. [illegible] *are the following* [illegible]

First, It takes away the *Aids pur file marier* and *pur faire fitz chevalier*, which were incident to all Socage Tenures. 2. It relieves Socage *in capite* from the burden of the King's *primer-seisin*, and of *fines of alienation* to the King, to both of which Socage *in capite* was equally liable, with Tenure by Knight-service *in capite*, though not so to Wardship. 3. It extends the father's power of appointing guardians to children of both sexes; and thus supplied the means of still further preventing guardianship in Socage. See this Dictionary, title *Guardian*. In all other respects, the Tenure in Socage seems to be under the same circumstances, and attended with the same consequences, as it was before the Restoration.

Having thus reformed and improved this favourite Tenure, the statute, in the next place, provides for the extension of it throughout the kingdom. This it effectually secures, by converting into Socage all Tenures by Knight-service, as mentioned above; and by taking from the Crown the power of creating any other Tenure than Socage in future. 1 *Inst.* 95. (*b*) *in n*: And see *Id.* 85. (*a*) *in n.*

It appears that there is nothing, however, in the above statute which in the least varies the Tenure in *Frankalmoigne*; it being expressly saved in the statute, § 7. See this Dict. titles *Charitable Uses*; *Frankalmoigne*; *Mortmain*.—Neither does it appear in any way to affect the Tenure by Burgage. See title *Burgage Tenure*.—And it leaves the Tenure by villenage as it was before; one of the provisoes declaring, that it shall not be construed *to alter or change any Tenure by Copy of Court-roll*, or any services incident thereto. § 7.

4. Thus therefore, *All our English Fees, or Holdings, fall at present under the notion of* SOCAGE-TENURES; which, though they vary in point of service, succession, [illegible] feuds, yet retain the nature of feuds, as they are holden of a superior by fealty, and usually by some other certain service or acknowledgment; and [illegible] relief and escheat. *Wright* 144, 5. [illegible] Socage, *stat.* 37 *Hen.* 8. *c.* 20 [illegible] 2 *Comm. c.* 6.

[illegible] according to their duration, into [illegible] *for life*, *for years*, and at *will*: In [illegible] be sufficient to class them under [illegible] *life only*.

Estates in [illegible] *Fee-simple* or *Fees-tail*.

5. A FEE-SIMPLE [illegible] it be according to *Littleton* (§ 1.) *Hereditas pura*, [illegible] so called, because it imports an estate purely [illegible] free from all tenure; but in opposition to fee-conditional at Common Law, and fee-tail since the *Statute De donis*. It imports a simple inheritance, clear of any condition, limitation, or restriction to any particular heirs, and descendible to [illegible] male or female, lineal or collateral. In the [illegible] language of our Law, [illegible] fee-simple [illegible] lands or tenements, to hold to him and his heirs for ever. *Litt.* § 1: 1 *Inst.* 1: *Bracton*, *lib.* 2. [illegible]

[illegible] conferring these fees or estates in [illegible] contrary to the original purity [illegible] the ancient form of [illegible] *feoffment*, whether [illegible] fee, retains even at this day the form of a gift. It is perfected and notified by the

the same solemnity of livery and seisin on investiture, as a pure feudal donation, and is still directed and governed by the same rules. 1 *Inst.* 9, *a*; 42, *a*: *Fleta*, *lib.* 3. *c.* 15. §§ 4, 5: *Bracton*, *lib.* 2. *c.* 17. § 1. See titles *Conveyance*; *Deed*; *Feoffment*; *Grant*, &c.

Tenures being thus derived from the feudal law, and partaking of their origin, *Fees*, or estates in fee, could not, at Common Law, be aliened without the licence of the Lord: (see *ante* I. 4.) This introduced *Sub-infeudations* by the tenant *to hold of himself*; which were so far restrained by *Magna Charta*, *c.* 32, as to compel the tenant of an inferior Lord to keep in his own hands so much of the fee as would be sufficient to answer his services to the Lord. The first statute that materially varied from this law of feuds, was the statute of *Quia emptores*, 18 *E.* 1. *c.* 1, which enabled such tenants to sell all or part of their lands, *to hold of their Lords*, by the same services as the feoffor had held. The King's tenants were, however, under several disabilities of alienation, but which were all finally removed by *stat.* 34 *Ed.* 3. *c.* 15; and fines for alienation were paid to the King by his tenants, till abolished by the *stat.* 12 *Car.* 2. *c.* 24, already so often alluded to. See 1 *Comm.* *c.* 5. *p.* 71; *c.* 6. *p.* 89.

As a tenant could not alien, so neither could he subject the tenancy or fee to his debts, until the *stat. Westm.* 2. (13 *E.* 1. *st.* 1.) *c.* 18, subjected a moiety of lands to execution; leaving the other to enable the tenant to do the services of the Tenure. But several other statutes, as 13 *E.* 1. *st.* 3, *de Mercatoribus*; 27 *E.* 3. *c.* 9; 23 *H.* 8. *c.* 6, were afterwards made, by which lands were subjected, in a special manner, to the particular liens created by those statutes. Vide 2 *Inst.* 394; and this Dictionary, title *Execution*.

As tenants could not, by the feudal or Common Law, alien their tenancies without the licence or consent of the Lord; so neither could the Lord himself alien his seigniory without the consent of his tenant. Hence sprung the doctrine of *Attornment*, now quite abolished by *stat.* 4 *Ann.* *c.* 16. § 9. See title *Attornment*.

For the feudal restraints on devise, see title *Wills*.

The rules which at present operate on the law of descents to the eldest son, and the general preference of males to females, as well as those which exclude the immediate ascending line of relations, are all deducible from these feudal foundations of the Law; and are very ably explained by Sir *Martin Wright* in his Treatise, *pp.* 173—185. See this Dictionary, title *Descent*; and further, as to *Estates* in Fee-simple, this Dictionary, title *Fee and Fee-simple*.

6. A FEE-TAIL, (*feudum talliatum*,) as distinguished from a fee-simple, is a fee limited and restrained to some particular heirs, exclusive of others. It is so denominated from the *French*, *tailler*, to cut, or cut off, on account of the particular restriction by which the heir-general was often, and collateral or remote heirs were always, cut off. *Fleta*, *lib.* 3. *c.* 3: *Bract.* *lib.* 2. *c.* 5. § 3. *Brit.* *c.* 34: *Litt.* §§ 13, 18: 1 *Inst.* 18, *b*; *Spelm. Gloss.* *ad.* *v.* *Feodum*; and this Dictionary, title *Tail*.

A Fee thus limited was at Common Law known by the name of a *fee conditional*; so called from the condition, express or implied in the gift or constitution of the fee, that in case the donee died without such *particular* heirs, the land or fee should revert to the donor. But our ancestors were, after heir or issue had, suffered at Common Law, to alien such fee, and to defeat the donor as well as the heir; on a supposition that the condition was, for this purpose, satisfied or performed by the donee's having issue. See 1 *Inst.* 19, *a*: *Plowd. Comm.* 242, 5, *b*; 247, *a*.

This practice being manifestly contrary to the intent of the gift, was restrained by *stat. Westm.* 2. (13 *E.* 1. *st.* 1.) *c.* 1; commonly called the Statute *De donis conditionalibus* (or, shortly, the Statute *De donis*;) which required that the will and intent of the donor should be observed, and the fee so given should go to the issue, and for want of issue revert to the donor. So that, though *Littleton* says (§ 13.) that a Fee-tail is by force of this statute, yet it is not to be understood as creating any new fee, but only severing and distinguishing the limitation from the condition, and restoring the effect of each; *i. e.* the Limitation to the issue, and the Reversion to the donor: yet as by means of this statute the limitation was raised above the condition, the fee might thenceforth be denominated from the limitation, which thus became the substance, as it had before been the immediate end, of the gift. But this was at length eluded by the legal fictions of *Fines and Recoveries*. See this Dictionary under that title, and also title *Forfeiture*; and for further matter on this head of Estates-tail, and the policy of making them alienable, title *Tail and Fee-tail*. *Wright* 186, 9.

7. ESTATES FOR LIFE are either *conventional* or *legal*; of the former sort are such estates as are, in their creation, expressly given or conferred for life of the tenant only. These are of a feudal nature, held by fealty, and liable to conventional services. Of the other sort are, 1. *Tenancies in tail after possibility of issue extinct*; 2. *Tenancies in dower, and by the Curtesy*. See the several titles, and title *Life-Estate*, in this Dictionary.

The first of these is distinguished by the particular description merely to suggest the legal disadvantages cast on such estate-tail, when turned to a hopeless inheritance. It arises where lands and tenements are given to a man and his wife in *special* tail, and either of them dies without issue had between them. The survivor is tenant in tail after possibility, &c. See *Litt.* § 32: 1 *Inst.* 28; 11 *Rep.* 80; and this Dictionary, title *Tail after Possibility*, &c.

8. DOWER, called by *Craig*, *Triens* and *Tertia*, and known to the feudists by several other names, was probably brought into *England* by the *Normans*, as a branch of their doctrine of fiefs or tenures; for we find no footsteps of dower in lands until the time of the *Normans*: But, on the contrary, provision is made by one of the laws of the *Saxon* King, *Edmund*, for the support of the wife surviving her husband, out of his goods only. *Wright* 191, 2. See this Dictionary, title *Dower*.

9. TENANCIES BY THE CURTESY, or *per legem terræ*, though so called as if they were peculiar to *England*, were known not only in *Scotland*, but in *Ireland*, and in *Normandy* also; and the like custom is to be found amongst the ancient *Almain* laws; and yet it does not seem to have been feudal, nor does its original any where satisfactorily appear. Some *English* writers (*Mirror*, *Selden*, *Corbett*) ascribe it to *Henry* I.; but *Nat. Bacon* calls it a Law of Counter-tenure to that of Dowers, and yet supposes it as ancient as from the time of the *Saxons*; and that it was therefore rather restored than introduced

by

by *Henry* I. *Eng. Gov.* 109, 147. But as there are no notices of this curtesy among the laws of the *Saxons*, or among those we have of *Hen.* I. we may, perhaps, with safety rely on *Craig's* conjecture, that it is derived from the Civil Law. *Craig de Jure Feud.* 312: *Wright* 192, 5.

10. FORFEITURES of estates in fee, though they were very many by the feudal and Common Law, [vide *Spelm. in v. Felonia,* & *Ll. H.* 1. *c.* 43: *Glanv. l.* 9. *c.* 4: *Bract. l.* 2. *c.* 35. §§ 11, 12,] are reduced, as the Law now stands, to forfeitures by *Attainders of treason*; and by *Cesser*.

Of the former enough has been said at present. *Ante* II. 7; and this Dictionary, titles *Escheat*; *Forfeiture*; *Treason*. The latter, which depended on true feudal principles, and introduced many feudal hardships, was at length regulated by the statute of *Gloucester*, 6 *Ed.* 1. *c.* 4; and *stat. Westm.* 2. 13 *E.* 1. *c.* 21. These statutes provided, that in case a tenant should *cease* to pay his rent for two years, and there should not, during that time, be sufficient distress on the land, the Lord might have a *Cessavit*; and by means thereof, if the tenant did not render his arrears before judgment, the Lord should upon such *cesser* recover the land or fee itself, and bar the tenant for ever. See 2 *Inst.* 295, 400, 460: *Booth's Real. Act.* 133, 4: *F. N. B.* 208, 9: *Wright* 196—202; and this Dictionary, titles *Cessavit*; *Rent*.

Estates for life are also forfeitable by waste, and by all such acts as tend to defeat the reversion. 1 *Inst.* 251, 2. See title *Life-Estates*.

THERE are yet two kinds of Estates which, though they fall under the head of *Socage*, are denominated and usually treated as particular species of Tenure, viz. *Burgage* and *Gavelkind*.

11. BURGAGE-TENURE, so called to denote the particular service or Tenure of *houses* in ancient cities or *boroughs*, is certainly a species of *Socage*-tenure. The tenements being holden by a certain annual rent in money, or by some service relating to trade; and not by military or other service that had no such relation. The qualities of this Tenure vary according to the particular customs of every borough, and that without prejudice to the feudal nature of it. See *Wright* 204, 5: *Mad. firma Burgi*: *Litt.* §§ 162, 3, 4, 5, 6, 7: *Co. Litt.* 109: *Somn. on Gav.* 142, 8: *Taylor on Gav.* 171: 1 *Inst.* 109. *a*: *Spelm.*: *Craig. de Jure Feud.* 88: *Jenk. Cent.* 127: 2 *Comm.* *c.* 6. *p.* 82; and this Dictionary, title *Burgage*.

12. The properties of GAVELKIND TENURE are so many, and the qualities of it so different from those of any other Tenure, that it seems to have been doubted whether it be a Tenure of feudal nature or not. The Gavelkind tenant retains strong marks of propriety; as power to alien even at the age of 15: *Somn. Gav.* 8, 9: Freedom from forfeiture for felony; and many other privileges unknown to persons holding their lands by any other kind of Tenure.

It is however certain that the Tenure is strictly feudal, and, like the more usual Tenures by *Knight-service* and *Socage*, is denominated from the kind or nature of the prevailing service, which was, as the name imports, *tributary* or *censual*, the word Gavelkind being (according to *Somner on Gav.* [illegible] and [illegible]) a compound of the *Saxon* words *gavel*, *gafol*, or *gable*, a tribute, and [illegible] kind, sort, or quality; thus directly importing that such lands are censual or rented: Although they are also subject to other kinds of service, this Tenure in fact being, like Burgage, a kind of Socage Tenure, and liable to the same feudal burdens and forfeitures. See *Wright* 206—212.

As for the famous partible quality of *most* of the lands in *Kent*, [not all, see *Hale Hist. C. L.* 225: *Stat.* 31 *H.* 8. *c.* 3: but see 1 *Mod.* 98: 2 *Sid.* 153: *Cro. Car.* 465: *Lutw.* 236, 754: By which it appears that all lands in *Kent* shall be presumed, without pleading, to be gavelkind; unless they can be proved to be disgavelled;] it was not a particular or proper effect of Gavelkind Tenure. But it was rather the ancient course of descent retained and continued in that county. *Somn. on Gav.* 89, 90. And however particular this course of descent (whereby the lands of the father are equally divided among all the sons; and of a brother dying without issue, among all his brethren; *Litt.* § 210: *Co. Litt.* 140,) may now appear to us, yet if we consider Gavelkind as a species of *Socage Tenure*, and that all Tenures by *Socage*, or of that nature, were anciently in point of succession divisible; and that they might, without prejudice to their feudal nature, descend equally or otherwise, as best suited the genius and usage of every county; it will appear much more extraordinary that all other counties should depart from this, the more ancient and natural course of descent, than that this particular county should retain it. *Wright* 213. See further, 2 *Comm. c.* 6; and this Dict. title *Gavelkind*.

13. Under this Head, *Tenure*, something ought to be said of *Copyholds*; though they are not reducible to any of the preceding divisions of the subject.

COPYHOLDS are the remains of *Villenage*; which, considered as a Tenure, was not entirely *Saxon*, *Norman*, or Feudal, but a Tenure of a mixed nature, advanced by the *Normans* upon the *Saxon* bondage, and which gradually superseded it. See *F. N. B.* 12, C: 1 *Inst.* 58. *a*: *Bacon's Use of the Law* 42, 3: *Litt. tit. Villenage*: *Old Ten.*: *Somn. Gav.* 85, 6.

The *Normans*, according to Sir *William Temple*, "finding among us a sort of people who were in a condition of downright servitude, used and employed in the most servile works, and belonging (they, their children, and effects) to the Lord of the soil, like the rest of the stock or cattle upon it," *enfranchised* all such as fell to their share; by admitting them to *fealty* in respect of the little livings they had hitherto been allowed to possess, merely as the scanty supports of their base condition; and which they were still suffered to retain upon the like service as they had in their former servitude been used and employed in. But this possession, as now clothed with *fealty*, and by that means advanced into a kind of *Tenure*, differed very much from the ancient servile possession, and was from henceforth called *Villenage*. See *Temp. Introd.* 59: *Mirror, l.* 2. *c.* 28: *Bract. lib.* [illegible]: *Litt.* §§ 206, 7: *Leg. W.* 1. *cc.* 29, 33: in which last the word *Vilain* seems first applied to such tenant. See also this Dictionary, title *Villein*; and *Spelm. Gloss. in v. Servus*.

Our *Saxon* ancestors having submitted to the feudal law, which to them was *A Law of Liberty*, perhaps imitated the *Normans* in this particular: But neither did our *Saxon* or *Norman* ancestors mean to increase or strengthen the possession of their *villeins*, but to leave that

that altogether as dependent and precarious as before; save only that, as by their admission to *fealty*, their possession was put, in some measure, upon a feudal footing, the Lords could not deal with them so wantonly as before: (*vide ante* I. 4:) And at length the uninterrupted benevolence and good nature of the successive Lords of many manors, having, time out of mind, permitted them, or them and their children, to enjoy their possessions in a course of succession, or for life only, became customary and binding on their successors, and advanced such possession into the legal interest or estate we now call *Copyhold*; which yet remains subject to the same servile conditions and forfeitures as before, they being all of them so many branches of that continuance or custom which made it what it is. *Somn. Gav.* 58: *Spelm. Gloss. v Feudum*: *Bro.* title *Villenage*.

From this view of the origin and nature of Copyholds we may possibly collect the ground of the great variety of customs that influence and govern those estates in different manors; it appearing that they are only customary estates, after the ancient will of the first Lords, as preserved and evidenced by the Rolls, or kept on foot by the constant and uninterrupted usages of the several manors wherein they lie. *Litt.* § 73, 75, 77. *Wright* 220.

As to *Copyholds*, see further, 2 *Comm.* c 6 III: and this Dictionary, titles *Ancient Demesne*; *Copyholds*; *Manors*; *Villeins*, &c.

FROM the above compendious view of the principal and fundamental points of the doctrine of Tenures, both ancient and modern, may be observed the mutual connection and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these Tenures, in progress of time, underwent, from the *Saxon* æra to 12 *Cha.* II. all *Lay-Tenures* are now in effect reduced to two species: *Free Tenure in Common Socage*, and *Base Tenure by Copy of Court Roll*. There is one other species of Tenure reserved by the statute of *Charles* II. which is of a *spiritual* nature, and called the Tenure in *Frankalmoigne*. See this Dictionary under that title.

TERM, *Terminus*.] Signifies commonly the limitation of time or estate; as a lease for term of life, or years, *&c. Bract. lib.* 2. Term is also a space of time, wherein the Superior Courts at *Westminster* sit. See *Terms*.

TERMINUM QUI PRETERIIT; See *Ad Terminum*; *Ejectment*.

TERMOR, *Tenens ex Termino*.] He that holds lands or tenements for term of years or life. *Litt.* § 100. A Termor for years cannot plead in assise like tenant of the freehold; but the special matter, *viz.* his lease for years, the reversion in the plaintiff, and that he is in possession, *&c. Dyer* 246; *Jenk. Cent.* 142. See title *Lease* I. 1.

TERMS, Those spaces of time, wherein the Courts of Justice are open, for all that complain of wrongs or injuries, and seek their rights by course of law or action, in order to their redress; and during which, the Courts in *Westminster-Hall* sit and give judgments, *&c.* But the High Court of Parliament, the Chancery, and inferior Courts, do not observe the Terms; only the Courts of King's Bench, the Common Pleas, and Exchequer, the highest Courts at Common Law. Of these Terms there are four in every year, *viz. Hilary* Term, which begins the 23d of *January*, and ends the 12th of *February* (unless on *Sundays*, and then the day after); *Easter* Term, that begins the *Wednesday* fortnight after *Easter* Day, and ends the *Monday* next after *Ascension* Day; *Trinity* Term, which begins the *Friday* after *Trinity Sunday*, and ends the *Wednesday* fortnight after; and *Michaelmas* Term, that begins the 6th of *November*, and ends the 28th of *November* (unless on *Sundays*, and then the day after).

These Terms are supposed by *Selden* to have been instituted by *William* the Conqueror: But *Spelman* hath clearly and learnedly shewn, that they were gradually formed from the canonical constitutions of the Church; being indeed no other than those leisure seasons of the year, which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. Throughout all Christendom, in very early times, the whole year was one continual Term for hearing and deciding causes. For the Christian Magistrates, to distinguish themselves from the Heathens, who were extremely superstitious in the observation of their *dies fasti et nefasti*, went into a contrary extreme, and administered justice upon all days alike. Till at length the Church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. As, particularly, the time of *Advent* and *Christmas*, which gave rise to the winter vacation; the time of *Lent* and *Easter*, which created that in the spring; the time of *Pentecost*, which produced the third; and the *Long Vacation*, between *Midsummer* and *Michaelmas*, which was allowed for the hay time and harvest. All *Sundays* also, and some particular festivals, as the days of the *Purification*, *Ascension*, and some others, were included in the same prohibition: which was established by a canon of the church, *A. D.* 517, and was fortified by an imperial constitution of the younger *Theodosius*, comprized in the *Theodosian* code. *Spelm. of the Terms*

Afterwards, when our own legal Constitution came to be settled, the commencement and duration of our Law Terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of King *Edward* the Confessor, (*c.* 3, *de temporibus et diebus pacis*,) that from the *Advent* to the octave of the *Epiphany*, from *Septuagesima* to the octave of *Easter*, from the *Ascension* to the octave of *Pentecost*, and from three in the afternoon of all *Saturdays* till *Monday* morning, the peace of God and of Holy Church shall be kept throughout all the kingdom. And so extravagant was afterwards the regard that was paid to these holy times, that though the Author of the *Mirror* mentions only one vacation of any considerable length, containing the months of *August* and *September*; yet *Britton* is express, that in the reign of King *Edward* I. no secular plea could be held, nor any man sworn on the Evangelists, in the times of *Advent*, *Lent*, *Pentecost*, harvest and vintage, the days of the great Litanies, and all solemn festivals. But he adds, that the Bishops did nevertheless grant dispensations, (of which many are preserved in *Rymer's Fœdera*,) that Assises and Juries might be taken in some of these holy seasons. And soon afterwards a general dispensation was established by *stat. Westm.* 1. 3 *Edw.* I. c. 51; which declares, that, "by the assent of all the prelates, Assises of *novel disseisin*, *mort d'ancestor*, and *darrein presentment* shall be taken in *Advent*, *Septuagesima*, and *Lent*; and that at the special request of

of the King to the Bishops." The portions of time, that were not included within these prohibited seasons, fell naturally into a fourfold division, and, from some festival day that immediately preceded their commencement, were denominated the Terms of *St. Hilary*, of *Easter*, of the *Holy Trinity*, and of *St. Michael*; which Terms have been since regulated and abbreviated by several acts of Parliament; particularly *Trinity* Term by *stat.* 32 *Hen.* 8. *c.* 21, and *Michaelmas* Term by *stat.* 16 *Car.* 1. *c.* 6, and again by *stat.* 24 *Geo* 2. *c.* 48.

There are in each of these Terms stated days called Days in Bank; (*dies in banco*;) that is, days of appearance in the Court of Common Bench. They are generally at the distance of about a week from each other, and have reference to some festival of the Church. On some one of these day in Bank, all original writs must be made returnable; and therefore they are generally called the Returns of that Term: whereof every Term has more or less, said by the *Mirror* to have been originally fixed by King *Alfred*, but certainly settled as early as the statute of 51 *Hen.* 3. *st.* 2 Now *Easter* Term hath five returns; and all the other Terms four. But though many of the return days are fixed upon *Sundays*, yet the Court never sits to receive these returns till the *Monday* after; and therefore no proceedings can be held, or judgment can be given, or supposed to be given, on the *Sunday*. See *Salk.* 627: 6 *Mod.* 250: 1 *Jon.* 156, *Swan* v. *Broome*: *Bro. P. C.*

The first return in every Term is, properly speaking, the first day in that Term; as, for instance, the octave of *St. Hilary*, or the eighth day inclusive after the feast of that Saint: which falling on the thirteenth of *January*, the octave therefore or first day of *Hilary* Term is the twentieth of *January*. And thereon (one Judge of) the Court sits to take *essoigns*, or excuses, for such as do not appear according to the summons of the writ: wherefore this is usually called the Essoign Day of the Term. But on every return day in the Term, the person summoned has three days of grace, beyond the day named in the writ, in which to make his appearance; and if he appears on the fourth day inclusive, (*quarto die post*,) it is sufficient. For our sturdy ancestors held it beneath the condition of a freeman to appear, or to do any other act, at the precise time appointed. Therefore, at the beginning of each Term, the Court does not usually sit for dispatch of business till the fourth or appearance day, as in *Hilary* Term on the 23d of *January*; and in Trinity Term, by statute 32 *Hen.* 8 *c.* 21, not till the fifth day, the fourth happening on the great popish festival of *Corpus Christi*; which days are therefore called and set down in the almanacs as the first days of the Term: And the Court also sits till the *quarto die post* or appearance day of the last return, which is therefore the end of each Term. See 1 *Bulst.* 35: 3 *Comm.* *c.* 18.

If the feast of Saint John the Baptist, or Midsummer Day, falls on the Morrow of *Corpus Christi* day, (as it did *A. D.* 1614, 1698, 1709, and 1791,) *Trinity* full Term then commences, and the Court sits on that day; though in other years it is no juridical day. Yet in [illegible], 1701, and 1724, when *Midsummer* Day fell upon what was regularly the last day of the Term, the Court did not then sit; but it was regarded like a *Sunday*, and the Term was prolonged to the twenty-fifth of *June*. *Rot. C. B.*; *Bunb.* 176.

The whole Term in construction of Law is accounted but as one day to many purposes; for a plea that is put in the last day of a Term, is a plea of the first day of the Term; and a judgment on the last day of Term is as effectual as on the first day. *Trin.* 23 *Car. B. R.* See 1 *Wils.* 37. And for this reason the Judges may alter and amend their judgments in the same Term, *&c.* See titles *Judgment*; *Amendment.* It has been held, that the Courts sit not but in Term, as to the giving of judgments: The Judges of *B. R.* and *C. B.* before *Trinity* Term 1651, did not sit longer in Court than till one o'clock upon the last day of Term; because they would not encourage attornies to neglect their clients' business till the last day of Term, as too commonly they do, to the toil of the Court, and too much hurry in dispatch. *Mich.* 22 *Car.* 2: *Lill.* 91.

Terms have been adjourned, and returns of writs and processes confirmed. *Stat.* 1 *W. & M. sess.* 1. *c.* 4.

The issuable Terms are *Hilary* and *Trinity* Terms only; they are so called, because in them the issues are joined and records made up of causes, to be tried at the *Lent* and Summer Assises, which immediately follow 2 *Lil. Abr.* 568. See title *Assises*, &c

By *stat.* 24 *Geo.* 2. *c.* 48, special days and returns may be appointed by the Judges in such cases as have been usual. The days of Assise in *darrein presentment*, and in a plea of *quare impedit* appointed by the statute of *Marlebridge*; and the days to be given in attaint by *stat.* 5 *E.* 3, and also in *stat.* 23 *H.* 8, not being contrary to this act, shall be in force. Day for swearing the Lord Mayor of *London* is appointed for *November* 9th, unless it be *Sunday*, and then the next day. The Morrow of *St. Martin* yearly, appointed for nominating Sheriffs in the *Exchequer*.

The Terms in *Scotland* are *Martinmas*, *Candlemas*, *Whitsuntide*, and *Lammas*; at which times the Court of *Exchequer*, &c. there is to be kept. *Stat.* 6 *Ann* *c.* 6. The Terms of our Universities for Students, are different in time from the Terms of the Courts of Law.

Terms of the Law. Artificial or technical words and Terms of art, particularly used in and adapted to the profession of the *Law*. 2 *Hawk. P. C.* *c.* 25. § 87.

Terms for Payment of Rent, Or Rent Terms; the four quarterly feasts upon which rent is usually paid. *Cartular. St. Edmund.* 238. See titles *Rent*; *Lease*.

Terms for Years, To secure payment of mortgages, and Terms to attend the inheritance. See titles *Mortgage*; *Trust*; *Use*.

TERRA, In all the Surveys in Domesday Register, is taken for arable land; and always so distinguished from the *Pratum*, &c. *Kennet's Gloss.*

Terra affirmata, Land let to farm.

Terra Boscalis, Woody lands; according to an inquisition, *an.* 8 *Car.* 1.

Terra Culta, Land that is tilled or manured; as *Terra Inculta* is the contrary. *Mon. Ang.* i. 500.

Terra Frusca, Weak or barren ground. *Inq.* 22 *R.* 2.

Terra Dominica vel Indominicata, The demesne land of a Manor. *Cowell.*

Terra Excultabilis, Land which may be ploughed. *Mon. Ang.* i. 426.

Terra extendenda, A writ directed to the escheator, *&c.* willing him to inquire and find out the true

true yearly value of any land, &c. by the oath of twelve men, and to certify the extent into the Chancery, &c. *Reg. of Writs* 293.

TERRA FRUSCA, Fresh land, or such as hath not been lately ploughed; likewise written *Terra frisca*. *Mon. Ang.* ii. 327.

TERRA HYDATA, Land subject to the payment of *Hydage*; as the contrary was *terra non hydata*, *Selden*.

TERRA LUCRABILIS, Land that may be gained from the sea, or inclosed out of a waste, to a particular use. *Mon. Ang.* 1. *par. fol.* 406.

TERRA NORMANNORUM, Such land in *England* as in the beginning of *Henry* III. had been lately held by some noble *Norman*, who, by adhering to the *French* King, or Dauphin, had forfeited his estate; which, by this means, became an escheat to the Crown, and restored, or otherwise disposed of at the King's pleasure. *Paroch. Antiq. pag.* 197.

TERRA NOVA, Land newly afferted and converted from wood ground to arable; *terra noviter concessa*. *Spelman*.

TERRA PUTURA, Land in forests held by the tenure of furnishing man's meat, horse meat, &c. to the keepers therein. See *Putura*.

TERRA SABULOSA, Gravelly or sandy ground. *Inq.* 10 *Ed.* 3. *n.* 3.

TERRA VESTITA, Is used in old charters for land sown with corn. *Cowell*.

TERRA WAINABILIS, Tillable land. *Cowell*.

TERRA WARENNATA, Land that has the liberty of free warren. *Rot. Parl.* 21 *Ed.* 1.

TERRÆ BOSCALES, Woody lands. *Inq.* 2. *par.* 8 *Car.* 1. *num.* 71.

TERRÆ TESTAMENTALES. Lands that were held free from feodal services, in *allodio*; or in socage, descendible to all the sons, and therefore called Gavelkind, being devisable by will, were thereupon called *Terræ Testamentales*, as the Thane who possessed them was said to be *testamento dignus*. See *Spelman of Feuds*, c. 5.

TERRAGE, *Terragium*.] Seems to be an exemption *à precariis*, viz. Boons of ploughing, reaping, &c. and perhaps from all land taxes, or from money paid for digging and breaking the earth in fairs and markets. *Cowell*.

TERRAR, or *Terrier*; *Terrarium*, *catalogus Terrarum*.] A land-roll, or survey of lands, either of a single person, or of a town; containing the quantity of acres, tenants' names, and such like; and in the Exchequer, there is a Terrar of all the glebe lands in *England*, made about 11 *E.* 3. See *stat.* 18 *Eliz. c.* 17.

TERRARIUS, A land-holder, or one who possesses many farms of land. *Leg. W.* 1.

TERRARIUS CŒNOBIALIS, An officer in Religious Houses, whose office was to keep a terrier of all their estates, and to have the lands belonging to the houses exactly surveyed and registered; and one part of his office was to entertain the better sort of convent-tenants, when they came to pay their rents, &c. *Hist. Dunelm.*

TERRE-TENANT, TERTENANT, *Terræ Tenens*.] He who hath the actual possession of the land: For example, a Lord of a manor has a freeholder, who letteth out his freehold to another, to be possessed and occupied by him, such other is called the Tertenant, *West. Symb. par.* 2: *Britton*, c. 29. In the case of a recognizance, statute, or judgment, the heir is chargeable as Tertenant, and not as heir; because, by the recognizance or judgment, the heir is not bound, but the ancestor *concessit* that the money *de terris*, &c. *levetur*. 3 *Rep.* 12. Vide *Cro. Eliz.* 872: *Cro. Jac.* 506; and this Dictionary, titles *Scire facias*; *Elegit*; *Execution*.

TERRIS, *Bonis et Catallis rehabendis post Purgationem*; A writ for a clerk to recover his lands, goods, and chattels formerly seized, after he had cleared himself of the felony of which he was accused, and delivered to his Ordinary to be purged. *Reg. Orig.* 68.

TERRIS *et Catallis tentis ultra debitum levatum*, A judicial writ for the restoring of lands or goods to a debtor that is distrained above the quantity of the debt. *Reg. Judic.* 38.

TERRIS LIBERANDIS, A writ lying for a man convicted by attaint, to bring the record and process before the King, and take a fine for his imprisonment, and then *to deliver him his lands* and tenements again, and release him of the strip and waste. *Reg. Orig.* 232. It is also a writ for the delivery of lands to the heir, after homage and relief performed; or upon security taken that he shall perform them. *Ibid* 293, 313

TERTIAN, A measure of eighty-four gallons; so called, because it is a third part of a tun. See *stats.* 2 *H.* 6. *c.* 11: 1 *R.* 3 *c.* 13.

TEST. To bring one to the Test, is to bring him to a trial and examination, &c. For the Test-Act, see titles *Non conformists*; *Papists*

TESTA DE NEVIL, An ancient record in the custody of the King's Remembrancer in the Exchequer, compiled by *John de Nevil*; a Justice Itinerant in the 18 & 24 of King *Henry* III. containing an account of lands held in Grand Serjeanty, with fees and escheats to the King, &c.

TESTAMENT, *Testamentum*.] Is defined by *Plowden* to be *testatio mentis*; a witness of the mind: But *Aulus Gellius*, *lib.* 6. *c.* 12, denies it to be a compound word, and saith, it is *verbum simplex*, as *Calceamentum*, *Plaudamentum*, &c. And therefore it may be thus better defined, *Testamentum est ultimæ voluntatis justa sententia, de eo quod quis post mortem suam fieri vult*; &c. See *Wills*.

Testament was anciently used (according to *Spelman*) *pro scripto charta vel instrumento, quo prædiorum rerumve aliarum transactiones perficiuntur, sic dictum quod de ea re vel* Testimonium *ferret vel testium nomina contineret.*—— *Si quis contra hoc meæ authoritatis* Testamentum *aliquod machinari impedimentum præsumpsit. Charta Croylandiæ ab Æthelbaldo Rege. Anno Domini* 716. *Cowell*.

TESTAMENTARY CAUSES, A species of Causes belonging to the Ecclesiastical jurisdiction. They were originally cognizable in the King's Courts of Common Law, *viz.* the County Courts; and afterwards transferred to the jurisdiction of the Church by the favour of the Crown, as a natural consequence of granting to the Bishops the administration of intestates' effects. 3 *Comm.* c. 7: See title *Courts Ecclesiastical*.

As observed by *Lindewode*, the ablest Canonist of the fifteenth century, Testamentary Causes belong to the Ecclesiastical Courts, "*de consuetudine Angliæ, & super consensu regio & suorum procerum in talibus ab antiquo concesso.*" *Provincial. l.* 3. *t.* 13. *fo.* 176.

Testamentary Guardian; See Guardian I. 4.

Testamentary Jurisdiction in Equity; See Chancery.

Testamento annexo, Administration cum. See title *Executor* II.

TESTATOR, *Lat.* He that makes a testament. See *Swinburn of Wills and Testaments.* See also a Dissertation of the Probate of Wills or Testaments by the learned Sir *Henry Spelman* among his Remains, *pag.* 127; and this Dictionary, title *Wills.*

TESTATUM-CAPIAS; See title *Capias.*

TESTE, (Witness;) That part of a writ wherein the date is contained; which begin with these words, *Teste meipso,* &c. if it be an original writ; or *Teste* the *Lord Chief Justice,* &c. if judicial. See *Co. Litt.* 134; and this Dictionary, titles *Original*; *Writs.*

TESTIMONIAL, A certificate under the hand of a Justice of the Peace, testifying the place and time, when and where a soldier or mariner landed, and the place of his dwelling and birth unto which he is to pass. 39 *Eliz. c.* 17. See title *Vagrants.* Formerly Testimonials were to be given by mayors and constables to servants quitting their services, &c. *Stat.* 5 *Eliz. c.* 4. See title *Servants.*

Testimonials of Clergy, Are necessary to be made by persons present, that a Clergyman inducted to a benefice hath performed all things according to the act of uniformity; to evidence that the clerk hath complied with what the Law requires on his institution and induction, which in some cases he shall be put to do. *Count. Pars. Comp.* 24, 26. See titles *Parson*; *Ordination.*

TESTIMOIGNES, *French,* Witnesses; So *Testimoignage,* Testimony. *Law Fr. Dict.*

TESTON, or TESTOON, Commonly called Tester, a sort of money which among the *French* did bear the value of 18*d.* but being made of brass lightly gilt with silver, in the reign of King *Henry* VIII., it was reduced to 12*d.* and afterwards to 6*d. Lowndes's Ess. on Coins, p.* 22.

TEXTUS, A Text or subject of a discourse; It is mentioned by several ancient authors to signify the *New Testament*; which was written in golden letters, and carefully preserved in the churches.

Textus magni Altaris, We read of in *Domesday* and *Cartular S. Edmund.*

Textus Roffensis, An ancient manuscript containing the rights, customs, and tenures, &c. of the church of *Rochester,* drawn up by the Bishop of that See, *anno* 1114.

THAMES; See titles *Rivers*; *London.*

THANAGE OF THE KING, *Thanagium Regis.*] Signified a certain part of the King's land or property, whereof the ruler or governor was called *Thane. Cowell.*

THANE, From *Sax.* Thenian, *ministrare.*] Was the title of those who attended the *English Saxon* Kings in their Courts, and who held their lands immediately of those Kings; and therefore, in *Domesday,* they were promiscuously called *thani et servientes Regis;* though not long after the Conquest the word was disused; and, instead thereof, those men were called *Barones Regis,* who, as to their dignity, were inferior to Earls, and took place next after Bishops, Abbots, Barons, and Knights. There were also *Thani minores,* and those were likewise called Barons: These were Lords of Manors, who had a particular jurisdiction within their limits, and over their own tenants in their Courts, which to this day are called Courts-Baron. But the word signifies sometimes a nobleman, sometimes a freeman, sometimes a magistrate, but more properly an officer or minister of the King.—Edward *King grete mine Bishops, and mine Earles, and all mine Thanes, on that Shiren, wher mine Preostes in Paulus minister habband land. Charta Edw. Conf. Pat.* 18 *H.* 6. *m.* 9. *per Inspex. Lambard,* in his *Exposition of* Saxon *words,* verb. *Thanus;* and *Skene, de verbor signif.* say, That it is a name of dignity, equal with the son of an Earl.

This appellation was in use among us after the *Norman* Conquest, as appears by *Domesday,* and by a certain writ of *William* the First. Willielmus *Rex salutat Hermannum episcopum, & Stewinum, & Britwi, & omnes Thanos meos in Dorsetrensi pago amicabiliter. MSS. de Abbatsbury.*—*Camden* says, They were ennobled only by the office which they administred. *Thanus Regis* is taken for a Baron, in 1 *Inst. fol.* 5, 1. And in *Domesday, tenens, qui est caput manerii.* See *Mills de Nobilitate, fol.* 132. A Thane, at first, (in like manner as an Earl,) was not properly a title of dignity, but of service. But according to the degrees of service, some of greater estimation, some of less. So those that served the King in places of eminence, either in Court, or Commonwealth, were called *Thani majores* and *Thani Regis.* Those that served under them, as they did under the King, were called *Thani minores,* or the lesser Thanes. *Cowell.* See *Spelman of Feuds, cap.* 7.

Thane-Lands, Such Lands as were granted by charter of the *Saxon* Kings to their Thanes; which were held with all immunities, except the threefold necessity of expeditions, repairs of castles, and mending of bridges.—*Thane* signified also land under the government of a Thane. *Skene.* See titles *Tenures*; *Reveland*; *Bockland.*

THASCIA, A certain sum of money or tribute imposed by the *Romans* on the *Britons,* and their lands *Leg. H.* 1. *c.* 78.

THEATRES; See *Play-houses.*

THEFT, *Furtum.*] An unlawful felonious taking away of another man's moveable and personal goods, against the will of the owner. See titles *Larceny*; *Robbery.*

Theft-bote, From the *Sax. Theof,* i. e. *Fur,* & Bote, *compensatio.*] The receiving of a man's goods again from a Thief, after stolen; or other amends not to prosecute the felon, and to the intent the Thief may escape; which is an offence punishable with fine and imprisonment, &c. *H. P. C.* 130. See titles *Compounding of Felony*; *Misprision.*

THELONIUM; or Breve essendi quieti de Thelonio, A writ lying for the citizens of any city, or burgesses of any town, that have a charter or prescription to free them from toll, against the officers of any town or market, who would constrain them to pay toll of their merchandise, contrary to their said grant or prescription. *F. N. B. fol.* 226. See title *Toll.*

THELONMANNUS, The toll man, or officer who receives toll. *Cartular Abbat. Glaston. MS.* 46.

THELONIO rationabili habendo; pro Dominis habentibus Dominica Regis ad firmam, A writ for him that hath of the King's demesne in fee-farm to recover reasonable toll of the King's tenants there, if his demesne hath been accustomed to be tolled. *Reg. Orig.* 87.

THEMMAGIUM,

THEMMAGIUM, A duty or acknowledgment paid by inferior tenants in respect of *theam* or *team*. *Cowell*.

THENICIUM, A hedge-row, or dike-row. *Lindw.*; *Cowell*.

THEODEN, In the degrees or distinctions of persons among the *Saxons*, the Earl or prime Lord was called Thane, and the King's Thane; and the Husbandman or inferior tenant was called Theodan, or under Thane. See *Spelm.*; and *ante*, title *Thane*.

THEOWES. The Slaves, Captives, or Bondmen among our *Saxons* were called Theowes and Esnes, who were not counted members of the Commonwealth, but parcels of their master's goods and substance. *Spelman of Feuds, cap.* 5.

THESAURUS, Was sometimes taken in old charters for *thesaurarium*, the Treasury; and hence the *Domesday* register preserved in the Treasury or Exchequer, when kept at *Winchester*, hath been often called *Liber Thesauri. Chart. Q. Maud, wife of King Henry I.*

THETHINGA, A word signifying a tithing: *Tithingmannus*, a tithingman. *Sax.*

THEW, or THEOWE; See *Theowes*.

THIEF-TAKER; See titles *Felony*; *Rewards*.

THINGUS, The same with *Thanus*; a Nobleman, Knight, or Freeman. *Cromp. Jurisd.* 197.

THIRDBOROW, Is used for a constable, by *Lambard* in his *Duty of Constables, p.* 6. And in the *stat.* 28 *H.* 8. *c.* 10. See *Constable*.

THIRDINGS, *i. e.* The Third Part of the corn growing on the ground, due to the Lord for a Heriot on the death of his tenant, within the manor of *Turfat* in *Com. Hereford*. *Blount. Ten.*

THIRD-NIGHT-AWN-HINDE, *trium noctium hospes.*] By the Laws of *St. Edward the Confessor*, if any may lay a Third-Night in an inn, he was called a Third-Night-Awn-Hinde, for whom his host was answerable, if he committed an offence. The first night, Forman-Night, or Uncuth, (*Sax.* Unknown,) he was reckoned a stranger; the second night, Twa-Night, a guest; and the third night, an Agen-Hinde, or Awn-Hinde, a domestic. *Bract. lib.* 3.

THIRD-PENNY; See *Denarius Tertius Comitatûs*.

THISTLE-TAKE, It was a custom within the manor of *Halton* in the county palatine of *Chester*, that if, in driving beasts over the common, the driver permits them to graze or take but a Thistle, he shall pay a halfpenny a beast to the Lord of the fee. And at *Fiskerton* in *Nottinghamshire*, by ancient custom, if a native or a cottager killed a swine above a year old, he paid to the Lord a penny, which purchase of leave to kill a hog was also called Thistle-take. *Reg. Priorat. de Thurgarton. Cowell.*

THOKES, Fish with broken bellies, *stat.* 22 *E.* 4. *cap.* 2; which by the said statute are not to be mixt or packed with tale-fish.

THORP, THREP, TROP, Either in the beginning or end of names of places, signifies a street or village, as *Aldestrop*: From the Sax. *Thorp, villa, vicus.*

THRAVE OF CORN, *Trava bladi*, from the Sax. *Threav*, a bundle, or the British *dresa*, twenty-four.] In most parts of *England*, consists of twenty-four sheaves, or four shocks, six sheaves to every shock, *stat.* 2 *H.* 6. *c.* 2; yet in some counties they reckon but twelve sheaves to the Thrave. King *Athelstan*, *anno* 923, gave by his charter to *St. John of Beverley*'s Church, four Thraves of Corn, from every plough-land in the East-Riding of *Yorkshire*. *Cowell*.

THREAD, Is liable to certain duties on importation. Regulations as to reeling *Ounce* or *Nun's Thread*. *Stat.* 28 *Geo.* 3. *c.* 17.

THREATENING LETTERS. By *stat.* 9 *Geo.* 1. *c.* 22, (amended by *stat.* 27 *Geo.* 2. *c.* 15,) Knowingly to *send* any Letter without a name, or with a fictitious name, demanding money, venison, or any other valuable thing, or threatening (without any demand) to kill or fire the house, out-houses, barns, or ricks of any person, is made felony without Benefit of Clergy. This offence was formerly High Treason, by the *stat.* 8 *Hen.* 5. *c.* 6. It has been determined that if the writer of a Threatening Letter delivers it himself, and does not *send* it by any other, he is not guilty of felony under this act. *Leach* 351.

By *stat.* 30 *Geo.* 2. *c.* 24, If any person shall knowingly *send* or *deliver* any Letter or Letters, threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels, he is punishable at the discretion of the Court, with fine, imprisonment, pillory, whipping, or transportation for seven years.

THREATS. Threats and menaces of bodily hurt, through fear of which a man's business is interrupted, are a species of injury to individuals. A menace alone, without a consequent inconvenience, makes not the injury; but to complete the wrong, there must be both of them together. The remedy for this is in pecuniary damages, to be recovered by action of trespass *vi & armis*, this being an inchoate, though not an absolute violence. 3 *Comm. c.* 8. *p.* 120. As to Threats or menaces where bodily harm is justly feared, See title *Surety of the Peace*, &c.

THRENGES. *Quia vero non erant adhuc tempore Regis* Willielmi *milites in* Anglia, *sed Threnges, præcipit Rex ut de eis milites fierent ad defendendum terram, fecit autem* Lanfrancus Threngos *suos milites*, &c. *Somner's Gavelk.* 123, 210. They were vassals, but not of the lowest degree, of those who held lands of the chief Lord; the name was imposed by the Conqueror; for when one *Edward Sharnbourn* of *Norfolk*, and others, were ejected out of their lands, they complained to the Conqueror, insisting, that they were always on his side, and never opposed him, which upon inquiry he found to be true, and therefore he commanded that they should be restored to their lands, and for ever after be called *Drenches*. *Spelm.* See titles *Drenches*; *Sharnburn*.

THRIMSA, *Sax. Thrim.* Three] An old piece of money of three shillings, according to *Lambard*, or the third part of a shilling, being a *German* coin passing for 4*d*. *Seld. Tit. Hon.* 604.

THRITHING, *Thrithingum*.] A division, consisting of three or four hundreds. *Stat. Merton*, 2 *Inst.* 99. See *Trithing*.

THUDE-WEALD, *Sax.*] A woodward, or person that looks after the woods.

THUMELUM, A thumb. *Leg. Inæ, cap.* 55. *apud Brompton*.

THWERTNICK, A *Saxon* word, which in some old Writers is taken for the custom of giving entertainments to the Sheriff, &c. for three nights. *Rot.* 11 & 12 *Rich.* 2.

TIDESMEN, Are certain Officers of the Custom-house, appointed to watch or attend upon ships, till the customs are paid; and they are so called, because they go aboard the ships at their arrival in the mouth of the *Thames*, and come up with the tide. See title *Customs*.

TIERCE, Fr. *Tiers*, i. e. a third.] A measure of wine, oil, &c. containing the third part of a pipe, or forty-two gallons. *Stat.* 32 *H.* 8. *c.* 14.

TIGH, Sax. *Teag.*] A close or inclosure, mentioned in ancient charters; which word is still used in *Kent* in the same sense. *Chart. Eccl. Cant.*

TIHLA, *Sax.*] An accusation: *Ll. Canuti.*

TILES; See *Bricks and Tiles*.

TILLAGE, *Agricultura*] Is of great account in Law, as being very profitable to the Commonwealth; and therefore arable land hath the preference before meadows, pastures, and all other ground whatsoever: And so careful is our Law to preserve it, that a bond or condition to restrain Tillage, or sowing of lands, &c. is void. 11 *Rep.* 53. There are divers ancient statutes for encouragement of Tillage and Husbandry, now become in a great measure, if not altogether, obsolete.

TILTING; See title *Homicide* II. 1.

TIMBER, Wood fitted for building, or other such like use; in a legal sense it extends to oak, ash, and elm, &c. 1 *Roll. Abr.* 649. See *post*. Lessees of land may not take Timber-trees felled by the wind; for thereby their special property ceases. 1 *Keb.* 691.

The importation, &c. of Timber is regulated by divers Statutes.

Against cutting up, barking, or destroying of Timber; *stat.* 1 *Geo.* 1. *st.* 2. *c.* 48. See title *Woods*.

Oak Timber, (except for building,) to be felled in *April*, *May*, and *June*; *stat.* 1 *Jac.* 1. *c.* 22. *s.* 20.

By *stat.* 6 *Geo.* 3. *c.* 36, Any one who shall, in the night-time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil or destroy, or carry away, any oak, beech, ash, elm, fir, chesnut, or asp, Timber-tree, or other tree or trees, standing for Timber, or likely to become Timber, without the consent of the owner; or shall, in the night-time, pluck up, dig up, break, spoil or destroy, or carry away, any root, shrub, or plant, roots, shrubs, or plants, of the value of five shillings, and which shall be growing, standing, or being in the garden-ground, nursery-ground, or other inclosed ground, of any person or persons whomsoever; shall be deemed and construed to be guilty of felony, and the offenders may be transported. Those who are assisting, and purchasers, knowing the things to be stolen, shall be liable to the same punishment, as if they had stolen the same.

By *stat.* 6 *Geo.* 3. *c.* 48, Every person convicted of damaging, destroying, or carrying away any Timber-tree or trees, or trees likely to become Timber, without consent of the owner, &c. shall forfeit for the first offence not exceeding 20*l.* with the charges attending; and on non-payment, are to be committed for not more than twelve, nor less than six months; for the second offence, a sum not exceeding 30*l.* and, on non-payment, are to be committed for not more than eighteen, nor less than twelve months; and for the third offence are to be transported for seven years.

All oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, and birch trees, shall be deemed and taken to be Timber-trees within the meaning of the Act. Persons convicted of plucking up, spoiling, or taking away, any root, shrub, or plant, out of private cultivated ground, shall forfeit for the first offence any sum not exceeding 40*s.* with the charges; for the second offence, a sum not exceeding 5*l.* with the charges; and for the third offence, are to be transported for seven years. Persons hindering, or attempting to prevent seizing offenders, forfeit 10*l.* to the person convicting them; and, if not paid down, to be committed to hard labour, not exceeding six months. See title MISCHIEF, *Malicious*.

TIMBER FOR THE NAVY. An act for the increase and preservation of Timber, within the forest of *Dean*, *stat.* 20 *Car.* 2. *c.* 3.—Two thousand acres of land in the New Forest to be inclosed, for preserving Timber for the Navy Royal, *stat.* 9 & 10 *W.* 3. *c.* 36.

TIMBERLODE, A service by which tenants were to carry Timber felled from the woods to the Lord's house. *Thorn's Chron.*

TIME and *Place*, Are to be set forth with certainty in a declaration; but Time may be only a circumstance when a thing was done, and not to be made part of the issue, &c. 5 *Mod.* 286. It has been held, that an impossible Time is no Time; and where a day or Time is appointed for the payment of money, and there is no such, the money may be due presently. *Hob.* 189: 5 *Rep.* 22.

If no certain Time is implied by Law for the doing of any thing, and there is no Time agreed upon by the parties, then the Law doth allow a convenient Time to the party for the doing thereof, *i. e.* as much as shall be adjudged reasonable, without prejudice to the doer of it. 2 *Lill. Abr.* 572. In some cases one hath Time during his life for the performance of a thing agreed, if he be not hastened to do it by request of the party for whom it is to be done; but if in such case he be hastened by request, he is obliged to do it in convenient Time, after such request made. *Hil.* 22 *Car.* 1. *B. R.*

Time, taken generally, hath also its Time: What is done in Time of peace, the Law doth more countenance than in Time of war; in case of bar of an entry, or claim by fine, and of descents, &c. 1 *Inst.* 249: 10 *Rep.* 82; 4 *Shep. Abr.* 6.

Regularly, there cannot be any fraction in a day. See 20 *Vin. Abr.* and the several apposite titles in this Dictionary.

TINEL LE ROY. *Fr.*] The King's hall wherein his servants used to dine and sup. *Stat.* 13 *R.* 2. *st.* 1. *c.* 3.

TINEMAN, or TIENMAN, A petty officer in the forest, who had the nocturnal care of vert and venison, and other servile employments. *Constitut. Forestæ Canuti Regis, cap.* 4.

TINET, *Tinettum.*] Brushwood and thorns, to make and repair hedges: In *Herefordshire* to tine a gap in a hedge is to fill it up with thorns, that cattle may not pass through it. *Chart.* 21 *Hen.* 6.

TINEWALD, The ancient parliament or annual convention of the people of the *Isle of Man*, of which this account is given:—The Governor and Officers of that Island do usually call the twenty-four Keys, being the chief commons thereof, especially once every year, *viz.* upon *Midsummer-day*, at *St. John's Chapel*, to the Court kept there, called the Tinewald Court; where, upon a hill near the said chapel, all the inhabitants of the Island stand

ſtand round about, and in the plain adjoining, and hear the laws and ordinances agreed upon in the Chapel of *St. John*, which are publiſhed and declared unto them; and at this ſolemnity the Lord of the Iſland ſits in a chair of ſtate with a royal canopy over his head, and a ſword held before him, attended by the ſeveral degrees of the people, who ſit on each ſide of him, *&c. King's Deſcript. Iſle of Man*: See title MAN, *Iſle of*.

TINKERMEN, Thoſe fiſhermen who deſtroyed the young fry on the river *Thames*, by nets and unlawful engines, till ſuppreſſed by the Mayor and Citizens of *London*. Of which, ſee *Stow's Survey of London, p.* 18.

TINPENY, A tribute ſo called, uſually paid for the liberty of digging in Tin-mines. But ſome Writers ſay it is a cuſtomary payment to the tithingman from the ſeveral friburghs, contracted from *Teding-penny*, which ſee.

TIPSTAFFS, Officers appointed by the Marſhal of the King's Bench, to attend upon the Judges with a kind of rod or ſtaff tipt with ſilver, who take into their cuſtody all priſoners, either committed, or turned over by the Judges at their chambers, *&c.* See title *Baſton*; and *ſtat.* 1 *R.* 2.

TITHES,

DECIMÆ; from the Sax. *Teotha*; *i.e.* tenth.] In ſome of our Law-books are briefly defined to be an eccleſiaſtical inheritance, or property in the Church, collateral to the eſtate of the lands thereof: But in others they are more fully defined to be a certain part of the fruit, or lawful increaſe of the earth, beaſts and men's labour, which in moſt places, and of moſt things, is the tenth part, which, by the Law, hath been given to the Miniſters of the Goſpel, in recompence of their attending their office. 11 *Rep.* 13: *Dyer* 84.

Tithes are claſſed by *Blackſtone*, as a ſpecies of incorporeal hereditaments; and defined to be a *tenth* part of the increaſe, yearly ariſing and renewing from the profits of lands, the ſtock upon lands, and the perſonal induſtry of the inhabitants: The firſt ſpecies being uſually called *predial*; as of corn, graſs, hops, and wood: The ſecond *mixed*; as of wool, milk, pigs, *&c.* conſiſting of natural products, but nurtured and preſerved in part by the care of Man; and of theſe two ſorts the Tenth muſt be paid in groſs: The third, *perſonal*; as of manual occupations, trades, fiſheries, and the like, and of theſe only the tenth part of the clear gains and profits is due. 2 *Comm. c.* 3.

Tithes, with regard to value, are divided into *great* and *ſmall*. Great Tithes are chiefly corn, hay, and wood: Small Tithes are the predial Tithes of other kinds, together with mixed and perſonal Tithes. *Burn's Juſtice*, title *Tithes*.

Great Tithes generally belong to the Rector; and ſmall Tithes to the Vicar. *Cro. Car.* 20.

Some things may be great or ſmall Tithes, in regard of the place; as hops in gardens are ſmall Tithes, and in fields may be great Tithes; and it is ſaid the quantity will turn a ſmall Tithe into a great one, if the pariſh is generally ſown with it. 1 *Roll. Abr.* 643: 1 *Cro.* 578: *Wood's Inſt.* 162.

Great Tithes are commonly called *Parſonage Tithes*—Small Tithes, *Vicarage Tithes*; as being, in general, payable the one to the Parſon, the other to the Vicar.

I. *Of the Origin of Tithes; and to whom they are payable.*

II. *Of what Tithes are in general due; and where perſonal Tithes are due.*

III. *Of what predial Tithes are due; and herein, of the Tithe of Agiſtment, Corn, Hay, and Wood.*

IV. *Of what mixed Tithes are due.*

V. *Of recovering Tithes in the Eccleſiaſtical or Temporal Courts; or in a ſummary Way: againſt Quakers; and in* London.

VI. *Of particular Things for which Tithes are paid, and for which not; in alphabetical Order.*

VII. *Who may be diſcharged, either totally or in part, from paying Tithes.*

I. BISHOP *Barlow*, *Selden*, Father *Paul*, and others, have obſerved, that neither Tithes nor eccleſiaſtical benefices, (which are correlative in their nature,) were ever heard of for many ages in the Chriſtian Church, or pretended to be due to the Chriſtian Prieſthood; and, as that Biſhop affirms, no mention is made of Tithes in the grand codex of Canons, ending in the year 451, which, next to the Bible, is the moſt authentic book in the world; and that it thereby appears, during all that time, both Churches and Churchmen were maintained by free gifts and oblations only. *Barlow's Remains, p.* 169: *Selden of Tithes* 82: See *Watſon's Complete Incumbent, p.* 3, 4, *&c.*

Selden contends, that Tithes were not introduced here into *England*, till towards the end of the eighth century, *i.e* about the year 786; when pariſhes and eccleſiaſtical benefices came to be ſettled; for, it is ſaid, Tithes and eccleſiaſtical benefices being correlative, the one could not exiſt without the other; for whenever any eccleſiaſtical perſon had any portion of Tithes granted to him out of certain lands, this naturally conſtituted the benefice; the granting of the Tithes of ſuch a manor or pariſh being, in fact, a grant of the benefice; as a grant of the benefice did imply a grant of the Tithes: And thus the relation between patrons and incumbents was analogous to that of Lord and Tenant by the feudal Law. *Selden of Tithes* 86, *&c.*

About the Year 794, *Offa*, King of *Mercia*, (the moſt potent of all the *Saxon* Kings of his time in this Iſland,) made a law, whereby he gave unto the Church the Tithes of all his kingdom; which the Hiſtorians tell us was done to expiate for the death of *Ethelbert*, King of the *Eaſt Angles*, whom in the year preceding he had cauſed baſely to be murdered. But that Tithes were before paid in *England* by way of offerings, according to the ancient uſage and decrees of the Church, appears from the canons of *Egbert*, Archbiſhop of *York*, about the year 750; and from an epiſtle of *Boniface*, Archbiſhop of *Mentz*, which he wrote to *Cuthbert*, Archbiſhop of *Canterbury* about the ſame time; and from the ſeventeenth canon of the general Council held for the whole kingdom at *Chalcuth*, in the year 787.—But this law of *Offa* was that which firſt gave the Church a civil right in them in this land, by way of property and inheritance, and enabled the Clergy to gather and recover them as their legal dues, by the coercion of the civil power. Yet this eſtabliſhment of *Offa* reached no further than the kingdoms of *Mercia*, (over which *Offa* reigned,) and *Northumberland*, until *Ethelwulph*, about ſixty years after, enlarged it for the whole Realm of *England*. *Prideaux on Tithes* 166, 167. See *poſt*.

It is said, Tithes, Oblations, *&c.* were originally the voluntary gifts of Christians, and that there was not any canon before that of the fourth Council of *Lateran, anno Dom.* 1215, that even supposed Tithes to be due of common right. 2 *Wils.* 182. But this seems very contrary to other opinions.

Blackstone says, he will not put the title of the Clergy to Tithes upon any divine right; though such a right certainly commenced, and as certainly ceased, with the *Jewish* Theocracy. Yet an honourable and competent maintenance for the Ministers of the Gospel is, undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be. For, besides the positive precepts of the New Testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with the necessaries, conveniencies, and moderate enjoyments of life, at their expence for whose benefit they forego the usual means of providing them. Accordingly all Municipal Laws have provided a liberal and decent maintenance for their national Priests or Clergy; ours, in particular, have established this of Tithes, probably in imitation of the *Jewish* Law; and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the *English* Clergy to found their title on the Law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions. 2 *Comm. c.* 3.

It has been well observed, that the Clergy have precisely the same right to Tithes, as the heir at law has to his ancestor's estate, or the farmer to the possession in consequence of his lease; and the proprietor has no more reason to complain that his land is not Tithe free, than that his neighbour's field is not his own. *Christian's note on* 2 *Comm.* 25.

We cannot (continues the Commentator) precisely ascertain the time when Tithes were first introduced into this country. Possibly they were contemporary with the planting of Christianity among the *Saxons*, by *Augustin* the monk, about the end of the sixth century. But the first mention of them in any written *English* Law appears to be in a constitutional decree, made in a Synod held *A. D.* 786, wherein the payment of Tithes in general is strongly enjoined. *Selden, c.* 8. § 2. This canon, or decree, which at first bound not the Laity, was effectually confirmed by two kingdoms of the Heptarchy, in their parliamentary conventions of estates, respectively consisting of the Kings of *Mercia* and *Northumberland*, the Bishops, Dukes, Senators, and People; which was a few years later than the time that *Charlemagne* established the payment of them in *France*, (*A. D.* 778,) and made that famous division of them into four parts; one to maintain the edifice of the Church, the second to support the Poor, the third the Bishop, and the fourth the Parochial Clergy. *Seld. c.* 6. § 7: *Spirit of Laws, b.* 31. *c.* 12.

The next authentic mention of them is in the *Fœdus* [illegible] laws agreed upon between King *Guthrun* the *Dane*, and *Alfred* and his son *Edward* the Elder, successive Kings of *England*, about the year 900. This was a kind of treaty between those Monarchs, which may be found at large in the *Anglo-Saxon* Laws: Wherein it was necessary, as *Guthrun* was a Pagan, to provide for the subsistence of the Christian Clergy under his dominion; and, accordingly, we find the payment of Tithes not only *enjoined*, but a *penalty* added upon non-observance. Which Law is seconded by the Laws of *Athelstan*, about the year 930. And this is as much as can certainly be traced out, with regard to their legal original. See *Wilkins, p.* 51: 2 *Comm. c.* 3.

Upon the first introduction of Tithes, though every man was obliged to pay Tithes in general, yet he might give them to what priests he pleased; which were called *arbitrary* consecrations of Tithes: Or he might pay them into the hands of the Bishop, who distributed among his diocesan Clergy the revenues of the Church, which were then in common. 2 *Inst.* 646: *Hob.* 296: *Seld. c.* 9. § 4. But, when dioceses were divided into parishes, the Tithes of each parish were allotted to its own particular Minister; first by common consent, or the appointments of Lords of Manors, and afterwards by the written Law of the land. *Ll. Edgar, cc.* 1 *&* 2: *Canut. c.* 11.

However, arbitrary consecrations of Tithes took place again afterwards, and became in general use till the time of King *John*. *Selden, c.* 11. This was probably owing to the intrigues of the regular Clergy, or monks of the *Benedictine* and other rules, under Archbishop *Dunstan* and his successors; who endeavoured to wean the people from paying their dues to the secular or parochial Clergy, (a much more valuable set of men than themselves,) and were then in hopes to have drawn, by sanctimonious pretences to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the Monasteries and Religious Houses which were founded in those days, and which were frequently endowed with Tithes. For a layman, who was obliged to pay his Tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected; since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of Tithes, it was remedied by Pope *Innocent* III. about the year 1200, in a decretal epistle sent to the Archbishop of *Canterbury*, and dated from the palace of *Lateran*; which has occasioned Sir *Henry Hobart* and others to mistake it for a decree of the Council of *Lateran*, held *A. D.* 1179, which only prohibited what was called the infeodation of Tithes, or their being granted to mere laymen, whereas this letter of Pope *Innocent* to the Archbishop enjoined the payment of Tithes to the Parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same Pope in other countries. This epistle, says *Coke*, bound not the Lay Subjects of this Realm; but, being reasonable and just, (and, he might have added, being correspondent to the ancient Law,) it was allowed of, and so became *Lex terræ*. 2 *Inst.* 641. This put an effectual stop to all the arbitrary consecrations of Tithes; except some footsteps which still continue in those portions of Tithes, which the Parson of one parish hath, though rarely, a right to claim in another; for it is now universally held, that Tithes are due, of common right, to the Parson of the

parish,

pariſh, unleſs there be a ſpecial exemption. *Regiſt.* 46: *Hob.* 296. This Parſon of the pariſh, we have formerly ſeen, may be either the actual incumbent, or elſe the appropriator of the benefice; appropriations being a method of endowing Monaſteries, which ſeems to have been deviſed by the regular Clergy, by way of ſubſtitution to arbitrary conſecrations of Tithes. In extraparochial places, the King, by his royal prerogative, has a right to all the Tithes. 2 *Rep.* 2, 44: 2 *Inſt.* 64. See 2 *Comm.* c. 3.

II. In general, Tithes are to be paid for every thing that yields an annual increaſe, as corn, hay, fruit, cattle, poultry, and the like: but not for any thing that is of the ſubſtance of the earth, or is not of annual increaſe; as ſtone, lime, chalk, and the like: nor for creatures that are of a wild nature, as deer, hawks, *&c.*, whoſe increaſe, ſo as to profit the owner, is not annual, but caſual: though for deer and rabbits Tithes may be payable by ſpecial cuſtom. 2 *Comm.* c. 3. *&c.*

Tithes are due either *de jure*, or by cuſtom. All Tithes which are due *de jure*, ariſe from ſuch fruits of the earth as renew annually; or from the profit that accrues from the labour of a man. Hence it follows, that ſuch Tithes can never be part of, but muſt always be collateral to, the land from which they ariſe. 11 *Rep.* 13, 14.

Nay, Tithes due *de jure* are ſo collateral to every kind of land, that if a leaſe is made of the glebe belonging to a rectory, with all the profits and advantages thereof; and there is beſides a covenant, that the rent to be paid ſhall be in full ſatisfaction of every kind of exaction, and demand, belonging to the rectory; yet, as the glebe is not expreſsly diſcharged of Tithes, the leſſee ſhall be liable to the payment thereof. 11 *Rep.* 13, 14: 1 *Roll. Abr.* 655. *pl.* 1: *Cro. Eliz.* 162, 261: *Cro. Car.* 362.

No Tithe is due *de jure* of the produce of a mine or of a quarry, becauſe this is not a fruit of the earth renewing annually; but is the ſubſtance of the earth, and has perhaps been ſo for a great number of years. *F.N.B.* 53: *Br. Dim. pl.* 18: 2 *Inſt.* 651: 1 *Roll. Abr.* 637: *Cro. Eliz.* 277.

No Tithe is due *de jure* of any thing (generally) which is part of the ſoil, and does not renew annually; but it may be due by cuſtom. Vide 2 *Vern.* 46: 1 *Roll. Abr.* 637. *pl.* 5: 2 *Mod.* 77: 1 *Mod.* 35: 1 *Roll. Abr.* 642, S. *pl* 7, 8.

No Tithes are due *de jure* of houſes; for Tithes are only due *de jure* of ſuch things as renew from year to year. 11 *Rep.* 16, *Graunt's* caſe. But houſes in *London* are, by decree, which was confirmed by an Act of Parliament, made liable to the payment of Tithes. 2 *Inſt.* 659. See *ſtats.* 37 *H.* 8. c. 12; 22 & 23 *C.* 2. c. 15. Before this decree, houſes in *London* were by cuſtom liable to pay Tithes; the *quantum* to be paid being thereby only ſettled, as to ſuch houſes for which there was no cuſtomary payment. 2 *Inſt.* 659: *Hard.* 116: *Gilb. Eq. Rep.* 193, 194. See *poſt* V. There is likewiſe in moſt ancient cities and boroughs, a cuſtom to pay Tithes for houſes; without which there would be no maintenance in many pariſhes for the Clergy. 11 *Rep* 16: *Bunb.* 102.

It was held by three Barons of the Exchequer, *Price*, *Montague*, and *Page*, contrary to the opinion of *Bury*, Chief Baron, that two Tithes may be due of the ſame thing, one *de jure*, the other by cuſtom. *Bunb.* 43.

In § 7, of *ſtat.* 2 & 3 *Ed.* 6. c. 13, common day-labourers are exempted from the payment of perſonal Tithes. No perſonal Tithes are due from ſervants in huſbandry; for by their labour the Tithes of many other things are increaſed. 1 *Roll. Abr.* 646. *pl.* 1. It was ſettled, by a decree of the Houſe of Lords, upon an appeal from a decree of the Court of Exchequer, that only perſonal Tithes are due from the occupier of a corn-mill. 1 *Eq. Abr.* 366: 2 *P. Wms.* 463: *Bro. P. C.*

The *ſtat.* 9 *Ed.* 2. *ſt.* 1. c. 5, (as to occupiers of mills, paying Tithes,) provides, that new erected mills ſhall be liable to the payment of Tithes. But, as nothing therein is ſaid concerning ancient mills, there can be no doubt, that ſuch ancient mills, as before the making of this ſtatute were liable to pay Tithes, continued afterwards to be liable. 12 *Mod.* 243: 3 *Bulſt.* 212.

No perſonal Tithe is due of the profit which a man receives without perſonal labour, or of the profit which one man receives from the labour of another. 1 *Roll. Abr.* 656. *pl.* 1. *pl.* 2: 2 *Inſt.* 621, 6, 9. If a man lets a ſhip to a fiſherman, no perſonal Tithe is due of the money received for the uſe of ſuch ſhip; becauſe this is a profit without perſonal labour. 1 *Roll. Abr.* 656, *n. pl.* 2. Vide 1 *Roll. Abr.* 656, *n. pl.* 3: 2 *Bulſt.* 141.

Perſonal Tithes are only payable by a ſpecial cuſtom; and perhaps are now paid no-where in *England*; except for fiſh caught in the ſea, and for corn-mills. 3 *Burn's Eccl. Law* 473.

III. Such Tithes as ariſe immediately from the fruits of the earth, as from corn, hay, hemp, hops; and all kinds of fruits, ſeeds, and herbs, are called *Predial* Tithes. 2 *Inſt.* 649. They are ſo called becauſe they ariſe immediately from the fruits of the farm, (*prædium*,) or earth. 2 *Inſt.* 647. By the Eccleſiaſtical Law, many things are liable to the payment of predial Tithes, which by the Common Law, or in the Courts of Equity, are not held to be ſo. 2 *Inſt.* 621: 4 *Mod.* 344. This may cauſe, and has cauſed, ſome confuſion. In the former caſe, the laſt reſort is to the Delegates; in the latter, to the Houſe of Lords. *Shaw's Law of Tithes* 139. The canons muſt, in all caſes, give way to the cuſtom of the place. *Id.* 112.

The deſign, under this Head, is to ſhew what things are liable by the Common Law to pay predial Tithes.

In doing this, it will appear, that ſome things, which are in the general exempted therefrom, become, by cuſtom, liable to the payment of predial Tithes. 1 *Roll. Abr.* 637, *E. pl.* 2: 642, *S. pl* 7. *pl.* 8.

It will alſo appear, that divers things, which are in the general liable thereto, are, under particular circumſtances, exempted from the payment of ſuch Tithes. 1 *Roll. Abr.* 645. *pl.* 11: *Cro. Eliz.* 475: *Freem.* 335: 12 *Mod* 235.

But wherever any fraud is uſed, to bring a thing under thoſe circumſtances, by reaſon of which it would, if it had come fairly under them, have been exempted from the payment of predial Tithes, it is by ſuch fraud rendered liable thereto. *Cro. Eliz.* 475: *Freem.* 335.

The predial *great* Tithes now appear to be corn, grain, hay, clover-graſs (when made into hay), wood, underwood, and beans and peaſe (when ſown in fields). The predial *ſmall* Tithes are flax, hemp, madder, hops, garden roots, and herbs, as potatoes, turnips, parſley, cabbage, ſaffron; and the fruits of all kinds of trees,

as

as apples, pears, acorns, &c. All kinds of feeds, as turnip-feed, parfley-feed, rape-feed, carraway-feed, ani-feed, clover-feed, and beans and peafe if fown in a garden. *Shaw's Law of Tithes.*

As it would be tedious to enumerate all the things which are liable to predial Tithes, only thofe fhall be mentioned concerning the Tithes of which fome queftion has arifen; but, from fuch as will be mentioned, it may be eafily collected of what other things predial Tithes are due.

AGISTMENT. Agifting, in the ftrict fenfe of the word, means the depafturing of a beaft the property of a ftranger. But this word is conftantly ufed, in the Books, for depafturing the beaft of an occupier of land, as well as that of a ftranger. 5 *New Abr.* 53. The Tithe of Agiftment is the tenth part of the value of the keeping or depafturing fuch cattle as are liable to pay it. *Agiftment* is derived from the French *geyfer, gifter* (*jacere*); becaufe the beafts are *levant* and *couchant* during the time they are on the land. Agiftment Tithe feems rather a mixed than ftrictly a predial Tithe.

An occupier of land is not liable to pay Tithe for the pafture of horfes, or other beafts, which are ufed in hufbandry in the parifh in which they are depaftured. Becaufe the Tithe of corn is by their labour increafed. 1 *Roll. Abr.* 646. *pl* 2. *pl.* 3; *pl.* 6. *pl* 7: *Cro. Eliz.* 446: *Ld. Raym.* 130. But, if horfes or other beafts are ufed in hufbandry out of the parifh in which they are depaftured, an Agiftment Tithe is due for them. 7 *Mod.* 114: *Ld. Raym.* 130.

It feems to be the better opinion, that no Tithe is due for the pafture of a faddle-horfe, which an occupier of land keeps for himfelf or fervants to ride upon. 1 *Roll. Abr.* 642. *pl.* 4: *Cro. Jac.* 430: *Bulft.* 171; *Bunb.* 3. No Tithe is due for the pafture of milk cattle, which are milked in the parifh in which they are depaftured; becaufe Tithe is paid of the milk of fuch cattle. 1 *Roll. Abr.* 646. *pl.* 2: *Ld. Raym.* 130: *Cro. Eliz* 446.

Milch cattle, which are referved for calving, fhall pay no Tithe for their pafture whilft they are dry. But, if they are afterwards fold, or milked in another parifh, an Agiftment Tithe is due for the time they were dry. *Hetl.* 100: *Ld. Raym.* 130. No Tithe is due from an occupier of land, for the pafture of young cattle, reared to be ufed in hufbandry, or for the pail. *Cro. Eliz.* 476. But if fuch young beafts are fold, before they come to fuch perfection as to be fit for hufbandry, or before they give milk, an Agiftment Tithe muft be paid for them. *Hetl.* 86.

An occupier of land is liable to an Agiftment Tithe, for all fuch cattle as he keeps for fale. *Cro Eliz.* 445, 476: *Jenk.* 28. *pl.* 6: *Cro. Car.* 237: *Show. P. C.* 192. Vide *Cro. Jac.* 430: 1 *Roll. Abr.* 647. *pl* 14.

But if any cattle, which have neither been ufed in hufbandry, nor for the pail, are, after being kept fome time, killed, to be fpent in the family of the occupier of the land on which they were depaftured, no Tithe is due for their pafture. *Jenk.* 281. *pl.* 6: *Cro. Eliz.* 446, 476: *Cro. Car.* 237.—It is in general true, that an Agiftment Tithe is due, for depafturing any fort of cattle the property of a ftranger. *Cro. Eliz.* 276: *Cro. Jac.* 276: *Bunb.* 11: *Freem* 329. No Tithe is due for the cattle, either of a ftranger or an occupier, which are depaftured in grounds that have in the fame year paid Tithe of hay. *Bunb.* 10, 79: *Poph.* 142: 2 *Roll. Rep.* 191.

No Agiftment Tithe is due for fuch beafts, either of a ftranger or an occupier, as are depaftured on the headlands of ploughed fields; provided that thefe are not wider than is fufficient to turn the plough and horfes upon. 1 *Rol. Abr.* 646. *pl.* 19. No Tithe is due for fuch cattle as are depaftured upon land that has the fame year paid Tithes of corn. *Bro. Difm.* 18: 1 *Mod.* 216. If land, which has paid Tithe of corn in one year, is left unfown the next year, no Agiftment is due for fuch land; becaufe, by this lying frefh, the Tithe of the next crop of corn is increafed. 1 *Roll. Abr.* 642. *pl.* 9. But if land, which has paid Tithe of corn, is fuffered to lie fallow longer than by the courfe of hufbandry is ufual, an Agiftment Tithe is due for the beafts depaftured upon fuch land. *Shep. Abr.* 1008.

As the queftion, whether an Agiftment Tithe is due for fheep, does not feem to be quite fettled, it will not be amifs to refer to the principal cafes in which this has been agitated, which are, 1 *Roll. Rep* 63. *pl.* 7: 1 *Roll. Abr.* 641, 642. *pl.* 8: *Poph.* 197: *Cro. Car.* 207: 1 *Roll. Abr.* 647. *pl.* 13: *Bunb.* 90: *Gilb. Rep. in Equity* 231: *Bunb.* 313.

This depends on the queftion, whether there is a *new increafe*; as if, after fhearing, the fheep are fed on turnips, which, if fevered, would be tithable. See *Show. P. C.* 192: *Bunb.* 314.

There is a peculiar difficulty attending this Tithe, that it cannot be taken in kind; cuftom is therefore the principal rule to go by in payment of it; and the old decifions on the fubject vary fo much, that it would be difficult to obtain any general inference from them.—*Burn* fays, in all cafes, the Tithe of Agiftment of barren and *unprofitable* cattle is to be paid according to the value of the keeping of each *per* week; and the value of the keeping of a fheep, beaft, or horfe, upon any particular lands, is eafily afcertained from the ufual prices given for their depafture *per* week in the neighbourhood, where profitable cattle are kept at the fame time upon the lands, together with them, or not. 3 *Burn Ec. L.* 448.

The parfon, vicar, or other proprietor of the Tithes, is entitled to Agiftment Tithe *de jure*; becaufe the grafs which is eat is of common right tithable. *Ld. Raym.* 137: 2 *Salk.* 655: 2 *Inft.* 651.

CORN.—It is laid down in fome books, that no Tithe is due of the rakings of Corn involuntarily fcattered. 1 *Roll. Abr.* 645. *pl.* 11: *Cro. Eliz.* 278: *Freem.* 335: *Moor* 278. But if more of any fort of corn is fraudulently fcattered, than, if proper care had been taken, would have been fcattered, Tithe is due of the rakings of fuch Corn. *Cro. Eliz.* 475: *Freem* 335. And it has been faid by *Holt*, Ch. J. that Tithe is due of the rakings of all corn, except fuch as is bound up in fheaves. 12 *Mod.* 235. No Tithes are due of the ftubbles left in Corn-fields, after mowing or reaping the Corn. 2 *Inft.* 261: 1 *Roll. Abr.* 640, *pl.* 14. See *poft.* VI.

HAY.—Tithe of Hay is to be paid, although beafts of the plough or pail, or fheep, are to be foddered with fuch Hay. *Cro. Jac.* 474. *Webb.* v. *Warner*: 1 *Roll. Abr.* 650. *pl.* 12; 12 *Mod.* 497. But no Tithe is due of Hay grown upon the headlands of ploughed grounds, provided that fuch headlands are not wider than is fufficient to turn the plough and horfes upon. 1 *Roll. Abr.* 646. *pl.* 19. See *poft.* VI. It is laid down in one old cafe, that

that if a man cuts down grafs, and, while it is in the fwathes, carries it away and gives it to his plough cattle, not having fufficient fuftenance for them otherwife, no Tithe is due thereof. 1 *Roll. Abr.* 645, *Crawley* v. *Wells*, *Mich.* 9 *Car.* 1. In one cafe, the Court of Exchequer feemed to be of opinion, that no Tithe is due of vetches or clover, cut green, and given to cattle in hufbandry. *Bunb.* 279. But in another cafe, it was afterwards held, that the right to Tithe of Hay accrues upon mowing the grafs, and that the fubfequent application of this, while it is in grafs, or when it is made into Hay, fhall not, although beafts of the plough or pail are fed with it, take away this right. 12 *Mod.* 498. And the doctrine of this laft cafe coincides with that of an old cafe, in which it was held, that tares cut green, and given to beafts of the plough, may, by fpecial cuftom, be exempted from the payment of Tithes; from whence it follows that fuch tares are not exempted *de jure*. 12 *Mod.* 498. See *poft*. VI.

It is laid down in fome books, that no Tithe is due of aftermowth Hay; becaufe Tithe can only be due once in the fame year from the fame land. *F. N. B.* 53: *Bro. Difm. pl.* 16: 2 *Inft.* 262: 11 *Rep.* 16: *Cro. Jac.* 42: *Lord Raym.* 243. But it is held in other books, that Tithe is due of aftermowth Hay. 1 *Roll. Abr.* 64. *pl.* 11: *Cro Eliz.* 660: *Cro. Jac.* 116: *Cro. Car.* 403: 12 *Mod.* 498: *Bunb.* 10. And the principle upon which the doctrine, that no Tithe is due of aftermowth Hay, is founded, is denied in fome modern cafes.

In fome of thefe it is laid down, that Tithes fhall be paid of divers crops grown upon the fame land in the fame year. *Bunb.* 19, 314. In others it is held, wherever there is, in the fame year, *a new increafe* from the fame thing, Tithe is due. *Bunb.* 9: *Gilb. Rep. in Eq.* 231.

WOOD.—Tithe of Wood is not due of common right, becaufe Wood does not renew annually: But it was, in very ancient times, paid in many places by cuftom. 2 *Inft.* 642: 12 *Mod.* 111. *Salk* 656: *Comb.* 404: *Bunb.* 61.

A conftitution was made, in the feventeenth year of the reign of *Edward* the Third, by *John Stratford*, Archbifhop of *Canterbury*, that Tithes fhall be paid, within this province, of *filva cædua*. 2 *Inft.* 642: *Palm.* 37, 38.

Several petitions having been prefented to the King, complaining of the Clergy for taking Tithe of Grofs-wood and Underwood, by virtue of this conftitution; at length, a ftatute was made in thefe words: "At the complaint of the great men and commoners, fhewing by their petition, that when they fell their Grofs-wood, of the age of 20 or 40 years, and of a greater age, to merchants, to their own profit, and to the aid of the King in his wars, the Parfons and Vicars of Holy Church do implead and trouble the faid merchants, in Court Chriftian, for the Tithe of the faid Wood, under the denomination of *filva cædua*, by the reafon of which they cannot fell their Wood for the real value, to the great damage of themfelves and the Realm; it is ordained and eftablifhed, that a prohibition in this cafe fhall be granted, and upon the fame an attachment, as it hath hitherto been." *Stat.* 45 *Ed.* 3. *c.* 3.

From the petitions and anfwers, from this ftatute, and from books of the beft authority, it appears plainly, that no Tithe of Grofs-wood was due *de jure* at the Common Law; and that the demand thereof as fuch, by virtue of the conftitution made by the Archbifhop, was an encroachment. 2 *Inft.* 642: *Stat.* 45 *Ed.* 3. *c.* 3: *Plowd.* 470: *Bro. Parech. pl* 1: *Cro. Jac.* 100.

After the making of this ftatute, prohibitions were conftantly granted to fuits inftituted in Spiritual Courts for Tithes of Grofs-wood. But two queftions often arofe; what is Grofs-wood? and of what age Grofs-wood muft be before it is exempted from the payment of Tithe? 2 *Inft.* 643, 644, 645.

For the putting an end to thefe, it hath been long fettled, that by Grofs-wood is not meant fmall Wood, nor large Wood, but fuch Wood as is generally, or by the cuftom of a particular part of the country, ufed as timber; and that all fuch Wood, if of the age of 20 years, is exempt from the payment of Tithe. 2 *Inft.* 642, 643: *Cro. Eliz.* 1: 12 *Mod.* 524: *Bunb.* 127. Oaks, afhes, and elms, being univerfally ufed as timber, it has been always held, that fuch trees, if of the age of 20 years, are Grofs-wood. 2 *Inft.* 642. It hath been held, upon great deliberation, (notwithftanding what is laid down to the contrary in *Plowd.* 470,) that a hornbeam tree, if of the age of 20 years, is Grofs-wood, becaufe this is ufed in building and repairing. It has for the fame reafon been held, that an afpen-tree, of the age of 20 years, is Grofs-wood. 2 *Inft.* 643.

A difficulty often occurs in fixing the exact age of timber; to avoid this, in many places where Wood is plentiful, it is the cuftom to eftimate the fame by meafuring round the middle part of the tree; and if it is 24 inches in circumference, it is deemed 20 years growth; but if under that meafure, it is accounted Underwood. *Shaw's Law of Tithes.*

Tithes are not in the general due of beech, birch, hazel, willow, fallow, alder, maple, or white-thorn trees, or of any fruit-trees, of whatfoever age they are; becaufe thefe are not timber. *Plowd* 470: *Cro. El.* 477: 1 *Cro. Jac.* 190: 1 *Roll. Abr.* 640. *pl.* 5. *pl.* 6: *Brownl* 94. But, if the Wood of any of thefe trees is ufed in a particular part of the country, where timber is fcarce, in building and repairing, no Tithe is due of fuch Wood, if of the age of 20 years, in that part of the country. *Hob.* 289: *Brownl.* 94. It is laid down in feveral old books, that if a timber-tree, after it is of the age of 20 years, decays fo as to be unfit to be ufed in building, no Tithe is due of the Wood of this tree, becaufe it was once privileged. 11 *Rep.* 48: *Cro. Eliz.* 477: *Cro. Jac* 100: 1 *Rol. Abr.* 640. *pl.* 2.

If the Wood of a coppice has been ufually felled for firing, fuch Wood fhall pay Tithe, although it ftand till it be 40 years of age. *Sid* 300: 1 *Lev.* 189.

If, when the Wood of coppice is felled, fome trees growing therein, which are of the age of 20 years, and have never been lopped, are lopped, and thefe loppings are promifcuoufly bound up in faggots with the coppice-wood, Tithe muft be paid of the whole; becaufe it would be very difficult to feparate the tithable Wood from that which is not fo, and the owner ought to fuffer for his folly in mixing them. *Walton* v. *Tryon*, 5 *Bac. Abr.*

If the Wood of a timber-tree is fold for firing, it was determined in one cafe, that although the tree was of the age of 20 years, it was liable to pay Tithe. *Bunb.* 99, *Greenaway* v. *The Earl of Kent*. The Reporter of this cafe mentions four others, in which the fame had been held;

held, and says, that it was, in one of them, laid down, that the Wood of timber-trees is only exempted from the payment of Tithe, on the account of its being used in building.

The contrary doctrine, however, of the old books, was confirmed by a subsequent case in the Court of Chancery. A bill being brought for Tithe of the loppings of timber-trees, which had been sold fo[illegible] it was insisted that this Wood, which would [illegible] have been exempted from the payment of Tithes, was liable thereto, because it was sold to be used for firing; and the cases just now cited were relied upon. But the bill was dismissed; and by *Hardwicke*, Chancellor,— In the case in 1 *Leon.* 189, and *Seld.* 300, the Wood in question was coppice-wood, which had been usually felled for firing: and such Wood, of whatever age it is, is always tithable. The case of *Greenaway* and the Earl of *Kent* is quite a singular one, and is not Law; for in the case of *Bebye* and *Huxley*, *Hil.* 11 *Geo.* 1, it was agreed, that no Tithe is due of the Wood of a timber-tree, which has been once privileged from the payment of Tithe, although such Wood is sold to be used for firing. *Walton* v. *Tryon*, *Mich.* 25 *Geo* 2. 5 *Bac. Abr.* See farther, *Bro. Dism* pl 14: 11 *Rep* 4. *Cro. El* 4: *Godb.* 175; *Roll. Abr* 640. *pl.* 3. Held also in the said case of *Walton* v. *Tryon*, that wherever a tree has been lopped before it was of the age of 20 years, all future loppings, although ever so old, are liable to pay Tithe. If a tree, which was once privileged from paying Tithe, is felled, the germins that spring from the root of such tree are also privileged. 11 *Rep.* 48, *Lyford's* case. But, in the case already cited, it was said by *Hardwicke*, Chancellor, that all germins which spring from the roots of trees that hath been felled, are tithable. *Walton* v. *Tryon*.

IV. Such Tithes as arise from beasts or fowls which are fed with the fruits of the earth, are called *mixed* Tithes. 2 *Inst* 649: 1 *Roll. Abr* 635. Many things are, by the Ecclesiastical Law, liable to pay such Tithes, which by the Common Law are not. 2 *Inst.* 621. 4 *Mod* 344.

The design under this Head is to shew, of what mixed Tithes are due by the Common Law.

The same general observations as to *custom, frauds*, and exemption, apply here, as to the former kind of *prædial* Tithes.

The Tithes of colts, calves, lambs, kids, pigs, milk, cheese, agistment or pasturage, eggs, chickens, &c. are mixed Tithes. *Snaw's Law of Tithes.*

Tithes are in general due of the young of all beasts, except such as are *feræ naturæ*. But none are due of young hounds, apes, or the like, because such beasts are kept only for pleasure. *Bro. Dism. pl* 20 No Tithe is due of the young deer, for these are *feræ naturæ*. 2 *Inst.* 651. And, for the same reason, none is due, but by custom, of young conies. 1 *Roll. Abr* 635, *C. pl.* 3: *Cro. Car.* 339: 1 *Ventr.* 5.

The young of all birds and fowls, except such as are *feræ naturæ*, are in the general liable to pay Tithes; unless the eggs of such birds or fowls have before paid Tithes. 1 *Roll. Abr.* 642. *pl* 6: 2 *P. Wms.* 463. But no Tithes are due either of the eggs or young of any birds or fowls which are kept only for pleasure. *Bro. Dism. pl.* 20. No Tithes are due of the eggs or young of partridges or pheasants, because these are *feræ naturæ*. *Moor* 599: 2 *P. Wms.* 463. If a man keeps pheasants, in an inclosed wood, whose wings are clipped, and from their eggs hatches and brings up young ones, no Tithe is due of these young pheasants, although none was paid for their eggs; because the old ones are not reclaimed, and would go out of the inclosure if their wings were not clipped. 1 *Roll. Abr.* 636. *pl.* 5.

It was heretofore held, that neither the eggs nor young of turkies are tithable, turkies being *feræ naturæ*. *Moor* 599. But it is now held that, as turkies are now as tame as hens or other poultry, Tithe is due of their eggs or young. 2 *P. Wms.* 463. No Tithe is due of such young pigeons as are spent in the house of the person who breeds them. 1 *Roll. Abr.* 644, *Z pl.* 4 *pl.* 6: 1 *Ventr.* 5: 12 *Mod* 77: 12 *Mod.* 47. But if any young pigeons are sold, Tithe is due to them. 1 *Roll. Abr.* 644, *Z. pl.* 5. *pl.* 6.

If a man pays Tithe of young lambs, at Marks-tide, and at Midsummer Assises shears the other nine parts of the lambs, Tithe is due of the wool, for although there are but two months between the time of paying Tithe-lambs which were not shorn, and the shearing of the residue, there is in this case a new increase. 1 *Roll. Abr.* 642, *R. pl* 7: *Bunb* 90. If a man shears his sheep about their necks at *Michaelmas* time, to preserve their fleeces from the brambles, no Tithe is due of this wool; for it appears that this, which is done before their wool is much grown, can never be for the sake of the wool, 1 *Roll. Abr.* 645. *pl.* 16. If a man, after their wool is well grown, shear his sheep about their necks to preserve them from vermin, no Tithe is due of the wool. 1 *Rol. Abr.* 645, *pl.* 14.

If a man, a little before shearing time, cuts dirty locks of wool from his sheep to preserve them from vermin, no Tithe is due of such wool. 1 *Roll. Abr.* 646. *pl.* 17.

But, in any of these cases, if more wool than ought to have been cut off, is fraudulently cut off, Tithe must be paid of the wool 1 *Roll. Abr.* 645. *pl* 15; 646. *pl* 17. Tithe is due of the wool of such sheep as are killed to be spent in the house. 1 *Roll. Abr.* 646 *pl* 18: *Cent. Litt. Rep.* 31.

Fish taken in a pond, or in any inclosed river, are liable to pay Tithe 1 *Roll. Abr.* 636 *pl* 4 *pl.* 6. *pl* 7. But no Tithe is due, except by custom, of fish taken in the sea, or in any open river, although they are taken by a person who has a several fishery, because such fish ar *feræ naturæ* *Noy* 108. 1 *Roll Abr.* 636. *pl* 4 *pl.* 6. *pl* 7: *Cro. Car.* 332: 1 *Lev.* 179. *Sid.* 278. Honey and Bees-wax re both tithable. *Fitz N B* 51: 1 *Roll. Abr.* 635, *C pl.* 1: *Cro. Car.* 559. But where the Tithe of their honey and wax has been paid, no Tithe is due of the bees. *Cro Car.* 404. No Tithe is due of the milk spent in the house of a farmer, provided such house stands in that parish in which the cows are milked. *Ld. Raym.* 129. See *post*. VI.

V. The Subtraction or withholding of Tithes from the Parson or Vicar, whether the former be a Clergyman or a Lay Appropriator, is among the pecuniary causes cognizable in the Ecclesiastical Court.—But herein a distinction must be taken; for the Ecclesiastical Courts have no jurisdiction to try the right of Tithes, unless

unless between spiritual persons; but in ordinary cases, between spiritual men and lay-men, are only to compel the payment of them, when the right is not disputed. 2 *Inst.* 364, 489, 490. By the statute, or rather writ, of *Circumspecte agatis*, it is declared, that the Court Christian shall not be prohibited from holding plea, "*si rector petat versus parochianos oblationes et decimas debitas et consuetas.*" So that if any dispute arises whether such Tithes be due and accustomed, this cannot be determined in the Ecclesiastical Court, but before the King's Courts of the Common Law; as such question affects the temporal inheritance, and the determination must bind the real property. But where the right does not come into question, but only the fact, whether or no the Tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury, for which the remedy may properly be had in the Spiritual Court; *viz.* the recovery of the Tithes, or their equivalent. By *stat.* 2 & 3 *Ed.* 6. *c.* 13, it is enacted, that if any person shall carry off his predial Tithes, (*viz.* of corn, hay, or the like,) before the tenth part is duly set forth, or agreement is made with the proprietor, or shall willingly withdraw his Tithes of the same, or shall stop or hinder the proprietor of the Tithes, or his deputy, from viewing or carrying them away; such offender shall pay double the value of the Tithes, with costs, to be recovered before the Ecclesiastical Judge, according to the King's Ecclesiastical Laws. By a former clause of the same statute, the treble value of the Tithes, so subtracted or withheld, may be sued for in the Temporal Courts; which is equivalent to the double value to be sued for in the Ecclesiastical: For one may sue for and recover in the Ecclesiastical Courts, the Tithes themselves, or a recompence for them, by the ancient Law; to which the suit for the double value is superadded by the statute: But as no suit lay in the Temporal Courts for the subtraction of Tithes themselves, therefore the statute gave a treble forfeiture, if sued for there; in order to make the course of justice uniform, by giving the same reparation in one Court as in the other. 2 *Inst.* 250.

By *stats.* 27 *H.* 8. *c.* 20; 32 *H.* 8. *c.* 7; upon complaint by the Ecclesiastical Judge, of any contempt or misbehaviour by a defendant in any suit for Tithes, any Privy Counsellor, or any two Justices of the Peace, (or, in case of disobedience to a definitive sentence, any two Justices of the Peace,) may commit the party to prison, without bail or mainprise, till he enters into a recognizance, with sufficient sureties, to give due obedience to the process and sentence of the Court.

However, it now seldom happens that Tithes are sued for at all in the Spiritual Court; for if the defendant pleads any custom, *modus*, composition, or other matter whereby the right of tithing is called in question, this takes it out of the jurisdiction of the Ecclesiastical Judges; for the Law will not suffer the existence of such a right to be decided by the sentence of any single, much less an Ecclesiastical, Judge; without the verdict of a Jury. 3 *Comm. c.* 7.

The following statutes have also operated to abridge the power of the Ecclesiastical Court in this respect.

By *stat.* 7 & 8 *W.* 3. *cap.* 6. § 1, it is, for the more easy recovery of Small Tithes, where the same do not amount to above the yearly value of 40 *s.* from any one person, enacted, "that if any person shall fail in payment for 20 days after demand, the Parson may make complaint in writing to two Justices of the Peace, (neither being patron, nor interested,) who, after summoning the party, are to hear and determine the complaint, give a reasonable allowance for the Tithes, and costs not exceeding 10 *s.*

"If the person complained against insists on any prescription, composition, *modus decimandi*, or other title, delivers the same in writing to the Justices, and gives to the party complaining sufficient security to pay costs at Law, if the title is not allowed, the Justices are not to give judgment. The Justices have power to give costs, not exceeding 10 *s.*, to the party prosecuted, if they find the complaint false and vexatious. The act not to extend to Tithes within the city of *London*, or in any other place where the same are settled by any act of Parliament. An appeal is given to the Sessions, and no proceedings or judgment, had by virtue of this act, to be removed or superseded, by any writ of *certiorari*, or other writ whatsoever, unless the title of such Tithes shall be in question."

By *stat.* 7 & 8 *W.* 3. *c.* 34. § 4, where any Quaker shall refuse to pay, or compound for, his Great or Small Tithes, it shall be lawful for the two next Justices of the Peace of the same county, other than such Justice of the Peace as is patron of the church or chapel to which the Tithes belong, or any ways interested, upon complaint, to convene before them such Quaker, and to examine upon oath the truth of the complaint, and to ascertain what is due from such Quaker, and by order under their hands and seals to direct the payment thereof, so as the sum ordered do not exceed 10*l.*; and, upon refusal of the Quaker to pay, to levy the money. Any person aggrieved, may appeal to the next General Quarter Sessions.

No proceedings, or judgment, had by virtue of this act, shall be removed or superseded by any writ of *certiorari*, or other writ out of his Majesty's Courts at *Westminster*, or any other Court whatsoever, unless the title to such Tithes shall be in question.

The material point as to granting a *certiorari* is, whether the *title* to the Tithes is *really in question* or not. The general denial of a right to Tithes, by a Quaker, is not such a controverting the title, as shall enable him to have a *certiorari*. 1 *Burr.* 485.

By *stat.* 1 *Geo.* 1. *st.* 2. *c.* 6. § 2, the like remedy is given for the recovery of all Tithes and all other ecclesiastical dues from Quakers, as by *stat.* 7 & 8 *W.* 3. *c.* 34, is given for Tithes to the value of 10*l.*

And such Justices of the Peace, upon complaint of any parson, vicar, curate, farmer or proprietor of such Tithes, or other person who ought to have, receive, or collect, any such Tithes or dues, may proceed in a similar manner as directed by the former act, touching Quakers.

The Tithes of Houses in *London*, which are regulated by *stat.* 37 *H.* 8. *c.* 12, may be recovered in the Court of Exchequer. *Bennett v. Treppass, Bro. P. C.*—Under *stat.* 22 & 23 *Car.* 2. *c.* 15, the Tithes of all the Parishes in *London*, injured by the great fire in 1666, are settled, to be levied by an equal rate; and, on non-payment, the Lord Mayor is to grant a warrant of distress for the same; or, on his refusal, the Lord Chancellor, or two Barons of the Exchequer, may grant such warrant;

warrant; and all Courts, Ecclesiastical and Temporal, are ousted of their jurisdiction in this case, by this statute.—These Tithes are a real charge on the houses, payable though they are empty, and leviable on the goods of the succeeding occupier; and appeal lies from the Lord Mayor to the Lord Chancellor. 3 *Atk.* 639.

VI. Acorns, as they yearly increase, are liable to the payment of Tithes; but this is where they are gathered and sold, and reduced to a certain profit; not when they drop, and the hogs eat them. 2 *Inst.* 643: *Hetl.* 27. After-math, or After pasture, pays no Tithes, except by custom; being the remains of what was before tithed. 2 *Inst.* 652: 2 *Danv. Abr.* 589; title *Dismes.*

Agistment of Cattle upon pasture land, which hath paid no other Tithes that year, pays Tithe for the Cattle. And if a man breeds or buys barren unprofitable Cattle, and sells them, he shall pay for the Agistment; but if he depastures his land with his own Saddle Horses, he shall pay no Tithes. If ground is eat up with unprofitable Cattle of a man's own, or others, a tenth part of the yearly value of the rent of the land, *i. e.* the sum of 2*s. per* pound, is payable by the owner of the land, or his tenant; though the twentieth part is usually accepted. 1 *Roll. Abr.* 646: *Hard.* 184. See *ante* III.—Alder Trees pay Tithes, notwithstanding they are above 20 years growth, not being timber.—Ash is timber, and therefore, if these trees are above twenty years' growth, they are Tithe free.—Asp or Aspin Trees are exempted, if beyond that growth, in places where they are used for timber. 2 *Cro.* 199: 2 *Inst.* 643.

Bark of Trees is not tithable, if the Trees whereon produced were timber. 11 *Rep.* 49.—Barren Land, which is so of its own nature, pays no Tithe; where land is barren, and not manurable without some extraordinary charge, in respect of such charge, and for the advancement of husbandry, such Land being converted to tillage, shall, for the first seven years after the improvement, be discharged from Tithes; by *stat.* 2 & 3 *Ed.* 6. *c.* 13. But the barren Land, during the seven years of improvement, shall pay such Small Tithes as have been accustomably paid before; and afterwards to pay the full Tithe according to the improvement. And if Land is over-run with bushes, or become unprofitable by bad husbandry, it cannot properly be called barren Land; for if it be grubbed, or ploughed and sowed, it immediately pays Tithes. 2 *Inst.* 656: *Cro. Eliz.* 475.—Beech Trees, where timber is scarce, and these trees are used for building, if above 20 years' growth to be timber, are privileged from Tithes, by *stat.* 45 *Ed.* 3. *c.* 3; though this tree is not naturally timber, for it is necessity makes it so. 2 *Danv. Ab.* 589. Bees are tithable for their Honey and Wax, by the tenth measure and tenth pound. It has been a question, whether the tenth Swarm can be demanded for Tithes of Bees, because Bees are *feræ naturæ*; but when the Bees are gathered into the hives, they are then under custody, and may pay Tithe by the Hive or Swarm; but the Tithe is generally paid in the tenth part of the Honey or Wax. 1 *Roll. Abr.* 651: 3 *Cro.* 404, 559.—Birch Wood is tithable, though of above 20 years' growth. 2 *Inst.* 643.—Bricks pay not Tithes, for they are made of parcel of the freehold, and are of the substance of the earth, not an annual increase, 1 *Cro.* 1.—Broom shall pay Tithe; but it may be discharged by custom, if burnt in the owner's house, or kept for husbandry. 2 *Danv. Abr.* 597.

Calves are tithable, and the tenth Calf is due to the Parson, when weaned; and he is not obliged to take it before; but if in one year a person hath not the number of ten Calves, the Parson is not entitled to Tithes in kind for that year, without a special custom for it; though he may take it in the next year, throwing both years together; and it is a good custom to pay one Calf in seven, where there hath been no more in one year; and where a man sells a Calf to pay the tenth of the value, or for the Parson to have the right shoulder, &c. 1 *Roll. Abr.* 648: *Raym.* 277.

Cattle sold pay Tithe; but not Cattle kept for the plough or pail, which shall pay no Tithe for their pasture, by reason the Parson hath the benefit of the labour of Plough-Cattle in tilling the ground, by the Tithe of Corn, and Tithe Milk for those kept for the pail; yet if such Cattle bought are sold before used; or if, being past their labour, the Cows are barren, and afterwards fatted in order to sell, Tithes shall be paid for them; though if the owner kill and spend the Cattle in his own house, no Tithe is due for them, being for his provision, to support him in his labour about other affairs for which the Parson hath Tithes. Cattle feeding on large commons, where the bounds of the parish are not certainly known, shall pay Tithes to the Parson of the parish where the owner lives; and if fed in several parishes, and they continue above a month in each parish, Tithes shall be paid to the two Parsons proportionably. 1 *Roll. Abr.* 635, 646, 647: *Hardr.* 35: *Stat.* 2 & 3 *Ed.* 6. *c.* 13. § 3.—Chalk and Chalk-Pits are not tithable; nor is Clay or Coal, as they are part of the freehold, and not annual, to pay Tithes. 2 *Inst.* 651.—Cheese pays Tithe by custom, where Tithe is not paid for the Milk; but if the Milk pays a Tithe, the Cheese pays none; and it may be a good custom to pay the tenth Cheese made in such a month, for all Tithe Milk in that year. 1 *Roll. Abr.* 651. See *Milk.*—Chickens are not tithable, if Tithe is paid for the Eggs. 1 *Roll. Abr.* 642.—Colts pay Tithes in the same manner as Calves. *Ibid.*—Conies are tithable only by custom, for those that are sold, not for such as are spent in the house. 2 *Danv. Abr.* 583.—Corn pays a predial Tithe; it is tithed by the tenth cock, heap, or sheaf; which, if the owner do not set out, he may be sued in an action upon the *stat.* 2 & 3 *Ed.* 6. *c.* 13. And if the Parishioner will not sow his land usually sown, the Parson may bring his action against him. When Tithe Corn is set forth, the Law gives the Parson a reasonable time to carry it away, and if he suffer the same to lie too long on the land, to the prejudice of the owner thereof, he may be liable to an action; but the Parson may not set out the Tithes himself, or take them away without leave. 1 *Roll. Abr.* 644: 1 *Sid.* 283: 2 *Vent.* 48: *Ley* 70.

Deer are not tithable, for they are *feræ naturæ*; though in parks, &c. they pay Tithes by custom. 2 *Inst.* 651.—Doves kept in a dove-house, if they are not spent in the owner's house, are tithable. 1 *Vent.* 5.

Eggs pay Tithes when Tithes are not paid for the young. 1 *Roll. Abr.* 642.—Elm trees, being timber, are discharged from the payment of Tithes, but not if under twenty years' growth. 2 *Inst.* 643.

Fallow Ground is not tithable for the pasture in that year in which it lies fallow, unless it remain beyond the course of husbandry; because it improves and renders the land more fertile by lying fresh. 1 *Roll. Abr.* 642.—Fenns being drained and made manurable, or converted into pasture, are subject to the payment of Tithes. 1 *Roll. Rep.* 354.—Fish taken in the sea, or common rivers, are tithable only by custom, and the Tithe is to be paid in money, and not the tenth fish; but fish in ponds and rivers inclosed, ought to be set forth as a Tithe in kind. 2 *Danv. Abr.* 583, 584.—Flax, every acre of flax or hemp sown shall pay yearly 5*s.* for Tithe, and no more. *Stat.* 11 & 12 *W.* 3. *c.* 16. A former act (3 & 4 *W.* & *M. c.* 3.) fixed the *modus* at 4*s.*—Forest Lands shall pay no Tithes while in the hands of the King, though such lands in the hands of a Subject shall pay Tithes; and if a forest shall be disafforested, and within a parish, it shall pay Tithes. 1 *Roll. Abr.* 655: 3 *Cro.* 94.—Fowls, as hens, geese, ducks, are to pay Tithes, either in eggs or the young, according to custom, but not in both; So of Turkies it is now resolved, that Tithes are due of their eggs or young. 2 *P. Wms.* 463.—Fruit, apples, pears, plumbs, cherries, &c. pay Tithes in kind when gathered, and ought to be set out according to the statute. 2 *Inst.* 621.—Fruit Trees cut down and sold, are not tithable, if they have paid Tithe fruit that year before cut. *Ibid.* 652.—Furzes, if sold, pay Tithe, not if used for fuel in the house, or to make pens for sheep, &c. *Wood's Inst.* 166.

Gardens are tithable as lands, and therefore Tithes in kind are due for all herbs, plants, and seeds sowed in them; but money is generally paid by custom or agreement.—Grass mown is tithable by payment of the tenth cock, or according to custom; but for grass cut in swaths for the sustenance of plough cattle only, not made into hay, no Tithe is to be paid. Grass or corn, &c. when sold standing, the buyer shall pay the Tithes; and if sold after cut and severed, the seller must pay it. The parson is not obliged to take Tithe of grass the day it is cut, but may let it lie long enough to make it into hay, 1 *Strange* 245: 1 *Roll. Abr.* 644, 645. See post. *Hay.*

Hazle, Holly, and Maple Trees, &c. are regularly tithable, although of twenty years' growth. 2 *Danv. Abr.* 589.—Hay pays a predial Tithe; the tenth cock is to be set out and paid, after made into hay, by the custom of most places; and by custom generally, but not of common right, the parishioners shall make the grass cocks into hay for the parson's Tithe; but if they are not obliged to make the Tithe into hay, they may leave it in cocks, and the parson must make it, for which purpose he may come on the ground, &c. A prescription to measure out and pay the tenth acre, or part of grass standing, in lieu of all Tithe hay, may be good: And if meadow ground is so rich, that there are two crops of hay in one year, the parson, by special custom, may have Tithe of both. 1 *Roll. Abr.* 643, 647, 950.—Headlands are not tithable, if only large enough for turning the plough; but if larger, Tithe may be, and generally is, payable. 2 *Inst.* 653.—Hemp; see *Flax.*—Herbage of ground is tithable for barren cattle kept for sale, which yield no profit to the parson. *Wood's Inst.* 167.—Honey pays a Tithe, see *Bees.*—Hops are tithable, and the tenth part may be set out after they are picked. There are several ways of tithing Hops, *viz.* by the hills, pole, or pound; in some places they set forth the tenth pole for Tithes; but Lord *Chief Justice Rolle* tells us, they ought not to be tithed before dried. 1 *Roll. Abr.* 644. It is now settled, on appeal to the House of Lords, that Hops ought to be picked and gathered from the lines before they are tithable: And then measured in baskets, before being dried, and every tenth basket set out for the Tithes. *Walton* v. *Tyers, Bro. P. C.*—Horses kept to sell, and afterwards sold, Tithes shall be paid for their pasture; though not where horses are kept for work and labour. *Hut.* 77.—Houses for dwelling are not properly tithable: A *modus* may be paid for houses in lieu of Tithes of the land upon which they are built; and a great many cities and boroughs have a custom to pay a *modus* for their houses: as it may be reasonably supposed that it was usual to pay so much for the land, before the houses were erected on it. 11 *Rep.* 16: 2 *Inst.* 659. See title *London (Tithes)*; and *ante* V.

Kids pay a Tithe as calves, the tenth is due to the parson. *Wood* 167.

Lambs are tithable in like manner as calves; but if they are yeaned in one parish, and do not tarry there thirty days, no Tithe is due to the parson of that place: If there be a custom that the parishioners, having six lambs or under, shall pay so much for every lamb; and if he have above that number then to pay the seventh, it is good. 3 *Cro.* 403.—Lead may pay Tithe by custom, as it does in some counties; but it doth not without it. 2 *Inst.* 651.—By custom only, Lime and Lime-kilns are tithable. 1 *Rol Abr.* 642.

Madder is now tithable in kind: It was liable, for 28 years only, to a *modus* of 5*s.* but the statutes for that purpose are now expired. *Stats.* 31 *Geo.* 2. *c.* 12: 5 *Geo.* 3. *c.* 18.—Mast of oak and beech pays Tithes as under *Acorns.*—Milk is tithable when no Tithes are paid for cheese, all the year round, except custom over-rules; and it is payable by every tenth meal, not tenth quart or part of every meal; and it was formerly held, that it was to be brought to the house of the parson, &c. in which particular this Tithe differs from all others, which must be fetched by the receiver. But this is only where there is a special custom; and it seems now decided that the Tithe of milk is by setting out every tenth *morning and evening's* meal, in clean vessels, belonging to the owner of the milk, and leaving the same therein till the vessels are again wanted by the owner: And if not fetched away by the parson, prior to that time, the owner is at liberty *to throw it on the ground*; and in the intermediate time, the owner is not answerable for any accident that may happen to it. *Dr. Bosworth* v. *Limbrick, Bro. P. C.* In some places they pay Tithe cheese for milk, and in others some small rate, according to custom. *Cro. Eliz.* 609: 2 *Danv. Abr.* 596.—Mills, as there are several sorts of them, the Tithes are different; the Tithes of corn-mills driven by wind or water, have been paid in kind, every tenth toll-dish of corn to the parson of the parish wherein the mills are standing: But ancient corn-mills are Tithe-free, being suggested that they are very ancient, and never paid Tithes, &c. And it is questioned

whether Tithe is due for any corn-mills, unless by custom, because the corn hath before paid Tithe; and it seems rather a personal Tithe where due: The Tithes of fulling-mills, paper-mills, powder-mills, &c. are personal, charged in respect to the labour of men, by custom only; and these are regarded more as engines of several trades than as mills. 1 *Roll. Abr.* 656: 2 *Inst.* 621. It is now settled that Tithes of all mills are personal Tithes; and only a tenth part of the clear profits, deducting all charges and expences, is payable as Tithe, *Newte* v. *Chamberlain*, *Bro. P.C.*; and see 2 *P. Wms.* 463.—MINES pay no Tithes but by custom, being of the substance of the earth, and not annually increasing. 2 *Inst.* 651.

NURSERIES OF TREES shall pay Tithes, if the owner dig them up and makes profit of them by selling. 2 *Danv. Abr.* 585: 1 *Co.* 526: 2 *Jon.* 416: *Godb.* 431: *Hardr.* 380.

OAK TREES are privileged as timber from the payment of Tithes by the statute of *Silva Cædua*, 45 *Edw.* 3. *c.* 3; if of or above twenty years' growth; and if Oaks are under that age, it is the same when they are apt for timber. *Moor* 541. See *ante* III.—OFFERINGS, &c. are in the nature of personal Tithes. 2 *Inst.* 659, 661. See titles *Offerings*; *Oblations*.—ORCHARDS pay Tithes both for the fruit they produce, and the grass or grain, if any be sown or cut therein. 2 *Inst.* 652.

PARKS are tithable by custom, for the deer and the herbage; and when disparked and converted into tillage they shall pay Tithes in kind: The Tithes of Parks may be in part certain, and part casual; and 2*s.* a-year, and a shoulder of every third deer, hath been paid as Tithe for a Park. 1 *Roll. Rep.* 176: *Hob.* 37, 40.—PARTRIDGES and PHEASANTS, &c. as they are *feræ naturæ*, yield no Tithes of eggs or young. 1 *Roll. Abr.* 636.—PEASE, if gathered for sale, or to feed hogs, pay Tithes; but not green Pease spent in the house. 1 *Roll. Abr.* 647. Eating Pease, sown in fields, and sold green for sale, are a small Tithe. *Sims* v. *Bennett and another*. *Bro. P. C.*—PIGEONS ought to pay Tithes when sold, and this holds good if they lodge in holes about an house, as well as in a dove-house; and by custom, if spent in the house, they may be tithable, though not of common right. 2 *Danv. Abr.* 583, 597.—PIGS are tithable, as calves. *Ibid.*—POLLARD TREES, such as are usually lopped, and distinguished from timber-trees, pay Tithes. *Plowd.* 470.

QUARRIES of stone, &c. are not subject to pay Tithes; because they are part of the inheritance, and Tithes ought to be collateral to the land, and distinct from it. 1 *Roll.* 644.

RABBITS; See *Conies*.—RAKINGS OF CORN are not tithable, for they are left for the poor, and are properly the scatterings of the corn whereof the Tithes have been paid, left after the cocks set out are taken away. *Cro. Eliz.* 660. See *ante* III. (*Corn*).

SAFFRON pays a predial and small Tithe. 1 *Cro.* 467.—SALT is not tithable, but by custom only. 1 *Bunb.* 10.—SHEEP, a Tithe is paid for, of lambs and wool, and therefore they pay no Tithe for their feeding. But see *ante* III. *Agistment*. If Sheep are in the parish all the year, they are to pay Tithe wool to the Parson; but if removed from one parish to another, (without fraud,) the Parson of each parish to have Tithe *pro rata*, where they remain thirty days in a parish; and if they are fed in one parish, and brought into another to be shorn, the same tithing is to be observed. 1 *Roll. Abr.* 642, 647: 3 *Cro.* 237. It seems now that the rule is, that Tithe of the wool shall be paid where the Sheep are shorn; and Agistment Tithe in other parishes where they have been depastured. *Shaw's Law of Tithes*.—STUBBLE pays no Tithe under aftermath. 2 *Inst.* 652.

TARES, vetches, &c. are tithable; but if they are cut down green, and given to the cattle of the plough, where there is not a sufficient pasture in the parish, no Tithe shall be paid for them. 1 *Cro.* 139.—TILES are no yearly increase, and not tithable. 2 *Inst.* 651.—TIMBER TREES, such as oaks, ashes, and elms, and in some places beech, &c. above the age of twenty years, were discharged of Tithes by the Common Law, before the statute 45 *Ed.* 3. *c.* 3; and the reason of it is, because such trees are employed to build houses, and houses when built are not only fixed to, but part of the freehold; loppings of Timber trees above twenty years' growth, pay no Tithes, for the branch is privileged as well as the body of the tree; and the roots of such trees are exempted as parcel of the inheritance. Trees cut for plough-bote, cart-bote, &c. shall not pay Tithes, although they are no Timber; but all trees not fit for Timber, and not put to those uses, pay Tithes. 1 *Roll. Abr.* 650: *Cro. Eliz.* 477, 499. See *ante* III.—TURFS used for fuel are part of the soil, and Tithe-free. 2 *Inst.* 651.—TURNIPS, are reckoned among small predial Tithes; and the Tithes of them shall be paid as often as they are sown, though twice or more on the same land and in the same year. So if eaten off the land by barren cattle. *Bunb.* 10. See III. *Agistment*.

UNDERWOOD is tithable, though the Tithe is not of annual payment; and is set out while standing, by the tenth acre, pole, or perch; or when cut down, by tenth faggot or billet, as custom directs; and if he that fells the wood doth not set out the Tithe, he is liable to the treble damages by *stat.* 2 & 3 *Ed.* 6. *c.* 13. But if the Underwood is used for firing in a house of husbandry, or to burn brick to repair the house, or for hedging and fencing the lands in the same parish, it may be discharged from Tithe. 2 *Inst.* 642, 643, 652: *Hob.* 250: 2 *Danv. Abr.* 597.

WARRENS where tithable, see *Conies*.—WASTE GROUND, whereon cattle feed, is liable to the payment of Tithes. 2 *Danv. Abr.*—WOAD growing in the nature of an herb is a predial and small Tithe. *Hutt.* 77: *Cro. Car.* 28:—WOOD is generally esteemed to be a great Tithe. If Wood grounds have likewise timber-trees grown on them, and consist for the most part of such trees, the timber-trees shall privilege the other Wood; but if the Wood is the greatest part, then it must pay Tithes for the whole. 13 *Rep.* 13. If Wood be cut to make hop-poles, where the Parson hath Tithe hops, no Tithe shall be paid for it. *Hughes's Abr.* 689. See *ante* III.—WOOL is a mixed small Tithe, paid when clipped; one fleece in ten, or in some places one in seven, is given to the Parson. If there is under ten pounds of Wool at the shearing, a reasonable consideration shall be paid, because the Tithes are due of common right; and if less than ten fleeces, they shall be divided into ten parts, or an allowance be otherwise made. All sheep killed, and sheep which die, pay Tithe Wool; and neck Wool cut off for the benefit of the Wool, but not if it is to pre-

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ferve the sheep from vermin, &c. Also the Wool of lambs shorn at *Midsummer*, though Tithe was paid for the lambs at *Mark-tide*, is tithable. 1 *Roll. Abr.* 646, 647: 2 *Inst.* 652. See *Sheep*, and *ante* IV.

VII. Lands, and their occupiers, may be exempted or discharged from the payment of Tithes, either in part or totally, first, by a real composition; or, secondly, by custom or prescription.

First; A real composition is when an agreement is made between the owner of the lands, and the Parson or vicar, with the consent of the Ordinary and the Patron, that such lands shall for the future be discharged from payment of Tithes, by reason of some land or other real recompence given to the Parson, in lieu and satisfaction thereof. 4 *Inst.* 490: *Regist.* 38: 13 *Rep.* 40. This was permitted by Law, because it was supposed that the Clergy would be no losers by such composition; since the consent of the Ordinary, whose duty it is to take care of the church in general, and of the Patron, whose interest it is protect that particular church, were both made necessary to render the composition effectual: and hence have arisen all such compositions as exist at this day by force of the Common Law. But, experience shewing that even this caution was ineffectual, and the possessions of the Church being, by this and other means, every day diminished, the disabling statute, 13 *Eliz.* c. 10, was made; which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives or twenty-one years. So that now, by virtue of this statute, no real composition made since the 13 *Eliz.* is good for any longer term than three lives, or twenty-one years, though made by consent of the Patron and Ordinary; nor is it binding on the succeeding Incumbent, though confirmed by a decree in Chancery. 2 *Woodd.* 107. This has indeed effectually demolished this kind of traffic; such compositions being now rarely heard of, unless by authority of Parliament. 2 *Comm.* c. 3.

With regard to compositions entered into between the Tithe-owner and any parishioner, for the latter to retain the Tithe of his own estate, it has been decided, that they are analogous to leases from year to year between landlord and tenant; and if they are paid without or beyond an agreement for a specific time, they cannot be put an end to without six months' notice before the time of payment, and the parishioner may avail himself of the defect of notice, at the same time that he controverts the right of the Incumbent to receive Tithe in kind: an objection not permitted to a tenant, who denies the right of the landlord. See title *Rent.* 2 *Bro. C. R.* 161.

Secondly, A discharge by custom or prescription, is where, time out of mind, such persons or such lands have been, either partially or totally, discharged from the payment of Tithes. And this immemorial usage is binding upon all parties; as it is in its nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made. This custom or prescription is either *de modo decimandi*, or *de non decimando*.

A *Modus decimandi*, commonly called by the simple name of a *Modus* only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking Tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as two-pence an acre for the Tithe of land: sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him; sometimes, in lieu of a large quantity of crude or imperfect Tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of Tithe eggs; and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

To make a good and sufficient *Modus*, the following rules must be observed. 1. It must be certain and invariable, for payment of different sums will prove it to be no *modus*, that is, no original real composition; because that must have been one and the same, from its first original to the present time. 1 *Keb.* 602. 2. The thing given, in lieu of Tithes, must be beneficial to the parson, and not for the emolument of third persons only: thus a *modus*, to repair the church in lieu of Tithes, is not good, because that is an advantage to the parish only; but to repair the chancel is a good *modus*, for that is an advantage to the parson. 1 *Roll. Abr.* 649. 3. It must be something different from the thing compounded for; one load of hay, in lieu of all Tithe hay, is no good *modus*: for no parson would *bonâ fide* make a composition to receive less than his due in the same species of Tithe: and therefore the Law will not suppose it possible for such composition to have existed. 1 *Lev.* 179. 4. One cannot be discharged from payment of one species of Tithe, by paying a *modus* for another. Thus a *modus* of 1*d.* for every milch cow will discharge the Tithe of milch kine, but not of barren cattle: for Tithe is, of common right, due for both; and therefore a *modus* for one, shall never be a discharge for the other. *Cro. Eliz.* 446: *Salk.* 657. 5. The recompence must be in its nature as durable as the Tithes discharged by it; that is, an inheritance certain: and therefore a *modus* that every inhabitant of a house shall pay 4*d.* a-year, in lieu of the owner's Tithes, is no good *modus*; for possibly the house may not be inhabited, and then the recompence will be lost. 2 *P. Wms.* 462. 6 The *modus* must not be too large, which is called a rank *modus*; as if the real value of the Tithes be 60*l.* *per ann.* and a *modus* is suggested of 40*l.* this *modus* will not be established; though one of 40*s.* might have been valid. 11 *Mod.* 60. Indeed, properly speaking, the doctrine of rankness in a *modus*, is a mere rule of evidence, drawn from the improbability of the fact, and not a rule of Law. *Pyke* v. *Dowling*. *Hil* 19 *Geo.* 3. *C B.* For, in these cases of prescriptive or customary *modus's*, it is supposed that an original real composition was anciently made; which being lost by length of time, the immemorial usage is admitted as evidence that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained by the Law to commence from the beginning of the reign of *Richard* the First; and any custom may be destroyed by evidence of its non-existence in any part of the long period from that time to the present; wherefore, as this real composition is supposed to have been an

an equitable contract, or the full value of the Tithes, at the time of making it, if the *modus* set up is so rank and large, as that it beyond dispute exceeds the value of the Tithes in the time of *Richard* the First, this *modus* is (in point of evidence) *felo de se*, and destroys itself. For, as it would be destroyed by any direct evidence to prove its non-existence at any time since that æra, so also it is destroyed by carrying in itself this internal evidence of a much later original.

To constitute a good *Modus*, it seems necessary that it should be such as would have been a certain, fair, and reasonable equivalent or composition for the Tithes in kind, before the year 1189; and therefore no *modus* for hops, turkies, or other things introduced into *England*, since that time, can be good. *Bunb.* 307. The question of rankness, or rather *modus* or *no modus*, is a question of fact which Courts of Equity will send to a Jury; unless the grossness of the *modus* is so obvious as to preclude the necessity of it. 2 *Bro. C. R.* 163: 1 *Black. Rep.* 420.

A Prescription *de non decimando* is a claim to be entirely discharged of Tithes, and to pay no compensation in lieu of them. Thus the King by his prerogative is discharged from all Tithes. *Cro. Eliz.* 511. So a Vicar shall pay no Tithes to the Rector, nor the Rector to the Vicar, for *ecclesia decimas non solvit ecclesiæ. Cro. Eliz.* 479, 511: *Sav.* 3: *Moor* 910. But these personal privileges (not arising from or being annexed to the land) are personally confined to both the King and the Clergy; for their tenant or lessee shall pay Tithes, though in their own occupation their lands are not generally tithable. And, generally speaking, it is an established rule, that in lay hands, *modus de non decimando non valet.* But it seems that the King's tenant *at will* shall not pay Tithes. 1 *Woodd.* 100.

Spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of Tithes, by various ways; *Hob.* 309: *Cro Jac.* 308; As, 1. By real composition; 2. By the Pope's bull of exemption; 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of Tithes by this unity of possession; 4. By prescription; having never been liable to Tithes, by being always in spiritual hands; 5. By virtue of their order; as the Knights Templars, Cistercians, and others, whose lands were privileged by the Pope with a discharge of Tithes. 2 *Rep.* 44: *Seld. Tith. c.* 13. § 2. Though, upon the dissolution of the greater abbeys by *Henry* VIII., most of these exemptions from Tithes would have fallen with them, and the lands become tithable again; had they not been supported and upheld by the *stat.* 31 *Hen.* 8. *c.* 13; which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of Tithes, in as large and ample a manner as the abbeys themselves formerly held them. This provision is peculiar to this statute, and therefore all the lands belonging to the *lesser* monasteries, dissolved by *stat.* 27 *H.* 8. *c.* 28, are now liable to pay Tithe. And from this original have sprung all the lands, which, being in lay hands, do at present claim to be Tithe-free; for if a man can shew his lands to have been such abbey lands, and also immemorially discharged of Tithes by any of the means before-mentioned, this is now a good prescription *de non decimando.* But he must shew both these requisites; for abbey lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of Tithes, unless it relates to such abbey lands. 2 *Comm. c.* 3.

For more learning on this subject, see 5 *Bac. Abr.*: *Vin. Abr.* title *Disines*; and *Shaw's Law of Tithes.*

TITHING, *Tithinga*, from the Sax. *Teothunge*, *Decuria.*] Was, in its first appointment, the number or company of ten men with their families, held together in a society, all being bound for the peaceable behaviour of each other: And of these companies there was one chief person who was called Teothung-man, at this day Tithing-man; but the old discipline of Tithings is long since left off. In the *Saxon* times, for the better conservation of the peace, and more easy administration of justice, every hundred was divided into ten districts or Tithings; and, within every Tithing, the Tithing-men were to examine and determine all lesser causes between villagers and neighbours; but to refer greater matters to the then superior Courts, which had a jurisdiction over the whole Hundred. *Paroch. Antiq.* 633. The subdivision of Hundreds into Tithings, seems to be most peculiarly the invention of King *Alfred.* See 1 *Comm. Introd.*

TITHING-MEN, Are now a kind of petty Constables, elected by parishes, and sworn in their offices in the Court-leet, and sometimes by Justices of Peace, &c. There is frequently a Tithing-man in the same town with a Constable, who is as it were a deputy to execute the office in the Constable's absence; but there are some things which a Constable has power to do, that Tithing-men and Headboroughs cannot intermeddle with. *Dalt.* 3. When there is no Constable of a parish, the office and authority of a Tithing-man seems to be the same under another name. *Stat.* 13 & 14 *Car.* 2. *c.* 12. See title *Constable.*

TITHING-PENNY; See *Teding-penny.*

TITLE, *Titulus.*] Is when a man hath lawful cause of entry into lands whereof another is seised; and it signifies also the means whereby a man comes to lands or tenements, as by feoffment, fine, last will and testament, &c. The word Title includeth a right, but is the more general word: Every right is a Title, though every Title is not such a right for which an action lies; so that *titulus est, justa causa possidendi quod nostrum est*, and is the means of holding the lands. *Co. Litt.* 345. *Blackstone* defines it to be "The means whereby the owner of lands has the just possession of his property." 2 *Comm. c.* 13.

There are several stages or degrees requisite to form a complete Title to Lands and Tenements: As, 1st, The lowest and most imperfect degree of Title consists in the mere *naked Possession*, or actual Occupation of the Estate, without any apparent right, or any shadow or pretence of right, to hold and continue such possession; which naked possession, by length of time, and negligence of him who hath the right, may by degrees ripen into a perfect and indefeasible Title; and, at all events, without actual possession, no Title can be completely good. 2d, The next step to a good and perfect Title is a *Right of Possession*; which is either *actual* or *apparent*; and which may reside in one man, while the actual possession

possession is in another. This actual possession may be recovered by him who has the right of possession, if sued for within a competent time; otherwise he will have nothing left in him, but, 3dly, *The mere Right of Property*, without even Possession, or the Right of Possession.

Thus, if a disseisor turns me out of Possession of my lands, he thereby gains a mere *naked Possession*, and I still retain the *Right of Possession* and the *Right of Property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of *Possession*, but I still retain the *actual* right, both of Possession and Property. If I acquiesce for 30 years, without bringing any action to recover the Possession of the lands, the son gains the *actual Right of Possession*, and I retain nothing but the mere right of Property; and even this right of Property will fail, or at least be without a remedy, unless I pursue it within the space of 60 years. So also if the father be Tenant in Tail, and aliens the Estate-Tail to a stranger in Fee, the alienee thereby gains *the Right of Possession*, and the son hath only the *mere Right*, or *Right of Property*. And hence it will follow, that one man may have the *Possession*, another the *Right of Possession*, and a third the *Right of Property*. For if Tenant in Tail enfeoffs *A*. in Fee-simple, and dies; and *B*. disseises *A*.; now *B*. will have the *Possession*, *A*. the *Right of Possession*, and the Issue in Tail the *Right of Property*. *A*. may recover the Possession against *B*., and afterwards the Issue in Tail may evict *A*., and *unite* in himself the *Possession*, the *Right of Possession*, and also the *Right of Property*; in which union consists *a complete Title* to lands, tenements, and hereditaments; for it is an ancient maxim of the Law, that no Title is completely good, unless the Right of Possession be joined with the Right of Property; which Right is then denominated a double Right, *jus duplicatum*, or *droit droit*. *Mirr. l.* 2. *c.* 27: 1 *Inst.* 266: *Bract. l.* 5. *tr.* 3. *c.* 5. And when, to this double Right, the actual Possession is also united; when there is, according to the expression of *Fleta*, (*l.* 3. *c.* 15. § 5.) *juris et seisinæ conjunctio*, then, and then only, is the Title completely legal. See 2 *Comm. c.* 13.

Title is generally applied to signify the Right to Land and Real Effects; as *Property* is to signify that to mere Personal Estate. See title *Property*; and further, this Dictionary, titles *Estate*; *Limitation of Actions*; *Disseisin*; *Release*, &c.

Title to Lands, Tenements, and Hereditaments, is said to accrue either by *Descent* or *Purchase*. Purchase, in this sense, includes every mode of acquiring Lands, except by Descent. See this Dict. title *Purchase*.

As to Title by *Descent*, see this Dict. under that Title.

Title by Purchase may be either by *Escheat*; *Occupancy*; *Prescription*; *Forfeiture*; or *Alienation*; which latter may be either by *Deed*, Matter of *Record*, special *Custom*, or *Devise*.

Property in, or Title to, Things Personal, may arise either by *Occupancy*; *Prerogative*; and *Forfeiture*; by *Custom*; by *Succession*; *Marriage*; *Judgment*; *Gift*; *Grant*; *Contract*: *Bankruptcy*; *Will*; or *Administration*. See the several Titles in this Dictionary; as also Title *Executor*, and other apposite Titles; and 2 *Comm. per tot*.

A man may plead in trespass, *&c.* without particularly setting forth his Title, where his justification is collateral to the Title of the land; so if damages are to be recovered, and the Title of the land is not in question; and in actions on real contracts, where the plaintiff shews enough to entitle him to the action, *&c.* 2 *Mod.* 70: 1 *Roll. Rep.* 13: *Cro. Car.* 571: 3 *Nels. Abr.* 325. But in trespass for cutting corn on lands, the party must set forth the Title which he hath to the corn, or on demurrer it will be judged ill; for the shewing that he is possessed thereof, is not sufficient without a Title, because the property shall be intended to be in the owner of the soil. 2 *Sand.* 401: 3 *Salk.* 361. See title *Trespass*.

When a person will recover any thing from another, he must generally make out and prove a better Title than the other hath, or it will not be enough to destroy his Title, *&c. Hob.* 103. It is not allowed for the party to forsake his own Title, and fly upon the other's; for he must recover by his own strength, not the other's weakness. *Ibid.* 104. If by the record it appears that the plaintiff in the cause hath no Title, he shall not have judgment. *Lutw.* 1631. The Law will not permit Titles and things in entry, *&c.* to be granted over; and the buying or selling any pretended rights, or Titles, to lands, is prohibited by statute as *Maintenance*. See that title, and further, 20 *Vin. Abr.* 278—288.

TITLE OF ACTS OF PARLIAMENT; See title *Parliament* VII.

TITLES, *pretended*, Buying or selling. See titles *Champerty*; *Maintenance*.

TITLE TO THE CROWN; See title *King* I.

TITLES OF CLERGYMEN, Signify some certain place where they may exercise their functions. A Title, in this sense, is the church to which a priest was ordained there constantly to reside: And there are many reasons why a church is called *Titulus*; one is because in former days the name of the Saint to whom the church is dedicated was engraved on the porch, as a sign that the Saint had a title to that church; from whence the church itself was afterwards denominated *titulus*. *Concil. London, Anno* 1025. Anciently a Title of Clergy was no more than entering their names in the Bishop's roll, and then they had not only authority to assist in the ministerial function, but had a right to the share of the common stock or treasury of the church; but since, a Title is an assurance of being preferred to some ecclesiastical benefice, *&c.* See this Dictionary, titles *Curate*; *Parson*.

TITLE OF ENTRY, Is when one seised of land in fee, makes a feoffment thereof on condition, and the condition is broken; after which the feoffor hath Title to enter into the land, and may do so at his pleasure, and by his Entry the freehold shall be said to be in him presently. And it is called Title of Entry, because he cannot have a Writ of Right against his feoffee upon condition, for his right was out of him by the feoffment, which cannot be reduced into Entry; and the Entry must be for the breach of the condition. *Cowell*. See title *Entry*.

TITINYLKS, Tale bearers. *Letter Secr. State*, 28 *Hen.* 8. to *James* V. *King of Scotland*.

TOALIA; A towel. There is a Tenure of Lands by the service of waiting with a Towel at the King's Coronation. *Inq. Ann.* 12, 13 *King John*. See title *Serjeanty*.

TOBACCO, Is not to be planted in *England*, on pain of forfeiting 40*s*. for every rod of ground thus planted; but this shall not extend to hinder the planting of Tobacco in physic gardens. *Stat.* 12 *Car.* 2. *c.* 34. Justices

tices of Peace have power to issue warrants to constables, to search after and examine whether any Tobacco be sown or planted, and to destroy the same; which they are to do under penalties, &c. *Stat.* 22 & 23 *Car.* 2. *c.* 26, continued by *stat.* 5 *Geo.* 1. *c.* 11. The importation and exportation of *Tobacco* is liable to the regulations of the *Navigation Acts*. See that title. A duty is payable thereon on importation, under the management of the Commissioners of *Customs* and *Excise*; and the manufacture is subject to the control of the Commissioners and Officers of Excise; every manufacturer taking out a licence; the licence being charged according to the quantity manufactured, from 20,000 *lb.* weight to 150,000, at from 2*l.* to 20*l.* Dealers also take out licences. Various provisions, by many statutes, are made to enforce the above, and other regulations, to avoid adulteration in the manufacture, by mixing walnut-tree leaves, or other leaves, with Tobacco. Under *stat.* 1 *Geo.* 1. *c.* 46, this incurred a penalty of 5*s.* *per lb.*; but under *stat.* 29 *Geo.* 3. *c.* 68. § 84, the goods are forfeited, and a penalty of 200*l.* is also imposed. By *stat.* 19 *Geo.* 3. *c.* 35, so much of former acts as prohibits the growth of Tobacco in *Ireland* is repealed, but Tobacco raised there is to be exported thence to *England* only.

TOD OF WOOL, Twenty-eight pounds, or two stone; mentioned in *stat.* 12 *Car.* 2. *c.* 32.

TOFT, *Toftum.*] A messuage; or rather a place or piece of ground where an house formerly stood, but is decayed or casually burnt, and not re-edified. It is a word much used in fines, wherein we often read *toftum* and *croftum*, &c. *West. Symb. par.* 2.

TOFTMAN, *Toftmanus.*] The owner or possessor of a Toft. *Reg. Priorat. Lew. pag.* 18.

TOILE, *Fr.* i. e. *Tela.*] A net to encompass or take deer, which is forbid to be used unlawfully in parks, on pain of 20 *l.* for every deer taken therewith. 3 & 4 *P. & M. c.* 10. But see title *Deer*.

TOKENS, False; See title *Cheats*.

TOLERATION ACT. The *stat.* 1 *W. & M. st.* 1. *c.* 18; as to which, see this Dict. titles *Dissenters*; *Papists*.

TOLL, or To Toll, from Lat. *tollere.*] To bar, defeat, or take away; as to toll the entry, *i. e.* to deny or take away the right of entry. *Stat.* 8 *Hen.* 6. *c.* 9. See title *Entry*.

TOLL, *Tolnetum*, vel *Theolonium.*] A *Saxon* word, signifying properly a payment in towns, markets, and fairs, for goods and cattle bought and sold. It is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the same. 2 *Inst.* 220.

The word is used for a liberty as well to take, as to be free from Toll; of which freedom from Toll the City of *Coventry* boasts an ancient charter granted by *Leofrick* Earl of the *Mercians*, in the time of King *Edward* the Confessor, who, at the importunity of *Godiva*, his virtuous lady, granted this freedom to that City.

By the ancient law of this land, the buyers of corn or cattle in fairs or markets ought to pay Toll to the Lord of the market, in testimony of the contract there lawfully made; for Toll was first invented that contracts in markets should be openly made before witnesses; and privy contracts were held unlawful.

But the King shall pay no Toll for any of his goods; and a man may be discharged from the payment of Toll by the King's grant.

Also tenants in ancient demesne are discharged of Toll throughout the kingdom, for things which arise out of their lands, or bought for manurance thereof, &c. not for merchandizes. *Horn's Mirr. lib.* 1: 2 *Inst.* 221: 2 *Roll. Abr.* 198.

Toll doth not of common right belong to a fair; though it hath been held, that some Toll is due of common right, as appears from the immunities of several persons not to pay Toll; which proves that, if it was not for those privileges, they ought to pay Toll of common right; therefore where the King grants a market, Toll is due, although it is not expressed in the grant what Toll is to be paid; and this from the necessity of it, because the property of things sold in a market is not altered without paying Toll. *Palm.* 76: 2 *Lutw.* 1377. But it is said, that Toll is not incident of common right to a Fair. If the King grants to a man a Fair or Market, and grants no Toll, the patentee shall have no Toll; for Toll being a matter of private right for the benefit of the Lord, is not incident to a Fair or Market, as a Court of Piepowder is, which is for the benefit of the Public and advancement of justice, &c. Such a Fair or Market is free from Toll; and, after the grant made, the King cannot grant a Toll to such free Fair or Market, without some proportionable benefit to the Subject. And if the Toll granted with the Fair or Market be outrageous, the grant of the Toll is void; and the same is a free Market, &c. 2 *Inst.* 220: *Cro. Eliz.* 559. And see 1 *Wils.* 109; and this Dict. titles *Fairs*; *Markets*.

When the King grants a Fair, he may likewise grant that Toll shall be paid, though it be a charge upon the Subjects, but then it must be of a very small sum. Toll is to be reasonable, for the King cannot grant a burdensome Toll; and one may have Toll by prescription for some reasonable cause, but such a prescription to charge the Subject with a duty of Toll, must import a benefit or recompence for it, or some reason must be shewn why it is claimed. *Cro. Eliz.* 559; 3 *Lev.* 424: 2 *Mod.* 143: 4 *Mod.* 323. The Toll in Fairs is generally taken upon the sale of Cattle, as Horses, &c.; but, in the Markets, for Grain only; and the Lord may seize until satisfaction is made him. It is always to be paid by the Buyer, unless there be a custom to the contrary; and nothing is tollable before the sale, except it be by custom time out of mind; which custom none can challenge that claim the Fair or Market by grant since the reign of King *Richard* II.; so that it is better to have a Market or Fair by prescription, than grant. 2 *Inst.* 220, 221.

At this day there is not any one certain Toll to be taken in Markets; but if that which is taken be unreasonable, it is punishable by the *stat.* 3 *Ed.* 1. *c.* 31. And what shall be deemed reasonable, is to be determined by the Judges of the Law, when it comes judicially before them. Toll may be said to be unreasonable and outrageous, when a reasonable Toll is due, and excessive Toll is taken; or when no Toll is due, and Toll is unjustly usurped, &c. 2 *Inst.* 222. If excessive Toll be taken in a Market Town by the Lord's consent, the Franchise shall be seized; and if by other Officers, they shall pay double damages, and suffer imprisonment, &c. *Stat. Westm.* 1. 3 *Ed.* 1. *c.* 31.

Owners of Markets and Fairs are to appoint Toll-takers, where Toll is to be taken, under penalties. *Stat.*

Stat. 2 & 3 *Ph.* & *M. c.* 7. And he that hath the Toll, or profit of the Market where no Toll is, ought to provide a lawful measure of brass; and chain it in the public Market-place, or shall forfeit 5 *l.* *Stat.* 22 *Car.* 2. *c.* 8.

The remedy for taking Toll where none is due, or for taking excessive Toll, is by action of trespass, or an action on the case; and, in some cases, by indictment. See title *Extortion.* Where the party is *exempt* from Toll, he may have his remedy on the ancient writ *De essendo quietum de Theolonio.*

It was finally determined in the House of Peers, after a long contest, that this writ *De essendo quietum, &c.* is not merely prohibitory, but remedial; on which the parties may *plead to issue* on a question of right. And where it is directed to a Corporation, the Corporation cannot be attached for contempt, in their corporate capacity, for not returning it; but an Attachment, in the nature of a *Cone*, is the proper remedy to compel them to appear. The great question, as to the exemption of the Citizens of *London* from Toll, was also determined, *viz.* that Freemen of the city of *London* have a right to be exempt from the payment of all Tolls and Port-duties throughout *England*, (except the prizes of Wines,) in whatever place they reside; and though they have obtained their freedom by purchase. 1 *H. Blac. Rep. C. B.* 206. This judgment of the Court of Common Pleas was reversed by the Court of K. B. (see 4 *Term Rep.* 130;) but affirmed in Parliament, *May* 2, 1796. *London (Corporation)* v. *King's Lynn (Corp.)*

PORT-TOLL. A prescription to have Port-Toll for all Toll coming into a man's Port, may be good. 2 *Lev.* 96: 2 *Lut.* 1519. The liberty of bringing goods into a Port for safety, implying a consideration in itself. 3 *Lev.* 37. Prescription of Toll for goods landed in a manor, or to have Port-Toll for all goods coming into Port, is a good prescription; but not to have Toll of goods brought into a river, &c. 2 *Lev.* 96, 97. Toll may be appurtenant to a manor. 2 *Mod.* 144.

TOLL-TRAVERS, or TRAVERSE, Is where one claimeth to have Toll for every beast driven *across* his ground; for which a man may prescribe, and distrain for it in *via Regia.* *Cro. Eliz.* 710. They who claim these Tolls by grant, ought to aver the certainty of the sum mentioned in the grant, &c. *Palm.* 76. Toll-travers being to pass a nearer way, he that has it is to repair the way, because he receives money for it. 2 *Lil. Abr.* 585.

TOLL-TRAVERSE, Is properly when a man pays certain Toll for passing over the soil of another man in a way not a high street. 22 *Ass.* 58. And for this Toll a man may prescribe; 2 *Rol. Abr.* 522: *Cro. Eliz.* 710: *Moor* 574.

THOROUGH-TOLL, Is when a town prescribes to have Toll for such a number of Beasts, or for every Beast that goeth *through* their town; or over a Bridge or Ferry maintained at their cost; which is reasonable, though it be for passing through the King's highway, where every man may lawfully go, as it is for the ease of travellers that go that way. *Terms de Ley* 561, 562. Persons may have this Toll by prescription or grant; but it must be for a reasonable cause, which must be shewn, *viz.* that they are to repair or maintain a causeway, or a bridge, or such like. *Cro. Eliz.* 711. The King granted to a man, to take such Toll of persons that passed over certain bridges with their Cattle, as was [illegible]here and elsewhere in *England, &c.*; and [illegible] void for incertainty. *Bridg.* 88. [illegible] words Toll-thorough and Toll-traverse are used promiscuously. A man cannot prescribe to have Thorough-Toll of men passing through a vill in the high-street, because it is against the Common Law and common right, for the high street is common to all, without alledging of a special consideration, as the repairing the way. And the King cannot have such Toll for passing in the high street, as in the case aforesaid, for the cause aforesaid. 2 *Roll. Abr.* 522: 22 *Ass.* 58.

A man cannot prescribe to have Thorough Toll of men for passing through a vill in a place which is not the high street; for it is more than the Law allows to go there. 2 *Roll. Abr.* 523: 22 *Ass.* 58.

TURN-TOLL, A Tollpaid for beasts that are driven to market to be sold, and do return unsold. 6 *Rep.* 46. There is also *in* Toll and *out* Toll, mentioned in ancient Charters.

TOLLAGE, Is the same with Tallage; signifying generally any manner of custom or imposition.

TOLL-BOOTH, The place where goods are weighed, &c.

TOLL-CORN, Corn taken for Toll ground at a mill; and an indictment lies against a miller for taking too great Toll. 5 *Mod.* 13: *Ld. Raym.* 159. See title *Extortion.*

TOLL-HOP, A small Dish or Measure, by which Toll is taken in a market, &c.

TOLSESTER, *Tolcestrum.*] An old excise, or duty paid by the Tenants of some manors to the Lord, for liberty to brew and sell ale. *Cartular. Rading.* 221: *Chart.* 51 *Hen.* 3.

TOLSEY, from the Sax. *Tol*, i. e. *Tributum*, and *Sec Sedes.*] The place where merchants meet, in a city or town of trade.

TOLT, Lat. *Tollit, quia tollit causam.*] A writ whereby a cause depending in a Court-baron, is *taken* and removed into the County Court. *Old Nat. Br.* 4. And as this writ removes the cause to the County Court; so the writ *Pone* removeth a cause from thence into the Court of Common Pleas, &c.

TOLTA, Wrong, rapine, extortion, any thing exacted or imposed contrary to right and justice. *Pat.* 48 *H.* 3. *in Brady Hist. Eng. Append. p.* 235.

TOMBS, Defacing of, in churches. See *Monument.*

TOMIN, A weight of twelve grains used by goldsmiths and jewellers.

TON; See *Tun.*

TONGUE, CUTTING OUT OR DISABLING; See title *Maihem.*

TONNAGE; See *Tunnage*; *Customs.*

TORCARE, *Boves striliare & torcare*; To comb and cleanse his oxen. *Fleta, lib.* 2. *c.* 75.

TORRA, Sax. *Tor.*] A mount or hill; as *Glastenbury* Torre. *Chart. Abbat. Glaston. MS. p.* 114. So a variety of high hills, in *Derbyshire*, are called Tor; but generally some epithet is prefixed, as Mam-tor, &c.

TORT, from the Lat. *Tortus.*] A French word for injury or wrong; as, *de son Tort demesne*, in his own wrong. *Cro Rep. fol.* 20. *White*'s case. Wrong or injury is properly called *Tort*, because it is wrested or crooked, and contrary to that which is right and straight. *Co. Litt. fol.* 158.

TORTFEASOR, Fr. *Tortfaiseur.*] A wrong[illegible] trespasser.

TORTITIUM, A torch. *Fleta.*

TORTURE. The Statute Law of *England* doth very seldom, and the Common Law doth never, inflict any punishment extending to life or limb, unless upon the highest necessity: And the Constitution is an utter stranger to any arbitrary power of killing or maiming the Subject without the express Warrant of Law. "*Nullus liber homo,* says the Great Charter, (*c.* 29,) *aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terræ.*" Which words, "*Aliquo modo destruatur,*" according to Sir *Edward Coke,* (2 *Inst.* 48,) include a prohibition not only of killing, and maiming, but also of torturing (to which our laws are strangers) and of every oppression by colour of an illegal authority.

The *Peine forte et dure,* formerly inflicted on prisoners standing mute, and which was the only species of punishment, in the nature of Torture, allowed by the Common Law, is now repealed by *stat.* 12 *Geo.* 3. *c.* 20. See title *Mute.*

The rack, or question, to extort a confession from criminals, is a practice of a different nature; the *peine forte et dure* having been only used to compel a man to put himself upon his trial; that being a species of trial in itself. And the trial by rack is utterly unknown to the Law of *England.* See *Rushw. Coll.* i. 638: 4 *Comm. c.* 25.

No person to be subject to Torture in *Scotland.* *Stat.* 7 *Ann. c.* 21.

TOTIES QUOTIES, As often as a thing shall happen, &c. *Stat.* 19 *Car.* 2. *c.* 4.

TOTTED. A good debt to the King, is by the foreign apposer or officer in the Exchequer noted for such by writing the word Tot to it: And that which is paid shall be Totted.—Tot *pecuniæ regi debitur. Stats.* 42 *Ed.* 3. *c.* 9: 1 *Ed.* 6. *c.* 15.

TOURN; See *Turn.*

TOURNAMENTS; See *Just.*

TOUT TEMPS PRIST ET UNCORE EST, *i. e.* Always was, and is at present ready. See title *Tender.*

TOWAGE, *Towagium,* Fr. *Tavage.*] The towing or drawing a ship or barge along the water by another ship or boat fastened to her; or by men or horses, &c. on land: It is also money which is given by bargemen to the owner of ground next a river where they tow a barge or other vessel. *Plac. Parl.* 18 *Ed.* 1.

TOWN, *Oppidum, Villa.*] A walled place or borough: The old boroughs were first of all Towns; and upland Towns, which are not ruled and governed as boroughs, are but Towns, though inclosed with walls. *Finch.* 80. There ought to be in every Town a Constable, or Tithing-man; and it cannot be a Town unless it hath or had a church, with celebration of sacraments and burials, &c. But if a Town is decayed so that it hath no houses left, yet it is a Town in Law. 1 *Inst.* 115. Under the name of a Town, or Village, boroughs, and it is said, cities are contained; for every borough or city is a Town. See *City.* Where a murderer escapes untaken in a Town, in the day-time, the Town shall be amerced. *Stat.* 3 *Hen.* 7. *c.* 1.—A Township is answerable for felons goods to the King, which may be seized by them. But by *stat.* 31 *Ed.* 3. *c.* 3. if it can alledge any thing in discharge of itself, and by which another doth become chargeable, it shall be heard, and right administered.

TOWN-CLERK, Ought not to be a *Popish* recusant convict. *Stat.* 3 *Jac.* 1. *c.* 5.—How to deliver a schedule of fines, &c. to the Sheriff. And a duplicate into the Court of Exchequer. Discharging or concealing an indictment, &c. leviable to a forfeiture of treble the penalty incurred by the original offence. *Stat.* 22 & 23 *C.* 2. *c.* 22. May be amerced by the Barons of the Exchequer; and which amercements are leviable according to the usual practice. *Stat.* 3 *Geo.* 1. *c.* 15. § 12.

TRABARIÆ, Little boats, so called from their being made out of single beams, or pieces of timber cut hollow. *Florence of Worcester, pag.* 618.

TRABES in churches, were what we now call branches, made usually with brass, but formerly with iron. *Cowell.*

TRACTUS, A trace by which horses in their gears draw a cart, plough, or waggon. *Paroch. Antiq.* 549.

TRADE, In general signification, is traffic or merchandize: Also a private art, and way of living. Trading with enemies is generally prohibited by positive statutes in time of war. See title *Treason.*

It was formerly held that none of the King's subjects might trade to and with a nation of Infidels without the King's leave, because of the danger of relinquishing Christianity. And Sir *Edward Coke* said, That he had seen a licence from one of our Kings, reciting, That he, having a special trust and confidence that such a one, his subject, would not decline his faith and religion, licensed him to trade with Infidels, &c. 3 *Nels. Abr* 331.

As to private Trades, at Common Law, none was prohibited to exercise any particular Trade, wherein he had not any skill or knowledge; and if he used it unskilfully, the party grieved might have his remedy against him by action on the case, &c. By *stat.* 5 *Eliz. c.* 4, a man must serve seven years apprenticeship before he can set up any Trade; see title *Apprentice.* An indictment on the statute for exercising a Trade used at that time in *Great Britain,* quashed; it should have been *England,* there being then no such kingdom as *Great Britain.* 1 *Strange* 552: 2 *Strange* 788: 11 *Rep.* 53.

If a bond or promise restrains the exercise of a Trade, though it be to a particular place only, if there was no consideration for it, it is void; if there be a consideration, in such a case it may be good: But if the restraint be general throughout *England,* although there be a consideration, it will be void. 2 *Lill. Abr.* 179: Lord *Raym.* 1436: 2 *Strange* 739: see title *Bond.*

Frequent acts are passed to enable soldiers and sailors, having served his Majesty for certain terms, to exercise any Trades in *Great Britain,* though not regularly bred to them, or free of corporations or companies. See titles *Navy*; *Soldiers.*

TRADESMEN, *Actions against.* There is in Law, always, an implied contract with a common taylor, or other workman, that he performs his business in a workman-like manner; in which, if they fail, an action on the case lies to recover damages for such breach of their general undertaking. 11 *Rep.* 54: 1 *Saund.* 324. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the Law implies no such general undertaking; but, in order to charge him with damages, a special agreement is required. 3 *Comm.* 165.

TRAGA, A waggon without wheels; *Mon. Ang.* i. 851.

TRAILBASTON; See *Justices of Trailbaston*.

TRAITORS; See *Treason*.

TRANSCRIPT, Is the copy of any original writing, or deed, &c. where it is written over again, or exemplified; *stat.* 34 & 35 *Hen.* 8. *c.* 14.

TRANSCRIPTO PEDES FINIS LEVATI MITTENDO IN CANCELLARIAM, A writ for certifying the foot of a fine levied before Justices in eyre, &c. into the Chancery. *Reg. Orig.* 669.

TRANSCRIPTO RECOGNITIONIS FACTÆ CORAM JUSTICIARIIS ITINERANTIBUS, &c. An old writ to certify a recognizance taken by Justices in eyre. *Reg. Orig.* 152.

TRANSGRESSIONE, A Writ or Action of Trespass, according to *Fitzherbert*.

TRANSIRE, from *Transeo*.] Is used for a Warrant from the Custom-house to let pass. *Stat.* 14 *Car.* 2. *c.* 11.

TRANSITORY, Is the opposite to *local*. Transitory Actions are those that may be laid in any county or place; such as personal Action of Trespass, &c. See title *Action*; *Venue*.

TRANSLATION, *Translatio*.] In the common sense of the word, signifies a Version out of one language into another; but, in a more confined acceptation, it denotes the removing from one place to another: So the removal of a Bishop to another diocese, &c. is called translating; and such a Bishop writes not, *anno Consecrationis*, but *anno Translationis nostræ*, &c. A Bishop translated, is not consecrated *de novo*; for a consecration is like an ordination, it is an indelible character, and holds good for ever. 3 *Salk.* 72. But the Bishop is to be a-new elected, &c. 1 *Salk.* 137. See title *Bishop*.

TRANSPORTATION, The banishing or sending away a Criminal into another country.

It is said, that Exile was first introduced as a punishment by the Legislature in the 39th year of Queen *Elizabeth*, when a statute (*stat.* 39 *Eliz. c.* 4.) enacted, that such rogues as were dangerous to the inferior people, should be banished the realm. *Barr. Ant. Stat.* 269. And that the first statute in which the word *Transportation* is used, is *stat.* 18 *Car.* 2. *c.* 3, which gives a power to the Judges, at their discretion, either to execute, or transport to *America* for life, the Moss-troopers of *Cumberland* and *Northumberland*. 2 *Woodd.* 498. This statute was made perpetual by *stat.* 31 *Geo.* 2. *c.* 42. This is, perhaps, the only instance in which the Legislature has extended the term of Transportation beyond fourteen years. 1 *Comm. c.* 1. *p.* 137, *n.*

Transportation was first brought into general use as a punishment *anno* 1718, by *stat.* 4 *Geo.* 1. *c.* 11; continued by *stat.* 6 *Geo.* 1. *c.* 23, which statute allowed the Court a discretionary power to order felons, who were by Law entitled to their clergy, to be transported to the *American* Plantations. See this Dictionary, title CLERGY, *Benefit of*.

By these statutes the persons contracting for the Transportation of convicts to the colonies, or their assigns, had an interest in the service of each, for seven or fourteen years, according to the term of Transportation.

Returning from Transportation, or being at large in *Great Britain* before the expiration of the term for which an offender is ordered to be transported, or has agreed to transport himself, is felony without benefit of clergy, in all cases; as is also the assisting a felon to escape from such as are conveying him to the port of Transportation. See *stats.* 4 *Geo.* 1. *c.* 11: 6 *Geo.* 1. *c.* 23: 16 *Geo.* 2. *c.* 15: 8 *Geo.* 3. *c.* 15: 24 *Geo.* 3. *st.* 2. *c.* 56.

To persons capitally convicted the King frequently offers a pardon upon condition of their being transported for life. Many have at first rejected this gracious offer: and there were one or two instances of persons so desperate as to persist in the refusal, and who, in consequence, suffered the execution of their sentence. This evil seems to be intended to be obviated by *stat.* 24 *Geo.* 3. *st.* 2. *c.* 56. § 1: 31 *Geo.* 3. *c.* 46. § 7, under the latter of which, continued by *stat.* 34 *Geo.* 3. *c.* 60, all convicts sentenced to Transportation, may be [illegible] to hard labour from the time of their sentence, till they are transported; and that time is to be reckoned in part discharge of their Transportation.

The System of Transportation to the *American* Colonies continued for fifty-six years; during which period, and until the commencement of the *American* war in 1775, great numbers of felons were sent, chiefly to the province of *Maryland*. The rigid discipline which the colonial laws authorized the masters to exercise over the servants, joined to the prospects which agricultural pursuits, after some experience, held out to these convicts, tended to reform the chief part; who, after the expiration of their servitude, mingled in the society of the country, under circumstances highly beneficial to themselves, and even to the colony. *Treatise on the Police of the Metropolis*.

The Convicts having accumulated greatly in the year 1776, and the intercourse with *America* being then shut up, it became indispensably necessary to resort to some other expedient; and in the choice of difficulties the system of the *Hulks* was suggested, and first adpoted under the authority of a statute, 16 *Geo.* 3.

The Legislature, uncertain with regard to the success of this new species of punishment, and wishing to make other experiments, by an act of the same session empowered the Justices of every county in *England*, to prepare houses of correction for the reception of convicts under sentence of death, to wh[illegible] Majesty should extend his royal mercy, to be k[illegible] hard labour for a term not exceeding ten years. The same act, among many other excellent regulations, ordered the convicts to be kept separate, and not allowed to mix with any offenders convicted of crimes less than larceny; and that they should be fed with coarse, inferior food, water, and small beer, and clothed at the public expence; without permission to have any other food, drink, or clothing than that allowed by the act, under certain penalties.—As an encouragement to these delinquents, while such as refused to work were to receive corporal punishments, those who behaved well had not only the prospect held out of the period of their confinement being shortened, but they were also to receive decent clothes, and a sum of money not less than 40*s.* nor more than 5*l.* when discharged. *Stat.* 16 *Geo.* 3. *c.* 43.

This very salutary act was followed up three years afterwards by another statute; viz. *stat.* 19 *Geo.* 3. *c.* 74: This had two very important objects in view:

The *first* was to erect in some convenient common or waste ground in *Middlesex*, *Essex*, *Kent*, or *Surrey*, two large *Penitentiary Houses*; one for 600 male, the other for 300 female convicts; with proper offices, gardens,

&c. The expence to be paid by Government; and his Majesty to appoint a Committee of three persons to regulate the establishment, under the control of the Justices of Peace, and Judges of Assize; with power to appoint officers with salaries, to be paid out of the profits of the work to be performed by the convicts.—In these Penitentiary Houses, persons convicted of transportable offences were to be confined to hard labour in the proportion of five years' labour to seven years' Transportation, and not exceeding seven years labour in lieu of fourteen years Transportation. The number of convicts to be sent from the circuits, or the Metropolis, being limited accordingly. These Convicts w[illegible] be employed in works of the most servile kind, and such as were least liable to be spoiled by ignorance, neglect, or obstinacy, *viz.* Treading in a wheel for moving machinery; drawing in a capstan for turning a mill; sawing stone; polishing marble; beating hemp; rasping logwood; making cordage; picking oakum; weaving sacks; making nets, *&c.* The food and drink of the offenders to be bread and coarse meat, with water or small beer, and their clothing to be uniform, with badges affixed. Other rules were also to be established under the direction of the Committee, who were to attend every fortnight, and to have power to reward the diligent with a part of their earnings; and when an offender was discharged, he was to have decent clothing, and from 20*s.* to 3*l.* in money.

The *Second* purpose of this act (and which is the only part of it that has ever been carried into effect) regards the continuation of the system of *The Hulks.*

It declares, that for the more effectual punishment of atrocious male offenders liable to be transported, the Court may order such convicts as are of proper age, and free from bodily infirmity, to be punished, by being kept on board ships or vessels, and employed in hard labour, in raising sand, soil, and gravel, and cleansing the river *Thames*, or any other river or port approved of by the Privy Council; or in any other works upon the banks or shores of the same, under the directi[o]n of superintendants approved of by the Justices, for a term not less than one year, no[illegible] than five; except any offender be liable to Trans[illegible]n for fourteen years, in which case his punishmen[illegible] be commuted for seven years on board the Hulks. The mode of feeding, clothing, and discipline, similar to that already explained, is established, and on discharge the convicts are to receive from 20*s.* to 3*l.* according to circumstances.

The concluding part of the act obliges the governors and superintendants of the two establishments, to make annual returns to the Court of King's Bench; and also authorises his Majesty to appoint *Inspectors* of the Penitentiary Houses, of the Hulks, and of all the other gaols and places of criminal confinement in *London* and *Middlesex*: these Inspectors personally to visit every such place of confinement at least once in three months, to examine into the particulars of each, and to make a return to the Court of King's Bench of the state of the buildings, the conduct of the officers, treatment of the prisoners, state of their earnings and expences; and to follow up this by a report to both Houses of Parliament at the beginning of each Session. It is believed, that the yearly report to the Court of King's Bench by the Superintendant of the Hulks, is the only part of the act that is in any degree punctually complied with.

It is much to be lamented, that neither of these statutes, so far as regarded *Penitentiary Houses*, which seemed to hold out so fair a prospect of employing convicts, in pursuits connected with productive labour, and ultimate reformation, without sending them out of the kingdom, have been carried effectively into execution; for in the year 1784, the system of Transportation was again revived; by an act which empowers the Court, before whom a felon shall be convicted, to order the prisoner to be transported beyond seas, either within his Majesty's dominions, or elsewhere: and his service to be assigned to the contractor, who shall undertake such Transportation. *Stat.* 24 *Geo.* 3. *st.* 2. *c.* 56.

The same act continues the system of the Hulks for a further length of time, by directing the removal of convicts under sentence of death, and reprieved by his Majesty, and also such as are under sentence of Transportation, (being free from infectious disorders,) to other places of confinement, either inland, or on board of any ship or vessel in the river *Thames*, or any other navigable river; and to continue them so confined, until transported according to law, or until the expiration of the term of the sentence should otherwise entitle them to their liberty.

The plan of Transportation, through the medium of the contractors, (although some felons were sent to *Africa*,) does not appear to have answered; from the great difficulty of finding any situation since the independence of *America*, where the services of convicts could be rendered productive or profitable, to merchants who would undertake to transport them. Hence arose the idea of making an establishment for these Outcasts of Society on the eastern coast of *New South Wales*, more generally known by the name of *Botany Bay*, from a bay on the coast so named by Captain *Cook*, and where the first convicts were landed; to which remote region it was at length determined to transport atrocious offenders. Accordingly, in the year 1787, an act passed authorising the establishment of a Court of Judicature for the trial of offenders who should be transported thither. *Stat.* 27 *Geo.* 3. *c* 2.

An act of the following year empowered his Majesty, under his sign manual, to authorise any person to make contracts for the Transportation of offenders; and to direct to whom security should be given for the due performance of the contract. *Stat.* 28 *Geo.* 3. *c.* 24.

By a subsequent act, the Governor of the Settlement may remit the punishment of offenders there; and on a certificate from him, their names shall be inserted in the next General Pardon. *Stat.* 30 *Geo.* 3. *c.* 47.

Under these various legislative regulations, the two Systems of punishments, namely, the *Hulks*, and *Transportation*, are now regulated.

The System of the Hulks first commenced on the 12th *July* 1776, and from that time until *December* 12, 1795, 8000 convicts were ordered for punishment by hard labour on the river *Thames*, and at *Langston* and *Portsmouth* harbours. The expence of these establishments has been 1*s.* 3*d.* *per* day for the maintenance of each Convict; the bounties to discharged convicts, and the expence of chaplain and coroner, about 400*l.* *per annum.* The earnings of the convicts about three-fifths of the expence incurred by their maintenance. *Treatise on Police.*

The first embarkation to *New South Wales* commenced in 1787; and in the month of *May* in the following year, 1030 male and female convicts were landed on the new colony.

colony. In 21 months after, there were 77 deaths, and 87 births in the whole Settlement; which was divided, by placing a part of the Convicts on *Norfolk Island*, a small fertile spot, containing only about 14,000 acres of land, and situated about 1200 miles distant from *Sydney Cove* in *New South Wales*, where the seat of Government was fixed.

In this project considerably above 500,000*l.* has already been expended by Government. Many inconveniencies and hardships have been felt, and repeated supplies of all sorts have been sent thither from *Great-Britain.* With regard to subsistence, there is now a prospect of the Colony maintaining itself; but not much of its yet proving at all advantageous to this country.

A hope was probably entertained, that the great expence of the passage home, the fertility of the soil, and salubrity of the climate, would induce Convicts to remain there after the expiration of their sentence. Experience, however, has shown that these circumstances have not operated to prevent the return of many atrocious and adroit offenders; nor has the length and hardship of the voyage thither, nor other evils attending it, operated to decreale the number here liable to suffer the punishment of Transportation. *Treatise on Police.*

Transportation, Of goods and merchandise, is allowed or prohibited, in many cases by statute, for the advantage of trade. See title *Navigation Acts.*

TRANSUBSTANTIATION, *Transubstantiatio.*] Is a converting into another substance: To transubstantiate, i. e. *Quidpiam in aliam substantiam convertere. Litt. Dict.* A declaration against the doctrine of Transubstantiation maintained by the Church of *Rome*, is required by the *stat.* 30 *Car.* 2. *st.* 2. *c.* 1. See title *Papists.*

TRAVELLERS; See title *Inns* and *Innkeepers.*

TRAVERSE, from Fr. *Traverser.*] Is used in Law for the denying of some matter of fact, alledged to be done, in a declaration or pleadings; upon which the other side comes and affirms that it was done; and this makes a single and good issue for the cause to proceed to trial. The formal words of a Traverse are in our French *Sans ceo*, in Latin *Absque hoc*, and in English *without that*, that such a thing was done or not, &c. *Kitch.* 217; *West Symb. par.* 2. See title *Pleading* I. 2.

A Plea will be ill, which neither traverseth, nor confesseth the plaintiff's title, &c. And every matter in fact, alledged by the plaintiff, may be traversed by the defendant, but not matter of law, or where it is part matter of law and part matter of fact; nor may a record be traversed which is not to be tried by a Jury. And if a matter be expresly pleaded in the affirmative, which is expresly answered in the negative, no Traverse is necessary, there being a sufficient issue joined: also where the defendant hath given a particular answer in his plea, to all the material matters contained in the declaration, he need not take a Traverse; for when the thing is answered, there needs no further denial. *Cro. Eliz.* 755: *Yelv.* 173, 193, 195: 2 *Mod.* 54. If a Traverse contain no more than the party hath pleaded before, it will not be good. It hath been said that a Traverse ought not to be taken but where the thing traversed is issuable: And where one will make a Traverse to a declaration, he ought to traverse that part of it, the doing whereof will make an end of the matter, when the point is determined by the Jury. 2 *Roll. Rep.* 37: 2 *Lill. Abr.* 587.

Any fact which appears to be material is traversable, though it be only on suggestion; as in prohibition, a suggestion of a refusal by the Spiritual Court, of a plea (which ought to be allowed) in a suit there for tithes, or other matter of their cognizance, is traversable; otherwise their jurisdiction might in any case be taken away by such suggestion. 2 *Co.* 45, *a.* So any surmise which takes away the jurisdiction of the Court is traversable. *Cro Eliz.* 511. But Traverse of a thing, not necessary to be alledged, is bad. *Cro. Car.* 328. So of matter of mere suppoial, or inducement. *Com. Dig.* title *Pleading.* (G. 13, 14.)

As one Traverse is enough to make a perfect issue, a Traverse cannot be regularly taken upon a Traverse, if it is well taken to the material point, and goes to the substance of the action; but where the first Traverse is not well taken, nor pertinent to the matter, there, to that which was sufficiently confessed and avoided before, the other party may well take a Traverse after such immaterial Traverse taken before: And if special matter alledged in a foreign county in the defendant's plea be false, the plaintiff may maintain his action, and traverse that special matter; and in such case a Traverse on a Traverse hath been adjudged good: but a Traverse *after* a Traverse may be allowed; as in trespass in such a county, defendant pleads a concord for trespass in every other county, and traverses the county; the plaintiff may join issue on the county, or traverse the concord. 2 *Inst.* 282, *b*: *Mo* 428: 1 *Saund.* 32: *Poph.* 101.

These rules are to be observed in Traverses: 1. The Traverse of a thing not immediately alledged, vitiates a good bar. 2. Nothing must be traversed but what is expresly alledged. 3. Surplusage in a plea doth not inforce a Traverse. 4. It must be always made to the substantial part of the title. 5. Where an act may indifferently be intended to be at one day or another, there the day is not traversable. 6. In action of trespass, generally the day is not material; though, if a matter be to be done upon a particular day, there it is material and traversable. 2 *Roll. Rep.* 37: 1 *Roll. Rep.* 235: *Yelv.* 122: 2 *Lill. Abr.* 313. If the parties have agreed on the day for a thing to be done, the Traverse of the day is material: but where they are not agreed on the day, it is otherwise; and though 'tis proved to be done on another day, 'tis sufficient. *Palm.* 280.

Where a Traverse goes to the matter of a plea, &c. all that went before is waved by the Traverse; and if the Traverse goes to the time only, it is not waved. 2 *Salk.* 642.—In action of trespass, a particular place and time were laid in the declaration, and in the plea there was a Traverse as to the place, but not as to time: On averment that it was *eadem transgressio*, the plea was held good. 3 *Lev.* 227: 2 *Lutw.* 1452. Where a plea in justification of a thing is not local, a Traverse of the place is wrong. 2 *Mod.* 270. Where a justification in trespass, relates to a particular place, different from the *Venue* laid in the declaration, 'tis proper to add a Traverse at the end of the plea. *J. M.*

The substance and body of a plea must be traversed. *Hob.* 232.—But a Traverse that a person died seised of land in fee *modo & forma* as the defendant had declared, was adjudged good. *Hutt.* 123.—A Lord and tenant

differ in the ſervices, there the tenure and not the ſeiſin ſhall be traverſed; but if they agree in the ſervices, the ſeiſin and not the tenure is traverſable; and it is a general rule, that the tenant ſhall never traverſe the ſeiſin of the ſervices without admitting the tenure. *March* 116.—That which is not material nor traverſable, is not admitted when it is alledged, and not traverſed. 2 *Salk.* 361.—But the omitting a Traverſe where it is neceſſary, is matter of ſubſtance. 2 *Mod.* 60. And a Traverſe of a debt is ill when a promiſe is the ground of the action; which ought to be traverſed, and not the debt. *Leon.* 252.

A Traverſe ſhould have an inducement to make it relate to the foregoing matter. And 'tis no good plea for the plaintiff to reply, that a man is alive who is alledged to be dead, without traverſing that he is not dead. 3 *Salk.* 357. It is ſaid that where a Traverſe *abſque hoc* comprizes the whole matter generally, it may conclude & *de hoc pon. ſe ſuper patriam*; but when it traverſes a particular matter, the concluſion ought to be with an averment, &c. 1 *Salk.* 4. That it ought not to conclude to the country, for it is in the negative. See 2 *Mod.* [illegible]

Traverſe may be in an anſwer in Chancery, replication, &c. In an action upon a bail-bond the arreſt is not traverſable. 1 *Strange* 444.—Traverſe of a ſeiſin in fee is ill, where a leſs eſtate would be ſufficient. 2 *Strange* 818. Where the party confeſſes and avoids, he ought not to traverſe. But it may be paſſed over and iſſue taken upon the Traverſe. 2 *Strange* 837.

Default of Traverſe where the plaintiff has not fully confeſſed and avoided, is only form, and aided on a general demurrer: And by *ſtat.* 4 & 5 *Ann. c.* 16, no exception ſhall be for an immaterial Traverſe, unleſs ſhown for cauſe of demurrer. But defect of a Traverſe where there are two affirmatives, is not aided on a general demurrer; for by default of an iſſue the right cannot appear to the Court. So if a Traverſe be neceſſary to make a good bar, the omiſſion will be fatal on a general demurrer. And if the replication does not traverſe the matter of the bar, which is not fully confeſſed and avoided, the defendant ſhall not be aided on a general demurrer. *Com Dig.* title *Pleading* (G. 22.) See titles *Pleading*; *Treſpaſs.* And particularly *Com. Dig.* title *Pleader* (G).

Traverse *of an Inditement or Preſentment.* The taking iſſue upon, and contradicting or denying ſome chief point of it; as in a Preſentment againſt a perſon for a highway overflowed with water; for default of ſcouring a ditch, &c. he may traverſe the matter, that there is no highway, or that the ditch is ſufficiently ſcoured; or otherwiſe traverſe the cauſe, *viz.* That he hath not the land, or he and they whoſe eſtate, &c. have not uſed to ſcour the ditch. *Lamb. Eiren.* 521; *Book Entr.* See title *Trial.*

Traverse of an Office, is the proving that an inquiſition made of lands or goods by the eſcheator, is defective and untruly made. See title *Inqueſt of Office.* No perſon ſhall traverſe an Office, unleſs he can make to himſelf a good right and title: and if one be admitted to traverſe an Office, this admiſſion of the party to the Traverſe, doth ſuppoſe the title to be in him, or elſe he had no cauſe of Traverſe. *Vaugh.* 641; 2 *Lill. Abr.* 590, 591. The Traverſe of an inquiſition for the King is to be conſidered as a debt, and the proſecutor may carry down the record. 2 *Strange* 1208.

TRAVERSUM, A ferry. *Mon. Angl.* ii. 1002.

TRAWLERMEN, A kind of fiſhermen on the river *Thames*, who uſed unlawful arts and engines to deſtroy fiſh; of theſe ſome were termed *Tinckermen*, others *Hebbermen*, and Trawlermen, &c. And hence comes to trowl or trawl for pikes. *Stow's Surv. Lond. pag.* 19.

TRAYLBASTON; See title *Juſtices of Trailbaſton.* See copies of ſeveral commiſſions granted to them by *Edward* the Firſt, in *Spelman's Gloſſary, verbo Traylbaſton. Edward* the Firſt, in his thirty-ſecond year, ſends out a new writ of inquiſition, called *Trailbaſton*, againſt intruders on other men's lands, who, to oppreſs their right owner, would make over their lands to great men; againſt batterers hired to beat men, breakers of the peace, raviſhers, incendiaries, murderers, fighters, falſe aſſiſors, and other ſuch malefactors; which inquiſition was ſo ſtrictly executed, and ſuch fines taken, that it brought in great treaſure to the King. *Chron fol* 111. See *Plac. Parliamentaria, fol.* 211, & 280: 4 *Inſt.* 186. In a Parliament, 1 *Ric.* II. the Commons of *England* petitioned the King, that no commiſſion of Eyre, or Traylbaſton, might be iſſued during the war, or for twenty years to come. *Rot. Parl.* 1 *R.* 2.

TRAYTOR, *Traditor, Proditor.*] A State offender, Betrayer, &c. See *Treaſon.*

TRAYTEROUS, *Perfidioſus.*] Treacherous, or full of diſloyalty. *Lat. Law Dict.*

Trayterous position, Of taking arms by the King's authority againſt his perſon, and thoſe that are commiſſioned by him, is condemned by the *ſtat.* 14 *Car.* 2. *c.* 3.

T. R. E. *Tempore Regis Edwardi.* Theſe initial letters have this continual note of time in the *Domſday Regiſter*, where the valuation of manors is recounted, what it was in the time of *Edward* the Confeſſor; and what ſince the Conqueſt. *Cowell.*

TREASON.

From Fr. *Trahir*, to betray; *Trahiſon*, betraying, contracted into Treaſon. Lat. *Proditio.*] The crime of treachery and infidelity to our Lawful Sovereign.

IV. *Of other Treasons, by Statutes subsequent to stat. 25 E. 3.*

V. *Of the Proceedings and Judgment in Trials for High Treason.*

1. *The Indictment, and Steps previous.*
2. *The Process and Regulations previous to Trial.*
3. *The Trial, and Judgment.*

I. Treason, in its very name, imports a betraying, treachery, or breach of faith. It therefore happens only between allies, saith the *Mirror*; for Treason is indeed a general appellation, made use of by the Law, to denote not only offences against the King and Government, but also that accumulation of guilt which arises, whenever a Superior reposes a confidence in a Subject or Inferior, between whom and himself there subsists a natural, civil, or even a spiritual relation; and the Inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such Superior or Lord. This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbours it to have conspired in public against his liege Lord and Sovereign; and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or Ordinary; these, being breaches of the lower allegiance, of private and domestic faith, are denominated Petit Treasons. See title *Petty Treason*.—But when disloyalty so rears its crest, as to attack even Majesty itself, it is called by way of eminent distinction High Treason, *Alta Proditio*; being equivalent to the *crimen læsæ Majestatis* of the *Romans*, as *Glanville* denominates it also in our *English* Law. 4 *Comm.* c 6.

The greatness of this offence of Treason and severity of the punishment thereof, is upon two reasons; because the safety, peace, and tranquillity of the kingdom, are highly concerned in the preservation of the person and government of the King; and therefore the Laws have given all possible security thereto, under the severest penalties: And as the Subjects have protection from the King and his Laws; so they are bound by their allegiance to be true and faithful to him. 1 *Hale's Hist. P. C.* 59.

As this is the highest civil crime, which (considered as a member of the Community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of High Treason be indeterminate, this alone (says *Montesquieu*) is sufficient to make any Government degenerate into arbitrary power. And yet, by the ancient Common Law, there was a great latitude left in the breast of the Judges, to determine what was Treason, or not so; whereby the creatures of tyrannical Princes had opportunity to create abundance of constructive Treasons; that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of Treason, which never were suspected to be such. Thus, in the reign of *Edward* I., appealing to the *French* Courts, in opposition to the King's, was in Parliament solemnly adjudged High Treason. 3 *Inst.* 7: 1 *Hale* 79; and this under the idea of *Subverting the realm.*—Another charge; the *accroaching*, or attempting to exercise royal power, (a very uncertain charge,) was, in the 21 *Edw.* III, held to be Treason in a Knight of *Hertfordshire*, who forcibly assaulted and detained one of the King's Subjects, till he paid him 90*l.*; a crime, it must be owned, well deserving of punishment; but which seems to be of a complexion very different from that of Treason. 1 *Hal. P. C.* 80. Killing the King's Father, or Brother, or even his Messenger, has also fallen under the same denomination. *Britt.* c. 22: 1 *Hawk. P. C.* c. 17. § 1. But however, to prevent the inconveniencies which began to arise in *England* from this multitude of constructive Treasons, the *stat.* 25 *Edw.* 3. *st.* 5. c. 2, was made; which defines what offences only for the future should be held to be Treason. See *post.* III.

Nothing can be construed to be Treason under this statute which is not literally specified therein; nor may the statute be construed by equity, because it is a declarative Law, and one declaration ought not to be the declaration of another; besides, it was made to secure the Subject in his life, liberty, and estate, which, by admitting constructions to be made of it, might destroy all. 1 *Hawk. P. C.* 34: 3 *Salk.* 358.

This statute, after reciting that divers opinions having been, what cases should amount to High Treason, enacts and declares, That if a person doth compass or imagine the death of the King, Queen, or their eldest son and heir; or if he do violate and deflower the King's wife or companion, or his eldest daughter unmarried, or the wife of the King's eldest son; or if he levy war against the King in his realm, or adhere to his enemies, give them aid and comfort in the realm, or elsewhere, *and thereof be probably* (or proveably) *attainted of open deed*; and if a man counterfeit the King's Great or Privy Seal, or his money, or bring false money into the kingdom, like to the money of *England*, to make payment therewith in deceit of the King and his People; or if he kill the Chancellor, Treasurer, or any of the King's Justices in either Bench, Justices of Assise, &c. being in their places, doing their offices; these cases are to be adjudged Treason.

II. Every Subject of *Great Britain*, whether ecclesiastical or lay, man or woman, if of the age of discretion, and of sane memory, may be guilty of High Treason. 1 *Hawk. P. C*, c. 17. § 4. If a married Woman commit High Treason, in the company of her Husband, or by his command, she is punishable as if unmarried; for in a crime of such magnitude, the presumption of coercion by the Husband is no excuse. 1 *Hawk. P. C.* c. 1. § 11: 1 *Hal. P. C.* 47. A Soldier cannot justify by the command of his superior Officer, for, as the command is traiterous, so is the obedience. *Kely.* 13. Neither can a man justify, by acting as Counsel. *Kely.* 23. Madmen were heretofore punished as Traitors, particularly by *stat.* 33 *H.* 8. c. 20: See title *Idiots* V.; but now they are not punishable, if the crime is committed during a total deprivation of reason. 1 *Hal. P. C.* 37. And this has been confirmed in modern cases; though the frequency of attempts against the person and family of King *George* III., by persons actually or pretendedly of that description, was extremely remarkable.

The Husband of a Queen regnant, as was King *Philip*, may commit High Treason. So may a Queen consort against the King her husband. Such were the cases of Queen *Anne Boleyne* and *Catharine Howard*: For the

Queen

Queen is considered, in the eye of the Law, as a distinct person, for many purposes. 3 *Inst.* 8.

Aliens may commit Treason; for as there is a local protection on the King's part, so there is a local allegiance on theirs. 7 *Rep.* 6. There is no distinction whether the Alien's Sovereign is in amity or enmity with the Crown of *England*. If during his residence here, under the protection of the Crown, he does that which would constitute Treason in a natural-born Subject, he may be dealt with as a traitor. 1 *Hal. P. C.* 60. So also if he resides here, after a proclamation of war; unless he openly removes himself, by passing to his own Prince, or publicly renounces the King of *England*'s protection, which is analogous to a *diffidatio*, or defiance; and then, under such circumstances, he is considered as an enemy. 1 *Hal. P. C.* 92. Thus the Marquis *De Guiscard*, a *French* Papist, residing here, during a war, under the protection of Queen *Anne*, was charged with holding a traiterous correspondence with *France*. And two *Portuguese* were indicted and attainted of High Treason, for joining in a conspiracy with Dr. *Lopez* to poison Queen *Elizabeth*. 7 *Rep.* 6: *Dy.* 144.

If an Alien, during a war with his native country, leaving his family and effects here, goes home, and adheres to the King's enemies, for the purposes of hostility, he is a Traitor; for he was settled here, and his family and effects are still under the King's protection. 1 *Salk.* 46: 1 *Ld. Raym.* 282: *Fost.* 185, 186. In declarations of war, it has been frequently used to except, and take under the protection of the Crown, such resident Aliens as demean themselves dutifully, and neither assist or correspond with the enemy. In that case, they are upon the footing of Aliens coming here by licence or safe conduct, and are considered as alien friends. *Fost.* 185.

If an Alien is charged with a breach of his *natural* allegiance, he may give alienage in evidence, for he is charged with a breach of that species of allegiance, which is not due from an Alien. 4 *St. Tr.* 699, 700.

Alien merchants are protected by the statute Staple, in case of a war, which provides, that they shall have convenient warning, by forty days proclamation, or eighty days in case of accident, to avoid the realm; during which time, they may be dealt with as traitors, for any treasonable acts; if after that time they reside and trade here, as before, they may be either treated as alien Enemies, by the Law of Nations, or as Traitors by the law of the land. 1 *Hal. P. C.* 93, 94. See *Mag. Cart.* c. 30: *Stat.* 27 *E.* 3. *st.* 2. *cc.* 2, 13, 17, 19, 20.

Subjects of the King in open war or rebellion, are not the King's Enemies, but Traitors; and if a Subject join with a foreign Enemy, and come into *England* with him, if he be taken prisoner, he shall not be ransomed or proceeded against as an Enemy, but as a Traitor to the King: on the other hand, an Enemy coming in open hostility into *England*, and taken, shall be either executed by Martial Law, or ransomed; for he cannot be indicted of Treason, because he never was within the ligeance of the King. 3 *Inst.* 11: 7 *Rep.* 6: 1 *Hal. P. C.* 100.

A Natural-born Subject cannot abjure his allegiance, and transfer it to a foreign Prince; neither can any foreign Prince, by naturalizing, or employing a Subject of *Great Britain*, dissolve the bond of allegiance between that Subject and the Crown. 1 *Comm.* 369. This was determined, in the case of *Æneas Macdonald*, who was born in *Great Britain*, but educated from his early infancy in *France*; and being appointed commissary of the *French* troops intended for *Scotland*, was taken prisoner, tried, and found guilty of High Treason. *Fost.* 60: 9 *Sta. Tri.* 585.

It is a question, whether the general exemption of Ambassadors from the cognizance of the Municipal Tribunal, extends to Treason? On the one hand, there is a positive breach of local allegiance; on the other, an infringement of the privilege of personal inviolability, universally allowed by the Law of Nations. *Coke* maintains, that if an Ambassador commits Treason, he loses the privilege and dignity of an Ambassador, as unworthy of so high a place, and may be punished here, as any other private Alien, and not remanded to his Sovereign, but of courtesy. 4 *Inst.* 153. Most writers agree that an Ambassador, conspiring the death of the King, or raising a Rebellion, may be punished with death. But it is doubted, whether he is obnoxious to punishment for bare conspiracies of this nature. 1 *Roll. Rep.* 185: 1 *Hale* 96, 97, 99.

The Bishop of *Rosse*, Ambassador from *Mary* Queen of *Scots*, to *Elizabeth*, was committed to the *Tower*, as a confederate with the Duke of *Norfolk*, for corresponding with the *Spanish* Ministry, to invade the kingdom; he pleaded his privilege, and afterwards, having made a full confession, no criminal process was commenced. 1 *Hal. P. C.* 97: 1 *St. Tri.* 105. But he was afterwards banished the country. The *Spanish* Ambassador for encouraging Treason, and the *French* Ambassador for conspiring the same Queen's death, were only reprimanded. Doctor *Story* was condemned and executed, but he was an *Englishman* by birth, and therefore could never shake off his natural allegiance. *Dyer* 298, 300: 3 *St. Tri.* 775.

From this view we may collect, that the right of proceeding against Ambassadors for Treason, in the ordinary course of justice, has been waved, from motives of policy and prudence: and that they have seldom been proceeded against further than by imprisonment, seizing their papers, and sending them home in custody. As was done in the case of Count *Gyllenburg* the *Swedish* Minister in *George* the Second's time. *Fost.* 187. See 1 *Comm.* 254: *Ward's Law of Nations*.

But, according to the Law of Nations, it seems that the *Universal Inviolability* of Ambassadors, is of more consequence than the punishment of any crime that may be committed by them; and the best professors of this law have held, that whatever crime Ambassadors may commit, whether against the positive Municipal Law of the land where they reside, or against the general Law of nature, though it may be right to treat them as Enemies, that is, if they were in open hostility, yet neither ought more violence to be shown than the necessity of self-defence exactly requires, nor can they ever be made subject to any sort of judicial process. In cases of delinquency an Ambassador is to be stripped of his functions, and sent back to his Master, with a request for his punishment; and if his Master refuse, he makes the act his own; and the Nations are then in a state of hostility. See *Ward on the Law of Nations*, where this subject is ably and fully treated. It must be understood, that the above applies only to Ambassadors *received* and *acknowledged* as such. See this Dict. title *Ambassador*.

III. 1. The

III. 1. The first Treason described by the *stat.* 25 *E.* 3. *st.* 5. *c.* 2, is, "When a man doth compass or imagine the death of our Lord the King, of our Lady his Queen, or of their eldest Son and Heir."—Under this description it is held that a Queen Regnant (such as Queen *Elizabeth* or Queen *Anne*) is within the words of the act, being invested with royal power, and entitled to the allegiance of her Subjects. 1 *Hal. P. C.* 101:—But the Husband of such a Queen is not comprised within these words, and therefore no Treason can be committed against him. 3 *Inst.* 7: 1 *Hal. P. C.* 106.

Though the compassing the death of the Queen Consort be Treason, this must be intended during the marriage; for it doth not extend to a Queen Dowager. And the eldest Son and Heir of the King, that is living, is intended by the said act, though he was not the first Son; but if the Heir Apparent to the Crown be a collateral Heir, he is not within the statute; nor is a conspiracy against such collateral Heir, Treason by this act. 3 *Inst.* 8.

At Common Law, compassing the death of any of the King's children, and declaring it by overt act, was taken to be Treason; though by this statute it is restrained to the eldest Son and Heir. 1 *Hal. P. C.* 125.

The King, intended by the act, is the King in possession, without any respect to his title; for it is held, that a King *de facto* and not *de jure*, or in other words an Usurper that hath got possession of the Throne, is a King within the meaning of the statute; as there is a temporary allegiance due to him for his administration of the Government, and temporary protection of the Public; and therefore Treasons committed against *Henry* VI. were punished under *Edward* IV., though all the Line of *Lancaster* had been previously declared Usurpers by Act of Parliament. But the most rightful Heir of the Crown, or King *de jure* and not *de facto*, who hath never had plenary possession of the Throne, as was the case of the House of *York* during the three reigns of the Line of *Lancaster*, is not a King within this statute, against whom Treasons may be committed. 3 *Inst.* 7: 1 *Hal. P. C.* 104. And a very sensible writer on the Crown-Law carries the point of possession so far, that he holds, that a King out of possession is so far from having any right to our allegiance, by any other title which he may set up against the King in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the *stat.* 11 *Hen.* 7. *c.* 1, which is declaratory of the Common Law, and pronounces all Subjects excused from any penalty, or forfeiture, who do assist and obey a King *de facto*. 1 *Hawk. P. C. c.* 17. §§ 14—18. But this seems, says *Blackstone*, to be confounding all notions of right and wrong; and the consequence would be, that when *Cromwell* had murdered the elder *Charles*, and usurped the Power (though not the Name) of King, the People were bound in duty to hinder the Son's restoration: And were a foreign King to invade this kingdom, and by any means to get possession of the Crown, (a term, by the way, of very loose and indistinct signification,) the Subject would be bound by his allegiance to fight for his natural Prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of *Henry* VII. does by no means command any opposition to a King *de jure*; but excuses the obedience paid to a King *de facto*. When, therefore, an Usurper is in possession, the Subject is excused and justified in obeying and giving him assistance: Otherwise, under an Usurpation, no man could be safe, if the lawful Prince had a right to hang him for obedience to the Powers in being, as the Usurper would certainly do for disobedience. Nay, farther, as the mass of People are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the Law compels no man to yield obedience to that Prince, whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose in his favour, and decide the ambiguous claim: And therefore, till he is entitled to such allegiance by possession, no Treason can be committed against him. Lastly, a King who has resigned his Crown, such resignation being admitted and ratified in Parliament, is, according to *Hale*, no longer the object of Treason. 1 *Hal. P. C.* 104. And the same reason holds, in case a King abdicates the Government; or, by actions subversive of the Constitution, virtually renounces the authority which he claims by that very Constitution: Since, when the fact of abdication is once established, and determined by the proper Judges, the consequence necessarily follows, that the Throne is thereby vacant, and he is no longer King. 4 *Comm. c.* 6.

Let us next see, what is compassing or imagining the death of the King, &c. These are synonymous terms; the word *compass* signifying the purpose or design of the mind or will, and not, as in common speech, the carrying such design into effect. 1 *Hal. P. C.* 107. And therefore, it has been held, that an accidental stroke, which may mortally wound the Sovereign, *per infortunium*, without any traiterous intent, is no Treason; as was the case of Sir *Walter Tyrrel*, who, by the command of King *William Rufus*, shooting at a hart, the arrow glanced against a tree, and killed the King upon the spot. 3 *Inst.* 6. But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some *overt* (*i. e.* open) act; and therefore it is necessary that there appear an open or overt act of a more full and explicit nature, to convict the Traitor upon. The statute expressly requires, that the accused "Be thereof, upon sufficient proof, attainted, of some open act, by men of his own condition." Thus, to provide weapons or ammunition for the purpose of killing the King, is held to be a palpable overt act of Treason in imagining his death. 3 *Inst.* 12. To conspire to imprison the King by force, and move towards it by assembling company, is an overt act of compassing the King's death; for all force, used to the person of the King, in its consequence may tend to his death, and is a strong presumption of something worse intended than the present force by such as have so far thrown off their bounden duty to their Sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of Princes. 1 *Hal. P. C.* 109. There is no question, also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the King, is a sufficient overt act of High Treason. 1 *Hawk. P. C. c.* 17. § 31: 1 *Hal. P. C.* 119.

Mr. Justice *Foster* lays down generally, that the care the Law hath taken for the personal safety of the King, is

is not confined to actions or attempts of the more flagitious kind, to assassination or poison, or other attempts immediately and directly aimed at his life: It is extended to every thing wilfully and deliberately done or attempted, whereby his life *may be* endangered. *Fost.* 195.

It hath been adjudged, that he who intended by force to prescribe laws to the King, and to restrain him of his power, doth intend to deprive him of his Crown and life; that if a man be ignorant of the intention of those who take up arms against the King, if he join in any action with them, he is guilty of Treason; and that the Law construeth every rebellion to be a plot against the King's life, and a deposing him, because a rebel would not suffer that King to reign and live, who will punish him for rebellion. *Moor* 620: 2 *Salk.* 63.

How far mere words, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to Treason, has been formerly matter of doubt. Two instances occurred in the reign of *Edward* IV. of persons executed for treasonable words: The one a citizen of *London*, who said he would make his Son Heir of the Crown, being the sign of the house in which he lived; the other a gentleman, whose favourite Buck the King killed in hunting, whereupon he wished it, horns and all, in the King's belly. These were esteemed hard cases; and the Chief Justice *Markham* rather chose to leave his place than assent to the latter judgment. 1 *Hal. P. C.* 115.

It was resolved in the trial of the Regicides, that though a man cannot be indicted of High Treason for words only, yet if he be indicted for compassing the King's death, these words may be laid as an overt act, to prove that he compassed the death of the King; and to support this opinion, the case of a person was cited who was indicted of Treason, *anno* 9 *Car.* I., for that he, being the King's Subject at *Lisbon*, used these words: "I will kill the King, (*innuendo* King *Charles*,) if I may come to him;" and afterwards he came into *England* for that purpose; and two merchants proving that he spoke the words, for that his traiterous intent, and the wicked imagination of his heart was declared by these words, it was held to be High Treason by the Common Law, and within the statute of the 25 *Ed.* 3. *c.* 2: *Cro Car.* 242: 1 *Lev.* 57.

But now it seems clearly to be agreed, that, by the Common Law, and the statute of *Edward* III., words spoken amount only to a High Misdemesnor, and no Treason: For they may be spoken in heat, without any intention; or be mistaken, perverted, or misremembered by the hearers; their meaning depends always on their connexion with other words, and things; they may signify differently even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to High Treason. And accordingly, in 4 *Car.* I on a reference to all the Judges, concerning some very atrocious words spoken by one *Pyne*, they certified to the King, "That though the words were as wicked as might be, yet they were no Treason; for, unless it be by some particular statute, no words will be Treason." *Cro. Car.* 125. See 1 *Hal. P. C.* 111—120; 320—322: *Fost.* 196—207. From which authorities it may be concluded, that *bare words* are not overt acts of Treason, unless uttered in contemplation of some traiterous purpose actually on foot or intended; and *in prosecution of it*: As if they are attended or followed by a consultation, meeting, or any act, then they will be evidence, or a confession of the intent of such meeting, consultation, or act.

Ever since the Revolution, it has been the constant practice, where a person, by treasonable discourses, has manifested a design to murder or depose the King, to convict him upon such evidence. And Chief Justice *Holt* was of opinion, that express words were not necessary to convict a man of High Treason; but if, from the tenor of his discourse, the Jury were satisfied he was engaged in a design against the King's life, this was sufficient to convict the prisoner. 4 *State Trials* 172.

If the words be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of Treason; for *scribere est agere* But even in this case the bare words are not the Treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of Treason; particularly in the cases of one *Peacham*, a Clergyman, for treasonable passages in a sermon never preached; and of *Algernon Sydney*, for some papers found in his closet; which, had they been plainly relative to any previous formed design of dethroning or murdering the King, might doubtless have been properly read in evidence as overt acts of that Treason, which was specially laid in the indictment *Foster* 198. But being merely speculative, without any intention (so far as appeared) of making any public use of them, the convicting the authors of Treason upon such an insufficient foundation has been universally disapproved. *Peacham* was therefore pardoned; and though *Sydney* indeed was executed, yet it was to the general discontent of the Nation; and his attainder was afterwards reversed by Parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overt act of Treason at the Common Law; though, of late, even that has been questioned. 1 *Hal. P. C.* 118: 1 *Hawk. P. C* c. 17. § 32, 45.

2. The next species of Treason to be considered is, "If a man do levy war against our Lord the King in his realm." And this may be done by taking arms, not only to dethrone the King, but under pretence to reform Religion or the Laws, or to remove evil Counsellors, or other grievances, whether real or pretended. 1 *Hawk. P. C* c 17. § 25. So it was held, in the case of Lord *G. Gordon*, that an attempt, by intimidation and violence, to force the repeal of a Law, is a levying war against the King, and High Treason. *Dougl.* 570. For the Law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the High Court of Parliament. Neither does the Constitution justify any private or particular resistance, for private or particular grievances; though, in cases of national oppression, the Nation has very justifiably risen as one man, to vindicate the original contract subsisting between the King and his People. To resist the King's forces, by defending

defending a Castle against them, is a levying of war; and so is an insurrection, with an avowed design to pull down *all* inclosures, *all* brothels, and the like; the universality of the design making it a rebellion against the State, and usurpation of the powers of Government, and an insolent invasion of the King's authority. 1 *Hal. P. C.* 132. But a tumult, with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a Riot; this being no general defiance of public Government. So, if two Subjects quarrel and levy war against each other, it is only a great Riot and Contempt, and no Treason. Thus it happened between the Earls of *Hereford* and *Gloucester*, in 20 *Edward* I., who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives; yet this was held to be no High Treason, but only a great misdemesnor. 1 *Hal. P. C.* 136.

But in the case of a great riot in *London* by the Apprentices there, some whereof being imprisoned, the rest conspired to kill the Lord Mayor, and release their comrades; and, in order to it, to provide themselves with armour, by breaking open two houses near the *Tower*: They marched with a cloak on a pole, instead of an ensign, towards the Lord Mayor's house; and in the way, meeting with opposition from the Sheriffs, resisted them: This was held levying of war, and Treason. *Sid.* 358.

Those who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, are said to levy war against the King, although they have no direct design against his person; as they are for doing that by private authority, which he by public justice ought to do, which manifestly tends to a rebellion. For example; where great numbers by force endeavour to remove certain persons from the King, or to lay violent hands on a Privy Counsellor, or revenge themselves against a Magistrate for executing his office, or to deliver men out of prison, expel foreigners, or to reform the Law of Religion, to pull down all bawdy-houses, to throw down all inclosures in general, &c. But where a number of men rise to remove a grievance to their private interest, as to pull down a particular inclosure, they are only Rioters; for there is a difference between a pretence that is public and general, and one that is private and particular. 3 *Inst.* 9: *H. P. C.* 14: *Kel.* 75: 1 *Hawk. P. C. c.* 17. § 25.

It was resolved by all the Judges of *England*, in the reign of King *Henry* VIII., that an insurrection against the statute of Labourers, for raising their wages, was a levying of war against the King; because it was generally against the King's Law, and the offenders took upon them the reformation thereof. *Read. Statutes, vol.* 5. *p.* 150. Not only such as directly rebel and take up arms against the King, but also those who in a violent manner withstand his lawful authority, or attempt to reform his Government, do levy war against him; and therefore, to hold a Fort or Castle against the King's forces, or keep together armed men in great numbers against the King's express command, have been adjudged a levying of war, and Treason. But those who join themselves to rebels, &c. for fear of death, and return the first opportunity, are not guilty of this offence. 3 *Inst.* 10: *Kel.* 76.

A person in arms was sent for by some of the Council from the King, and to give in the names of those that were armed with him; but he refused, and continued in arms in his house; and it was held Treason. Also, where one went with a troop of Captains and others into *London*, to pray help of the City to save his life, and bring him to Court to the Queen, though there was no intent of hurt to her, was adjudged Treason; and in them who joined with him, though they knew nothing but only a difference between him and some Courtiers. So if any man shall attempt to strengthen himself so far, that the Prince cannot resist him. *E. of Essex's Case, Moor* 620.

A bare conspiracy to levy war does not amount to this species of Treason; but, if particularly pointed at the person of the King or his Government, it falls within the first, of compassing or imagining the King's death. 3 *Inst.* 9: *Foster* 211, 213.

By the Common Law, levying war against the King was Treason: But as, in cases of High Treason, there must be an overt act, therefore it is that a conspiracy, or compassing to levy war, is no overt act, unless a war is actually levied; though if a war is actually levied, then the conspirators are all Traitors, although they are not in arms. And a conspiracy to levy war will be evidence of an overt act to maintain an indictment for compassing the King's death; but if the indictment be for levying war only, proof must be made that a war was levied, to bring the offender under this clause of the statute. 3 *Inst.* 8, 9: *H. P. C.* 14. If two or more conspire to levy war, and one of them alone raises forces, this shall be adjudged Treason in all. *Dyer* 98.

3. "If a man be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," he is also declared guilty of High Treason. This must likewise be proved by some overt act, as by giving them intelligence, by lending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like. 3 *Inst.* 10. Sending intelligence to the enemy of the destinations and designs of this Kingdom, in order to assist them in their operations against us, or in defence of themselves, is High Treason, although such correspondence should be intercepted. 1 *Burr.* 650. So sending any intelligence to the enemy, in order to serve them in shaping their attack or defence, though its object be to dissuade them from an invasion, is High Treason. 6 *Term Rep.* 529.

Officers or Soldiers of this realm, holding correspondence with any rebel, or enemy to the King, or giving them any advice, information by letter, message, &c. are declared guilty of Treason by *stat.* 2 & 3 *Ann. c.* 20.

By Enemies are here understood the Subjects of foreign Powers with whom we are at open war. As to foreign Pirates or Robbers who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any Prince or State at enmity with the Crown of *Great Britain*, the giving them any assistance is also clearly Treason; either in the light of adhering to the public enemies of the King and kingdom, or else in that of levying war against his Majesty. *Foster* 219. And, most indisputably, the same acts of adherence or aid which, when applied to foreign enemies, will constitute Treason under this branch of the statute, will, when afforded to our own Fellow-

 subjects

subjects in actual rebellion at home, amount to High Treason, under the description of levying war against the King. *Fost.* 216. But to relieve a rebel, fled out of the kingdom, is no Treason; for the statute is taken strictly, and a rebel is not an enemy; an enemy being always the subject of some foreign Prince, and one who owes no allegiance to the Crown of *England* 1 *Hawk. P. C. c.* 17. § 28. And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he hath a safe opportunity. *Foster* 216. See *ante* I.

The delivery or surrender of the King's Castles or Forts, by the Captains thereof, to the King's enemy, within the realm or without, for reward, &c. is an adhering to the King's enemies. A Lieutenant of *Ireland* let several rebels out of *Dublin* Castle, and discharged some *Irish* hostages which had been given for securing the peace; and for this he was attainted of High Treason in adhering to the King's enemies. 33 *H.* 8. Adhering to the King's enemies out of the realm is Treason; but such adherence out of the realm must be alleged in some place in *England*. 3 *Inst.* 10: *H. P. C.* 14: *Dyer* 298, 310. If there be war between the King of *England* and *France*, those *Englishmen* that live in *France* before the war, and continue there after, are not merely upon that account adherents to the King's enemies, to be guilty of Treason, unless they actually assist in such war; or at least refuse to return into *England* upon a Privy Seal, or on Proclamation and notice thereof; and this refusal is but evidence of an adherence, and not so in itself. 1 *Hale's Hist. P. C.* 165. Adhering to the King's enemies is an adhering against him; and *English* Subjects joining with rebel Subjects of the King's Allies, and fighting with them under the command of an alien enemy Prince, are guilty of Treason in adhering to the King's enemies: So cruising in a ship with intent to destroy the King's ships, without doing any act of hostility, is an overt act of adhering, comforting, and aiding; for where an *Englishman* lists himself and marches, this is [illegible], without coming to battle or actual fighting. [illegible]

[illegible] 33 *Geo.* 3. *c.* 27, called the *Traiterous Correspondence Act*, it was enacted, that if any person residing in *Great Britain* should, during the war with *France*, either on his own account or on account of any other person whatsoever, buy, sell, procure, or send, or assist in so doing, for the use of the *French* armies, or of any persons resident within the dominions of *France*, any ordnance, stores, iron, lead, or copper, except cutlery ware, not being arms, and except buttons, buckles, japanned wares, toys and trinkets, [illegible] any bank notes, gold, or silver, or any provisions [illegible], or any clothing for the [illegible] or [illegible] any leather wrought or unwrought, without licence from the King or Privy Council, he shall be guilty of *High Treason*. And that every *British* Subject, who should purchase, or enter into any agreement for any land or real property in *France*, should also be guilty of *High Treason*.

4. The Legislature, in the reign of *Edward* III., was not only careful to specify and reduce to a certainty the vague notions of Treason that had formerly prevailed; but the statute goes on to state, that, "Because other like cases of Treason may happen in time to come, which cannot be thought of nor declared at present, it is accorded, that if any other case supposed to be Treason, which is not above specified, doth happen before any Judge: the Judge shall tarry, without going to judgment of the Treason, till the cause be shewed and declared before the King and his Parliament, whether it ought to be judged Treason, or other felony." Sir *Matthew Hale* is very high in his encomiums on the great wisdom and care of the Parliament, in thus keeping Judges within the proper bounds and limits of this act; by not suffering them to run out (upon their own opinions) into constructive Treasons, though in cases that seem to them to have a like parity of reason; but reserving them to the decision of Parliament. This is a great security to the Public, the Judges, and even this sacred act itself; and leaves a weighty *memento* to Judges to be careful and not overhasty in letting in Treasons by construction or interpretation, especially in new cases that have not been resolved and settled. 2. He observes, that as the authoritative decision of these *casus omissi* is reserved to the King and Parliament, the most regular way to do it is by a new declarative act; and therefore the opinion of any one or of both Houses, though of very respectable weight, is not that solemn declaration referred to by this act, as the only criterion for judging of future Treasons. 1 *Hal. P. C.* 259: 4 *Comm. c.* 6

Many subtleties having been made use of, in the defence of several persons indicted for High Treason in 1794, (see title *Jury* V. 1;) to evade the meaning, direct or constructive, of the above statute, 25 *E.* 3; and doubts being entertained, in consequence, how far the words of that act were applicable, with sufficient explicitness, to the modern treasonable attempts to overturn the Constitution, by means of tumultuous assemblies of the People; (see title *Riot* II.) The publication and dispersion of inflammatory works and speeches, against all the branches of the Legislature having increased to an enormous and very alarming degree, "with unremitted industry, and with a transcendent boldness:" The project of overawing Parliament, by means of Mobs and their leaders, having been repeatedly avowed: And, finally, his Majesty King *George* III. having been violently attacked, the windows of his coach broken, and his person put in imminent danger, as he was proceeding to open the Parliament on the 29th of *October* 1795; the Legislature thought the following act absolutely necessary to explain and enlarge the clauses of the statute 25 *E.* 3, relative to the Treasons enumerated in the three preceding divisions.

It is therefore enacted, by the *stat.* 36 *Geo.* 3. *c.* 7, (the recital of which alludes to the transactions just mentioned,) "That if any person, during the life of his present Majesty, and until the end of the next Session of Parliament, after a demise of the Crown, shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, *or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint* of the person of the King, his Heirs and Successors: Or to deprive or depose him or them from the style, honour, or kingly name of the Imperial Crown of this

this Realm, or of any other of his dominions: Or to *levy war* against his Majesty, his Heirs, and Successors within this Realm, in order, by force or constraint, to compel him or them to change his or their measures or Councils, or in order *to put any force or constraint upon, or to intimidate or overawe*, BOTH HOUSES, OR EITHER HOUSE OF PARLIAMENT: Or to move or stir any foreigner with force to invade this realm, or any other of his Majesty's dominions; and such compassings, &c. shall express, utter, or declare, by *publishing any printing or writing*, or by any overt act or deed," the offender shall be deemed a Traitor, and punished accordingly. The benefits of *stats.* 7 *W.* 3. *c.* 3; 7 *Ann. c.* 11, (see *post.* V. 2,) are reserved to the offenders; and the act does not extend to prevent any prosecutions at Common Law.

5. The killing of the King's Chancellor, Treasurer, Justices of either Bench, &c. declared to be Treason, relates to no other officers of State besides those expresly named; and to them only when they are in actual execution of their offices, representing the person of the King, and it doth not extend to any attempt to kill, or wounding them, &c. 3 *Inst.* 18, 38: *H. P. C.* 17. The places for the Justices to do their offices, are the Courts themselves, where they usually, or by adjournment, sit for dispatch of the business of their Courts. 1 *Hale's Hist. P. C.* 232. See titles *Judges*; *Privy Council*.

By *stat.* 7 *Ann. c.* 21, it is made High Treason to slay any of the Lords of Session in *Scotland*, or Lords of Justiciary, sitting in judgment; or to counterfeit the King's Seals appointed by the Act of Union. See *post.* 7.

6. It is also a species of Treason, under this statute 25 *Ed.* 3. "if a man do violate the King's Companion, or the King's eldest Daughter unmarried, or the Wife of the King's eldest Son and Heir." By the King's Companion is meant his Wife; and by violation is understood carnal knowledge, as well without force as with it; and this is High Treason in both parties, if both be consenting, as some of the Wives of *Henry* VIII. by fatal experience evinced. The plain intention of this Law is to guard the Blood Royal from any suspicion of bastardy, whereby the succession to the Crown might be rendered dubious; and therefore, when this reason ceases, the Law (generally speaking) ceases with it; for to violate a Queen or Princess Dowager is held to be no Treason. 3 *Inst.* 9. But it has been remarked, that the instances specified in the statute do not prove much consistency in the application of this Treason; for there is no protection given to the Wives of the younger Sons of the King, though their issue must inherit the Crown before the issue of the King's eldest Daughter; and her chastity is only inviolable before marriage, whilst her children would be clearly illegitimate. 4 *Comm. c.* 6, *n.*

The eldest Daughter of the King is such a Daughter as is eldest not married at the time of the violation, which will be Treason, although there was an elder Daughter than her, who died without issue; for now the elder alive has a right to the inheritance of the Crown, upon failure of issue male. Violating the Queen's person, &c. was High Treason at Common Law, by reason it destroyed the certainty of the King's issue, and consequently raised contention about the succession. *H. P. C.* 16.

As a Queen Dowager after the death of her husband, is not a Queen within the statute; for though she bears the title, and hath many prerogatives answering the dignity of her person, yet she is not the King's Wife or Companion: So a Queen divorced from the King *a vinculo matrimonii*, is no Queen within this act, although the King be living; which was the case of Queen *Katharine*, who, after twenty years' marriage with King *Henry* VIII., was divorced *causâ affinitatis.* 1 *Hale's Hist. P. C.* 124.

7. "If a man counterfeit the King's Great or Privy Seal," this is also High Treason. But if a man takes wax bearing the impression of the Great Seal off from one patent, and fixes it to another, this is held to be only an abuse of the Seal, and not a counterfeiting of it: as was the case of a certain Chaplain, who in such manner framed a dispensation for non-residence. But the knavish artifice of a Lawyer much exceeded this of the Divine. One of the Clerks in Chancery glewed together two pieces of parchment; on the uppermost of which he wrote a patent, to which he regularly obtained the Great Seal, the label going through both the skins. He then dissolved the cement; and taking off the written patent, on the blank skin wrote a fresh patent, of a different import from the former, and published it as true. This was held no counterfeiting of the Great Seal, but only a great misprision; and *Coke* mentions it with some indignation, that the party was living at that day. 3 *Inst.* 16: 4 *Comm. c.* 6.

Counterfeiting the King's Seal was Treason by the Common Law; and the *stat.* 25 *Ed.* 3. *st.* 5. *c.* 2, mentions only the Great Seal and Privy Seal; for the counterfeiting of the Sign Manual, or Privy Signet, is not Treason within that act, but by *stat.* 1 *Mary*, *st.* 2. *c.* 6, those who aid and consent to the counterfeiting of the King's Seal are equally guilty with the actors: But an intent or compassing to counterfeit the Great Seal, if it be not actually done, is not Treason; there must be an actual counterfeiting, and it is to be generally like the King's Great Seal. 3 *Inst.* 15: *S. P. C.* 3: *H. P. C.* 18. This branch of the statute does not extend to the affixing the Great Seal to a patent, without a warrant for so doing; nor to the rasing any thing out of a patent, and adding new matter therein; yet this, like the taking off the wax impressed by the Great Seal, from one patent, and fixing it to another, though it be not a counterfeiting, has been adjudged a misprision of the highest degree: And a person guilty of an act of this nature, with relation to a commission for levying money, &c., had judgment to be drawn and hanged. 2 *H.* 4: 3 *Inst.* 16: *Kel* 80. Till a new Great Seal is made, the old one of a late King, being used and employed as such, is the King's Seal within the statute; notwithstanding its variance in the inscription, portraiture, and other substantials: When an old Great Seal is broken, the counterfeiting of that Seal, and applying it to an instrument of that date wherein it stood, or to any patent, &c. without date, is Treason. 1 *Hale's Hist. P. C.* 177. The adding a Crown in a counterfeit Privy Signet, which was not in the true; and omitting some words of the inscription, and inserting others, done purposely to make a little difference, alters not the case, but it is High Treason; being published on a feigned patent to be true, &c. 1 *Hal. P. C.* 184.

8. The last species of Treason under this statute, according to our present division, is, "If a man counterfeit the King's money; and if a man bring false money into the realm counterfeit to the money of *England*, knowing the money to be false, to merchandize and make payment withal." As to the first branch, counterfeiting the King's money; this is Treason, whether the false money be uttered in payment or not. Also, if the King's own minters alter the standard or alloy established by Law, it is Treason. But gold and silver money only are held to be within the statute. With regard likewise to the second branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the statute. 1 *Hawk. P. C. c.* 17. § 55. See this Dictionary, title *Coin*.

If A. counterfeit money, and another vent the same for his own benefit, he is not guilty of Treason; for it is only a cheat and misdemesnor in him, punishable by fine and imprisonment: But if one counterfeits the King's money, though he never vents it, this is a counterfeiting, and Treason within the statute. And if any man doth counterfeit the lawful coin of this kingdom in a great measure, but with some variation in the impression, *&c.* yet it is counterfeiting of the King's money; and shall not evade the statute. 1 *Hale's Hist. P. C.* 214, 215.

False money brought into this kingdom, counterfeited like the money of *England*, must be knowingly brought over from some foreign nation, not from any place subject to the Crown of *England*; and must be uttered in payment. 3 *Inst.* 18. See title *Coin*.

IV. IN CONSEQUENCE of the power, not indeed originally granted by the statute of *Edward* III., but constitutionally inherent in every subsequent Parliament, (which cannot be abridged of any rights by the act of a precedent one,) the Legislature was extremely liberal in declaring new Treasons in the unfortunate reign of King *Richard* II.; as, particularly, the killing of an Ambassador was made so; which seems to be founded upon better reason than the multitude of other points, that were then strained up to this high offence: The most arbitrary and absurd of all which was by the *stat.* 21 *Ric.* 2. *c.* 3, which made the bare purpose and intent of killing or deposing the King, without any overt act to demonstrate it, High Treason. And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very Prince was both deposed and murdered. And in the first year of his successor's reign, an act was passed, reciting "That no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of Treason: And therefore it was accorded, that in no time to come any Treason be judged, otherwise than was ordained by the statute of King *Edward* the Third." This at once swept away the whole load of extravagant Treasons introduced in the time of *Richard* the Second. *Stat.* 1 *Hen.* 4. *c.* 10.

But afterwards, between the reign of *Henry* IV. and Queen *Mary*, and particularly in the bloody reign of *Henry* VIII., the spirit of inventing new and strange Treasons was revived; among which we may reckon the offences of clipping money; breaking prison or rescue, when the prisoner is committed for Treason; burning houses to extort money; stealing cattle by *Welch-men*; counterfeiting foreign coin; wilful poisoning; execrations against the King: calling him opprobrious names by public writing; counterfeiting the Sign Manual or Signet; refusing to abjure the Pope; deflowering, or marrying without the Royal Licence, any of the King's Children, Sisters, Aunts, Nephews, or Nieces; bare solicitation of the chastity of the Queen or Princess, or advances made by themselves; marrying with the King, by a Woman not a Virgin, without previously discovering to him such her unchaste life; judging or *believing* (manifested by any overt act) the King to have been lawfully married to *Anne* of *Cleve*; derogating from the King's Royal Style and Title; impugning his Supremacy; and assembling riotously to the number of twelve, and not dispersing upon Proclamation: All which new-fangled Treasons were totally abrogated by the *stat.* 1 *Mar. st.* 1. *c.* 1, which once more reduced all Treasons to the standard of the statute 25 *Edw.* III. Since which time, though the Legislature has been more cautious in creating new offences of this kind, yet the number has been very considerably increased; these new Treasons may be comprised under three heads. 1. Such as relate to *Papists*. See that title.—2. Such as relate to falsifying the *Coin* or other *Royal Signatures*. See title *Coin*, and *ante*, Div. 7, 8.—3. Such as are created for the security of the Protestant succession to the Throne in the House of *Hanover*.—With respect to this latter, it may be necessary to state something in this place, in addition to what is said under title *King* I.

After the Act of Settlement (*stat.* 12 & 13 *W.* 3. *c.* 2,) was made, for transferring the Crown to the illustrious House of *Hanover*, it was enacted by *stat.* 13 & 14 *W.* 3. *c.* 3, that the pretended Prince of *Wales*, who was then thirteen years of age, and had assumed the title of King *James* III., should be attainted of High Treason; and it was made High Treason for any of the King's Subjects, by letters, messages, or otherwise, to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service.—And by *stat.* 17 *Geo.* 2. *c.* 39, it was enacted, that if any of the Sons of the Pretender should land or attempt to land in this kingdom, or be found in *Great Britain*, or *Ireland*, or any of the dominions belonging to the same, he should be judged attainted of High Treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, was made High Treason in the same manner as it was to correspond with the father. By *stat.* 1 *Ann. st.* 2. *c.* 17, if any person shall endeavour to deprive or hinder any person, being the next in succession to the Crown, according to the limitations of the Act of Settlement, from succeeding to the Crown, and shall maliciously and directly attempt the same by any overt act, such offence shall be High Treason.—And by *stat.* 6 *Ann. c.* 7, if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person hath any right or title to the Crown of this realm, otherwise than according to the Act of Settlement; or that the Kings of this realm, with the authority of Parliament, are not able to make Laws and Statutes, to bind the Crown, and the Descent thereof; such person shall be guilty of High Treason. This offence (or indeed maintaining this doctrine in any wise, that the King and Parliament cannot limit the Crown) was once before made

High Treason, by *stat.* 13 *Eliz.* c 1. during the life of that Princess. And after her decease it continued a high misdemesnor, punishable with forfeiture of goods and chattels, even in the most flourishing æra of indefeasible hereditary right and *jure divino* succession. But it was again raised into High Treason, by the statute of *Anne* before-mentioned, at the time of a projected invasion in favour of the then Pretender; and upon this statute one *Matthews*, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet intitled *Vox populi vox Dei*. 4 *Comm* c. 6.

V. 1. Though the offence of Treason is not within the letter of the commission of Justices of the Peace, yet because it is against the peace of the King and of the Realm, any Justice may upon his own knowledge, or the complaint of others, cause any person to be apprehended, and commit him to prison. And the Justice may take the examination of the person apprehended, and the information of those who can give material evidence against him, and put the same in writing, and also bind over those, who can give any material evidence, to the Justices of Oyer and Terminer, or Gaol-delivery; and certify the proceedings to that Court where he binds over the informers. 2 *Hawk. P. C.* c. 8. See title *Justices of the Peace*.

A Justice having no power to bail the offender, must commit him: and it may be advisable to send an account immediately to one of the Secretaries of State. The Court of King's Bench, having power to bail in all cases what soever, may admit a person to bail for Treason done upon the High Seas: or a person committed for High Treason generally, if four terms have elapsed, and no prosecution commenced. *Holt* 83: 1 *Stra.* 2. The commitment may be for High Treason generally; and it is not necessary to express the overt act in the warrant.

The regular and legal way of proceeding in cases of Treason, and misprision of Treason, is by indictment. An Information cannot be brought in capital cases, nor for misprision of Treason. Anciently an appeal of High Treason, by one Subject against another, was permitted in the Courts of Common Law, and in Parliament; and if committed beyond the Seas, in the Court of the High Constable and Marshal. See title *Appeal*.—And as to proceedings by *Impeachment*, see that title.

By the Common Law, no Grand Jurors can indict any offence whatsoever, which does not arise within the limits of the precincts for which they are returned; therefore they are enabled, by several statutes, to inquire of Treasons committed out of the county. See title *Indictment* II.

Offenders guilty of High Treason by being concerned in the rebellion in the first year of King *Geo.* I. were to be tried before such Commissioners of Oyer and Terminer and Gaol-delivery, and in such county as his Majesty by any Commission under the Great Seal should appoint, by lawful men of the same county, as if the fact had been there committed: This extended only to persons actually in arms. *Stat.* 1 *Geo.* 1. c. 33.

The Venue, or place laid in the indictment where the offence was committed, must generally be laid in that county where the offence was actually committed, unless a statute gives a power to the contrary. If Treason is committed in several counties, the Venue may be laid in any one of them. 4 *Sta. Tri.* 640. If Treason is committed out of the realm, the Venue may be laid in any county within the realm, where the Treason is appointed to be inquired into. See title *Indictment*.

Wales is within the kingdom of *England*. But if any Treason respecting the Coin is committed in *Wales*, the Venue may be changed to the next adjoining county in *England*, where the King's Writs run. 2 *Hawk. P. C.* c. 25. §. 41. See *stat.* 26 *H.* 8. c. 6. In *Chedley*'s case, who was indicted for Petit Treason, it was doubted whether a *certiorari* lay to remove the indictment from the Grand Sessions at *Anglesea* into an adjoining county. *Cro. Car.* 331. But it seems a *certiorari* may issue for a special purpose, as to quash the indictment for insufficiency; or to plead a pardon; but not as to trial of the fact, but it must be sent down by *mittimus*. 1 *Hale P C.* 158.

By *stat.* 7 *Ann.* c. 21, if Treason is committed by any native of *Scotland*, upon the High Seas, or in any place out of the realm of *Great Britain*, it may be inquired of in any shire or county, that is assigned by the commission. Therefore the Venue may be laid in such county, as if the Treason was actually committed there.

This *stat.* 7 *Ann.* c. 21, also enacted, that the crimes of High Treason, and Misprision of Treason, shall be exactly the same in *England* and *Scotland*: and that no acts in *Scotland* (except slaying the Lords of Session, &c. see *ante*, Div. 5.) shall be construed High Treason in *Scotland*, which are not High Treason in *England*.—And all persons prosecuted in *Scotland* for High Treason, or Misprision of Treason, shall be tried by a Jury, and in the same manner as if they had been prosecuted for the same crime in *England*.

It has been resolved, that if Treason is committed in *Ireland*, it may be laid and tried in *England*, in pursuance of *stat.* 35 *Hen.* 8. c. 2: 1 *Sta. Tri.* 189. In the case of Lord *Macguire*, the Venue was laid in *Middlesex*, though the war was levied against the King in *Ireland*. 1 *St. Tr.* 950. But see title *Ireland*.

The Indictment must be drawn with great form and accuracy: For there can be no conviction of Treason, where the crime is not formally laid, even though the facts charged amount to Treason. 2 *Sta. Tri.* 808, 809. The day laid in the indictment is circumstance and form only, and not material in point of proof. Therefore the Jury are not bound to find the defendant guilty on that particular day; but may find the Treason to be committed either before or after the time laid. 3 *Inst.* 230: *Kely.* 16.

There must be a specific charge of Treason. And since the traiterous intent is the Gist of the indictment, the Treason must be laid to have been committed traiterously; this word being indispensably requisite. If the charge is for compassing the King's death, the words of the *stat.* 25 *Ed.* 3. (or *stat.* 36 *Geo.* 3. as the case may be) must be strictly pursued. The indictment must charge, that the defendant did traiterously compass and imagine, &c. And then proceed to lay the several overt acts, as the means employed for executing his traiterous purposes. Levying war may be charged as a distinct species of Treason, according to the statute; or it may be laid as an overt act of compassing.

There must be an overt act laid. It is not necessary that the overt act be laid to have been committed traiterously, because that is not the offence; but if the Treason consists not in the intention, but in the act, as levying war, then it must be laid to have been done traiterously.

traiterously. *Cranburn's Case*, 2 *Salk*. 633. It has been doubted, whether an overt act is required for any other species, except that of compassing or imagining the King's death; but since the words of *stat*. 25 *Edw*. 3. "and thereof be provably attainted by overt act," relate to all the Treasons, an overt act is required for each. 5 *Sta. Tri*. 21: 2 *Salk*. 634.

Though a specific overt act must be alleged, yet it is not necessary that the whole detail of evidence intended to be given should be set forth; it is sufficient that the charge be reduced to a reasonable certainty, so that the defendant be apprised of its nature. Neither is it necessary to prove the overt act committed on the particular day laid. *Foster* 194: 9 *Sta. Tri*. 607.

As there must be an overt act laid, so that which is laid must be proved; for if another act than what was laid was sufficient, the prisoner would never be provided to make his defence. But if more than one are laid, the proof of any one will maintain the indictment. Also if one overt act is proved, others may be given in evidence to aggravate the crime, and render it more probable. 1 *Hale P. C*. 121, 122.

It has been said that since every overt act of compassing is transitory, it may be proved in a different county from where the Treason is laid. *Kel*. 15. But in *Layer*'s case, Chief Justice *Pratt* laid it down as clear Law, that there must be an overt act proved in the county where the indictment is laid; and that then the defendant may be charged with any overt act of the same species of Treason, in any county whatsoever. 6 *State Trials* 319.

The compassing is considered as the Treason, and the overt act as the method of effecting it.—As to what shall be considered as an *overt* act, see generally *ante* III. 1.

In Indictments upon the clause of the statute for levying war, which Sir *Matthew Hale* calls an obscure clause, it is not necessary to lay the day with precision. 9 *Sta. Tri*. 550. But there must be an overt act shewn in the indictment, upon which the Court may judge upon the question of fact, whether war is levied or conspired. And this is usually done by setting forth, that the insurgents were arrayed in a warlike manner, were armed, or were conspiring to procure arms for the purpose of arming themselves. 2 *Vent*. 316, *Harding's Case*.

2. If the Defendant is in custody before the finding of the Indictment, the next step is the arraignment. But if he absconds or secretes himself, still an indictment may be preferred against him in his absence; and if it is found, process issues to bring him into Court.

The first process is a *Capias*. At Common Law, in cases of Treason, there was but one *capias*; and as this has not been altered by statute, upon a *non est inventus* returned, an *exigent* is awarded, in order to proceed to outlawry. 2 *Hale P. C*. 194.

But if the indictment is originally taken in the King's Bench, the *stat*. 6 *Hen*. 6. *c*. 1. specially provides, that before any *exigent* awarded, the Court shall issue a *capias* to the Sheriff of the county where the indictment is taken, and another to the Sheriff of that county where the defendant is named in the indictment, having six weeks time or more before the return; and after these writs returned, the *exigent* to issue as before. 2 *Hale P. C*. 195.

A *capias* and *exigent* may issue against a Lord of Parliament; although, in civil cases, they cannot. 2 *Hale P. C*. 199.

If the offender is out of the realm, the process is of the same effect as if he was resident in the realm. *Com. Dig*. tit. *Indictment*, *p*. 513.

The punishment for Outlawries, upon indictments for misdemesnors, is the same as for Outlawries in civil actions. But an Outlawry in Treason amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender was found guilty by his country. See title *Outlawry*.

By *stat*. 5 & 6 *E*. 6. *c*. 11, a party within one year after the outlawry for Treason, may surrender himself to the Chief Justice of *England*, and traverse the indictment, and being found thereon not guilty, shall be acquitted.

By the word *proveably* (or probably) attainted, in the *stat*. 25 *E*. 3. a person ought to be convicted of the Treason on direct and manifest proofs, and not upon presumptions or inferences; and the word *attainted* necessarily implies, that the prisoner be proceeded against and attainted according to due course of Law; wherefore, if a man be killed in open war against the King, or be put to death arbitrarily, or by Martial Law, and be not attainted of Treason, according to the Common Law, he forfeits nothing; for which cause some persons, killed in open rebellion against the King, have been attainted by Act of Parliament. 3 *Inst*. 12.

The next proceeding is the arraignment, but previous to this, and the trial, the prisoner is entitled to many important privileges, conferred upon him by the *stats*. 7 *Will*. 3. *c*. 3; 7 *Ann*. *c*. 21; which are the standard for regulating trials, in cases of Treason and Misprision.

By the *stat*. 7 *W*. 3. *c*. 3, which extends to all cases of High Treason, whereby corruption of blood may ensue, (except Treason in counterfeiting the King's Coin or Seals,) or Misprision of such Treason, it is enacted, *First*, That no person shall be tried for any such Treason, except an attempt to assassinate the King, unless the indictment be found within three years after the offence committed: *Next*, That the prisoner shall have a copy of the indictment, (which includes the caption,) but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment; for then is his time to take any exceptions thereto, by way of plea or demurrer. See *Fost*. 229, 230: *Doug*. 590. *Thirdly*, That he shall also have a copy of the panel or jurors two days before his trial: And, *lastly*, that he shall have the same compulsive process to bring in his witnesses for him, as was usual to compel their appearance against him. And, by *stat*. 7 *Ann*. *c*. 21, (which did not take place till after the decease of the late Pretender,) all persons, indicted for High Treason or Misprision thereof, shall have, not only a copy of the indictment, but a list of all the *Witnesses* to be produced, and of the *Jurors* impanelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of High Treason, respecting the Coin and the Royal Seals, is repealed by *stat*. 6 *Geo*. 3. *c*. 53; else it had been impossible to have tried those offences in the same circuit in which they are indicted: For ten

clear

clear days, between the finding and the trial of the indictment, will exceed the time usually allotted for any Session of Oyer and Terminer. *Fost.* 250.

It is the practice to deliver the copy of the indictment, and the list of witnesses and jurors, ten clear days, exclusive of the day of delivery and the day of trial: and of intervening *Sundays* previous to the trial. *Fost.* 2; 230.

We cannot help inserting in this place the opinion of the *just* and venerable Judge *Foster*, on the subject of the indulgence given to prisoners accused of High Treason, by the above statutes. No one will dare to suggest that that eminent writer on Crown Law, was, in the least degree, an advocate for oppression or arbitrary power.

The furnishing the prisoner with the names, professions, and places of abode of the witnesses and Jury, so long before the trial, may serve *many bad purposes*, which are too obvious to be mentioned; one good purpose, *and but one*, it may serve. It giveth the prisoner an opportunity of informing himself of the character of the witnesses and Jury. But this single advantage will weigh very little in the scale of justice or sound policy, against the many bad ends that may be answered by it. However, if it weigheth any thing in the scale of justice, the Crown is entitled to the same opportunity of sifting the character of the prisoner's witnesses. *Fost.* 250.

Equal justice is certainly due to the Crown and the Public. For, let it be remembered, that the Public is deeply interested in every prosecution of this kind, that is well founded. Or shall we presume that all the management, all the practising upon the hopes or fears of witnesses, *lieth on one side?* It is true, *power* is on the side of the Crown: May it, for the sake of the constitutional rights of the Subject, always remain where the wisdom of the Law hath placed it! But in a Government like ours, and in a most changeable climate, Power, if, in criminal prosecutions it is but *suspected* [illegible] at oppression, generally disarmeth itself. It [illegible] and giveth countenance to a spirit of opposition [illegible] falling in with the pride or weakness of some, the *false patriotism* of others, and the sympathy of all, not to mention private attachments and party connections, generally turns the scale to the favourable side; *and frequently against the justice of the case.* *Fost.* 251.

If there is any objection to the copy, as if it does not appear before whom the indictment was taken, or that it was taken at all, or in what place, this must be objected to before the plea. For the copy is given the prisoner to enable him to plead; therefore, by pleading, he admits that he has had a copy, sufficient for the purpose intended by the act. 4 *Sta. Tri.* 668.

The reason of giving the prisoner a copy of the panel is, that he may inquire into the characters and qualifications of the Jury, and make what challenges he thinks fit. But the copy may be delivered antecedent to the panel returned by the Sheriff. For if he has a copy of the panel arrayed by the Sheriff, which is afterwards returned into Court, and there is no variation from it, the end and intent of the act is entirely pursued. 4 *Sta. Tri.* 649, 663, 664: 2 *Doug.* 590.

By the same *stat.* 7 *W.* 3. *c.* 3, the prisoner is allowed to make his defence by Counsel. And the Court is authorised to assign him Counsel, not more than two in number, who shall have free access to him at all seasonable hours. The Counsel are to assist him throughout the trial, to examine his witnesses, and to conduct his whole defence, as well in points of fact, as upon questions of law. And this indulgence is extended to cases of Impeachment in Parliament, by *stat.* 20 *Geo.* 2. *c.* 30.

3. The *Arraignment* is the calling the prisoner to the bar of the Court, to answer to the matter charged in the indictment. Upon this, the indictment being read, it is demanded of the prisoner what he saith to the indictment; who either confesses, stands mute, pleads, or demurs.

A plea to the *jurisdiction* is where the indictment is taken before a Court, that has no cognizance of the offence. *Fitzharris*, in the Court of King's Bench, pleaded to the jurisdiction of the Court, that he was impeached of High Treason, by the Commons of *England* in Parliament, before the Lords, and that the impeachment was still in force. But the Court, after taking time to consider, held that the plea was insufficient, to bar the Court of its jurisdiction. 3 *Sta. Tri.* 259, 260: 4 *Sta. Tri.* 167.

Lord *Macguire*, an *Irish* Peer, pleaded his privilege of Peerage, but the Court resolved he might be tried here. 1 *Sta. Tri.* 950: 4 *Sta. Tri.* 414.

Lord *Preston* pleaded his Peerage, at the Old Bailey, as a bar to the jurisdiction; the Court told him he must produce his patent of Peerage. The plea was overruled, for Lord *Preston* had disclaimed his right of Peerage in the House of Lords.

Lord *Delamere* was indicted for High Treason, before the Lord High Steward, during a prorogation of Parliament, and pleaded to the jurisdiction of the Court, that, as the Parliament was not dissolved, he ought to be tried by the whole body of the Peers; the plea was overruled. 4 *Sta. Tri.* 212, 215.

The *stat.* 7 *W.* 3. *c.* 3. § 9, provides, that the indictment shall not be quashed for mis-writing, mis-spelling, or false or improper *Latin*, unless the exception is taken before any evidence is given.

Pleas in Bar are general or special. The General Issue is *Not Guilty*. Upon which the defendant is not merely confined to evidence in negation of the charge, but may offer any matter in justification or excuse. In short, the general issue goes to say, that the prisoner, under the circumstances, has not been guilty of the crime imputed to him.

Special Pleas in Bar are such as preclude the Court from discussing the merits of the indictment; either on account of a former acquittal, or of some subsequent matter, operating in discharge of the defendant.

A Pardon may be pleaded in bar, either on the arraignment, or in arrest of judgment, or in bar of execution. By *stat.* 13 *R.* 2. *st.* 2. *c.* 1, no pardon of High Treason is good, unless the crime is expressly specified. See title *Pardon*.

Sir *H. Vane* justified that what he did was by authority of Parliament; that the King was out of possession of the kingdom; and that the Parliament was the only governing power. But this was over-ruled by the Court. *Kelyng.* 14. Neither can a man plead, by way of justification, that what he did was *se defendendo*. 2 *Hale P. C.* 258.

A man may plead specially the limitation of the *stat.* 7 *W.* 3. *c.* 3. § 5. that no man shall be indicted, tried, or

or prosecuted for certain Treasons, unless within three years after it is committed. See *ante* V. 2.

A Demurrer admits the facts stated in the indictment, but refers the law arising upon them to the determination of the Court. As if the prisoner insists that the fact as stated is no Treason.

After plea, the Jurors are sworn, unless challenged by the party.

A peremptory challenge of thirty five Jurors, is at this day allowable in cases of High Treason. For though the *stat.* 33 *Hen.* 8. *c.* 23, enacted, that in cases of High Treason or Misprision of Treason, a peremptory challenge should not be allowed: Yet the *stat.* 1 & 2 *P.* & *M. c.* 10, enacts, that all trials for any Treason shall be according to the order and course of the Common Law, which allowed this privilege. 3 *Inst.* 27; 2 *Hale P. C.* 269: and see *stat.* 7 & 8 *W.* 3. *c.* 3. § 2.

But by *stat.* 33 *H.* 8. *c.* 12, which seems to be still in force, for Treasons committed in the King's household, and tried before the Lord Steward, all challenge, except for malice, is taken away. See 2 *Hal. P. C.* 272.; and further this Dictionary, title *Jury*.

After the Jury are sworn, and the indictment opened, the next step is proceeding to evidence of the charge.

The *stat.* 7 *W.* 3. *c.* 3. § 2, enacts, that no person shall be indicted, tried, or attainted for High Treason or Misprision, except upon the oaths of *two lawful witnesses*; either both of them to the same overt act, or one of them to one, and the other to another overt act *of the same Treason*: unless the prisoner willingly, without violence, in open Court, confesses the same: or stands mute; or refuses to plead; or, in cases of High Treason, peremptorily challenges more than thirty-five of the Jury.

At Common Law, one positive witness was sufficient. But several statutes previous to the act of *William* required two; but a collateral fact, not tending to the proof of the overt acts, may be proved by one. 5 *St. Tr.* 29.

If two distinct heads of Treason are alleged in one bill of indictment, one witness produced to prove one of the Treasons, and another witness to prove another of the Treasons, are not two witnesses *to the same Treason*, according to the intent of the act.

As to the confession, there have been doubts whether the statute requires a confession upon the arraignment of the party; or a confession taken out of Court by a person authorised to take such examination. Evidence of a confession proved upon the trial by two witnesses has been held sufficient to convict, without farther proof of the overt acts. *Foster* 241. This point is however not clearly settled. But such confession out of Court is evidence admissible, proper to be left to a Jury, and will go in corroboration of other evidence to the overt acts.

In an indictment for compassing the King's death, the being armed with a dagger, for the purpose of killing the King, was laid as an overt act; and being armed with a pistol for the same purpose, as another overt act; it was held, that proving one overt act by one witness, and the other by a different witness, was good proof by two witnesses within the meaning of the act.

An overt act not laid may be given in evidence, if it be a direct proof of any of the overt acts that are laid. *Foster* 9. And after the overt act has been proved in the proper county, evidence of overt acts, though done in foreign counties, is admissible; and such evidence was given upon most of the trials after the rebellions of 1715 and 1745. *Fost.* 10.

The same rules of evidence are observable in cases of Parliamentary Impeachments, as in the ordinary Courts of Judicature.

We have seen that the prisoner is entitled by the act 7 *W.* 3. *c.* 3, to have a similar process of the Court to compel witnesses to appear for him, to that which is usually granted to compel witnesses to appear against him; and by *stat.* 1 *An. st.* 2. *c.* 9. § 3, the witnesses on the behalf of prisoners, before they give evidence, are to take an oath to depose the whole truth, &c. as the witnesses for the Crown are obliged to do. And if convicted of wilful perjury in their evidence, they shall suffer the usual punishment.

The Jury must be unanimous, and give their verdict in open Court. No privy verdict can be given. 2 *H P. C.* 300.

Upon the trial of Peers, in the Court of the Lord High Steward, a major vote is sufficient either to acquit or condemn; provided that vote amount to twelve or more. *Kelyng.* 56, 57. Therefore it has been usual to summon not less than twenty-three Peers. See title *Peers*.

After the trial and conviction, unless the prisoner has any thing to offer in arrest of judgment, the judgment of the Court is awarded.

The Punishment of High Treason, in general, is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried, or walk; though usually (by connivance, at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the King's disposal. 4 *Comm. c.* 6.

The King may, and often doth, discharge all the punishment, except beheading, especially where any of noble blood are attainted. For, beheading being part of the judgment, that may be executed, though all the rest be omitted by the King's command. But where beheading is no part of the judgment, as in murder or other felonies, it hath been said that the King cannot change the judgment, although at the request of the party, from one species of death to another. See title *Execution of Criminals*.

In the case of Coining, which is a Treason of a different complexion from the rest, the punishment is milder for male offenders; being only to be drawn, and hanged by the neck till dead. But in Treasons of every kind, the punishment of Women is the same, and different from that of men. For, as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence is now to be drawn to the gallows, and there to be hanged. See *stat.* 30 *Geo.* 3. *c.* 48; and title JUDGMENT, *Criminal*.

Upon a writ of error to reverse an attainder in Treason, because the party convicted was not asked what he had to say why judgment should not be given against him, the attainder was reversed; for he might have a pardon, or some matter to move in arrest of judgment. 2 *Salk.* 630; 3 *Mod.* 265. And the omission of any necessary part of the judgment for Treason, is

error

error sufficient to reverse an attainder, as it is more severe and formidable in Treason than for any other crime. 2 *Salk.* 632.

The consequences of this judgment are, attainder, forfeiture of all lands and tenements; and corruption of blood. Corruption of blood annihilates the powers of inheritance, both as to the offender and as to others. But *stat.* 17 *Geo.* 2. *c.* 39. § 3, enacts, that after the death of the sons of the late Pretender, no attainder of Treason shall extend to the disinheriting any heir, nor to the prejudice of any other person, except the offender himself. See titles *Attainder*; *Forfeiture.*

PETIT TREASON, Is where one, out of malice, takes away the life of a Subject, to whom he owes special obedience. And it is called Petit Treason in respect to High Treason, which is against the King. 3 *Inst.* 20. See title *Homicide* III. 4. Aiders, Abettors, and Procurers are within the *stat.* 25 *E.* 2; but if the killing is upon a sudden falling out, or *se defendendo*, &c. it is not Petit Treason; for persons accused of Petit Treason shall be adjudged not guilty, or principal and accessary, according to the rules of Law in other cases. *H. P. C.* 24.

If a Servant kills his Mistress, or the Wife of his Master, she is Master within the letter of the statute, and it is Petit Treason. But this statute is so strictly construed, that no case, which cannot be brought within the meaning of the words of it, shall be punished by it; and therefore, if a Son kills his Father, he shall not be tried for Petit Treason, except he served his Father for wages, &c., in which case he shall be indicted by the name of a Servant; and yet the offence is more heinous by far in a Child than a Servant. 3 *Inst.* 20: *H. P. C.* 23: 11 *Rep.* 34. A Servant procured another to kill his Master, who killed him in the Servant's presence; this was Petit Treason in the Servant, and murder in the other. If the Servant had been absent, the crime would not have been Petit Treason, but Murder, to which he would have been accessary. 3 *Inst.* 20: *Moor* 91. A Maid Servant and a stranger conspired to rob the Mistress; and in the night the Servant opened the door and let the stranger into the house, who killed her Mistress, she lighting him to her bed, but neither saying nor doing any thing, only holding the candle; and this was held Murder in the stranger, and Petit Treason in the Servant. *Dyer* 128.

If a Wife and a stranger kill the Husband, it is Petit Treason in the Wife, and Murder in the stranger. And so it is of an ecclesiastic person killing his Prelate, &c. *Dalt.* 337. If a Wife and her Servant conspire to kill the Husband, and appoint time and place for it, but the Servant alone in the absence of the Wife killeth him; it shall be Petit Treason in both: And if the Wife procure a Servant to kill the Husband, both are guilty of Petit Treason; also, if a stranger procures a Wife or Servant to kill the Husband or Master, he may be indicted as accessary to Petit Treason. *Dyer* 128, 332: *Crompt.* 41.

Where the Wife, and another who was not her Servant, conspired the death of the Husband, the indictment was, that the Wife *proditoriè*, and the other person *felonicè*, gave him poison, &c. whereof he died; and the Wife being acquitted on the indictment, she brought an action against her Son-in-law for a malicious prosecution, and recovered damages; but afterwards he brought an appeal of Murder against her, upon which she was convicted in *B. R.*, and carried down into the county where the fact was done, and there executed. *Cro. Car.* 331, 382: *Mod. Ca.* 217: 3 *Nels. Abr.* 372. On a Divorce from the Husband for Adultery, a woman is a Wife within the statute to be guilty of Petit Treason against her Husband; for they may cohabit again. But where a man marries a second Wife, the former being alive, she is not within this Law. 1 *Hale's Hist. P. C.* 381.

If a Clergyman be ordained by the Bishop of *A.*, and he kills that Bishop, it is Petit Treason, for he hath professed canonical obedience to him. And where a Parson hath benefices in two dioceses, if he kill the Bishop of either, it is Petit Treason; but in case he kill a Bishop out of the diocese where he is beneficed, it is only Murder. A Parson kills the Metropolitan of his province, this will be Petit Treason, though he be not his immediate Superior. 1 *Hal. P. C.* 381.

TREASURE-TROVE, *Thesaurus inventus*; French, *trouvé*, found.] Money or coin, gold, silver, plate, or bullion, found hidden in the earth or other private place, the owner thereof being unknown. In such case, the Treasure belongs to the King, and is part of his ordinary revenue; but if he that hid it be known, or afterwards found out, the owner, and not the King, is entitled to it. 3 *Inst.* 132: *Dalt. of Sheriffs*, *c.* 16. Also, if it be found in the sea, or upon the earth, it doth not belong to the King, but to the finder, if no owner appears. *Brit. c.* 17: *Finch. L.* 177. So that it seems it is the hiding, and not the abandoning of it, that gives the King a property: *Bracton* defining it, in the words of the Civilians, to be *vetus depositio pecuniæ*; *l.* 3. *c.* 3. § 4. This difference clearly arises from the different intentions which the Law implies in the owner. A man that hides his Treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it again when he sees occasion: And if he dies, and the secret also dies with him, the Law gives it to the King in part of his royal revenue. But a man that scatters his Treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it; and therefore it belongs, as in a state of nature, to the first occupant or finder; unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property. 1 *Comm. c.* 8.

Formerly, all Treasure-trove belonged to the finder. *Bract. l.* 3. *c.* 3: 3 *Inst.* 133: *Kitch.* 80. Afterwards it was judged expedient for the purposes of the State, and particularly for the Coinage, to allow part of what was so found to the King; which part was assigned to be all hidden Treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, still remaining the right of the fortunate finder. And that the Prince shall be entitled to this hidden Treasure is now grown to be, according to *Grotius*, "*jus commune, et quasi gentium*;" for it is not only observed, he adds, in *England*, but in *Germany*, *France*, *Spain*, and *Denmark*. The finding of deposited Treasure was much more frequent, and the Treasures themselves more considerable,

fiderable, in the infancy of our Conftitution, than at prefent; and therefore the punifhment of fuch as concealed from the King the finding of fuch hidden Treafure was formerly no lefs than death, but now it is only fine and imprifonment *Glanv. l.* 1. *c.* 2: 3 *Inft.* 133.

Nothing is faid to be Treafure-trove but gold and filver. It is every Subject's part, as foon as he has found any Treafure in the earth, to make it known to the Coroners of the county, *&c. Britton, cap.* 17: *S. P. C.* 25. Coroners ought to inquire of Treafure-trove, being certified thereof by the King's Bailiffs, or others, and of who were the finders, *&c.* 4 *Edw.* 1. *ft.* 2.—And feizures of Treafure-trove may be inquired of in the Sheriff's torn. 2 *Hawk. P. C. c.* 10. § 57.

TREASURER, *Thefaurarius.*] An Officer to whom the Treafure of another is committed to be kept, and truly difpofed of. The chief of thefe with us is the Lord Treafurer of *England*, who is a Lord by his office, and one of the greateft men of the kingdom. This great Officer holds his place *durante bene placito*, and is inftituted by the delivery of a white ftaff to him by the King; and in former times he received his office by delivery of the golden keys of the Treafury: He is alfo Treafurer of the Exchequer, by letters patent. By *ftat.* 31 *Edw.* 3. *ftat.* 1. *c.* 12, in writs of error the Lord Chancellor and Lord Treafurer fhall caufe the record and procefs of the Exchequer to be brought before them, who are Judges; but the writ is to be directed to the Treafurer and Barons, who have the keeping of the records. See title *Error.* Under the charge and government of the Lord Treafurer, is all the King's wealth contained in the Exchequer; he has the check of all the Officers employed in collecting the cuftoms and royal revenues; all the offices of the cuftoms in all ports of *England* are in his gift and difpofition; efcheators in every county are nominated by him; and he makes leafes of all the lands belonging to the Crown, *&c.*

But the high and important poft of Lord Treafurer has of late years, like fome other great offices, been efteemed too great a tafk for one perfon, and been generally executed by Commiffioners. See more belonging to this office, *ftats.* 20. *Ed.* 3. *c.* 6: 31 *H.* 6. *c.* 5: 4 *Ed.* 4. *c.* 1: 4 *Inft.* 104. If any one kill the Treafurer, being in his place, doing his office, it is High Treafon, by *ftat.* 25 *Ed.* 3. *c.* 2. See titles *Treafon*; *Judges.*

Befides the Lord Treafurer, there is a Treafurer of the King's Houfehold, who is of the Privy Council, and with the Comptroller, *&c.* has great power. A Treafurer of the Navy or War, fee *ftat.* 35 *Eliz. c.* 4. Treafurer of the King's Chamber, *ftat.* 33 *H.* 8. *c.* 39. A Treafurer of the Wardrobe, *ftat.* 25 *Ed.* 3. *c.* 21. There are alfo Treafurers of Corporations, *&c.*

TREASURER, IN CATHEDRAL CHURCHES, An Officer whofe charge was to take care of the veftments, plate, jewels, relics, and other Treafure belonging to the faid churches. At the time of the Reformation, the office was extinguifhed as needlefs, in moft Cathedral Churches; but it is ftill remaining in thofe of *Salifbury, London, &c.*

TREASURER OF THE COUNTY, He that keeps the County ftock. There are two of them in each County, chofen by the major part of the Juftices of the Peace, *&c.* at *Eafter* Seffions; they muft have 10*l.* a year in land, or 150*l.* in perfonal eftate; and fhall not continue in their office above a year; and they are to account yearly at *Eafter* Seffions, or within ten days after, to their fucceffors, under penalties. The County ftock, of which this Officer hath the keeping, is raifed by rating every parifh yearly; and is difpofed to charitable ufes, for the relief of maimed Soldiers and Mariners, prifoners in the County gaols, paying the falaries of Governors of Houfes of Correction, and relieving poor Alms-houfes, *&c.* The duty of thefe Treafurers, with the manner of raifing the ftock, *&c.* is particularly fpecified in the *ftats.* 43 *El c.* 2. 7 *Jac.* 1. *c.* 4: 11 & 12 *W.* 3. *c.* 18: 5 *Ann. c.* 32: 6 *Geo.* 1. *c.* 23, *&c.* See further, titles *Poor*; *Vagrants.*

TREASURY, Signifies fometimes the place where the King's Treafure is depofited; and, at other times, the office of Treafurer. *Cowell.*

TREATIES, LEAGUES, AND ALLIANCES; See title *King* V. 3.

TREBUCHET, TREBUCKET, TRIBUCH, *Terbichetum.*] A Tumbrel or Cucking-ftool. Alfo a great engine to caft ftones to batter walls. 3 *Inft.* 219: *Matt. Paris* 1246: *Knighton, An.* 1382. See title *Caftigatory.*

TREES. The Proprietors of Trees cut down or taken away, how recompenfed, and the offenders punifhed, *Stats.* 43 *El. c.* 7: 15 *Car.* 2. *c.* 2. § 2. The houfes of perfons fufpected to have cut or taken them away, to be fearched, *ftat.* 15 *Car.* 2. *c.* 2. § 3. Perfons deftroying Plantations, punifhed as trefpaffors, *ftats.* 22 & 23 *Car.* 2. *c.* 7. § 5: 1 *Geo.* 1. *ft.* 2. *c.* 48: 29 *Geo.* 2. *c.* 36. § 6. As Felons, *ftats.* 9 *Geo.* 1. *c.* 22. § 1: 13 *Geo.* 3. *c.* 33, (third offence). See *Larceny* I. 1. The neighbouring Inhabitants, *ftat.* 1 *Geo.* 1. *ft.* 2. *c.* 48, and the Hundred, anfwerable for damages, *ftats.* 9 *G.* 1. *c.* 22. § 7: 29 *G.* 2. *c.* 36. § 9. See 20 *Vin. Abr.* 415—420; and this Dictionary, titles *Timber*; MISCHIEF, *Malicious.*

TREET, *Triticum.*] Fine wheat; mentioned in the *ftat.* 51 *H.* 3. See *Bread.*

TREMAGIUM, TREMESIUM, TERMISIUM, The feafon or time of fowing Summer corn, being about *March*, the third month, to which the word may allude; and corn fowed in *March* is by the *French* called *Tremes* and *Tremois.* Tremefium was the feafon for Summer corn, barley, oats, beans, *&c.* oppofed to the feafon for Winter corn, wheat and rye, called *Hibernagium*; and is thus diftinguifhed in old charters. *Cartular. Glafton. MS.* 91.

TREMELLUM, A Granary. *Mon. Ang.* 1. 470.

TRENCHEATOR, From Fr. *Trancher*, to cut.] A Carver of meat at a table. In the Patent Rolls, mention is made of a penfion granted by the King to *A. B. uni Trenchiatorum noftrorum*, &c.

TRENCHIA, A Trench, or Dike newly cut. *Peramb.* 33 *Hen.* 3.

TRENTAL, *Trientale*; Fr. *Trentale.*] An Office for the Dead, that continued thirty days, or confifting of thirty maffes; from the Ital. *Trenta*, i. e. *Triginta. Stat.* 1 *Edw.* 6. *c.* 14.

TREPGET; See *Trebuchet.*

TRESAYLE, The name of a Writ, to be fued on oufter by abatement, on the death of the grandfather's grandfather; now obfolete. See title *Affife of Mort-d'anceftor.*

TRESPASS,

TRESPASS,

TRANSGRESSIO.] Any transgression of the Law less than treason, felony, or misprision of either: But it is most constantly used for that wrong, or damage, which is done by one private man to another; or to the King in his forest, &c. In which signification it is of two sorts: Trespass general, otherwise called Trespass *vi et armis*; and Trespass special, or upon the case. *Bro. Trespass*: *Bract. lib.* 4.

Trespass, in its largest and most extensive sense, signifies any transgression or offence against the Law of Nature, of Society, or of the Country in which we live; whether it relates to a man's person or his property. Therefore beating another is a Trespass; for which an action of Trespass *vi et armis* in assault and battery will lie: Taking or detaining a man's goods are respectively Trespasses; for which an action of Trespass *vi et armis*, or on the case in trover and conversion, is given by the Law: So, also, non-performance of promises or undertakings is a Trespass, upon which an action of Trespass on the case in *assumpsit* is grounded: And, in general, any misfeasance, or act of one man whereby another is injuriously treated or damnified, is a transgression, or Trespass in its largest sense; for which an action will lie. 3 *Comm. c.* 12. See titles *Action*; *Assault*; *Mayhem*, &c.

Trespass supposes a wrong to be done with force; and Trespasses against the person of a man are of several kinds, *viz.* By menacing or threatening to hurt him; assaulting or setting upon one, to beat him; battery being the actual beating of another; maiming of a person so that he loses the use of his limbs; by imprisonment, or restraining him of his lawful liberty, &c. Trespasses against a man's property may be committed in divers cases; as against his wife, children, or servants, or his house and goods, &c. and against his land, by carrying away deeds and evidences concerning it, cutting the trees, or spoiling the grass therein, &c. *F. N. B.* 86, 87: *Finch* 198, 201: 2 *Roll. Abr.* 545.

Trespass *vi et armis*, may be brought by him that hath the possession of goods, or of a house, or land, if he be disturbed in his possession; for the disturbance, besides the private damage, is also a breach of the public peace. 1 *Inst.* 57: 2 *Roll. Abr.* 572: 2 *Lil. Abr.* 596.

It is a settled distinction, that where an act is done which is in itself an *immediate injury* to another's person or property, there the remedy is usually by an action of Trespass *vi et armis*: But where there is no act done, but there is only a culpable omission, or where the act is not *immediately* injurious, but only by consequence and collaterally, there no action of Trespass *vi et armis* will lie, but an action on the special case for the damages consequent on such omission or act. 11 *Mod.* 180: *Ld. Raym.* 1402: *Stra.* 635: 3 *Comm. c.* 8. *p.* 123; *c.* 12. *p.* 208. The distinctions in these cases are frequently very delicate. See the subject much considered in 2 *Black. Rep.* 892.

Thus it is lawful for a man to make a dam on his own ground; but if, by making it, the water overflows his neighbour's land, an action on the case lies against him. *Mod. Cas. in L. & E.* 275: 1 *Strange* 634. Trespass lies generally for breaking a man's close; for chasing cattle, whereby they die or are injured; taking away pales, and breaking of fences, or of doors or windows of a house; for driving a cart and horses over the ground of another, where there is no way for it: Fishing in another person's pond, and for breaking the pond; for eating the corn of another with cattle, and digging in any man's coal mines, and carrying away coals; for taking away so much of the plaintiff's money; tearing a bond, &c. 1 *Bro. Ab.* 338: 1 *Saund.* 220: 2 *Cro.* 463: *Latch* 144.

Trespass lies for setting the end of a bridge on another man's soil, though it be a highway, 2 *Strange* 1004; and for erecting a stall in a market, without agreeing for stallage, *Ibid.* 1238.

In Trespass for taking goods, the plaintiff must allege a property in himself; because in such case there may be two intendments, one that they were the defendant's own goods, and then the taking is lawful; and the other that they were the goods of the plaintiff, when the taking will be wrongful; but wherever the construction is indifferent, it shall always be most strong against the plaintiff. 2 *Lev.* 20: *Yelv.* 36.

A man may have one action of Trespass for several Trespasses: And if divers actions of Trespass are brought for one and the same cause, the defendant may get them united in one, if brought to vex him; but the Trespasses must not be of several natures, which may not be tried in one action. *Mich.* 24 *Car. B. R.*

In all Trespasses there ought to be a voluntary act, and also a damage; and in detinue and trover, where the thing itself is in demand, it should be particularly named: if Trespass be laid in a declaration for the taking of goods, without expressing the quantity and quality of them, or the value, &c. it is bad upon a general demurrer; though, as to the omission of the value, it hath been held to be good after verdict. *Latch* 13: *Style* 170, 230: *Lutw.* 1384: *Sid.* 39.

Trespass *quod cepit & abduxit* lies not for the father for taking and carrying away any of his children, except for taking of a son or daughter who is heir. *Cro. Eliz.* 769. A man committed adultery with a woman in *Southwark*, where they both dwelt, and the woman went to *Ratcliff* in *Middlesex*, from whence the man brought her to *Richmond* in *Surrey*; the husband brought an action of Trespass *de uxore rapta & abducta cum bonis viri*; and it was a doubt whether, upon the matter given in evidence, the defendant could be found guilty in *London*; but the Jury found him guilty generally, and gave the plaintiff 300*l.* damages. *Dyer* 256.

Executors may bring Trespass for goods taken out of their possession, or for goods and chattels taken in the life of the testator: Also administrators shall have it for goods of intestates; and an Ordinary may bring action of Trespass for goods in his own possession to administer as Ordinary, &c. If a man voluntarily take away my goods or cattle, and keep them till I pay him money, on pretence that they are his heriot, &c. when they are not so, I may have action of Trespass. *Bro. Tres.* 354. And if the Sheriff have a writ against the lands and goods of one man, and he by mistake execute it upon my lands or goods; this action lies against him, and it will be no excuse that the plaintiff or any other informed him they were the goods, &c. of the defendant. *Dyer* 295: *Keilw.* 119, 129.

If a man hurt my beasts, in ground belonging to me, or some other person; he is liable to action of Trespass. Though the owner of the land wherein cattle are doing this Trespass, may gently by himself, or his dogs, chase them

them out, and justify the same. *Bro. Tresp.* 421: 8 *Rep.* 67.

Trespass will not lie against a Ministerial Officer, for any thing done merely in pursuance of his duty; though it is somewhat in support of a wrong, but a wrong to which he is no way accessary or assenting: As, where a distress is tortiously taken and impounded, an action will not lie against the pound-keeper. *Cowp.* 476.

Trespass will not lie against the Master or Seaman of a King's ship or privateer, for taking a vessel as *prize* on the Seas; though the capture is afterwards determined to be illegal in the Court of Admiralty; for questions of prize, or not prize, belong exclusively to that Court; which gives damages for the detention. *Rous* v. *Hassard, Doug.* 580: See 1 *Lev.* 243: *Sid.* 267: *Lindo* v. *Rodney, Doug.* 501.

With respect to Officers in the *Excise* and *Customs*, various Acts of Parliament have been made to protect them in the exercise of their duty; that they might not be harassed with actions of Trespass, where they have acted *bonâ fide*. See particularly, *stats.* 6 *Geo.* 1. *c.* 21: 19 *Geo.* 2. *c.* 34: and *Esp. Ni. Pri. Ch.* 8.

A Court, which is not a Court of Record, cannot hold plea of Trespass *vi et armis*. *F. N. B.* 85. Writs of Trespass lie either to the Sheriff to determine the matter in the County Court, or returnable in *B. R.* or *C. B. F. N. B.* 86, 190. Trespass *quare vi et armis clausum fregit* was brought, wherein the plaintiff laid damage to the value of 20*s.* and the defendant demurred for that cause, alleging that *B. R.* could have no cognizance at Common Law, or by the statute of *Gloucester*, to hold plea in action where the damages are under 40*s.* But it was adjudged, that Trespass *quare vi et armis* will lie in this Court, be the damages what they will. 3 *Mod.* 275.

At Common Law, in Trespass *vi et armis*, if the defendant was convicted, he was to be fined and imprisoned; but in other Trespasses only amerced *Jenk. Cent.* 185 In action of Trespass against two persons for carrying away goods, &c. one lets judgment go by default, and the other justifies under a licence from the plaintiff, and has a verdict; this goes to the whole, and judgment shall be arrested as to the other defendant. 2 *Ld. Raym.* 1372, 1374.

Trespass in a limited and confined sense, as relates to land, signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property, in lands being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon, without the owner's leave, and especially if contrary to his express order, is a Trespass or transgression; for satisfaction of which an action of Trespass will lie; but the *quantum* of that satisfaction is to be determined by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained. 3 *Comm. c.* 12.

Every unwarrantable entry on another's soil, the Law entitles a Trespass by breaking his close; the words of the writ of Trespass commanding the defendant to shew cause *quare clausum querentis fregit*. For every man's land is in the eye of the Law inclosed and set apart from his neighbour's: and that either by a visible and material fence, as one field is divided from another by a hedge; or, by an ideal, invisible boundary, existing only in the contemplation of Law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other: for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, *viz.* the treading down and bruising his herbage. *F. N. B.* 87, 88.

One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of Trespass: or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land. *Dyer* 285: 2 *Roll. Abr.* 549: *Mo.* 456. Thus, if a meadow be divided annually among the parishioners by lot, then, after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes: for they have an exclusive interest and freehold therein for the time. *Cro. Eliz.* 421. But, before entry and actual possession, one cannot maintain an action of Trespass, though he hath the freehold in Law. 2 *Roll. Abr.* 553. And therefore an heir before entry cannot have this action against an abator: though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land: but he cannot have it for any act done after the disseisin, until he have gained possession by re-entry, and then he may well maintain it for the intermediate damage done; for, after his re-entry, the Law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him. 11 *Rep.* 5. Neither, by the Common Law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrong-doer, by a mode of redress, which was calculated merely for injuries committed against the land while in the possession of the owner. But now, by the *stat.* 6 *Ann. c.* 18, if a guardian or trustee for any infant, a husband seised *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interests, hold over and continue in possession of the lands or tenements, without the consent of the person entitled thereto, they are adjudged to be Trespassers. See also the *stats.* 4 *Geo.* 2. *c.* 28: 11 *Geo.* 2. *c.* 19, as to tenants for years, &c. holding over, and this Dictionary, titles *Sufferance*; *Rent*; *Distress*, &c.

He that is possessed of lands, though he hath no good title, shall have this action for a Trespass against one who hath no right to the lands; but not against him that hath right. *Plowd* 431, 546: *Keilw* 163. The lessee for years, after his lease is expired, may have action for a Trespass on the land before his lease was ended. *Bro. Tresp.* 456. An action of Trespass was brought by the Lord of a manor, for Trespass done in the highway, by a tenant's beast breaking out of his close into the waste; and it was adjudged it would not lie. 1 *Bulst.* 157.—The reason of this determination seems to be, that the *locus* was a highway, and the cattle had not eaten therein; but that Trespass by the Lord of a manor, as owner of the soil, will lie, is indisputable. See 3 *Burr*, 1824.

If *A.* is bound to fence his close against *B.*, and he against *C.* a neighbour; and neither of them inclose against one another, so that the beasts of *C.* for want of inclosure go out of the ground to that of *B.* and thence

to

to *A.*'s ground: In this case *A.* shall have Trespass against *C.*, for he is bound only to fence against *B.*, and every one ought to keep his cattle as well in open grounds, not inclosed, as in several grounds where there is inclosure. *Dyer* 366: *Jenk. Cent.* 161.

One drives my cattle into another man's land, I may go on the land and fetch them out: yet by this I am a Trespasser to the owner of the ground, and he may have his action against me for it, and I must take my counter remedy against him that drove them in. 21 *H.* 7. 27: 1 *Rep.* 54. If another man have a horse, or other goods in my house or ground, and he enter to take it away, without my leave, action of Trespass lies against him: But if I drive the cattle or carry the goods of another into my land, he may come upon the land and take them, and no action lieth. 4 *Shep. Abr.* 135, 136.

A man is answerable for not only his own Trespass, but that of his cattle also; for, if by his negligent keeping they stray upon the land of another, (and much more if he permits, or drives them on,) and they there tread down his neighbour's herbage, and spoil his corn or his trees, this is a Trespass for which the owner must answer in damages. And the Law gives the party injured a double remedy in this case; by permitting him to distrain the cattle thus *damage feasant*, or doing damage till the owner shall make him satisfaction; or else by leaving him to the common remedy by action. And the action that lies in either of these cases of Trespass committed upon another's land, either by a man himself or his cattle, is the action of Trespass *vi et armis*; whereby a man is called upon to answer, *quare vi et armis clausum ipsius* A. *apud* B. *fregit, et blada ipsius* A. *ad valentiam* *entum solidorum ibidem nuper crescentia, cum quibusdam averiis depastus fuit, conculcavit, et consumpsit*, &c. *Registr.* 94. For the Law always couples the idea of force with that of intrusion upon the property of another. And herein, if any unwarrantable act of the defendant or his beasts, in coming upon the land, be proved, it is an act of Trespass for which the plaintiff must recover some damages; such however as the Jury shall think proper to assess. 3 *Comm. c.* 12.

In Trespasses of a permanent nature, where the injury is continually renewed, (as by spoiling or consuming the herbage with the defendant's cattle,) the declaration may allege the injury to have been committed *by continuation* from one given day to another; (which is called laying the action with a *continuando*;) and the plaintiff shall not be compelled to bring separate actions for every day's separate offence. 2 *Roll. Abr.* 545: *Lord Raym.* 240. But where the Trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando*; yet if there be repeated acts of Trespass committed, (as cutting down a certain number of trees,) they may be laid to be done, not continually, but at divers days and times within a given period. *Salk.* 638, 639: *Ld. Raym.* 823: 7 *Mod.* 152.

Things must lie in continuance, and not terminate in themselves, or a *continuando* will not be good: And where a Trespass is alleged with a continuance, that cannot be continued, the evidence ought only to be to the first act. 2 *Salk.* 638, 639.

The best way to declare for such Trespasses which lie in continuance, is for the plaintiff to set forth in his declaration that the defendant, between such a day and such a day, cut several trees, &c. and not to lay a *continuando transgressionis* from such a day to such a day; and upon such declaration, the plaintiff may give in evidence a cutting on any day within those days. 3 *Salk.* 360.

If the defendant makes the place where the Trespass was done material by his plea, he must shew it with great certainty; but if it be a Trespass *quare clausum fregit* in *B.* and the defendant pleads that the place where is his freehold, which is the common bar in this case, so justifies as in his freehold, &c. if issue be taken thereon, the defendant may give in evidence any close in which he hath a freehold; though if the plaintiff had replied and given the close a name, defendant must have a freehold in that very close. 2 *Salk* 453: *Carthew's Rep.* 176.

A plaintiff may make a new assignment of the place where, &c. and then the defendant may vary from his first justification: As for instance; an action of Trespass assigned to be done generally in *D.*, the defendant justified the taking *damage feasant*; and the plaintiff in his replication made a new assignment, upon which the defendant justified for a heriot; and it was adjudged good. *Moor* 540. The defendant in his plea may put the plaintiff to the new assignment; and every new assignment is a new declaration, to which the defendant is to give a new answer, and he may not traverse it, but must either plead or demur; yet where Trespasses are alleged to be done in several places, and the defendant pleads to some, and agrees to the places wherein the plaintiff alleged the Trespasses to be done, there the plaintiff may answer that part of the plea by a traverse, and shew a new assignment as to the rest. *Cro. Eliz.* 492, 812. See titles *New Assignment*; *Pleading*.

One action of Trespass may be brought for a Trespass committed in lands which lie in several towns or vills, if they are in one and the same county; for else they cannot receive one trial, as they are local causes of action triable in the county where done. 2 *Lil. Abr.* 595.

As Trespass *quare clausum fregit* is a local action, Trespass for breaking and entering a house in *Canada* in *America*, will not lie in this country. 4 *Term Rep.* 503.

In some cases Trespass is justifiable; or, rather, entry on another's land or house shall not in those cases be accounted Trespass: as if a man comes thither to demand or pay money, there payable; or to execute, in a legal manner, the process of the Law. Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because, when a man professes the keeping of such inn or public house, he thereby gives a general licence to any person to enter his doors. ee title *Inns*. So a landlord may justify entering to distrain for rent; a commoner to attend his cattle, commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing. 8 *Rep.* 146. Also it hath been said, that, by the Common Law and custom of *England*, the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of Trespass; but modern determinations have denied this right. See this Dictionary, title *Gleaning*.—The Common Law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land; because the destroying such creatures is said to be profitable to the Public. *Cro. Jac.* 321. See title *Game Laws*.

But

But in cases where a man misdemeans himself, or makes an ill use of the authority with which the Law entrusts him, he shall be accounted a Trespasser *ab initio*; as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night, contrary to the inclinations of the owner; this wrongful act shall affect and have relation back even to his first entry, and make the whole a Trespass. *Finch. L.* 47; *Cro. Jac.* 148: 2 *Roll. Abr.* 561. But a bare non-feasance, as not paying for the wine he calls for, will not make him a Trespasser; for this is only a breach of contract, for which the taverner shall have an action of debt or *assumpsit* against him. 8 *Rep.* 147. So, if a landlord distrained for rent, and wilfully killed the distress, this, by the Common Law, made him a Trespasser *ab initio*: and so indeed would any other irregularity have done, till the statute 11 *Geo.* 2. *c.* 19. See *Finch. L.* 47; and this Dictionary, title *Distress*. But still, if a Reversioner, who enters on pretence of seeing waste, breaks the house, or stays there all night; or if the commoner, who comes to tend his cattle, cuts down a tree: in these and similar cases the Law judges that he entered for this unlawful purpose; and therefore, as the act which demonstrates such his purpose is a Trespass, he shall be esteemed a Trespasser *ab initio*. 8 *Rep.* 146. So also, in the case of hunting the fox or the badger, a man cannot justify breaking the soil, and digging him out of his earth: for though the Law warrants the hunting of such noxious animals for the public good, yet it is held that such things must be done in an ordinary and usual manner; therefore, as there is an ordinary course to kill them, *viz.* by hunting, the Court held that the digging for them was unlawful. *Cro. Jac.* 321. See title *Game Laws*.

A man may also justify in an action of Trespass, on account of the freehold and right of entry being in himself; and this defence brings the title of the estate in question. This is therefore one of the ways devised, since the disuse of real actions, to try the property of estates; though it is not so usual as that by Ejectment, because that, being now a mixed action, not only gives damages for the ejection, but also possession of the land: whereas in Trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed. 3 *Comm. c.* 12. See title *Ejectment*.

One Justification in Trespass also arises from the leave or licence of the party complaining; and as to this the following has been stated as the difference:

There is difference between a positive abuse of an authority or licence in fact, and of an authority or licence in Law: The reason of this difference is in one book said to be, that the abuse in the latter case is deemed a Trespass with force *ab initio*; because the Law intends from the subsequent tortious act, that there was from the beginning a design to be guilty thereof. 8 *Rep.* 146. The *Six Carpenters'* case.

But this reason, which equally applies to both cases, is by no means conclusive: for it may be as well intended in the former case, from the subsequent tortious act, that there was from the beginning a design of being guilty thereof. Perhaps the difference between the two cases may be better accounted for in the following manner: in the one, where the Law has given an authority or licence, it seems reasonable, that the same law should, in order to secure the persons, who are without their direct assent made the objects thereof, from all positive abuses of such authority or licence, whenever either of these is positively abused, make the same void from the beginning; and leave the abuser thereof in the same situation, as if he had acted without any authority or licence. And this agrees perfectly with the maxim, *Actus legis nemini facit injuriam*. But in the other case, where a man, who was under no necessity of giving an authority or licence to any person, has thought proper to give one of these to a certain person, who is afterwards guilty of a positive abuse thereof, there is no reason that the Law should interpose, and make all that has been done, under the authority or licence by him so voluntarily given, void from the beginning; because it was his own folly to place a confidence in a man, who was not fit to be trusted. 5 *New Abr.* 156.

In order to prevent trifling and vexatious actions of Trespass, as well as other personal actions, it is (*inter alia*) enacted, by *stat.* 43 *Eliz. c.* 6: 22 & 23 *C.* 2. *c.* 9. § 136, that where the Jury, who try an action of Trespass, give less damages than 40*s.* the plaintiff shall be allowed no more costs than damages; unless the Judge shall certify under his hand, that the freehold or title of the land came chiefly in question. But this rule now admits of two exceptions more, which have been made by subsequent statutes: One is by *stat.* 8 & 9 *W.* 3. *c.* 11, which enacts, that in all Actions of Trespass, wherein it shall appear that the Trespass was wilful and malicious, and it be so certified by the Judge, the plaintiff shall recover full costs. Every Trespass is wilful, where the defendant has notice, and is especially forewarned not to come on the land; as every Trespass is *malicious*, though the damage may not amount to forty shillings, where the intent of the defendant plainly appears to be, to harass and distress the plaintiff; as in cases of sportsmen warned to go off, or not to come again on another's land. *Esp. N. P.* 425. The other exception is by *stat.* 4 & 5 *W. & M. c.* 23, which gives full costs against any inferior tradesman, apprentice, or other dissolute person, who is convicted of a Trespass in hawking, hunting, fishing, or fowling, on another's land; and these costs such inferior tradesman is liable to in case of such Trespass, whatever qualification he may have in point of estate. *Ld Raym.* 149: 3 *Comm. c.* 12. See this Dict. titles *Costs*; *Game-Laws*.

If the defendant, in Trespass *quare clausum fregit*, disclaim any title to the land, and the Trespass is involuntary, or by negligence, he may be admitted to plead a disclaimer and tender of amends before the action brought, &c. And if it be found for the defendant, the plaintiff shall be barred. *Stat.* 21 *Jac. c.* 16. See title *Tender*.

See further on this subject *Espinasse's Nisi Prius, Ch.* 8.

TRESPASSANTS, Fr.] Is used by *Britton*, *c.* 29, for passengers.

TRESPASSER, One who commits a Trespass. See title *Trespass*.

TRESTORNARE, To turn or divert another way; *Trestornare viam*, to turn the road. *Cowell.*

TREYTS, Fr.] Taken out or withdrawn, applied to a Juror removed or discharged. *F. N. B.* 459.

TRIAL,

TRIAL,

TRIATIO.] The examination of a cause, civil or criminal, before a Judge who has jurisdiction of it, according to the Laws of the Land. 1 *Inst*. 124: *Finch*. *L*. 36.

I. *Of the Course of Trial, in Civil Cases.*
II. ——————— *in Criminal Cases.*
III. *Of New Trials.*

I. TRIAL is the examination of the matter of fact in issue; of which there are many different species, according to the difference of the subject to be tried: As for example, Trial by *Record*; by *Inspection*, or *Examination*; by *Certificate*; by *Witnesses*; by *Wager of Battel*; by *Wager of Law*; and by *Jury*.

The first six of these species of Trial are only had in certain special and eccentrical cases, where the Trial by the Country *per pais*, or by Jury, would not be so proper or effectual. See this Dictionary, titles *Record*; *Inspection*; *Certificate*; *Battel*; *Wager of Law*; as to those Trials.

Trial by Witnesses, *per testes*, without the intervention of a Jury, is the only method of Trial known to the Civil Law; in which the Judge is left to form, in his own breast, his sentence, upon the credit of the witnesses examined: But it is very rarely used in our Law, which prefers the Trial by Jury before it, in almost every instance: Save only, that when a Widow brings a Writ of Dower, and the Tenant pleads that the Husband is not dead; this being looked upon as a dilatory plea, is, in favour of the Widow, and for greater expedition, allowed to be tried by Witnesses examined before the Judges: And so, saith *Finch*, shall no other case in our Law. But *Coke* mentions some others; as, to try whether the Tenant in a real action was duly summoned, or the validity of a challenge to a Juror; so that *Finch*'s observation must be confined to the Trial of direct, and not collateral, issues. And in every case *Coke* lays it down, that the affirmative must be proved by two witnesses at the least. 1 *Inst*. 6: 3 *Comm*. *c*. 22.

For the proceedings on the Trial in Civil Cases by *Jury*, as relate to the summoning and appearance of the Jury, see this Dict. title *Jury* I: As also titles *Assises*; *Justices of Assise*.

Trials by the Country are at Bar, or *Nisi Prius*.

TRIALS AT BAR are those which take place before all the Judges, at the Bar of the Court in which the action is brought. Before the *stat. Westm*. 2. 13 *Ed*. 1. *c*. 30, Civil Causes were tried either at the Bar of the Court, or, when of no great moment, before the Justices in Eyre; a practice having very early obtained, of continuing the cause from Term to Term, in the Court above, provided the Justices in Eyre did not previously come into the county where the cause of action arose; and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the Justices at *Westminster*, to that of the Justices in Eyre. See title *Jury* I. Afterwards, when the Justices in Eyre were superseded by the modern Justices of Assise, it was enacted by the above statute, "that inquisitions to be taken of trespasses pleaded before the Justices of *either Bench*, shall be determined before the Justices of Assise, unless the trespass be so heinous that it requires *great examination*; and that inquisitions of other pleas pleaded *in either Bench*, wherein the examination is easy, shall be also determined before them: But inquisitions of many and weighty matters, which require *great examination*, shall be taken before the Justices *of the Benches*, &c.; and when such inquests are taken, they shall be returned into the Benches, and there judgment shall be given, and they shall be inrolled." Since the making of this statute, causes in general are tried at *Nisi Prius*; Trials at Bar being only allowed in Ejectment, and other causes which require great examination. This statute, extending only to the Courts of King's Bench and Common Pleas, whenever an issue is joined in the Exchequer, to be tried in the Country, there is a particular Commission, authorising the Judges of Assise to try it. *Bull. N P*. 304.

When the Crown is immediately concerned, the Attorney-General has a right to demand a Trial at Bar. In all other cases, it is entirely in the discretion of the Court, governed by the circumstances of the case; even if the parties consent, such a mode of Trial cannot be had without leave of the Court. The grounds on which this Trial ought to be granted are, the great value of the subject-matter in question, the probable length of the inquiry, and the likelihood that difficulties may arise in the course of it. In Ejectment, it is said, the rule has been not to allow a Trial at Bar, except where the yearly value of the land is 100 *l*.; and value alone, or the probable length of the inquiry, is not a sufficient ground for it; but difficulty must concur; and in order to obtain it upon that ground, it is not sufficient to say generally in an affidavit, that the cause is expected to be difficult; but the particular difficulty which is expected to arise, ought to be pointed out, that the Court may judge whether it be sufficient. *Tidd's Pract*. *K*. *B*., and the authorities there cited.

If one of the Justices of either Bench, or a Master in Chancery, be concerned, it is a good cause for a Trial at Bar, be the value what it may; and, it is said, that such Trial was never denied to any Officer of the Court, nor hardly to any Gentleman at the Bar. The plaintiff may have a Trial of this nature, by the favour of the Court, though he sue *in formâ pauperis*: But, where the plaintiff is poor, the Court will not grant it to the defendant, unless he will agree to take *Nisi-Prius* costs if he succeed, and if he fail, to pay Bar costs. In *London*, it is said, a cause cannot be tried at Bar, by reason of their charter, which exempts them from serving upon Juries out of the city. But the great cause of *Lockyer* against the *East India Company*, was tried at Bar (*M*. 2 *Geo*. 3.) by a Special Jury of Merchants of *London*. 2 *Salk*. 644: 1 *Term Rep*. 366. In that case, however, the Jury consented to be sworn, and waived their privilege. 2 *Wils*. 136. And where the cause of action arises in a County Palatine, it has been doubted whether the Court of *K*. *B*. can compel the inhabitants of the Palatinate to attend as Jurors. *Tidd's Pract*.

A Trial at Bar is never granted before issue joined, except in Ejectment; in which, as issue is very seldom joined till the Term is over, it would afterwards be too late to make the application. This sort of Trial should regularly be moved for in the Term preceding that in which it is intended to be had; as in *Hilary* for *Easter*, and in *Trinity* for *Michaelmas* Term, except where

where lands lie in *Middlesex*; and it is never allowed in an issuable Term, unless the Crown be concerned in interest, or under very particular and pressing circumstances. In *Easter* Term, they did not formerly allow more than ten Trials at Bar; and they must have been brought on a fortnight at least before the end of it, to allow sufficient time for the other business of the Court. *Tidd's Pract.*

Anciently, there was no other notice given of such Trial, than the rule in the office; but now there must be 15 days' notice. The plaintiff however, as in other cases, may countermand his notice, and prevent the cause from being tried at the day appointed; after which, it cannot be brought to Trial again, unless some new day be appointed by the Court. And it is said, that a second rule cannot be made for a Trial at Bar, between the same parties, in the same Term. Previous to giving notice, the day appointed for the Trial must be entered with the Clerk of the Papers; and it could not formerly have been on a *Saturday*, or the last Paper Day in Term, except in the King's case. *Tidd's Pract.*

A Trial at Bar is had upon the *Venire Facias* or *Distringas*, &c. as at Common Law, without any clause of *Nisi Prius*; and it is mostly by a Special Jury of the county where the action is laid. But it may be had, by consent, by a Jury of a different county; and in *Wales* or *Berwick upon Tweed*, &c. or where an impartial Trial cannot be had, the Jury must come from the next *English* or adjoining county, where the King's writ of *Venire* runs. Six days' notice at least ought to be given to the Jurors before the Trial; and if a sufficient number do not attend to make a Jury, the Trial must be adjourned, and a *decem* or *octo Tales* awarded, as at Common Law; for the parties in this case cannot pray a *Tales* upon the statutes. See title *Jury*. And no writ of *alias* or *pluries Distringas*, with a *Tales*, for the Trial of Issues at the Bar, shall be sued out, before the precedent writ of *Distringas*, with a Panel of the names of the Jury annexed, shall be delivered to the Secondary of the Court, to the intent that the Issues, forfeited by the Jury for not appearing upon the precedent writ, may be duly estreated. After a Trial at Bar, if the parties be dissatisfied with the verdict, they may move for a new Trial, as in other cases. *Tidd's Pract.* and authorities there cited.

TRIALS AT NISI PRIUS are always had in the county where the Venue is laid, and where the fact was or is supposed to have been committed; except where the Venue is laid in *Wales* or *Berwick upon Tweed*, &c., or in a county where an impartial Trial cannot be had; in which cases the cause shall be tried in the next *English* or adjoining county, where the King's writ of *Venire* runs. *Tidd's Pract.* See title *Venue*.

When the Day of Trial is fixed, the plaintiff or his attorney must bring down the Record to the Assises, and enter it with the proper Officer, (the Clerk of the Papers,) in order to its being called on in course. If it be not so entered, it cannot be tried; therefore it is in the plaintiff's breast to delay any Trial by not carrying down the Record; unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on the Trial, giving proper notice to the plaintiff. Which proceeding is called the Trial by *Proviso*; by reason of the clause then inserted in the Sheriff's *Venire*, viz. "*Proviso*, provided that if two writs come to your hands, (that is, one from the plaintiff and another from the defendant,) you shall execute only one of them." But this practice hath begun to be disused, since the *stat.* 14 *Geo.* 2. *c.* 17, which enacts, that if, after issue joined, the cause is not carried down to be tried according to the course of the Court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant as in case of a nonsuit. See title *Nonsuit*.

In case the plaintiff intends to try the cause, he is bound to give the defendant (if he lives within forty miles of *London*) eight days' notice of Trial; and, if he lives at a greater distance, then fourteen days' notice, in order to prevent surprise: And if the plaintiff then changes his mind, and does not countermand the notice, six days before the Trial, he shall be liable to pay costs to the defendant for not proceeding to Trial, by the same last-mentioned statute. The defendant, however, or plaintiff, may, upon good cause shewn to the Court above, as upon absence or sickness of a material witness, obtain leave upon motion to defer the Trial of the cause till the next Assises. 3 *Comm. c.* 23.

The *stat.* 14 *Geo.* 2. *c.* 17, only requires ten days' notice of Trial; but at the Sittings in *London* and *Westminster*, the former practice of fourteen days' notice was still continued. But in all country causes, ten days' notice is sufficient: As where the Commission-Day is on the fifteenth of any month, notice of Trial must be given on or before the fifth. *Impey's Pract.* If the defendant resides within forty miles of *London*, and if the cause is to be tried at the Sittings in *London* or *Westminster*, then two days' notice of countermand, before it is to be tried, is sufficient. *Sellon's Pract.*

Where there have been no proceedings within four Terms, a full Term's notice must be given previous to the Assises or Sittings; unless the cause has been delayed by the defendant himself, by an injunction or other means. *Sellon's Pract*: 2 *Black. Rep* 784: 3 *Term Rep.* 530.—If the defendant proceed to Trial by *Proviso*, he must give the same notice as would have been required from the plaintiff. *Sellon's Pract* —Sometimes the Courts impose it as a condition upon the defendant, that he shall accept *short notice* of Trial; which, in country causes, shall be given at least four days before the Commission-Day, one day being exclusive, and the other inclusive. 3 *Term Rep.* 660.—But in town causes, two days' notice seems sufficient in such a case. *Tidd's Pract.*

The old rule for entering causes in *London* and *Middlesex* was, that unless they were entered with the Chief Justice, two days before the Sittings upon which they were to be tried, the Marshal might enter a *ne recipiatur*, at the request of the defendant or his attorney. And this rule still holds, with regard to Trials at the Sittings in Term. But if a cause was to be tried at the Sittings after Term, no *ne recipiatur* could be entered, until after Proclamation made, by order of the Chief Justice, for bringing in the record; and then, if the record was not brought in, the defendant's attorney might enter a *ne recipiatur*. *Tidd's Pract.*

At present, the practice with regard to entering causes for Trial, at the Sittings after Term or Assises, stands thus: In *Middlesex*, no record or writ of *Nisi Prius* will be received, at any Sitting after Term, unless the same shall

shall be delivered to and entered with the Marshal, within two days after the last day of every Term; and in *London*, no record of *Nisi Prius* will be received, at any Sitting after Term, unless the same shall be delivered to and entered with the Marshal, the day before the day to which the Sittings in *London* shall be adjourned, by nine in the evening. At the Assises, the writ and record are entered together; and no writ and record of *Nisi Prius* shall be received, in any county in *England*, unless they shall be delivered to and entered with the Marshal, before the first Sitting of the Court, after the Commission-Day, except in the counties of *York* and *Norfolk*, and there the writs and records shall be delivered to and entered with the Marshal, before the first Sitting of the Court, on the second day after the Commission-Day, otherwise they shall not be received. And both in *London* and *Middlesex*, as well as at the Assises, every cause shall be tried in the order in which it is entered, beginning with *remanets*, (those which have stood over from former Sittings,) unless it shall be made out to the satisfaction of the Judge, in open Court, that there is reasonable cause to the contrary; who thereupon may make such order for the Trial of the cause, so to be put off, as to him shall seem just. *Rule Hil.* 14 *Geo.* 2. Special-Jury causes are appointed for particular days, and in *London* and *Middlesex* no cause can be tried by a Special Jury, unless the rule for such Jury be drawn up, and the cause marked as a Special Jury, in the Marshal's book of Causes, before the Adjournment-Day after each Term. *Rule Trin.* 30 *Geo.* 3.

The cause being entered, stands ready for Trial, at the Bar of the Court, or before the Judge at *Nisi Prius*; and previous to its coming on, a Brief should be prepared for each party, and delivered to Counsel; containing a short abstract of the pleadings, a clear statement of the case, and a proper arrangement of the proofs, with the names of the witnesses. The grand rule to be observed in drawing Briefs, consists in conciseness with perspicuity. *Tidd's Pract. K.B.*: *Sellon's Pract.*

When the cause is called on in Court, in its turn, according to a list or paper, made out from the order in which the several causes are entered for hearing, by the Attornies in each cause, the Record is handed to the Judge to peruse and observe the pleadings, and what issues the parties are to maintain and prove. If no plea *puis darrein continuance* (see title *Pleading* I. 3.) intervenes, the Jury being completed, sworn, and ready to hear the merits, in order to fix their attention the closer to the facts which they are impanelled and sworn to try, the pleadings are opened to them by Counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question. The opening Counsel briefly informs them what has been transacted in the Court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings; and lastly, upon what point the issue is joined, which is there sent down to be determined. Instead of which, formerly, the whole record and process of the pleadings was read to them in *English* by the Court, and the matter in issue clearly explained to their capacities. The nature of the case, and the evidence intended to be produced, are next laid before them by Counsel also on the same side; and, when their evidence is gone through, the Advocate on the other side opens the adverse case, and supports it by evidence; and then the party which began is heard by way of reply. 3 *Comm. c.* 23.

As to the nature of the Evidence at the Trial, see this Dictionary, titles *Evidence*; *Jury* III.

When the Evidence is gone through on both sides, the Judge, in the presence of the parties, the Counsel, and all others, sums up the whole to the Jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of Law arising upon that evidence: The Jury then (unless the case be very clear) withdraw from the Bar to consider of their verdict; and when they are unanimously agreed, return, and before they deliver their verdict, the plaintiff is bound to appear in Court, by himself, Attorney, or Counsel, in order to answer the amercement to which by the old Law he is liable, in case he fails in his suit, as a punishment for his false claim. To be *amerced*, or *à mercie*, is to be at the King's mercy with regard to the fine to be imposed; *in misericordiâ Domini Regis pro falso clamore suo.* The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be nonsuit, *non sequitur clamorem suum.* Therefore it is usual for a plaintiff, when he or his Counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself; whereupon the Crier is ordered to call the plaintiff, and if neither he, nor any body for him, appears, he is nonsuited, the Jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that a nonsuit is more eligible for the plaintiff, than a verdict against him. See title *Nonsuit*; and further, title *Jury* III.

When a verdict will carry all the costs, and it is doubtful, from the evidence, for which party it will be given, and the action is trivial, though founded in strict Law, it is a common practice for the Judge to recommend, and the parties to consent, that a *Juror shall be withdrawn*: And thus no verdict is given, and each party pays his own costs.

If the plaintiff appears, the Clerk asks the Jury who they find for? and if for the plaintiff, what damages? The Jury naming the sum, and what costs, or pronouncing for the defendant, the Associate enters the verdict on the back of the panel of the Jurors' names, and repeats it to the Jury, which finishes the *Trial*.—The Verdict, Nonsuit, or whatever else passes at the Trial, is entered on the back of the Record of *Nisi Prius*: which entry, from the *Latin* word it began with, is called the *Postea*, the substance of which is, that *postea, afterwards*, the said plaintiff and defendant appeared by their Attornies at the place of Trial, and a Jury being sworn, found such a Verdict; or as the case may happen. This, being added to the roll, is returned to the Court from which it was sent, and the history of the cause is thus continued. See titles *Pleading*; *Practice*; *Record*.

When the cause is tried at the Sittings in *London* or *Middlesex*, the Associate in the Court of *K. B.* delivers the record to the party for whom the verdict is given; and he afterwards indorses the *Postea*, from the Associate's Minutes, on the Panel: But when the cause is tried at the Assises, the Associate keeps the record till the next Term, and then delivers it, with the *Postea*

 indorsed

indorsed thereon, to the party obtaining the verdict. On a motion for a new Trial, the *Postea* was brought into Court, and after the new Trial had been denied, the *Postea* could not be found; the Court, on debate, ordered a new one to be made out, from the record above, and the Associate's notes. If the *Postea* be wrong, it may be amended by the Plea-roll, by the memory or notes of the Judge, or by the notes of the Associate or Clerk of Assise. *Tidd's Pract. K.B.*; and see *Sellon's Pract.*

After these proceedings, the party entitled proceeds to enter up his *Judgment*; for which a certain period is allowed, and of which notice must be given to the opposite party by a rule of Court: And within the time allowed by that rule, motion must be made for a *New Trial*, (see *post*. III.) or in arrest of Judgment, &c. See titles *Judgment*; *Practice*; *Motion*, &c.

Many deserved eulogies are bestowed on this mode of Trial by Jury, in the Commentaries; where also some defects in it are suggested; as, the want of a complete discovery by the oath of the parties; the want of power to examine witnesses abroad; or to compel the production of books and papers belonging to the parties; and the prejudices or inconveniences arising from the locality of Trial and jurisdiction.—All, or most of these defects are, however, generally remedied in practice: And, on the whole, this mode of decision will be found (with all its unavoidable imperfections) the best criterion for investigating the truth of facts ever established in any country. See 3 *Comm. c.* 23.

Seisin of a house in the *East Indies* is not triable here. 1 *Strange* 646. In covenant the action was laid in *London*, and issue joined upon a feoffment in *Oxfordshire*, of lands in that county, and the cause was tried in *London*; after verdict it was objected that the Trial ought to have been in *Oxfordshire*; but resolved, that by the *stat.* 17 *Car.* 2, it was well tried in the county where the action was brought: But though the words of that statute are, that it shall be good, if tried by the county where the action is laid, it hath been adjudged, that must be understood of a Trial by the county where the matter in issue doth arise; for otherwise it would destroy the whole Law concerning Trials by Juries. 3 *Salk.* 364. See this Dict. titles *Action*; *Venue*; *Indictment*, &c.

II. THE SEVERAL methods of Trial and Conviction of *Offenders*, established by the Laws of *England*, were formerly more numerous than at present; and among them were reckoned the Trial by *Ordeal*; by *Corsned*; and by *Battel*. See this Dictionary, under those titles.

The Trial of Peers, in cases of Treason and Felony, or Misprision of either, is by the Peers of *Great Britain* in the Court of Parliament, or the Court of the Lord High Steward, when a Peer is indicted: For in case of *Appeal*, and all other criminal prosecutions therein, for the offences above mentioned, they are tried like Commoners by a Jury. 9 *Rep.* 30: 3 *Inst.* 30: 2 *Inst.* 49. See this Dictionary, titles *Appeal*; *Peers* IV.

The Trial by Jury, or the Country, *per patriam*, is also that Trial by the Peers of every *Englishman*, which, as the grand bulwark of his liberties, is secured to him by the Great Charter.

As to the mode of proceeding and giving the verdict, in the Trial of Criminal Cases, see, in general, titles *Jury* IV. 2 *Evidence* (*Introd.*); *Treason* V.

The following summary will give a general idea of the nature of Trials in Criminal Cases:

The Bill of indictment against an offender having been prepared; the party prosecutor and others being bound over to give evidence, the Grand Jury having found the Bill; the prisoner is brought to the bar of the Court; and the Crier, or Clerk of the Arraigns, says to him, "*A. B.* hold up thy hand: Thou standest indicted by the name of *A. B.* for such a felony, &c. (reciting the crime laid in the indictment): How sayest thou, art thou guilty of this felony, &c. whereof thou standest indicted, or Not Guilty?" To which the prisoner answers, "Not Guilty:" Whereupon the Clerk of the Peace says, "Culprit, (see title *Pleading* II,) How wilt thou be tried?" And the offender answers, "By God and my Country."

This was formerly a very significant question and answer, when there were Trials by Battel, and by Ordeal, as well as by Jury; and when the offender answered the question, "By God and his Country," it shewed that he made choice to be tried by a Jury: But now there is no other way of Trial of Criminals. *Blount's Dict.*

When the prisoner has pleaded Not Guilty, (which is the common plea,) it is to be recorded; and then the Petit Jury are called upon the panel, and a full Jury appearing, the prisoner is told they are to pass upon his life and death, and that he may challenge any of them as they come to the book to be sworn, and before they are sworn; for not being indifferent, but partial, or other defect, &c. Then the Jury are sworn, well and truly to try the prisoner, and to bring in a true verdict. This being done, the indictment is recited, and the Jury are acquainted with the particular crimes of which the prisoner stands indicted; and the Clerk of the Peace, addressing the Jury, states the crime laid in the indictment; and adds, "To which indictment he hath pleaded Not Guilty, and for his Trial hath put himself upon God and his Country, which Country you are: So that you (the Jury) are to inquire whether he be guilty of the felony, &c. whereof he stands indicted, or not? If you find him Guilty, you are to make inquiry into what goods and chattels he had at the time that the said felony, &c. was committed, or at any time since: And if you find him Not Guilty, you shall inquire whether he did fly for it; and if he fled for it, what goods, &c. he had at the time of his flight; but if you find him Not Guilty, and that he did not fly, you shall then say no more." Then the Clerk of the Peace swears the witnesses to give true evidence; to speak the whole truth, and nothing but the truth; and when the evidence is given to the Jury concerning the prisoner, the Jury (if they go out of the Court to consider of their verdict) are to be kept in a room, by a sworn Bailiff appointed, without meat, drink, fire, or candle, and without any persons speaking to them, till they bring in their verdict. See title *Jury* IV. All things being given in charge, the Jury go to their room, and consider of the matter; when they are all agreed, and returned within or near the bar, the prisoner is brought forth, and the Jury are called over; who all appearing, and the prisoner being set to the bar, the Clerk of the Peace says to them, "Look upon the prisoner, you Gentlemen of the Jury; How say you, is *A. B.* Guilty of the felony, &c. of which he stands indicted, or Not Guilty?" If the Jury say *Not Guilty*, it is recorded, and the prisoner taken away; if they say *Guilty*, the Clerk of

of the Peace says, "Gentlemen of the Jury, hearken to your verdict as the Court hath recorded it; You say *A. B.* is Guilty of the felony, *&c.* whereof he stands indicted:" To which they answer "Yes:" Then proclamation is made for all persons to keep silence, on which the prisoner is set to the bar, and sentence passed upon him; after which an order or warrant is made for his execution.—Though this part of passing sentence only takes place immediately, in cases of Murder; the felons being all brought up together, at the end of the Sessions, to receive their several sentences.

It is not customary nor agreeable to the general course of proceedings, (unless by consent of parties, or where the defendant is actually in gaol,) to try persons, indicted for misdemeanors, at the same Court in which they have pleaded *Not Guilty*, or traversed the indictment. But they usually give security to the Court to appear at the next Assizes or Sessions, and then and there to try the traverse, giving notice to the Prosecutor of the same. 4 *Comm.* c. 27 *p.* 351.

Every defendant, indicted for a misdemeanor, should give full eight days' notice of Trial to the prosecutor, before the Assises, if the Trial is to be held; at the Sessions, it is usual to give two or three days' notice: Or the Justices at Sessions fix, as a general rule, what time they think a reasonable notice in such cases. *Cro. Circ. Comp.* 17; 48.

When the Jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced by the Counsel for the Crown or Prosecution. But it is a settled rule at Common Law, that no Counsel shall be allowed a prisoner upon his Trial, upon the General Issue *in any capital crime*, unless some point of Law shall arise proper to be debated.—This has been considered as so great a hardship, and so very inconsistent with the general principles of the *English* Laws, that the Judges never scruple to allow a prisoner Counsel, to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact: But the Counsel are not allowed to address the Jury; except in cases of *Treason*, under *stat.* 7 *W.* 3. c. 3. See title *Treason* V. But in matters of Law, or in the Trial of Issues, or collateral facts, prisoners are entitled to the full assistance of Counsel. See 4 *Comm.* c. 27: *Fost.* 232, 242.

If the Jury find the prisoner *Not Guilty*, he is then for ever quit and discharged of the accusation, except he be *appealed* of Felony, within the time limited by Law. See title *Appeal.* And upon such his acquittal or discharge, for want of prosecution, he shall be immediately set at large, without payment of any fee to the Gaoler. *Stat.* 14 *Geo.* 3. c. 20. But if the offender is convicted, two collateral circumstances immediately arise, 1. On a conviction, (or even upon an acquittal where there was a reasonable ground to prosecute, and in fact a *bonâ fide* prosecution,) for any Grand or Petit Larceny, or other Felony, the reasonable expences of prosecution, and also, if the prosecutor be poor, a compensation for his trouble and loss of time, are by *stats.* 25 *Geo.* 2. c. 36: 18 *Geo.* 3. c. 19, to be allowed him out of the County stock, if he petitions the Judge for that purpose; and by *stat.* 27 *Geo.* 2. c. 3, explained by the same statute 18 *Geo.* 3. c. 19, all persons, appearing upon recognisance or *subpœna* to give evidence, whether any indictment be preferred or not, and as well without conviction as with it, are entitled to be paid their charges, with a farther allowance (if poor) for their trouble and loss of time. 2. On a conviction of Larceny, in particular, the prosecutor shall have restitution of his goods; as to which, see this Dictionary, title *Restitution.*

III. Causes of suspending the Judgment, by granting A New Trial, are at present wholly *extrinsic*; that is, arising from matters foreign to, or dehors the record. —Of this sort are want of Notice of Trial; or any flagrant misbehaviour of the party prevailing towards the Jury, which may have influenced their verdict; or any gross misbehaviour of the Jury among themselves; also, if it appears by the Judge's report, certified to the Court, that the Jury have brought in a verdict without, or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the Judge himself has misdirected the Jury, so that they found an unjustifiable verdict; for these, and other reasons of the like kind, it is the practice of the Court to award a *New*, or *Second* Trial. But if two Juries agree in the same or a similar verdict, a third Trial is seldom awarded; for the Law will not readily suppose, that the verdict of any one subsequent Jury can countervail the oaths of the two preceding ones. 3 *Comm.* c 24. Though the Court will grant any number of new Trials in the same Action, if the Jury find verdicts contrary to the established Law. *Tindal* and *Brown*, 1 *Term Rep.*

The exertion of these superintendent powers of the King's Courts, in setting aside the verdict of a Jury, and granting a New Trial, on account of misbehaviour in the Jurors, is of a date extremely ancient. There are instances, in the Year-books of the reigns of *Edward* III., *Henry* IV., and *Henry* VII. of Judgments being staid, (even after a Trial at Bar,) and new *Venire's* awarded, because the Jury had eat and drank without consent of the Judge, and because the plaintiff had privately given a paper to a Juryman before he was sworn. And upon these the Chief Justice *Glynn*, in 1655, grounded the first precedent that is reported in our books, for granting a New Trial upon account of *excessive damages* given by the Jury; apprehending, with reason, that notorious partiality in the Jurors was a principal species of misbehaviour. *Sty.* 466. A few years before, a practice took rise in the Common Pleas, of granting New Trials upon the mere Certificate of the Judge, (unfortified by any report of the evidence,) that the verdict had passed against his opinion; though Chief Justice *Rolle* (who allowed of New Trials in case of misbehaviour, surprise, or fraud, or if the verdict was notoriously contrary to evidence) refused to adopt that practice in the Court of King's Bench. And at that time it was clearly held for Law, that whatever matter was of force to avoid a verdict, ought to be returned upon the *Postea*, and not merely surmised by the Court; lest Posterity should wonder why a new *Venire* was awarded, without any sufficient reason appearing upon the record. But very early in the reign of *Charles* II. New Trials were granted upon *Affidavits*; and the former strictness of the Courts of Law, in respect of New Trials, having driven many parties into Courts of Equity, to be relieved from oppressive verdicts; they are now more liberal

liberal in granting them; the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one Trial, the injured party is entitled to another. 3 *Comm. c.* 24.

Formerly, the principal remedy for reversal of a verdict unduly given, was by writ of Attaint; which is at least as old as the institution of the Grand Assise by *Henry* II. in lieu of the *Norman* Trial by Battel; and as to which, see this Dictionary, title *Attaint*.

Next to doing right, the great object in the administration of public justice, should be to give public satisfaction. If the verdict be liable to many objections and doubts, in the opinion of his Counsel, or even in the opinion of By-standers, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive; he would arraign the determination as manifestly unjust; and abhor a Tribunal which he imagined had done him an injury without a possibility of redress. 3 *Comm. c.* 24.

Granting a new Trial, under proper regulations, cures all these, and many other, inconveniences; and at the same time preserves entire, and renders perfect, that most excellent method of decision, which is the glory of the *English* Law. A new Trial is a rehearing of the cause before another Jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former Verdict on the one side, or the Rule of Court for awarding such second Trial on the other; and the subsequent verdict, though contrary to the first, imports no tittle of blame upon the former Jury; who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the Counsel better prepared, the Law is more fully understood, the Judge is more master of the subject, and nothing is now tried but the real merits of the case. 3 *Comm. c.* 24.

A sufficient ground must however be laid before the Court, to satisfy them that it is necessary to justice that the cause should be farther considered. If the matter be such, as did not, or could not, appear to the Judge who presided at *Nisi Prius*, it is disclosed to the Court by Affidavit; if it arises from what passed at the Trial, it is taken from the Judge's information, who usually makes a special and minute report of the evidence. Counsel are heard on both sides, to impeach or establish the verdict, and the Court give their reasons at large, why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of Law which arose at the Trial are, upon full deliberation, clearly explained and settled. 3 *Comm. c.* 24.

Nor do the Courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new Trial is not granted, where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right, or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcileable to conscience. Nor is it granted where the scales of evidence hang nearly equal: that which leans against the former verdict, ought always very strongly to preponderate. 3 *Comm. c.* 24.

In granting such farther Trial, (which is matter of sound discretion,) the Court has also an opportunity, which it seldom fails to improve, of supplying the defects in this mode of Trial, before shortly alluded to, by laying the party applying under all such equitable terms, as his antagonist shall desire, and mutually offer to comply with; such as, the discovery of some facts upon oath; the admission of others not intended to be litigated; the production of deeds, books, and papers; the examination of witnesses, infirm or going beyond sea; and the like. And the delay and expence of this proceeding are so small and trifling, that it seldom can be moved for to gain time, or to gratify humour. The motion must be made within the first four days of the succeeding Term after the Verdict, within which Term it is usually heard and decided. And it is worthy observation, how infinitely superior to all others the Trial by Jury approves itself, even in the very mode of its revision. In every other country of *Europe*, and in those of our own Tribunals which conform themselves to the process of the Civil Law, (the *Scotch* Courts, for example,) the parties are at liberty, whenever they please, to appeal from day to day, and from Court to Court, upon questions merely of fact; which is a perpetual source of obstinate chicane, delay, and expensive litigation. With us, no new Trial is allowed, unless there be a manifest mistake, and the subject-matter be worthy of interposition. The party who thinks himself aggrieved, may still, if he pleases, have recourse to his writ of *Attaint* after judgment; in the course of the Trial he may *demur to the Evidence*; or tender a *Bill of Exceptions*. And, if the first is totally laid aside, and the other two very seldom put in practice, it is because long experience has shewn, that a motion for a second Trial is the shortest, cheapest, and most effectual cure for all imperfections in the verdict; whether they arise from the mistakes of the parties themselves, of their Counsel or Attornies, or even of the Judge or Jury. 3 *Comm. c.* 24.

If the verdict of the Jury be agreeable to Equity and Justice, the Court will not grant a new Trial, though there may have been an error in the admission of evidence, or in the direction of the Judge. 4 *Term Rep.* 468. —And it will not be granted merely because it has been discovered, after Trial, that a witness examined was incompetent. 1 *Term Rep.* 717.—But excessive damages in all cases, except in actions for Adultery, are a sufficient ground to grant a new Trial. 5 *Term Rep.* 257.

A new Trial may be granted on account of the misconduct of the Jury, as if they have referred to chance to determine the party for whom the verdict was given: But the Courts have frequently refused to hear any affidavit of such conduct from the Jury themselves. 1 *Term Rep.* 11.

It is generally said, that there cannot be a new Trial, in penal actions and criminal prosecutions, when there is a verdict *for the defendant*; the principle of this being the great favour which the Law shews to the liberty of the Subject. But the rule does not extend to informations in the nature of *Quo Warranto*. See that title, and 2 *Term Rep.* 484.—Nor does it extend to an action on a penal statute, in which a verdict is given for the defendant, in conse-

consequence of the misdirection of the Judge. 4 *Term Rep.* 753.

See further, *Tidd's Practice*; and on this subject of Trial in general, and as connected therewith, see this Dictionary, titles *Jury*; *Pleading*; *Practice*; *Assises*; and other applicable titles.

If the issue tried in any cause is not joined, it is not a good Trial; except it be an issue in Chancery in the Petit Bag side, which is to be sent from thence to be tried in *B. R. Hil.* 22 *Car.* It is a Mis-Trial for a thing to be tried before a Judge, who hath interest in the thing in question; and if a cause is tried by a Jury out of a wrong county, or there be any error in the process against the Jurors, or it is directed to a wrong officer, &c. it is a Mis-Trial; likewise, where matter of record is tried by a Jury, it will be a Mis-Trial; but if the matter of record be mixed with matter of fact, Trial by Jury is good. *Hob.* 124. A Mis Trial is helped by the Statute of Jeofails. See titles *Amendment*; *Pleading*.

TRIBUCH; See *Castigatory*.

TRICENNALE; See *Trental*.

TRICESIMA, An ancient custom in a borough in the county of *Hereford*, so called, because thirty burgesses paid 1*d.* rent for their houses to the Bishop, who is Lord of the manor. *Lib. Nigr Heref.*

TRIDINGMOTE, The Court held for a Triding or Trithing. See *Trithing*.

TRIENNIAL ELECTIONS; See *Parliament* VIII.

TRIGINTALS; See *Trental*.

TRIHING; See *Trithing*.

TRILION, A word used by merchants in accounts, to shew that the word million is thrice mentioned. *Merch. Dict.* It signifies millions of millions of millions.

TRIMILCHI, The *English Saxons* denominated the month of *May Trimilchi*; because they milked their cattle three times every day in that month. *Beda*.

TRINITY, *Trinitas*.] The number of three Persons in the Godhead or Deity; denying any one of the Persons in the *Trinity* to be God, is subject to divers penalties and incapacities by *stat.* 9 & 10 *W.* 3. *c.* 32. See title *Blasphemy*.

TRINITY-HOUSE, A kind of College at *Deptford*, belonging to a company or corporation of seamen, who have authority by the King's charter to take knowledge of those that destroy sea marks; also to redress the faults of sailors, and divers other things belonging to navigation. See *stat.* 8 *Eliz. c.* 13; and title *Pilots*.

TRINK, A fishing net, or engine to catch fish. *Stat.* 2 *Hen* 6 *c.* 15.

TRINOBANTES, The ancient inhabitants of *Middlesex*, *Essex*, *Hertfordshire*, &c.

TRINODA NECESSITAS, Signified a threefold necessary tax, to which all lands were liable, in the *Saxon* times, *i. e.* for repairing of bridges; the maintaining of castles or garrisons; and for expeditions to repel invasions: And in the King's grants, and conveyances of lands, these three things were excepted in the immunities from other services, &c. *Paroch. Antiq.* 46: *Cowell*: *Selden, in not. Eadm.*

TRIORS, TRIOURS, or TRIERS, Such as are chosen by the Court to examine whether a challenge made to the panel of Jurors, or any of them, be just or not. *Broke* 122. See title *Jury* II.

TRIORS, LORDS; See title *Peers* IV.

TRIORS OF JURORS; See title *Jury* II.

TRIPODIUM, *Leg. Hen.* 1. *c.* 64. *In quibus vero causis triplicem ladam haberet, ferat judicium* tripodii, *i. e.* 60 *solid.* The meaning is, that as for a small offence, or for a trivial cause, the composition was twenty shillings; so for a great offence, which was to be purged *triplici lada*, the composition was to be three times twenty shillings, viz. *tripodio. Cowell.*

TRIRODA TERRÆ, A quantity of land, containing three rods or perches. *MS. El. Ashmole Mus.*

TRISTEGA, The uppermost room in the house, a garret or room three stories high *Matt. Paris, an.* 1247.

TRISTIS, said to be from Fr. *Traist*, i. e. *Trust*.] An immunity, whereby a man is freed from attendance on the Lord of a forest when he is disposed to chase within the forest; and, by this privilege, he shall not be compelled to hold a dog, to follow the chace, or stand at any place appointed, which otherwise he is obliged to, on pain of amerciament. *Manwood, par.* 1. *pag.* 86.

TRISTRA, A post or station, in hunting. *Cowell.*

TRITHING; TRITHING REEVE; The third part of a County, or three or more Hundreds or Wapentakes, were called a Triding, or Trithing; such sort of portions are the Laths in *Kent*, the Rapes in *Sussex*, and the Ridings (corrupted from the word Trithing) in *Yorkshire*; and those who governed these Trithings were thereupon called Trithing-Reeves, before whom were brought all causes that could not be determined in the Wapentakes or Hundreds. See *Spelman of the ancient Government of England, p.* 52.

The term *Trithing* is also used for the Court held within the circuit of a *Trithing*, of the nature of a Court-Leet, but inferior to the County Court, to which causes might be removed from them. *Magna Charta, c.* 36.

TRIUMVIR, A Trithing man, or Constable of three Hundreds. *Hist. Eliens.*

TRONAGE, *Tronagium*.] A customary duty or toll for weighing of wool: According to *Fleta*, *trona* is a beam to weigh with, mentioned in *stat. Westm.* 2. *c.* 25. *Tronage* being used for the weighing of wool in a staple or public mart, by a common *trona* or beam; which, for the Tronage of wool in *London*, was fixed at *Leaden Hall. Fleta, lib.* 2. *c.* 12. The Mayor and Commonalty of *London* are ordained keepers of the beams and weights for weighing merchants' commodities, with power to assign clerks, and porters, &c. of the great beam and balance; which weighing of goods and wares is called Tronage: And no stranger shall buy any goods in *London*, before they are weighed at the King's beam, on pain of forfeiture. *Chart. King Hen.* VIII.

TRONATOR, from *Trona*, i. e. *Statera*.] An officer in the city of *London*, who weighs the wool brought thither.

TROPER, *Troperium*.] A book of alternate turns or responses in singing Mass; called *Liber sequentiarum*, by *Lindewoode. Hoved. Hist. p.* 283.

TROPHY-MONEY, Money formerly raised and collected in the several counties of *England*, towards providing harness and maintenance for the Militia, &c. See *Militia*.

TROVER, From the Fr. *Trouver*, i. e. *invenire*.] An action which lies where one man gets possession of the goods of another, by delivery, *finding*, or otherwise, and refuses to deliver them to the owner, or sells or converts them

them to his own use, without the consent of the owner; for which the owner, by this action, recovers the value of his goods. *Esp. Ni. Pri. cap* 12: 2 *Lill. Abr.* 618.

The action of *Trover and Conversion* was in its original an action of Trespass on the Case, for recovery of damages, against such person as had actually *found* another's goods, and refused to deliver them on demand, but converted them to his own use: from which finding and converting, it is called an action of Trover and Conversion. The freedom of this action from Wager of Law, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of Detinue, that, by a fiction of Law, actions of Trover were at length permitted to be brought against any man who had in his possession, by any means whatsoever, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the Conversion: for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein, unless the owner be for ever unknown: and therefore he must not convert them to his own use, which the Law presumes him to do, if he refuses to restore them to the owner: for which reason, such refusal alone is, *primâ facie*, sufficient evidence of a Conversion. The fact of the finding, or Trover, is therefore now totally immaterial: for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and, if he proves that the goods are his property, and that the defendant had them in his possession, it is sufficient. But a Conversion must be fully proved: and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of *Detinue* or *Replevin*. (See those titles.) 3 *Comm. c.* 9.

In Trover, *the Conversion is the Gist of the Action*; and the manner in which the goods come to the defendant's hands is but inducement; the plaintiff may therefore declare upon a *devenerunt ad manus* generally, or specially *by finding*; (though in fact the defendant came to them by delivery;) or that the defendant fraudulently obtained them; as by winning them at cards from the plaintiff's wife: And this being inducement, need not be proved: but it is sufficient to prove *property in the plaintiff*; the *possession* of, and *conversion* by, the *defendant*. *Bull. N. P.* 33: *Esp. N. P. c.* 12.

If in Trover, an actual Conversion cannot be proved, then proof is to be had of a demand made, before the action brought, of the thing for which the action is commenced, and that the thing demanded was not delivered: In this case, though an actual Conversion may not be proved, a demand, and refusing to deliver the things demanded, is a sufficient evidence to the Jury that he converted the same, till it appears to the contrary. 10 *Rep.* 56, 401: 2 *Lill.* 619.

Where a defendant really comes to the possession by finding, denial is a Conversion; but if he had the goods, *&c* by delivery, there denial is no Conversion, but evidence of a Conversion: And in both cases, the defendant hath a lawful possession, either by finding or by delivery; and where the possession is lawful, the plaintiff must shew a demand and a refusal, to make a Conversion: Though if the possession was tortious, as if the defendant takes away the plaintiff's hat, the very taking is a sufficient proof of the Conversion, without proving a demand and refusal. *Sid.* 264: 3 *Salk.* 365.

By *Holt*, Chief Justice, the denial of goods to him who hath a right to demand them, is a Conversion; and after a demand and refusal, if the defendant tender the goods, and the plaintiff refuse to receive them, that will go only in mitigation of damages; not to the right of the action of Trover, for the plaintiff may have that still. *Mod. Cas.* 212. An action of Trover and Conversion may be brought for goods, although the goods come into possession of the plaintiff before the action is brought; which doth not purge the wrong, or make satisfaction for that which was done to the plaintiff by detaining the goods: If a man takes my horse and rides him, and afterwards delivers him to me, Trover lies against him: for this is a Conversion, and the re-delivery is no bar to the action. 1 *Danv. Abr.* 21: 2 *Lill.* 618.

If goods are delivered to one to deliver over to another, and he to whom they were first delivered do afterwards refuse to deliver them over, and converts them to his own use; he is liable to action of Trover not only by him who first delivered them, but also by him to whom they were to be delivered: And a plaintiff may choose to have his action of Trover against the first finder of goods, or any other who gets them afterwards by sale, *&c.* 1 *Bulst.* 68: 1 *Leon* 183.

If a common carrier has goods delivered to him to carry to a certain place, and a stranger takes them out of his possession, and converts the goods to his own use; action of Trover and Conversion lies, for the carrier, against him. 1 *Mod.* 31. Trover doth lie against a common carrier for negligence in losing goods; though it doth not for an actual wrong: And if goods are stolen from a carrier, he may not be charged in Trover and Conversion; but by action upon the case on the custom of the Realm, *&c.* 2 *Salk.* 655. See title *Carrier*.

Where goods are stolen, and, before prosecution of the offender by indictment, the party robbed brings action of Trover, it lies not; for so felonies might be compounded: But where *A.* steals the goods or money of *B.* and is convicted, and hath his clergy, upon the prosecution of *B*, if *B.* brings Trover and Conversion for the money, and on Not Guilty pleaded this special matter is found, the plaintiff shall recover. 1 *Hale's Hist. P. C.* 546. See title *Restitution*.

If, upon a *Fieri Facias*, the Sheriff takes goods in execution, and, before the sale of them, a stranger takes them away and converts them to his own use; the Sheriff may have an action of Trover and Conversion, as he had a lawful possession, and is answerable for them. 2 *Saund.* 47. An Executor may have Trover for the goods of the Testator; the Law gives him a property, which draweth the possession to it, though there be not an actual possession. *Latch* 214.

There must be a right or property in the goods, or a lawful possession, *&c.* which is to be proved by the plaintiff in Trover, before the goods came to the defendant's hands: and such owner may maintain Trover against any person into whose hands the goods have fallen, though the person in whose possession they are found may (as far as relates to himself) have honestly obtained it: provided it was not by sale in market overt, or by other fair transfer. *Espin. N. P. c.* 12.

Trover lies for the finder of a jewel, against a goldsmith who defrauded him of it; 1 *Stra.* 503; for possession alone gives a sufficient title to maintain this action against all persons, except against the actual owner. Drawing out part of a vessel, and filling it up with water, is Conversion of all the liquor. 1 *Stra.* 576. A recovery in Trover vests the property of the goods in the defendant. 2 *Strange* 1078.

In Trover for a bond, the plaintiff need not shew the date; for the bond being lost or converted, he may not know the date: and if he should set out the date, and mistake it, he would fail in his action. *Cro. Car.* 262. If the defendant find the bond, and receive the money, action of Account lieth against the receiver, and not Trover. *Cro. Eliz.* 723.

The place of Conversion must be generally mentioned in Trover, or it will be naught. *Cro. Eliz.* 78, 79. And yet where the Trover of goods is in one county, and the Conversion in another county, the action brought for these goods may be laid in the county where the Conversion was, or in any other county, as it is only a transitory action; and neither the place of Trover, nor Conversion, are traversable. *Pasch.* 23 *Car. B. R.*

Trover lies against baron and feme, setting forth that they converted the goods to the use of the husband; for the feme may be a trespasser, and convert them to the husband's use, or the use of the stranger, but not to her own use; and if the Conversion be laid *ad usum* of herself and husband, or *ad usum proprium*, &c. it will not be good. *Cro. Car.* 494. In Trover, the plaintiff may lay a Conversion here, and prove it to have been in *Ireland*. *Stile* 331: 1 *Mod. Engl. Entr.* 393.

Action of Trover or Detinue, at the plaintiff's election, may be brought for goods detained; for it is but justice that the party should have his goods detained if they may be had, or else damages to the value for the detaining and Conversion of them. 2 *Lill. Abr.* 618. Action of Trespass, or Trover, lies for the same thing; though they cannot be brought in one declaration: And the allegation of the Conversion of the goods in trespass, is for aggravation of the damages, *&c.* *Cro. Jac.* 50: *Lutw.* 1526. See titles *Detinue*; *Trespass*.

Detinue doth not lie for money numbered; but Trover and Conversion lies for it: For though, in the finding and converting generally, the money of one person cannot be distinguished from that of another, all money being alike; yet the proof that the plaintiff lost, and the defendant converted so much, maintains the action, if the verdict finds it. *Jenk. Cent.* 208. Where money is given to a person to keep, though it be not in bags, action of Trover will lie; because this action is not to recover the money, but damages. *Poph.* 91: 3 *Salk.* 365. In case a master delivers corn to his servant to sell, who does so, and converts the money, the master may bring Trover against the servant. 2 *Bulst.* 307: 1 *Roll. Rep.* 59. Trover lieth not for any part of a freehold; but if doors fixed are removed and converted, it will lie. *Wood's Inst.* 540.

There is no proper plea in action of Trover, where it lies, but the General Issue *Not Guilty*; on which the special matter may be given in evidence, to prove the plaintiff hath no cause of action; or to entitle the defendant to the thing in controversy. 2 *Bulst.* 313. *Vide* also, 2 *Salk.* 654: *Yelv.* 198: *Cro. Car.* 27: 2 *Lill.* 622. But there are several instances of Special Pleas in Justification, in the books, though the purpose of many of them might have been answered by Evidence under the General Issue: Such plea in justification should always shew *a complete title* in the defendant; and such plea should either traverse the Conversion, or confess and avoid it: So the Statute of Limitations may be pleaded in Trover: and it begins to run from the time of the *Conversion*. See *Esp. N. P. c.* 12; and which see on the whole of the subject.

TROY-WEIGHT, *Pondus Trojæ*] A Weight of twelve ounces to the pound, having its name from *Troyes*, a city in *Champaign*, whence it first came to be used here. But see title *Pondus Regis*, for a different etymology; and this Dict. tit. *Weights*.

TRUCE, *Treuga*] A league or cessation of arms; anciently there were Keepers of Truces appointed; as King *Edw.* III. constituted, by commission, two Keepers of the Truce between him and the King of *Scots*, with this clause, *Nos volentes treugam prædictam quantum ad nos pertinet observari*, &c. *Rot. Scot.* 10 *Edw.* 3. See titles *Conservators of the Truce*; *Safe Conduct*.

TRUG-CORN, *Truga frumenti*] A measure of Corn. At *Leominster*, at this day, the Vicar hath Trug-Corn allowed him for officiating at some chapels of ease within that parish. *Liber Niger Heref.*

TRUNCUS, A Trunk set in churches, to receive the oblations of pious people; of which, in the times of Popery, there were many at several altars and images, like boxes which, since the Reformation, have been placed near the doors of churches, for receiving all voluntary contributions for the Poor: The customary free-will offerings that were dropt into those Trunks, made up a good part of the endowment of Vicars, and thereby oftentimes rendered their condition better than in latter times. See *Ordin. Vic. Lancast. Anno* 1430.

TRUSSA, A Truss, or bundle of Corn; mentioned among the customary services done by tenants. *Cartular. S. Edmund. MS.*

TRUST,

FIDUCIA, CONFIDENTIA.] A Confidence which one man reposes in another;—but, as generally used in Law, it is a right to receive the profits of land, and to dispose of the land itself (in many cases) for particular purposes, as directed by the lawful owner, or pointed out by settlement, *&c.* or by that deed of conveyance which created the Trust. A Trust is but a new name given to an Use.—For the origin of *Trusts*, and their former and present connexion with *Uses*, see this Dictionary under title *Uses*. What follows here is chiefly miscellaneous information on the nature and property of Trusts, and Trust-Terms; and the duty of Trustees: as to which, see more at large *Fonblanque's Treatise of Equity*, in the notes *passim*; and particularly, as to Trusts *Executory* and *Executed*, and the existing distinctions between them, *lib.* i. *c.* 6. § 8.—As to who may be seised to Use, or may be a Trustee, *lib.* ii. *c.* 6. § 1, *in n.*—What acts may or ought to be done by a Trustee, to alter or perfect the intent of his Trust, *lib* ii. *c.* 7. § 2, *in n.* And on the whole of the subject, *Vin. Ab.* tit. *Trust*:—And Mr. *Butler's* disquisition on this subject, in his note on 1 *Inst.* 290, *b.*

Trusts and legal estates are to be governed by the same rules; and this is a maxim which has universally prevailed. It is so in the rules of Descent, as in Gavelkind, and Borough-*English* lands; there is a *possessio fratris* of a Trust, as well as of a legal estate. The like rules in Limit-

Limitations, and also of barring Entails of Trusts, as of legal estates; *per* the Master of the Rolls; who said he thought there was no exception out of this general rule, nor is there any reason that there should; and that it would be impossible to fix boundaries, and shew how far, and no farther, it ought to go; and that perhaps in early times the necessity of keeping thereto was not seen, or thoroughly considered. 2 *P. Wms.* 645.

Declarations and Creations of Trust, of lands, tenements or hereditaments, are to be in writing, signed by the party empowered to declare such Trust, &c. *Stat.* 29 *Car.* 2. *c.* 3. But it is provided, that this shall not extend to Resulting Trusts, or Trusts arising by implication or construction of Law; which shall be of like force as before that act. See *post*, as to *Resulting Trusts*. Infants, seised of estates in fee in Trust, may make conveyances of such estates, by order of the *Chancery*. *Stat.* 7 *Ann.* c 19. If a man buys land in another person's name, and pays the money for the land, this will be a Trust for him that paid the money, though there be no deed declaring the Trust; because the Statute of Frauds extends not to Trusts raised by the implication of Law: And a bare declaration by parol, on a deed assigned, may prevent any resulting Trust to the assignor. 2 *Vent. Rep.* 361: 2 *Vern.* 294. Where there has been fraud in gaining a conveyance from another, that is a reason of making the grantee considered as a Trustee: But the *stat.* 29 *Car.* 2. *c.* 3, relates only to Equitable Trusts and Interests, and not to an Use, which is a legal estate. 1 *P. Wms.* 113.

There are only two kinds of Trusts by Operation of Law; either where the deed or conveyance has been taken in the name of one man, and the purchase-money paid by another; or where the owner of an estate has made a voluntary conveyance of it, and declared the Trust with regard to one part to be for another person, but hath been silent as to the other part: In which case he himself ought to have the benefit of that, it being plainly his intent. *Barnardist.* 388.

A Fine and Recovery of *Cestui-que-Trust* shall bar and transfer a Trust, as it should an estate at Law, if it were upon a consideration. *Chanc. Rep.* 49. See titles *Fine of Lands*; *Recovery*: and *Treat. Eq. lib.* i. c. 3. § 1, *in n.* And a *Cestui-que-Trust* may bar an entail of a Trust without fine or recovery, particularly, by Devise. See *Treat. Eq. l.* i. *c.* 4. § 40, *in n.*

In Equity, Trusts are so regarded, that no act of a Trustee will prejudice the *Cestui que-Trust*; for though a Purchaser for valuable consideration, without notice, shall not have his title any ways impeached, yet the Trustee must make good the Trust: But if he purchases, having notice, then he is the Trustee himself, and shall be accountable. *Abr. Cas. Eq.* 384. Where Trustees in a settlement join with tenant for life in any conveyance, to defeat a remainder, before it comes *in esse*, this is a plain breach of Trust; and those who claim under such deed, having notice of the Trust, will be liable to make good the estates. 2 *Salk.* 680. Yet in case a Trustee joins with *Cestui-que-Trust* in tail, in a deed to bar the entail, as it is no more than what he may be compelled to, it is no breach of his Trust. 1 *Chan. Cas.* 49, 213. See further, as to the several modes by which prejudice may be induced by acts of the Trustee, and of the interposition of Courts of Equity in favour of the Trustee and *Cestui-que-Trust*, *Treat. Eq. l.* ii. c. 3. § 1.

For much useful information, as to the manner in which the Courts have remedied the mischiefs arising from the secret nature of *Trusts*, both with respect to the *Cestui-que-Trust*, and the Public at large, see 1 *Inst.* 290, *b.* &c. and the long and learned note there.

This, with respect to the *Cestui-que-Trust* has been effected, in some degree, by Courts of Equity having held that *persons paying* money to Trustees, with notice of the Trust, are, generally speaking, obliged to see it properly applied.—It is perhaps to be wished that the operations and consequences of Trusts had been confined to the Trustee and *Cestui-que-Trust*: There is no doubt but the doctrine is, in many instances, of great service to the *Cestui-que-Trust*, as it preserves his property from the peculations, and other disasters, to which, if it were left solely to the discretion of the Trustee, it would necessarily be subject. Yet it may be questioned, whether the admission of it is not in general productive of more inconvenience than real good; for if the *Cestui-que-Trust* is a married woman, an infant, or otherwise incapable of giving assent to the payment of the money to the Trustee, the persons paying it cannot be indemnified against the Trustee's misapplication of it, but by paying it under the sanction of a Court of Equity. This retards and often absolutely impedes the progress of the business, involves the parties in an expensive and intricate litigation, and puts them to very great and, in other respects, useless expence. To avoid this, it is become usual to insert a clause in deeds or wills, that the receipts of the Trustees shall, of themselves, discharge the persons to whom they are given, from the obligation of seeing to the application of money paid by them as purchasers, &c. See this Dict. tit. *Purchase*; and further, 1 *Inst.* 290, *b. in n.*

The prevention of the mischief arising from Trusts, with respect to the Public, has been effected, in some measure, by the rule laid down in Courts of Equity, that in any competition of claims, where the Equity of the parties is equal, he who has the Law shall prevail. If a person has the legal estate or interest of the subject-matter in contest, he must necessarily prevail at Law over him whose right is only equitable, and therefore not even noticed by the Courts of Law: This advantage he carries with him even into a Court of Equity, so far, that if the equitable claims of the parties are of equal force, Equity will leave him who has the legal right in full possession of it; and not do any thing to reduce him to an equality with the other, who has the equitable right only. This very important rule of Equity is most fully illustrated, by an inquiry into the doctrine of Courts of Equity respecting *Trust-Terms of Years attendant upon the Inheritance*: In this inquiry, the origin and effect of these terms, and the general rules as to the cases in which it is necessary that they should be from time to time assigned to Trustees *to attend the inheritance, and protect a purchaser from all mesne incumbrances*, are very clearly and explicitly stated; though these rules must from their nature be subject to an endless variety of modifications. It is concluded by the learned Writer, that, in all cases of this description, it is infinitely better to err by an excess of care, than to trust any thing to hazard. "There is no doubt that the precautions used for the security of purchasers appear sometimes to be excessive; and satisfactory reasons cannot always be given for requiring some of them: Yet the more a person's experience increases, the more he finds the reason and real utility of them; and

the more he will be convinced that very few of the precautions required, by the general practice of the Profession, are without their use, or can be safely dispensed with. 1 *Inst.* 290, *b.* &c. *in notis*: And see *Treat. Eq. lib.* ii. *c.* 4. § 3, *in n.*; and also this Dict. title *Mortgage.*

By the operation of these long terms; the legal estate being separated from the beneficial interest, many inconveniences would have resulted from them, had not Courts of Equity interposed, and laid down certain rules, restrictive of the legal rights of the Trustee. Hence it became a rule in Equity, that where the Tenant for years is but a Trustee for the Owner of the inheritance, he shall not keep out his *Cestui-que-Trust*; nor, *pari ratione*, obstruct him in doing any act of Ownership, or in making any assurances of his estates; and therefore, in Equity, such a term for years shall yield and be moulded according to the uses, estates, or charges which the Owner of the inheritance declares or carves out of the Fee. See 1 *Term Rep.* 765. Courts of Law, feeling the reasonableness of this rule, allow it to prevail as an exception to the general rule, which requires a plaintiff in Ejectment to recover by the strength of a legal title; so that it is now established by many decisions, that, even at Law, an estate in Trust, merely for the benefit of the *Cestui-que-Trust*, shall not be set up against him; any thing shall rather be presumed. See *Cowp.* 46: *Doe* v. *Pott*, *Doug.* 721: *Bull. N. P. p.* 110, *Lade* v. *Holford*: 1 *T. Rep.* 758: 2 *T. Rep.* 698.

It has been decreed, that a Trust for a son, &c. shall pass with the lands into whose hands soever they come, and cannot be defeated by any act of the father or Trustees. And though a husband and wife have no children in many years, and they and the Trustees agree to sell the land settled, &c. it will not be permitted in Chancery. *Abr. Cas. Eq.* 391: 1 *Vern.* 181. A Termor grants his lands in Trust for himself for life, and to his wife for life, and after to his children for their lives, and then to *A. B.* This Trust to *A. B.* is good; though, if it had been to the heirs of their bodies, it would be otherwise. *Chanc. Rep.* 230, 239.

A Trust to pay portions, legacies, &c. out of the rents and profits of the lands, at the day prefixed, gives the Trustees power to sell; if the annual profits will not do it within that time, then they may sell the land, being within the intention of the Trust: And they cannot sell to raise the money, except it be to be paid at a certain time. *Rep. Chanc.* 176. A Trustee for sale of lands for payment of debts, paying debts to the value of the land, thereby becomes a purchaser himself. *Ibid.* 199. Where a Trustee for paying portions, pays one child his full share, and the Trust-estate decays, he shall not be allowed such payment. 2 *Chan. Ca.* 132. If one devises land to Trustees until his debts are paid, with remainder over, and the Trustees misapply the profits, they shall hold the land only till they might have paid the debts, if the rents had been duly applied; and after that the land is to be discharged, and the Trustees are only answerable. 1 *P. Wms.* 519. A person having granted a lease of land to Trustees, in Trust to pay all the debts which he should owe at his death, in a just proportion, without any preference; it was here declared, that the simple-contract debts became as debts due by mortgage, and should carry interest. *Ibid.* 229.

Trust of a fee-simple estate, or fee-tail, is forfeited by Treason, but not by Felony; for such forfeiture is by way of escheat, and an escheat cannot be but where there is a defect of a tenant; and here is a tenant. *Hard.* 495. See *Jenk. Cent.* 245. A Trust for a term is forfeited to the King, in case of Treason or Felony; and the Trustees in Equity shall be compelled to assign to the King. *Cro. Jac.* 513. If a bond be taken in another's name, or a lease be made to another in Trust for a person, who is afterwards convicted of Treason or Felony, they are as much liable to be forfeited, as a bond or lease made in his own name, or in his possession. See title *Forfeiture*; and *Treat. Eq. lib.* ii. *c.* 7. § 1, *in n.*

Trustees being obliged to join in receipts, one is not chargeable for money received by the other: In the case of executors it is otherwise. 1 *Salk.* 318: 2 *Vern. Rep.* 515.

But where Trustees so join in a receipt, that it cannot be distinguished what was received by one, and what by the other, there they shall both be charged with the whole: So, where one Trustee having received the Trust-money handed it over to his companion, he shall be charged; for where, by any act or any agreement of a Trustee, money gets into the hands of his companion, whether a Trustee or Co-executor, they shall both be answerable. So, if a Trustee be privy to the embezzlement of the Trust-fund by his companion, he shall be charged with the amount. *Treat. Eq.* ii. *c.* 7. § 5, *in n.*

It seems now to be settled, notwithstanding some old determinations to the contrary, that a Trustee (or Executor) is chargeable in Equity with *Interest* on the Trust-fund in his hands, wherever it appears that he has made Interest: and not only so, but if he appear to have employed the Trust-money in trade, whence he has derived profits beyond the rate of Interest, he shall account for the whole of such profits: And still further, if a Trustee, or Executor, retain money in his hands for any length of time, which he might by application to the Court, or by vesting in the Funds, have made productive, he shall be charged with Interest thereon. *Treat. Eq.* ii. *c.* 7. § 6, *in n.*—A Trustee is entitled to no allowance for his trouble in the Trust; but he will be paid his costs in case of an unfounded suit against him. *Treat. Eq.* ii. *c.* 7. § 3, *in n.*

A Trustee, robbed by his own servant, shall be discharged of it on account; though great negligence may charge him with more than he hath received, in the Trust. 2 *Chan. Ca.* 2: 1 *Vern.* 144.

Lord *Hobart* is stated to have been of opinion, that an action at Law might be maintained against a Trustee for Breach of Trust. See 1 *Eq. Ab.* 384, *in n.* But this opinion is inconsistent with Lord *Hardwicke*'s definition of a Trust; which is, that it is such a confidence between parties, that no action at Law will lie, but is merely a case for the consideration of Courts of Equity. 2 *Atk.* 612.—That a Trustee is liable, in Equity, for a Breach of Trust, was expressly determined in *Vernon* v. *Vaudrey*, *Barn. C.* 303. But it is material to observe, that even in Equity the *Cestui-que-Trust* is considered but as a simple-contract Creditor, in respect of such Breach of Trust; unless the Trustee has acknowledged the debt to the Trust-estate under hand and seal. See 2 *Atk.* 119: *Forrest.* 109.

Of a Resulting Trust, or Trust by Implication of Law.

It was ruled, by Lord Chancellor *Cowper*, that the Statute of Frauds, *stat.* 29 *Car.* 2. *c.* 3. § 8, which says, "That all Conveyances, where Trusts and Confidences

shall arise or result by implication of Law, shall be as if that act had never been made," must relate to Trusts and equitable Interests, and cannot relate to any use which is a legal estate. 1 *P. Wms.* 112. See *Treat. Eq. l.* ii. *c.* 5. § 1, and note there.

Nothing is more certain than that if a man makes a conveyance in Trust for such persons, and such estates as he shall appoint, and makes no appointment, the Resulting Trust must be to him and his heirs. The Trust in Equity must follow the rules of Law in the case of an Use, and that it would be so in the case of an Use is undoubtedly true, and that was Sir *Edward Clere*'s case, in 6 *Rep. per* Lord Chancellor. *Fitz-Gib.* 223.

Where a daughter's portion was charged upon the father's land, she, at the request of her father, had released her interest in the land, to the intent that he might be enabled to make a clear settlement thereof upon the son. It was declared by the Lord Keeper, that if this was done by the daughter without any consideration, there would be a Resulting Trust in the father, whereby he should be chargeable to the daughter for so much money. *Freem.* 305.

Where a Trustee purchases lands out of the profits of the Trust-estate, and takes the conveyance in his own name; it was formerly held, that though probably, if he could not make other satisfaction for the misapplication, these lands might be sequestered, yet they could not be declared to be a Trust for *Cestui que Use*, no more than if *A.* borrows money of *B.*, for it is not a Trust in writing; and a Resulting Trust it could not be, because that would be to contradict the deed by parol proof, directly against the Statute of Frauds. But it was allowed, that if this purchase had been recited to have been made with the profits of the Trust-estate, this appearing in writing might ground a Resulting Trust. And on appeal to the House of Lords, this decree was affirmed. *Kirk* v. *Webb*, *Chan. Prec.* 84. *pl.* 77. See 2 *P. Wms.* 414.

So, where a testator empowered the executor to lay out the personal estate in land, and settled it on *A.* and his heirs; and the executor being about to purchase, told *A.*'s mother of it, and asked her consent, but took the conveyance in his own name, and no Trust in writing was declared, but it was proved that he at several times declared it must be sold to make *A.* satisfaction; yet the Court (though inclined to decree a conveyance to *A.* the executor being dead insolvent) declared it could not, because there was no express proof of the application of the Trust-money. *Chan. Prec.* 168. *pl.* 139.—It has, however, been held in more modern cases, that evidence *aliunde* is admissible to shew, that the purchase was made with the Trust-money; and that upon such fact being clearly proved, a Trust will result. See *Ambl.* 409.

With respect to the cases in which a Trust shall result to the heir, where the particular purpose for which land was to be converted into money may have failed, see 3 *P. Wms.* 20, and *Mr. Cox*'s note (1) there, where the cases are collected and referred to their respective principles.

TRUSTEES OF PAPISTS, Are disabled to make presentations to Churches, by *stat.* 12 *Ann.* *c.* 14. See title *Papists*.

TUB, A measure containing sixty pounds weight of tea; and from fifty-six to eighty-six pounds of camphire, &c. *Merch. Dict.*

TUB-MAN; See title *Pre-audience*.

TUMBRELL, *Tumbrellum*, *Turbichetum*.] Is an engine of punishment, which ought to be in every Liberty that hath view of frank-pledge, for the correction of scolds and unquiet women. *Kitchin*, *fol.* 13. See titles *Castigatory*; *Pillory*.

TUN, *Sax.*] In the end of words, signifies a Town, or dwelling-place.

TUN, Lat. *Tunellum*.] A vessel of wine and oil, being four hogsheads. *Stat.* 1 *R.* 3. *c.* 12.—A Tun of Timber is a measure of forty solid feet, cut to a square. *Stat.* 12 *Car.* 2. *c.* 18. Twenty hundred weight is a Tun of Coals, &c. *Stat.* 9 & 10 *W.* 3. *c.* 13.

TUNNAGE, Lat. *Tunnagium*.] A custom or impost granted to the Crown for merchandize imported or exported, payable after a certain rate for every Tun thereof. See title *Customs on Merchandize*.

TUN-GREVE, Sax. *Tungerævus*, i. e. *villæ præpositus*.] A Town-Reeve or Bailiff, *qui in villis* (& *quæ dicimus maneriis*) *Domini personam sustinet, ejusque vice omnia disponit* & *moderatur*. *Spelman*.

TURBAGIUM, The liberty of digging Turfs. *Mon. Ang.* i. 632.

TURBARY, *Turbaria*, from *Turbus* or *Turba*, an obsolete *Latin* word for *Turf*.] Is a right to dig Turfs on a common, or in another man's ground. *Kitch.* 94. Also it is taken for the place where Turfs are dug. See title *Common of Turbary*.

TURBOTS, The importation of, is regulated by the *Navigation Acts*. See that title.

TURKEY COMPANY. The trade to the *Levant* subsisted under a charter in the 3d year of King *James* I. confirmed by letters patent of 13 *Car.* II. The incorporation was by the name of *The Governor and Company of Merchants of* England *trading into the* Levant *Seas*. The qualifications for admission to this Company were these: They were to be mere Merchants; and no person residing within 20 miles of *London* was to be admitted, unless he was made free of the City. The fee of admission was, by the charter of *Jac.* I., 25*l.* for those under 26 years old, and 50*l.* for those above that age. The greatness of this fee, and the peculiarity of the description of candidates, were thought unnecessary restraints: And by *stat.* 26 *Geo.* II. *c.* 18, it was enacted, that every Subject of *Great Britain* may be admitted, upon proper application, into *The Turkey Company*, upon paying the sum of 20*l.* and no more. § 1.—And all persons free of that Company may, separately or jointly, export from *Great Britain* to any port or place within the limits of the letters patent, in any *British* or Plantation-built ship, navigated according to Law, to any person being a freeman of the Company, and a Christian Subject, and submitting to the direction of the *British* Ambassador, and Consuls, any goods not prohibited to be exported; and import, in like manner, from any place within the said limits, raw silk, or any other goods purchased within those limits, and not prohibited by Law. § 3.

The limits of this trade were mentioned very generally in the first charter granted in 1581; the liberty there given was "to trade to *Turkey*." In the 2d charter, in 1593, the trade is specified more particularly; namely, "to *Venice*, *Zant*, *Cephalonia*, *Candia*, and other *Venetian* territories, the dominions of the Grand Seignior, by Land and Sea, and through his Countries over land to the *East Indies*." These charters were both temporary; the first for seven, the second for

twelve

twelve years. *Quære*, Did the limits continue the same under the charters of King *James* and *Car.* II.? *Reeves's L. S.* 213, 214.

TURKINS, A kind of sky-coloured cloth, mentioned in *stat.* 1 *R.* 2. *c.* 8.

TURN, or TOURN, The great Court-Leet of the County, as the County-Court is the Court-Baron; of this the Sheriff is Judge, and this Court is incident to his office; wherefore it is called the Sheriff's Tourn: And it had its name originally from the Sheriff's taking a Turn or Circuit about his Shire, and holding this Court in each respective Hundred. See 4 *Comm.* 273: 2 *Hawk. P. C. c.* 10.

The nature of the jurisdiction of this and the Court-Leet are exactly the same, the former being only a larger species of the latter, extending over more territory, but not over more causes. Much of the business of both has now (we will not say whether properly or not) by degrees devolved on the Court of Quarter Sessions. See titles *County-Court*; *Court Leet*; and 2 *Hawk. P. C. ubi supra*; and *Com. Dig.* title *Leet*.

The Turn is a Court of Record; and, by the Common Law, every Sheriff ought to make his Turn or Circuit throughout all the Hundreds in his County, in order to hold a Court in every Hundred for redressing common grievances, and preservation of the peace; and this Court might be holden at any place within the Hundred, and as often as the Sheriff thought fit: But this having been found to give the Sheriff too great power of oppressing the People, by holding his Court at such times and places at which they could not conveniently attend, and thereby increase the number of his amercements; by the Statute of *Magna Charta*, *c.* 35, it was enacted, that no Sheriff shall make his Turn through a Hundred but twice in a year, *viz.* once after *Easter*, and once after the feast of *St. Michael*; and at the place accustomed: Also a subsequent statute ordained, that every Sheriff shall make his Turn yearly, one time within the month after *Easter*, and another time within the month after *Michaelmas*; and if they hold them in any other manner, they shall lose their Turn for that time. *Stat.* 31 *Ed.* 3. *st.* 1. *c.* 15.

Since these statutes, the Sheriff is indictable for holding this Court at another time, than what is therein limited, or at an unusual place: And it has been held, that an indictment found at a Sheriff's Turn, appearing to have been holden at another time, is void. *Dalt. Sher.* 390, 391: *Dyer* 151: 38 *Hen.* 6.

At Common Law, the Sheriff might proceed to hear and determine any offence within his jurisdiction, being indicted before him, and requiring a trial, till Sheriffs were restrained from holding Pleas of the Crown by *Magna Charta*, *cap* 17. But that statute doth not restrain the Sheriff's Turn, from taking indictments or presentments, or awarding process thereon; though the power of awarding such process being abused, was taken from all the Sheriffs (except those of *London*) by *stat.* 1 *Ed.* 4. *c* 2, and lodged in the Justices of Peace at their Sessions; who are to award process on such indictments delivered to them by the Sheriff, as if they had been taken before themselves, *&c.* 2 *Hawk. P. C. c.* 10.

The Sheriff's power in this Court is still the same as anciently it was, in all cases not within the statutes abovementioned; he continues a Judge of Record, and may inquire in his Turn of Treasons and Felonies, by the Common Law; as well as the lowest offences against the King, such as purprestures, seizure of treasure-trove, of waifs, estrays, goods wrecked, *&c.* All common nusances and annoyances, and other such like offences; as, selling corrupt victuals, breaking the assise of beer and ale, or keeping false weights or measures, are here indictable; also all common disturbers of the peace, barretors, and common oppressors; and all dangerous and suspicious persons, *&c.* The Sheriff, in his Turn, may impose a fine on all such as are guilty of contempts in the face of the Court; and upon a suitor to the Court making default, or refusing to be sworn on the Jury; or on a Bailiff not making a panel; on a Tithing man neglecting to make his presentment; or a person whose Constable refusing to be sworn, *&c.* He may amerce for offences; which fines and amerciaments are leviable and recoverable by distress, *&c.* See 2 *H. P. C. c.* 10.

TURNIPS, Stealing; see title *Larceny* I. 1.

TURNO VICECOMITUM, A Writ that lieth for those that are called to the Sheriff's Turn out of their own Hundred. *Reg. Orig.* 173.

TURNPIKES; See title *Highways*, Div. 7. B.

TURNY; See *Tournament*.

TUTORS; See *Schoolmaster*.

TWAITE, A wood grubbed up, and converted to arable land. *Co. Lit.* 4.

TWANIGHT GESTE, *Hospes Duarum Noctium*,] A Guest at an inn a second Night. See *Third-Night-Awn-Hinde*.

TWELFHINDI, Sax.] The highest rank of men in the *Saxon* Government, who were valued at one thousand two hundred shillings; and if any injury were done to such persons, satisfaction was to be made according to their worth. *Leg. King Alfred. c.* 12, 13, *&c.*: *H.* 1. *c.* 76.

TWELVE MEN; See *Jury*.

TWO WITNESSES, When necessary. See title *Evidence*.

TWYHINDI, Sax.] The lower order of *Saxons*, valued at 200*s.* as to pecuniary mulcts inflicted for crimes, *&c* *Leg. Alfred. c.* 12.

TYHTLAN, An accusation, impeachment, or charge, of any trespass or offence. *Leg. Ethelred. c* 2.

TYLWITH, Brit. from *Tyle*, i. e. *locus ubi stetit domus, vel locus ædificandæ domui aptus*, or from *tylath*, *trabs*, *tignus*.] Signifies a place whereon to build a house, or a beam in the building: And it is applied to *familia*, a tribe or family branching forth of another, which, in the old *English* Heraldry, is called Second or Third Houses; so that in case the great paternal stock brancheth itself into several Tylwiths, or houses, they carry no second or younger houses farther; and the use of these Tylwiths was to shew not only the originals of families as to the pedigree, but the several distinctions and distances of birth, that in case any line should make a failure, the next in any degree may claim their interest according to the rule of descent, *&c.* *Cowell.* See title *Descent*.

TYNMOUTH. There is a customary descent of lands in the honour of *Tynmouth*, that if any tenant hath issue two or more daughters, and die seised in fee, the land shall go to the eldest daughter for life only, and after to the cousins of the male-line; and for default thereof, to escheat. 2 *Keb.* 113, 114.

TYTHES; See *Tithes*.

U AND V.

VACARIA, A void place, or waste ground. *Mem. in Scacc. Mich.* 9 *Edw.* 1.

VACATING RECORDS; See title *Record.*

VACATION, *Vacatio.*] Is all the time between the end of one Term and the beginning of another; and it begins the last day of every Term, as soon as the Court rises. The time from the death of a Bishop, or other spiritual person, till the Bishopric or dignity is supplied with another, is also called Vacation. *Stats. Westm.* 1. *c.* 21: 14 *Edw.* 3. *st.* 4. *c.* 4.

VACATURA, An avoidance of an Ecclesiastical Benefice; as, *prima Vacatura*, the first Avoidance, &c.

VACCARY, *Vaccaria.* A House or Place to keep Cows in; a Dairy house, or Cow-pasture. *Fleta, lib.* 2.

VACCARIUS, The Cow-herd, who looks after the common herd of cows. *Fleta.*

VADIARE DUELLUM, To wage a combat, where two contending parties, on a challenge, give and take a mutual pledge of fighting. *Cowell.* See title *Battel.*

VADIUM PONERE, To take security, bail, or pledges, for the appearance of a defendant in a Court of Justice. *Reg. Orig.* See *Pone.*

VADIUM MORTUUM; See *Mortgage.*

VADIUM VIVUM, A living Pledge; as when a man borrows a sum of another, and grants him an estate, as of 20*l. per annum*, to hold until the rents and profits shall repay the sum borrowed. See *Mortgage.*

VAGABOND, *Vagabundus.*] One that wanders about, and has no certain dwelling; an idle fellow. See *Vagrants.*

VAGRANTS,

VAGRANTES.] These are divided into three classes; *viz. Idle and Disorderly Persons—Rogues and Vagabonds*—and *Incorrigible Rogues*: And are thus described and particularised at full length in the *stat.* 17 *Geo.* 2. *c.* 5.—They who threaten to run away and leave their wives or children to the parish; or unlawfully return to a parish from whence they have been legally removed; or, not having wherewith to maintain themselves, live idle, and refuse to work for the usual wages; and all persons going from door to door, or placing themselves in streets, &c. to beg in the parishes where they dwell, shall be deemed *Idle and Disorderly Persons.* § 1.

All persons going about as patent-gatherers, or gatherers of alms, under pretence of losses by fire, &c. or as collectors for prisons, &c.; all fencers and bearwards; all common players of interludes; and persons who, for hire, gain, or reward, act, represent, or perform, or cause to be acted, &c. any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part therein, not being authorised by Law; all minstrels, jugglers; all persons pretending to be gypsies, or wandering in the habit or form of *Egyptians*, or pretending to have skill in physiognomy, palmistry, or other crafty science, or to tell fortunes, or using any subtle craft to deceive and impose on a person; or playing or betting at any unlawful games or plays; and all persons who run away and leave their wives and children, whereby they become chargeable to any parish; all pedlars not duly licensed; all persons wandering abroad, and lodging in alehouses, barns, outhouses, or in the open air, not giving a good account of themselves; and all persons wandering abroad and begging, pretending to be soldiers, mariners, or pretending to go to work in harvest, not having proper certificates; and all other persons wandering abroad and begging; and all persons going from door to door, or placing themselves in streets, &c. to beg in the parishes where they dwell, who being apprehended for the same, shall resist or escape, shall be deemed *Rogues and Vagabonds.* § 2.

All end-gatherers offending against the *stat.* 13 *Geo.* 1. *c.* 23, being convicted; all persons apprehended as rogues and vagabonds, and escaping, or refusing to go before a Justice, or to be examined upon oath before such Justice, or refusing to be conveyed by pass; or giving a false account of themselves after warning of the punishment; and all rogues or vagabonds breaking or escaping out of any House of Correction; and all persons who, having been punished as Rogues and Vagabonds, shall again commit any of the said offences; and offenders against this act, having children with them, (and such children being put out apprentices or servants pursuant to this Act,) being again found with the same children, shall be deemed *Incorrigible Rogues.* § 4.

The punishment of *Idle and Disorderly Persons* is commitment to the House of Correction, there to be kept to hard labour, not exceeding a month. § 1.

Rogues and Vagabonds are to be publicly whipt, or sent to the House of Correction until the next Sessions, or any less time; and, after such whipping or commitment, may be passed to their last legal settlement or place of birth; or if under fourteen, and having a father or mother living, to the place of abode of such father and mother. And if committed until the next Sessions, and adjudged a Rogue or Vagabond, the Justices may order them to be kept in the House of Correction to hard labour, not exceeding six months. § 8.

A person adjudged at the Sessions an *Incorrigible Rogue*, may be kept in the House of Correction to hard labour, not exceeding two years, nor less than six months; and during the confinement be corrected by whipping, at such times and places as the Justices shall think fit, and may then be passed as aforesaid: And if a male, and above the age of 12 years, the Justices, before his discharge, may send him to be employed in the King's service, either by sea or land. If, before the expiration of his confinement, he shall escape from the House of Correction; or offend again in the like manner, he shall be deemed to be guilty of Felony, and transported for any time not exceeding seven years. § 9.

Any Person may apprehend and carry before a Justice persons going about from door to door, or placing themselves in streets, highways, or passages, to beg alms *in the parishes where they dwell*; and the Justices may order the Overseers of the Poor to pay such person 5 *s.* for every offender; which, on refusal of payment, may be levied on the Overseers' goods. § 1.

A Constable refusing or neglecting to use his endeavour to apprehend any offender, shall forfeit not exceeding 5*l.* nor less than 10*s.* to the use of the Poor, to be levied by distress. And any other person charged by a Justice of Peace to apprehend such offender, refusing so to do, shall forfeit 10 *s.* A Justice may order the High Constable to pay to any person, whether a Constable or not, who shall apprehend any such offender, 10 *s.* for every offender. The Justices are, four times in the year at least, to cause a general privy search to be made in one night, for the apprehending Rogues and Vagabonds. §§ 5, 6.

To prevent expences in passing Rogues, Vagabonds, and Incorrigible Rogues, the Justice is to deliver to the Officer a note, directing how they are to be conveyed, whether in a cart, by horse, or on foot. § 10. The Constable is to convey such person, in such manner and time as by the pass is directed, the next direct way to the place where such person is ordered to be sent, if in the same county, *&c.*; but if in another county, *&c.* he shall deliver the person to the proper Officer of the first town in the next county, *&c.* in the direct way to the place where such person is to be conveyed, together with the pass and duplicate of examination; taking his receipt for the same; and such Officer is immediately to apply to a Justice of Peace in the same county, who is to make a like note, and deliver it to the Officer, who is to convey the person to the first parish, *&c.* in the next county; and so in like manner from one county to another, till they come to the place where such person is sent: And if the Officer who shall receive such person there, shall think the examination to be false, he may carry the person before a Justice of Peace, who, if he see cause, may commit such person to the House of Correction, till the next Sessions; where the Justices, if they see cause, may deal with such person as an Incorrigible Rogue; but he shall not be removed but by order of two Justices § 11.

If the Vagrant, upon search, be found to have effects sufficient to pay all or part of the expence of passing him, the Justice may order the same to be sold and employed for that purpose. The Justices at Sessions may direct what rates and allowances shall be made for passing such Rogues, Vagabonds, *&c.* and make orders for the more regular proceeding therein. The High Constable is to pay to the Petty Constable, or other Officer, the rates so allowed, on penalty of forfeiting double the sum, to be levied by distress. § 12.

When a Vagrant is to be passed to *Ireland*, the *Isle of Man*, *Jersey*, *Guernsey*, or *Scilly*, the master of any ship bound to those places shall, on a warrant from a Justice of Peace, and being paid such allowance as the Justice shall think proper, receive such Vagrant, and convey him to such place, and give a receipt for the Vagrant and money on the back of the warrant, on penalty of 5 *l.* to the Poor, to be levied by distress; but not to be obliged to take above one Vagrant for every twenty tons burthen of his ship. The parish to which any Vagrant shall be passed may employ him in work till he shall betake himself to some service; and if he shall refuse to work or go to service, he may be sent to the House of Correction. § 14.

From the above statute, and others cited, it appears that *Idle and Disorderly Persons* are, 1. Those who *threaten* to run away, and to leave their families upon the parish. (For further provisions as to these, see title *Poor* III. 2.)—2. Who return to the parish from which they are removed as paupers, without a certificate; (see title *Poor* VI.)—3. Who refuse to work for the usual wages.—4. Who beg within their own parishes.—5. (By *stat.* 32 *Geo.* 3. *c.* 45. § 8.) Who neglect work, or who spend their money idly, without making a sufficient allowance for the subsistence of their families.—All these are punishable with one month's imprisonment in the House of Correction.

Rogues and Vagabonds are thus described:—1. Gatherers of alms under pretence of losses, or for prisons or hospitals.—2. Fencers.—3. Bearwards.—4. Players of Interludes, not being authorised by Law; (see title *Playhouse.*)—5. Minstrels.—6. Jugglers.—7. Gypsies; (see title *Egyptians.*)—8. Fortune-tellers.—9 Deceivers by subtle craft.—10. Players and Betters at unlawful games —11. Persons who *run away* and leave their families chargeable to the parish; (see title *Poor* III. 2.)—12. Unlicensed Pedlars; (see title *Hawkers and Pedlars.*)—13. Persons who wander abroad, and lodge in alehouses, outhouses, or in the open air, without giving a good account of themselves.—14. Persons wandering from home, under pretence of seeking harvest-work, without a proper certificate; (see title *Poor* V.)—15. All wandering Beggars.—16. (By *stat.* 23 *Geo.* 3. *c.* 88.) All persons apprehended with any picklock or implement, with intent to feloniously break and enter any dwelling-house; or with any offensive weapon, with intent to feloniously assault any person; or who shall be found in or upon any dwelling-house, out-house, yard, area, or garden, with intent to steal.—17. (*By stat.* 32 *Geo.* 3. *c.* 45. § 7.) Soldiers and Mariners wandering about and begging. [Before this Act, it was the practice of some Justices to grant begging passes. *Const's Bott.* 791, *n*]—These are all punishable with whipping, or imprisonment six months.

Incorrigible Rogues, are Rogues and Vagabonds who escape when they are apprehended; or refuse to go before a Justice; or to be examined; or who give a false account of themselves, after warning of the consequences; or who refuse to be conveyed by a pass; or who escape from the House of Correction; or who commit, after punishment, a second offence.—These are punishable with whipping, and imprisonment not exceeding two years; and escaping from confinement, when committed as incorrigible, are liable to be transported for seven years.

Persons harbouring Vagrants are liable to a fine of 40 *s.*, and to pay all expences brought on the parish thereby. *Stat.* 17 *Geo.* 2. *c.* 5. § 23.

Female Vagabonds are subject to imprisonment the same as Males; but are not now, in any instance, liable to whipping. *Stat.* 32 *Geo* 3. *c.* 45.

The Justice, or Court of Quarter Sessions, may, if they think proper, order a Vagabond, after punishment, to be conveyed to his place of settlement by a pass. *Stat.* 17 *Geo.* 2. *c.* 5. §§ 7, 8. But by *stat.* 32 *Geo.* 3. *c.* 45.

c. 45. § 1. No Justice of Peace shall order any Vagrant to be conveyed by a pass, who has not been convicted of an act of Vagrancy, and actually whipt, or imprisoned for at least seven days; which shall be certified in the pass. The object of this was to correct an abuse which much prevailed, of removing Paupers by a Pass, who had committed no act of Vagrancy, and who ought to have been removed by an Order of Removal. For the effects of an Order of Removal and a Vagrant Pass are very different; in the first place, the Parish removing bears all the travelling expences of the Paupers; but the expence of conveying Vagrants by a pass is borne by each County through which they are carried: And no appeal lies against a Vagrant Pass, so that the Parish to which the Vagrant is conveyed must be at the expence of sending, by an order of removal, the Vagrant back again; or to such place as, on inquiry, may be thought his legal settlement. 3 *Burn. J.* tit. *Vagrants* X.: And see *Const's Bott.* ii. 782. *pl.* 733. that a person, not in a state of Vagrancy cannot be passed, even with his own consent.

By *stat.* 25 *Geo.* 2. *c.* 36, it shall be lawful for any two or more Justices, in case any person apprehended, upon any general privy search, or by virtue of any special warrant, shall be charged before them with being a Rogue and Vagabond, or an idle and disorderly person, or with suspicion of felony, (although no direct proof be then made thereof,) to examine such person upon oath, not only to the parish or place where he was last legally settled, but also as to his means of livelihood; the substance of which examination shall be put into writing, and be subscribed by the persons so examined, and the said Justice shall likewise sign the same, and transmit it to the next Sessions of the Peace, to be there filed and kept on record: And if such person shall not make it appear to such Justices, that he has a lawful way of getting his livelihood, or shall not procure some responsible housekeeper to appear to his character, and to give security for his appearance before such Justices, at some day to be fixed, (if the same shall be required,) to commit such person to some prison or house of correction, for any time not exceeding six days; and in the mean time to order the Overseers of the Poor where such person shall be apprehended, to insert an advertisement in some public paper, describing such suspicious person, and any things which shall be found upon him, and which he shall be suspected not to have honestly come by, and mentioning the place to which he is committed, and time and place when and where such person is to be again brought before them to be re-examined; and if no accusation shall then be laid against him, then such person shall be discharged. § 12.

By *stat.* 32 *Geo.* 3. *c.* 45, no reward shall be paid for apprehending any Rogue or Vagabond, until he shall have been punished as such. § 2.—Convicts discharged from prison, and persons acquitted at the Assises, *&c.* may be conveyed by passes. § 4.—Justices may order Vagrants to be conveyed by Masters of Houses of Correction. § 5.—The Sessions shall fix the rate to be allowed for passing Vagrants. § 6.

A common Soldier, billeted in a distant parish from that in which his family resides, is not a Vagrant within the *stat.* 17 *Geo.* 2. *c.* 5, as a person who has run away from his family, although he is able, and refuse to maintain them; and they, in consequence of being thus abandoned, become chargeable to the parish. *Const's Bott.* i. 335. *pl.* 424.—A person committed by one Justice of the Peace, under the said statute, (§ 7,) cannot be bailed by another Justice, for such commitment is in execution. *Id. ib. pl.* 425; 341. *pl.* 426.—Although it is settled that an appeal does not lie *by a parish* against a Vagrant Pass, yet it is not decided that it will not lie in the case of a *Foreigner*, taken in an act of Vagrancy, and sent, upon a false examination, to a parish to which he does not belong. *Const's Bott.* ii. 790. *pl.* 737.

VALET, VALECT, or VADELET, *Valettus* vel *Valecta.*] Was anciently a name specially denoting young gentlemen, though of great descent or quality; but afterwards attributed to those of lower rank, and now a servitor, or gentleman of the chamber. *Camd.*: *Selden's Tit. Hon.*: *Bract. lib.* 3. In the accounts of the Inner Temple, it is used for a bencher's clerk or servant; and the butlers of the house corruptly call them Varlets.

VALENTIA, The value or price of any thing. See *Value.*

VALESHERIA, Signifies the proving by the kindred of the slain, one on the father's side, and another on the side of the mother, that a man was a *Welshman*. It is mentioned in *stat. Walliæ*, 12 *Ed.* 1. *c.* 4. See *Englecery.*

VALOR MARITAGII. Under the ancient tenures, while an infant was in ward, the guardian had the power of tendering him or her a suitable match, without disparagement or inequality: Which if the infants refused, they forfeited the *value of the marriage* to their guardian; that is, so much as a Jury would assess, or any one would *bonâ fide* give to the guardian for such an alliance: And if the infants married themselves without the guardian's consent, they forfeited double the value. This was one of the greatest hardships of our ancient tenures.—But the tenures being taken away, by *stat.* 12 *Car.* 2. *c.* 24, the Law is abolished. See title *Tenures* II. 4.

VALUABLE CONSIDERATION; See title *Consideration.*

VALVASORS; See *Vavasors.*

VALUE, *Valentia, Valor.*] Is a known word; and the Value of those things as to which offences are committed, is usually comprised in indictments; which seems necessary in *theft* to make a difference from *petit larceny*, and in trespass to aggravate the *fault*, *&c.* But in other cases a distinction has been made between Value and Price. If a plaintiff declares in an action of trespass for the taking away of live cattle, or one particular thing, he ought to say that the defendant took them away, *pretii* so much; if the declaration be for taking of things without life, it must be alleged *ad valentiam*, &c. so that live cattle are to be prized at such a Price, as the owner of them did esteem them to be worth; and dead things to be reckoned at the Value of the market which may be certainly known. Of coin, not current, it shall be *pretii*; but of common coin, current, it shall be neither said *pretii* nor *ad valentiam*, for the Value and Price thereof is certain: The difference between *pretii* and *ad valentiam* may proceed from the rule in the register of writs, which shews it to be according to the ancient forms used in the Law. *West. Symb. par.* 2: 2 *Lil. Abr.* 629. A jewel, it is said, is not valuable in Law, but only according to the Valuation of the owner of it, and is very uncertain: But there seems to be a certain Value for

diamonds

diamonds among the merchant jewellers, according to their weight and lustre, *&c. Hil.* 21 *Car. B.R.* 2 *Lil.* 628. A man cannot say that another owes him so much, when the Value of the thing owing is uncertain; for which reason, actions in these cases are always brought in the *detinet*, and the declaration *ad valentiam*, &c. 1 *Lutw.* 484. See titles *Pleading*; *Money*, &c.

VALUE OF MARRIAGE; see *Valor Maritagii*.

VANG, *Sax.*] He vanged for me at the Vant, *i. e.* stood for me at the font. *Blount.*

VANNUS, A Vane, *Venti Index*; a fan to winnow corn with. *Lit. Dict.*

VANTARIUS, *Præcursor.*] As *Vantarius Regis*, the King's fore footman. *Rot. de finibus. Term Mich.* 2 *Ed.* 2.

VARIANCE, *Variantia*, from the Fr. *Varier*, i. e. *Alterare*] An alteration of a thing formerly laid in a plea; or where the declaration in a cause differs from the writ, or from the deed upon which it is grounded, *&c.* 2 *Lil. Abr.* 629. If there is a Variance between the declaration and the writ, it is error; and the writ shall abate. And if there appear to be a material Variance between the matter pleaded and the manner of the pleading it, this is not a good plea; for the manner and matter of pleading ought to agree in substance, or there will be no certainty in it. *Cro. Jac.* 479: 2 *Lil.* 629.

But when the pleading is good in substance, a small Variance shall not hurt. 3 *Mod.* 227. If the record of *Nisi Prius* agrees with the declaration delivered, a Variation from the issue is not material. 2 *Strange* 1131. Where the original writ varies from the declaration, it is not remedied by any statute of *Jeofails*. 5 *Rep.* 37. Though verdict in ejectment was for a messuage next the messuage of *A. B.*, and the judgment for a messuage next another messuage in the occupation of *A. B.*, this is no material Variance, but is amendable by the *stat.* 16 *&* 17 *Car.* 2. *c.* 8: *Raym.* 398: 3 *Salk.* 368. The original writ in *C. B.* concluded *ad damnum* 40*l.* and the declaration was *ad damnum* 100*l.* The Jury gave 12*l.* damages; and on a writ of error brought, this Variance was assigned: it was held that this had been a good objection in the original action; but it is not so after verdict; not being matter in point of judgment, especially as the Jury found only 12*l.* damages; but if the verdict had found more damages than what was mentioned in the writ, though less than what was set forth in the declaration, it had been ill, because there was no writ to warrant such damages. 2 *Cro.* 629: 1 *Bulst.* 49.

If a defendant pleads a Variance between the writ and declaration, he is to crave Oyer of the writ before he shall have any advantage of the Variance, because the writ and declaration are not upon the same roll; and therefore, if the defendant plead to it without demanding Oyer, on demurrer, judgment may be for him to answer over, *&c.* 2 *Salk.* 658. If in the imparlance-roll the declaration is in debt, and in the plea-roll it is in trespass, this is such a Variance, that if the plaintiff hath judgment it shall be reversed. 3 *Bulst.* 229.

In writ of error in the Exchequer-chamber to remove a record out of *B. R*, of a certain trespass the husband and wife hath done, the record certified was of a trespass done by the woman alone; and for this Variance the writ was abated, and the record judged not removed. *Sid.* 269: 3 *Salk.* 369.

On Variance in the persons or number of acres, *&c.* between a Fine and an Indenture to lead the uses; if the party avers, there was not any other consideration, or new agreement, but that the Fine was levied according to the uses and intents mentioned in the indenture, it is good. 5 *Rep.* 25. See further, titles *Amendment*; *Abatement*; *Error*; *Pleading*; *Averment*; *Verdict*, &c.

VASSAL, *Vassalus*] In our ancient customs signified a Tenant or Feudatary; or person who vowed fidelity and homage to a Lord, on account of some land, *&c.* held of him in fee; also a slave or servant, and especially a domestic of a Prince. *Du Cange.* *Vassalus* is said to be *quasi inferior socius*, as the Vassal is inferior to his master, and must serve him; and yet he is in a manner his companion, because each of them is obliged to the other. *Skene.* See 2 *Comm.* 53; and this Dict. title *Tenures*.

VASSALAGE, The state of a Vassal, or servitude and dependency on a superior Lord: *Liege Vassalage* belonged only to the King.

VASSELERIA, The tenure or holding of Vassals. *Cowell.*

VASTO, A writ against tenants for term of life or years, committing Waste. *F. N. B* 55: *Reg. Orig.* 72. See title *Waste*.

VASTUM, A Waste, or common lying open to the cattle of all tenants who have a right of commoning. *Paroch. Antiq.* 171.

VASTUM FORESTÆ VEL BOSCI, That part of a Forest, or Wood, wherein the trees and underwood were so destroyed, that it lay in a manner waste and barren. *Paroch. Antiq. p.* 351.

VAVASORS, The first name of dignity, next beneath a Peer, was anciently that of *Vidames*, *Vice-domini*, Valvasors, or Vavasors, who are mentioned by our ancient Lawyers, as *viri magnæ dignitatis*: and Sir *Edward Coke* speaks highly of them. Yet they are now quite out of use; and our legal Antiquarians are not agreed upon even their original or ancient office. 1 *Comm. c.* 12. *p.* 403: *Bract. lib.* 1. *c.* 8: *Spelm.*

VAVASORY, *Vavasoria.*] The lands that a Vavasor held. *Bract. lib.* 2.

UBIQUITY OF THE KING; See title *King* V. 3.

VEAL MONEY, The Tenants within the manor of *Bradford*, in the county of *Wilts*, pay a yearly rent by this name to their Lord; in lieu of Veal paid formerly in kind. *Blount's Ten.*

VECTIGAL JUDICIARIUM, Is applied to money or fines paid to the King, to defray the charge he is at in maintaining the Courts of Justice, and protection of the People. 3 *Salk.* 33.

VEJOURS, *Visores*, from the Fr. *Veier*, i. e. *Cernere.*] Such persons as are sent by the Court, to take a view of any place in question, for the better decision of the right thereto. It is also used for those that are appointed to view an offence. *Old Nat. Br.* 112: *Bract. lib.* 5. See *View*.

VELTRAIA, *Ministerium de* Veltraia.] The office of dog leader, or a courser. *Rot. Pip.* 5 *Steph.*

VELTRARIUS, One who leads greyhounds; which dogs, in *Germany*, are called *Welters*; in *Italy*, *Veltres*, &c. *Blount's Tenures, p.* 9.

VELUM QUADRAGESIMALE, A veil or piece of hangings, drawn before the Altar in *Lent*, as a token of mourning and sorrow. *Synod. Exon. Anno* 1217.

VENARIA, Beasts which are caught in the woods by hunting. *Leg. Canut.* c. 108.

VENATIO, In the statute of *Charta de Foresta*, signifies *Venison*, in Fr. *Venaison*. It is called *Venaison*, of the means whereby the beasts are taken, *quoniam ex Venatione capiuntur*, and being hunted are most wholesome: And they are termed beasts of Venary, because they are gotten by hunting. 4 *Inst.* 316.

VENDITIONI EXPONAS, A Judicial Writ, directed to the Sheriff, commanding him to sell goods which he hath formerly taken into his hands, for the satisfying a judgment given in the King's Court. *Reg. Judic.* 33: *Stat.* 14 *Car.* 2. c. 21. If the Sheriff upon a *Fieri facias* takes goods in execution, and returns that he hath so done, and cannot find buyers; or if he delay to deliver them to the party, &c. then the writ, *Venditioni exponas*, shall issue to the Sheriff, reciting the former writ and return, and commanding the Sheriff to make sale of the goods, and bring in the money. 13 *H.* 7. 1: *Dyer* 363. If a *Supersedeas* be not delivered to the Sheriff till he hath in part executed a writ of execution, he may afterwards be authorised to go through with it by a *Venditioni exponas*; as he may also in the like case after a writ of error. *Dyer* 98: *Cro. Eliz.* 597: 1 *Roll. Abr.* 894.

If goods are not taken to the value of the whole, the plaintiff may have a *Venditioni exponas* for part, and a *Fieri facias* for the residue, in the same writ. *Thes. Brev.* 305. And it seems that a *Venditioni exponas* may be directed to the new Sheriff, where the old one returns that he has taken goods, which remain in his hands for want of buyers. 2 *Saund.* 343. But the more usual way of proceeding in such case, is by writ of *Distringas* to the new Sheriff, commanding him to distrain the old one, till he sell the goods, &c. Of this writ there are two sorts; the first, which is the more ancient, commands the Sheriff, to whom it is directed, to *distrain the late Sheriff*, so that he expose the goods to sale, and cause the monies arising therefrom to be delivered to the present Sheriff, in order that such Sheriff may have those monies in Court at the return. *Gilb. Ex.* 21: 34 *Hen.* 6. 36. The other writ, which is the most usual, is to distrain the late Sheriff to sell the goods, and have the money in Court himself. 6 *Mod.* 299: *Rast.* 164: *Thes. Brev.* 90: *Off. Brev.* 45: 2 *Ld. Raym.* 1074, 5: 1 *Salk.* 323.

VENDITOR REGIS, The King's Salesman; being the person who exposed to sale goods and chattels seized or distrained to answer any debt due to the King: This office was granted by King *Edw.* I. to *Philip de Lardiner*, in the county of *York*; but the office was seized into the King's hands for the abuse thereof; *Anno* 2 *Ed.* 2.

VENDOR AND VENDEE. Vendor is the person who sells any thing, and Vendee the person to whom it is sold. Where a man sells a thing to another, it is implied that the Vendor shall make assurance by bill of sale to the Vendee, but not unless it be demanded; *per Finch*, Chancellor. 2 *Chan. Cases* 5. See 21 *Vin. Abr.* title *Vendor and Vendee.*

VENELLA, A narrow or strait way. *Monast.* i. 408.

VENIA, A kneeling or low prostration on the ground, by penitents. *Walsing.* 196.

VENIRE FACIAS, A writ judicial awarded to the Sheriff to cause a Jury in the neighbourhood to appear, when a cause is brought to issue, to try the same. *Old Nat. Br.* 157. See title *Jury* I.

Formerly, many questions arose concerning the place, or places, from whence a Jury should come; *Vide* 2 *Lill. Ab.* 633, 636: *Cro. Eliz.* 260: 3 *Salk.* 381: *Yelv.* 104: *Moor* 357, 412: 5 *Rep.* 36: *Lutw.* 213. But now, by *stat.* 4 & 5 *Ann.* c. 16, a *Venire Facias* may be from the body of the county, &c. In an information against a county for not repairing a bridge, it was held, that the Attorney-General might take a *Venire* to any adjacent county; and that it might be *de corpore* of the whole, or *de vicineto* of some particular place therein next adjoining. 3 *Salk.* 381.

One *Venire Facias* is sufficient to try several issues, between the same parties, and in the same county. 2 *Cro.* 550. Where an action was brought against two, they both joined issue, and one died; and after the *Venire Facias* was awarded to try the issue between both, which was done; and held to be no error, because one of the defendants was living. *Cro. Car.* 308. See title *Amendment.* If a *Venire Facias* is returned by the Coroner for defect of the Sheriff, &c. when it ought to be returned by the Sheriff, the trial is wrong, and not remedied by any statute of Jeofails. 5 *Rep.* 36. In all cases, where there is to be a Special Jury, the *Venire* must be special: If the matter to be tried be within divers places, and one and the same county, the *Venire Facias* shall be general; and if in several counties, it shall be special. 2 *Lill. Abr.* 635.

If a matter of Law be depending in Court, or if there be judgment by default as to part, and an issue also joined as to other part, there is to be a special *Venire* awarded, *tam ad triandum exitum, quam ad inquirendum de dampnis*, &c. *as well to try the issue, as to inquire of the damages*, both upon the issue and the matter put in judgment of the Court. 2 *Lill. Abr.* 636.

At a trial at *Nisi Prius*, the plaintiff changed the *Venire Facias* and panels, and had a Jury the defendant knew not of; and ruled, that the defendant cannot be aided, if the first *Venire* was not filed: And a difference was taken when the first *Venire* was not filed, that he cannot be aided, because he may resort to the Sheriff, and have a view of the panel, to be prepared for his challenges; but if the first *Venire* was filed, then the defendant shall have a new trial. *Raym.* 79.

A *Venire Facias* after filed, cannot be altered without consent of parties: Though where a verdict in a cause is imperfect, so that judgment cannot be given upon it, there shall be a new *Venire Facias* to try the cause, and find a new verdict. 2 *Lill.* 634, 635. *Venire* is now little more than form, unless in case of a trial at bar.

Venire Facias, is the common process upon any Presentment; being in nature of a summons for the party to appear; and is a proper process to be first awarded on an indictment for any crime, under the degree of Treason, Felony, or Maihem, except in such cases wherein other process is directed by statute. See title *Process* II. The *Venire Facias ad respondendum* may be without a day certain, because by an appearance the fault in this process is cured; but a *Venire Facias ad triand. exitum* must be returnable on a day certain, &c. 3 *Salk.* 371.

VENIRE FACIAS *tot Matronas*; See this Dictionary, title *Ventre Inspiciendo.*

VENIRE FACIAS, *de Novo*; The ancient proceeding of the Common Law, to send a cause to a *New Trial*: And this proceeding is still preserved in certain cases. New Trials are generally granted where a General

Verdict

Verdict is found; a *Venire Facias de Novo*, upon a Special Verdict. But the most material difference between them is this, that a *Venire Facias de Novo* must be granted upon matter appearing upon the record; while a New Trial may be granted upon things out of it, if the record be never so right: A *Venire de Novo* therefore is granted, 1st, If it appears upon the face of the record, that the Verdict is so imperfect that *no judgment* can be given upon it. 2d, Where it appears that the Jury ought to have found facts differently from what they do. See 1 *Wils.* 55; and this Dictionary, title *Trial*.

The following seem to be the cases in which a *Venire de Novo* is grantable: 1st, Where the Jury are improperly chosen, or there is any irregularity in returning them.—2dly, Where they have improperly conducted themselves.—3dly, Where they give *general* damages, upon a declaration consisting of several counts; and it afterwards appears that one or more of them is defective.—4thly, Where the Verdict, whether general or special, is imperfect, by reason of some ambiguity or uncertainty; or by finding less than the whole matter put in issue; or by not assessing damages. *Tidd's Pract. K. B.*; and the authorities there cited.

By *stat.* 7 & 8 *W.* 3. *c.* 32. § 1, if the plaintiff, after issuing Jury process, does not proceed to trial at the first Assises, he may sue a *Venire de Novo*: but if the Jury be discharged at the Assises in order to have a view, there is no need of a *Venire de Novo*. *Com.* 248.

A *Venire de Novo* may be granted by a Court of Error; or after a Demurrer to Evidence; or Bill of Exceptions. *Tidd's Pract.*

VENITARE, The Book of *Ecclesiasticus*; so called because of the *Venite exultemus Domino*, *Jubilate Deo*, &c. written in the Hymn-book or Psalter as it is appointed to be sung, &c. It often occurs in the history of our *English* Synods; and is called *Venitarium*. *Mon. Ang.* iii. 432.

VENTER, *Lat.*] Literally *the belly*; it is used in Law to distinguish the issue, where a man hath children by several wives; (said to be by a first or second *Venter*.) How they shall take in descents of lands; See tit. *Descent*.

VENTRE INSPICIENDO, A writ to search a Woman who saith she is with Child, and thereby withholdeth lands from the next heir: The Trial whereof is by a Jury of Women. *Reg. Orig.* 227.

Where a Widow is suspected to feign herself with Child, in order to produce a Supposititious Heir to the estate, the Heir presumptive may have this Writ to examine whether she be with Child or not; and if she be, to keep her under proper restraint till delivered: But if the Widow be, upon examination, found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again on the birth of a Child within forty weeks from the death of a husband. 1 *Comm.* c. 16. See title *Bastard*.

See further on the writ *De Ventre Inspiciendo*, *Aiscough's Case*, *Mosel.* 391; and 2 *P. Wms.* 591, *S. C.*; in which *King*, C. on petition, granted the writ, though the persons applying were only Tenants in Tail. And this writ is now granted, not only to an Heir at Law, but to a *Devisee*, whether for Life, or in Tail, or in Fee; and whether his interest is immediate or contingent. *Ex parte Bateman*, at the Rolls, 16th *Dec.* 1784: *Ex parte Bellett*, at the Rolls, 20th *Dec.* 1786: *Ex parte Brown*, *in Canc. Trin. T.* 1792. See 4 *Bro. C. R.* 90. In *Mosely's* Report of *Aiscough's* Case, a case of Personal Estate is cited, in which the then Master of the Rolls, in conformity to the reason of the Common Law, directed that the Master should appoint two Matrons to inspect a Woman. See 1 *Inst.* 8, *b. note* 3; where the necessity of an Act of Parliament to regulate the proceedings on this writ is suggested. See also this Dictionary, title *Execution and Reprieve*.

Thomas de Aldham of Surrey, brother of *Adam de Aldham*, *Anno* 4 *Hen.* 3, claimed his brother's estate: But *Joan*, widow of the said *Adam*, pleaded she was with Child; whereupon the said *Thomas* obtained the writ *Ventre Inspiciendo*, directed to the Sheriff—*Quod assumptis tecum discretis et legalibus militibus, et discretis et legalibus mulieribus de comitatu tuo, in propria persona accedas ad ipsam* Joannam *et ipsam à prædictis mulieribus coram præfatis militibus videri facias et diligenter tractari per ubera et Ventrem, et inquisitionem factam certificari facias sub sigillo tuo et sigillo duorum militum, justiciariis nostris apud* Westm &c.

In *Easter* Term, 39 *Eliz.* this writ was sued out of the Chancery into *C. B.* at the prosecution of *Percival Willoughby*, who had married the eldest of the five daughters of Sir *Francis Willoughby*, who died without any son, but left a wife named *Dorothy*, that at the time of his death pretended herself to be with Child by Sir *Francis*; which, if it were a son, all the five sisters would thereby lose the inheritance descended unto them; which writ was directed to the Sheriffs of *London*, and they were commanded to cause the said *Dorothy* to be viewed by twelve Knights, and searched by twelve Women, in the presence of the twelve Knights, *et ad tractandum per ubera et ad Ventrem inspiciendum*, whether she were with Child, and to certify the same to the Court of Common Pleas; and if she were with Child, to certify for how long in their judgments, *et quando sit paritura*; upon which the Sheriffs accordingly caused her to be searched, and returned that she was twenty weeks gone with Child, and that within twenty weeks more *fuit paritura*: Thereupon another writ issued out of *C. B.* requiring the Sheriffs safely to keep her in such a house, and that the doors should be well guarded; and that every day they should cause her to be viewed by some of the women named in the writ; and when she should be delivered, that some of them should be with her to view her birth, whether it be male or female, to the intent that there should be no falsity: And upon this writ the Sheriffs returned, That they had caused her accordingly to be kept and viewed, and that such a day she was delivered of a Daughter. *Cro. Eliz.* 566.

The Sheriffs of *London*, with a Jury of Women, whereof two were Midwives, came to the Lady's house, and into her chamber, and sent to her the women, sworn by the Sheriffs before, to search, try, and speak the truth whether she was with Child or not. The men all went out, and the women searched the Lady, and gave their verdict that she was with Child; whereupon the Sheriffs returned the writ accordingly. *Moore* 523. *pl.* 692.

In the 22d year of King *James* I., the Widow of one *Duncomb* married within a week after the death of her first husband; and his cousin and heir brought the writ *Ventre Inspiciendo* directed to the Sheriff of *L.* who returned that he had caused her to be searched by such

Matrons, who found her with Child, *et quod paritura fuit* within such a time; and thereon it was prayed, that the Sheriff might take her into his custody, and keep her till she was delivered; but because she ought to live with her husband, they would not take her from him; but he was ordered to enter into a recognizance not to remove her from his dwelling-house, and a writ was awarded to the Sheriff to cause her to be inspected every day by two of the women which he had returned had searched her, and that three of them should be present at her delivery, &c. *Cro Jac.* 685.

VENUE,

VICINETUM, or VISNETUM.] A Neighbouring Place, *locus quem vicini habitant*: The place from whence a Jury are to come for Trial of Causes. *F. N. B.* 115.

The want of a Venue is only curable by such a plea as admits the fact, for the trial whereof it was required to lay a Venue. 3 *Salk.* 381.

Where the Action could only have arisen in a particular county, it is *local*, and the Venue (by original) must be laid in that county; for if it be laid elsewhere, the defendant may demur to the Declaration, or the plaintiff, on the General Issue, will be nonsuited at the Trial. But where the Action might have arisen in any county, it is *transitory*, and the plaintiff may, in general, lay the Venue wherever he pleases; subject to its being changed by the Court, if not laid in the very county where the Action arose. Thus, in an Action upon a Lease for Rent, &c. founded on the privity of estate, as in Debt by the Assignee or Devisee of the Lessor against the Lessee; or by the Lessor, or his personal Representatives, against the Assignee of the Lessee; or against the Executor of the Lessee, in the *debet* and *detinet*; or in Covenant, by the Grantee of the Reversion against the Assignee of the Lessee; the Action is *local*, and the Venue must be laid in the county where the estate lies. But in an Action upon a Lease for Rent, &c. founded on the privity of contract; as in Debt by the Lessor against the Lessee, or his Executor in the *detinet* only; or in Covenant, by the Lessor or Grantee of the Reversion against the Lessee, the Action is *transitory*, and the Venue may be laid in any county, at the option of the plaintiff. *Tidd's Pract. K. B.*

There are, however, some Actions of a *transitory* nature, wherein the Venue must be laid in the county where the facts which are the ground of the Action were committed, and not elsewhere. Such are all Actions upon Penal Statutes, *stat.* 21 *Jac.* 1. *c.* 4. § 2. Actions upon the Case, or Trespass, against Justices of Peace, Mayors, or Bailiffs, of Cities or Towns-Corporate, Head-boroughs, Portreves, Constables, Tithingmen, Churchwardens, &c. or other persons acting in their aid and assistance, or by their command, for any thing done in their official capacity. *Stat.* 21 *Jac.* 1. *c.* 12. § 5. Actions against any person or persons, for any thing done by an Officer or Officers of the Excise or Customs, or others acting in his or their aid, in execution or by reason of his or their office. See *stats.* 20 *Geo.* 3. *c.* 70. § 34: 24 *Geo.* 3. *st.* 2. *c.* 47. § 35. In these Actions, the Venue must be laid in the county where the facts were committed, and not elsewhere. On the other hand, the Venue in a *transitory* Action is, in some cases, altogether optional in the plaintiff; as where the Action arises in *Wales*, or beyond the Sea, or is brought upon a Bond or other Specialty, Promissory Note, or Bill of Exchange; for *Scandalum Magnatum*, or a Libel dispersed throughout the kingdom; against a Carrier or Lighterman; for an Escape or False Return; and, in short, wherever the cause of action is not wholly and necessarily confined to a single county. In these cases, the Venue cannot be changed by the Court, but upon a special ground. *Tidd's Pract. K. B.* and the Authorities there cited.

The Venue by Bill is local or transitory, as by Original. In *local* Actions, it must be laid in the county where the cause of action arose; in *transitory* Actions, it may be laid in any county. The county in the margin will help, but not hurt. Hence, if there be no Venue laid in the body of the Declaration, reference must be had to the margin; but where a proper Venue is laid in the body, the word in the margin will not vitiate it. *Tidd's Pract. K. B.*: 3 *Term Rep.* 387.

The Law having settled the distinction between *local* and *transitory* Actions, it seems that, towards the reign of *Richard* II. this distinction was but little attended to; for a litigious plaintiff would frequently lay his Action in a foreign county, at a great distance from where the cause of it arose, and by that means oblige the defendant to come with his witnesses into that county. To remedy which, it was ordained by *stat.* 6 *R.* 2. *c.* 2. "To the intent that writs of Debt and Accompt, and all other such Actions, be from henceforth taken in their counties, and directed to the Sheriffs of the counties where the contracts of the same Action did arise; that if from henceforth, in Pleas upon the same Writs, it shall be declared, that the contract thereof was made in another county than is contained in the original Writ, that then incontinently the same Writ shall be utterly abated." The design of this statute was to compel the suing out of all Writs arising upon contract, in the very county where the contract was made; agreeably to a Law of *Hen.* 1. *c.* 31: *Gilb. C. P.* 89, *n.* But as the statute only prescribes, that the Count shall agree with the Writ in the place where the contract was made, it did not effectually prevent the mischief: And therefore the *stat.* 4 *H.* 4. *c.* 18, directed all Attornies to be sworn, that they will make no suit in a foreign county; and there is an old Rule of Court, which makes it highly penal for Attornies to transgress this statute. *R. Mich.* 1654.

Soon after the statute of *Henry* IV. a practice began of pleading, in abatement of the Writ, the impropriety of its Venue, even before the plaintiff had declared. At first, in the reign of *Henry* V. they examined the plaintiff, upon oath, as to the truth of his Venue. But, soon after, they began to allow the defendant to traverse the Venue, and to try the traverse by the Country. This practice being subject to much delay, the Judges introduced the present method of *Changing the Venue upon motion*, on the equity of the above statutes; which, Ld. *Holt* says, began in the time of *James* I. 2 *Salk.* 670. The forms of the rule and affidavit are also stated by *Styles*, as established in 23 *Car.* 1. *Sty. P. R.* 631. (ed. 1707.)

It is now settled that, in *transitory* Actions, the Venue may be changed upon motion, either by the plaintiff or defendant. The plaintiff shall not directly alter his Venue after the Essoign Day of the next Term after appearance;

appearance; though he would pay costs, or give an imparlance. Yet he may in effect do it, by moving to amend; and that after the defendant has changed the Venue, or pleaded, and even after two Terms have elapsed from the delivery of the Declaration. *Tidd's Pract. K. B.*

The defendant is, in general, allowed to change the Venue in all *transitory* Actions, arising in a county different from that where the plaintiff has laid it; and he may even change it from *London* to *Middlesex*, or *vice versa*. But the Venue cannot be changed in *local* Actions. And, in *transitory* Actions, where material evidence arises in two counties, the Venue may be laid in either. *R. M.* 10 *Geo.* 2. *reg.* 2. (*c*). And if it be laid in a third county, the Court will not change it; for the plaintiff in such case cannot make the necessary affidavit, that the cause of action arose in a particular county, and not elsewhere. 1 *Wilf.* 178. In order to change the Venue, therefore, it is indispensably necessary that the cause of action should be wholly confined to a single county; and therefore, where that is not the case, the Court will not change it. Thus, in an Action of Debt on Bond or other Specialty, the Court will not change the Venue, unless some special ground be laid; for *debitum & contractus sunt nullius loci*; and Bonds and other Specialties are *bona notabilia*, wherever they happen to be. In analogy to which, it is now holden, agreeably to the practice of the Court of Common Pleas, that the Venue cannot be changed in an Action upon a Promissory Note or Bill of Exchange; though this has been doubted; but the Venue may still be changed in an Action upon a Policy of Insurance, not being by deed; or in any other action, the right of which is founded upon simple contract. *Tidd's Pract. K. B.*

In an Action for *Scandalum Magnatum*, the Court will never change the Venue; because a Scandal raised of a Peer of the Realm is not confined to any particular county, but reflects on him through the whole kingdom; and he is a person of so great notoriety, that there is no necessity for obliging him to try his cause in the neighbourhood; though this was denied in the case of Lord *Sandwich* v. *Miller*. So in an Action for a Libel, published in a news-paper in one county, and circulated in other counties, or contained in a letter written by the defendant in one county, and directed into another, the Court will not change the Venue; because the defendant cannot make the common affidavit, that the cause of action arose in a single county, and not elsewhere: And, for a similar reason, the Venue cannot be changed in an Action against a Carrier or Lighterman, or for an Escape, or False Return. *Tidd.* But in an Action for a Libel, the Court will change the Venue into a county in which it was both written and published. And the distinction seems to be, between a Libel which is dispersed through several counties, and a Letter which is written in one county, and opened in another; on the former the Venue cannot be changed, on the latter it may. See 3 *Term Rep.* 306, 652.

Though the Court in general will not change the Venue, where it is laid in the proper county, yet they will change it, even then, upon a special ground. Thus, in Debt on Bond, where the Venue was laid in *London*, and the plaintiff's and defendant's witnesses lived in *Lincolnshire*, the Court changed it into the latter county. 1 *Term Rep.* 781; but see *Id.* 782: 1 *Wilf.* 162. And, on the other hand, though the Court will in general change the Venue, where it is not laid in the proper county, yet if an impartial or satisfactory Trial cannot be had there, they will not change it; as in an Action for words spoken of a Justice of the Peace, by a Candidate, upon the hustings, at a county election. *Cowp.* 510.

So, where the Venue is not laid in the proper county, the privilege of the plaintiff will, in some cases, prevent the Court from changing it. Thus, in an Action brought by a Barrister, Attorney, or other Officer of the Court, if the Venue be laid in *Middlesex*, the plaintiff, suing as a privileged person, has a right to retain it there, on account of the supposed necessity of his attendance on the Court. But if the Venue be laid in any other county, as in *London*; or the plaintiff sue as a common person, by original or otherwise, or *en autre droit*, as executor or administrator, or jointly with his wife or other persons, he has no such privilege. And where a Barrister, Attorney, or other Officer of the Court, is defendant, it seems that he has not any privilege respecting the Venue. *Tidd's Pract. K. B.*; and see this Dict. title *Privilege* I.

When the cause of action arises in an *English* county, where the Assises are regularly holden twice a year, it is a matter of course to change the Venue into that county. *R. M.* 1654, § 5. But where the cause of action arises out of the realm, the Court will not change the Venue, because the action may as well be tried in the county where the Venue is laid, as in any other where the cause of action did not arise. And, in order to avoid delay, the Court will not change the Venue, except by consent, into a Northern county, where there are no Lent Assises, in *Michaelmas* or *Hilary* Term; nor into *Hull*, *Canterbury*, &c. where the Justices of *Nisi Prius* seldom come; nor into the city of *Worcester* or *Gloucester*, out of the county at large, because the Assises for the city and county at large are holden at the same place. *Tidd.*

Where the cause of action arises in *Wales*, and the Venue is laid elsewhere, it cannot be changed, without consent, into the next adjoining *English* county; because the defendant cannot make the common affidavit, which is never dispensed with, that the cause of action arose in that particular county, and not elsewhere. And it has been doubted, whether the Venue can be changed, otherwise than by consent, directly into *Wales*; inasmuch as no Trial can be had there, but the issues (if any) must be tried in the next adjoining *English* county; and if the defendant let judgment go by default, it is doubtful whether the Court can award a writ of inquiry. *Tidd*; and see *stat.* 13 *Geo.* 3. *c.* 51. §§ 1, 2. The Venue, however, has been frequently changed into the Counties Palatine; because the Court can send down the record there by *Mittimus*. And, it has even been changed into next adjoining county. 12 *Mod.* 313: *Tidd.*

The motion for the defendant to change the Venue is a motion of course; and must formerly have been made within eight days after the Declaration delivered, which was the time allowed by the Rules of the Court for pleading. And accordingly it is said, that if a Declaration be delivered so early in Term, that the defendant has eight days in that Term, he cannot move to change the

the Venue the next Term. But it is now settled, that the defendant may move to change the Venue, at any time before plea pleaded. *R. M.* 1654, § 5. And he is even allowed to change it, after an order for time to plead, though upon the terms of pleading issuably; but not after an order for time to plead, where the terms are to plead issuably, and take short notice of trial, at the first or other Sittings within Term, in *London* or *Middlesex*, because a trial would by that means be lost. And the Venue cannot be changed, in any case, after plea pleaded; even though the defendant afterwards have leave to withdraw his plea, and plead it *de novo* with a notice of set-off. *Tidd's Pract.*

In order to change the Venue, the defendant must make a positive affidavit, that the plaintiff's cause of action (if any) arose in the county of *A.* and not in the county of *B.* (where the Venue is laid,) or elsewhere out of the county of *A.* *R. M.* 10 *Geo.* 2. *reg.* (2). An affidavit was necessary, because the motion succeeded, and was equivalent to a plea in abatement; and the form of the affidavit is always most strictly adhered to. *Tidd's Pract.*

Yet as it would be hard to conclude the plaintiff by the single affidavit of the defendant, he is at liberty to aver that the cause of action arose in the county where the Venue is laid, and to go to trial thereon at the same time that the merits are tried, by undertaking to give material evidence arising in that county. And, upon such undertaking, the Court will discharge the rule for changing the Venue This practice is equivalent to joining issue, before alluded to, that the cause of action arose in the first county: And if the plaintiff fail in proving it, he must be nonsuited at the trial; which has, in this case, the same effect as quashing the writ by a judgment on a plea in abatement, viz. *quod eat sine die*, and the plaintiff must begin again. 2 *Salk* 669. Originally it was required, that the plaintiff should give no evidence at the trial but what arose in the county wherein the Venue was retained; and if he gave no such evidence, he must have been nonsuited of course. But when it was laid down (more liberally) that the plaintiff might lay his Venue in any county wherein part of the cause of action arose, he was then bound only to give some evidence, and not the whole, (*dare aliquam evidentiam*,) in the county where the Venue was laid; which continues to be the rule at this day. The evidence however must be material; and therefore it is not sufficient merely to prove that the witnesses to the contract reside in the county where the Venue is laid. *Tidd's Pract. K. B.* But where a rule to change the Venue from *Middlesex* to *London* was discharged, on the plaintiff's undertaking to give material evidence in *Middlesex*, the Court held, that the undertaking was complied with, by proving a Rule of Court, obtained by the defendant in *Middlesex*, for paying money into Court; although that rule was obtained, after the rule for changing the Venue was discharged. 2 *T. Rep.* 275.

It was formerly holden, that the plaintiff must move to discharge the Rule for changing the Venue, before Replication; and therefore that he came too late after Issue was joined, and delivered to the defendant's agent. But now, as the plaintiff may alter his Venue, by moving to amend, so, for avoiding circuity, he may move to discharge the Rule for changing the Venue, on undertaking to give material evidence in the county where it is laid, at any time before the cause is tried; and it was accordingly discharged in one case, after the cause had been twice taken down for trial. *Cowp.* 409: *Tidd's Pract. K. B.*

VERDEROR, *Viridarius*, from the Fr. *Verdeur*, i. e. *Custos Nemoris*.] An Officer in the King's Forest, whose office is properly to look to the Vert, and see it well maintained; and he is sworn to keep the Assises of the Forest, and view, receive, and inrol the attachments, and presentments of trespasses of Vert and Venison, &c. *Manwood*, *par.* 1. *p.* 332. See title *Forest*.

VERDICT,

VEREDICTUM; QUASI DICTUM VERITATIS.] The answer of a Jury given to the Court, concerning the matter of fact in any cause committed to their trial; wherein every one of the twelve Jurors must agree, or it cannot be a Verdict: and the Jurors are to try the fact, and the Judges to adjudge according to the Law that ariseth upon it. 1 *Inst.* 226. See title *Jury* III. IV.

On a general Verdict, the Jury were liable to be attainted if they gave a false Verdict. To relieve them from this difficulty, it was enacted by *stat. Westm.* 2. (13 *Edw.* 1.) *c.* 30. § 2, "That the Justices of Assise shall not compel the Jurors to say precisely whether it be disseisin or not, so as they state the truth of the fact, and pray the aid of the Justices; but if they will say, of their own accord, that it is disseisin, their Verdict shall be admitted at their own peril." Upon this statute, it has become the practice for the Jury, when they have any doubt as to the matter of Law, to find a Special Verdict, stating the facts, and referring the Law arising thereon to the decision of the Court. See title *Jury* III.

In finding Special Verdicts, where the points are single and not complicated, and no special conclusion, the Counsel, if required, are to subscribe the points in question, and agree to amend omissions or mistakes in the mesne conveyance, according to the truth, to bring the point in question to judgment. And unnecessary finding of deeds in *hæc verba*, where the question rests not upon them, but are only derivation of title, ought to be spared; or they ought to be found shortly, according to the substance they bear in reference to the deed, as feoffment, lease, grant, &c. It is also a general rule, that, in a Special Verdict, the Jury must find facts, and not merely the evidence of facts: And if in this, or any other particular, the Verdict be defective, so that the Court are not able to give judgment thereon, they will amend it, if possible, by the Notes of Counsel, or even by an Affidavit of what was proved upon the Trial; or, otherwise, they will supply the defect by awarding a *Venire de novo*. *Tidd's Pract.* and the references there.

If, at the prayer of a plaintiff or defendant, a Special Verdict is ordered to be found, the party praying it is to prosecute the Special Verdict, that the matter in Law may be determined; and if either party delay to join in drawing it up, and pay his part of the charges, or if the Counsel for the defendant refuses to subscribe the Special Verdict, the party desiring it shall draw it up and enter it *ex parte*. Where the parties disagree, or the Special

Special Verdict is drawn contrary to the notes agreed upon, the Court on motion will rectify it; and the Court may amend a Special Verdict, to bring the Special Matter into question. 2 *Lil. Abr.* 645, 6, 653.

In all cases and all actions, the Jury may give a General or Special Verdict; and the Court is bound to receive it, if pertinent to the point in issue; and if the Jury doubt, they may refer themselves to the Court, but are not bound so to do. 3 *Salk.* 373.

A Special Case (see title *Jury* III,) has this advantage over a Special Verdict, that it is attended with much less expence, and obtains a much speedier decision; the *Postea* being staid in the hands of the Officer at *Nisi Prius* till the question is determined; and the Verdict is then entered for the plaintiff or defendant, as the case may happen. But as nothing appears upon the record, except the General Verdict, the parties are precluded hereby from the benefit of a Writ of Error, if dissatisfied with the judgment of the Court or Judge, in point of Law; which makes it a thing to be wished, that a method could be devised of either lessening the expence of Special Verdicts, or else of entering the case at length upon the *Postea* 3 *Comm. c.* 23.

Where there is a Special Verdict, the plaintiff's Attorney generally gets it drawn from the Minutes taken at the trial, and settled by his Counsel, who signs the draft. It is then delivered over to the opposite Attorney, who gets his Counsel to peruse and sign it; and when the Verdict is thus settled and signed, it is left with the Clerk of *Nisi Prius* in a town cause, or with the Associate in the country, who makes copies for each party. The whole proceedings are then entered, docketed, and filed of record; after which a *concilium* is moved for, a rule drawn up thereon with the Clerk of the Rules, the cause entered with the Clerk of the Papers, copies of the record made and delivered to the Judges, and Counsel instructed and heard, in like manner as upon arguing a demurrer; only that a Special Verdict must be set down in the paper for argument, within four days, and cannot be set down afterwards without leave of the Court. After judgment given, the prevailing party is immediately entitled to tax his costs, and take out execution, without giving a four-day rule for judgment; but the other party may have a rule to be present at taxing costs. *Tidd's Pract.*: and see *Sellon's Pract.*

In a *Special Case*, as in a Special Verdict, the facts proved at the trial ought to be stated, and not merely the evidence of facts. It is usually dictated by the Court, and signed by the Counsel, before the Jury are discharged; and if, in settling it, any difference arises about a fact, the opinion of the Jury is taken, and the fact stated accordingly. For the argument of a Special Case, the same steps must be taken, as for that of a Special Verdict, except that it is not entered of record. *Tidd's Pract.* When a Special Case is reserved, the Verdict ought always to be for the plaintiff; and the rule of *Nisi Prius* ought to be to the following effect: That if the Court should be of opinion for the defendant, then judgment of Nonsuit should be entered; otherwise the defendant could have no remedy in case of the plaintiff's death. *Barnes* 460: *Sellon's Pract.*

If a Special Verdict in a Criminal Case do not sufficiently ascertain the fact, a *Venire de novo* ought to issue. *Skin.* 667: *Ld. Raym.* 1521; for a Special Verdict ought not to be amended in Criminal Cases, *Ld. Raym.* 141; unless there are unobjectionable minutes to amend it by. See *Stra.* 514, 1197: And in Forgery, a Special Verdict has been amended where the fault was committed by the defendant. *Stra.* 844. If a Special Verdict find only part of the matter in issue, or do not take in the whole issue, or if the imperfection is such that judgment cannot be given, it is bad. *Ld. Raym.* 1522: *Cro. Jac.* 31. But if there be several issues, and the Jury find only some of them, the Court may give judgment. *Stra* 845. For in a General Verdict on several counts, if any one of them is good, it is sufficient in Criminal Cases. *Salk.* 384: *Doug* 730.

A Juryman withdrawing from his Fellows, or keeping them from giving their Verdict, without giving good reason for it, shall be fined; but if he differ from them in judgment, he shall not. *Dyer* 53. If one of the Jury that found a Verdict, were outlawed at the time of the Verdict, it is not good: And where a Verdict is given by thirteen Jurors, it is said to be a void Verdict; because no Attaint will lie. 2 *Lil.* 644, 650. If there be eleven Jurors agreed, and but one dissenting, the Verdict shall not be taken, nor the Refuser fined, &c. Though it is said, anciently, it was not necessary, that all the Twelve should agree in civil causes, 2 *Hale's Hist. P. C.* 297.

In capital cases, a Verdict must be actually given; and if the Jury do not all agree upon it, they may be carried in carts after the Judges, round the Circuit, till they agree; and in such case they may give their Verdict in another county. 1 *Inst.* 227, 281: 1 *Vent.* 97. If the Jury acquit a person of an indictment of Felony against evidence, the Court, before the Verdict is recorded, may order them to go out again and reconsider the matter; but this hath been thought hard, and of late years is not so frequently practised as formerly. 2 *Hawk. P. C. c.* 47. § 11.

In case a Jury acquits a man upon trial against full evidence, and being sent back to consider better of it, are peremptory in and stand to their Verdict, the Court must take it, but may respite judgment upon the acquittal: And here the King may have an Attaint: And if the Jury will, by Verdict, convict a person against or without evidence, and against the opinion of the Court; they may reprieve him before judgment, and certify for his pardon. 2 *Hale's Hist. P. C.* 310.

If the fact upon which the Court was to judge, be not found by the Verdict, a new *Venire facias* may be granted. 1 *Rol. Abr.* 693. A Verdict being given where no issue is joined, there can be no judgment upon it; but a repleader is to be had. *Mod. Ca.* 4. And if a Verdict be ambiguous, insufficient, repugnant, imperfect, or uncertain, judgment shall not pass upon it. 1 *Saund.* 154, 155. See title *Venire facias de Novo.*

Verdicts must in all things directly answer the issue, or they will not be good; and if a Verdict finds only part of the issue, it may be ill for the whole. 3 *Salk.* 374. But there is a difference between actions founded on a wrong, and on a contract; for where it is founded on a wrong, as on a trespass, or escape, &c. it is maintainable if any part of it is found: So in debt for rent, a less sum than demanded may be found by the Verdict, because it may be apportioned; but where an action is founded on a contract, there it is entire, and otherwise.

2 *Cro.*

2 *Cro.* 380. If several persons are indicted, or jointly charged in an information, a Verdict may find some of the defendants guilty, and not others. And if the substance of an issue be found, or so much as will serve the plaintiff's turn, although not directly according to the issue, the Verdict is good. 1 *Lev.* 142: *Hob* 73: 1 *Mod.* 4. Where only *two* are found guilty of a Riot, (which cannot be committed by less than three,) or only one found guilty of a Conspiracy, (to which two at least are required,) they having in both cases been indicted with others, judgment shall be given against them, even though the others who were indicted do not come to trial, *Stra.* 193, 1227. So where six were indicted for a Riot, and two died before trial, two were acquitted, and two only found guilty, judgment was given: For they must have been found guilty with one or both of those who had not been tried, or it could not have been a Riot. *Burr.* 1262.

If the Jury find the issue and more, it is good for the issue, and void for the residue: And where a Jury find a point in issue, and a superfluous matter over and above, that shall not vitiate the Verdict. 2 *Lev.* 253. Yet if a man brings an action of Debt, and declares for 20*l.* and the Jury, upon *nil debet* pleaded, find that the defendant owed 40*l.* this Verdict is ill; for the plaintiff cannot recover more than he demands; and in this case he may not recover what he demands, because the Court cannot sever their judgment from the Verdict. 3 *Salk* 376. See title *Debt*.

A Verdict found against a Record, which is of a higher nature than any Verdict, is not good: But where a Verdict may be any ways construed to make it good, it shall be so taken, and not to make it void. 2 *Lill.* 644, 651. Upon a General Issue, a Verdict which is contrary to another record, may be allowed; but not where the Verdict found is against the same record upon which it is given. *Dyer* 300. A Verdict against the confession of the party, is void: But it has been held, that the Verdict may be good in the disjunctive, though it be not formal; but if it find a thing merely out of the issue, it is not good. *Jenk. Cent.* 257: *Hob.* 53, 54. Where the Jury begin with a direct Verdict, and end with Special Matter, &c. that shall make the Verdict: Also if they begin with any Special Matter, and after make a general conclusion upon it, contrary to Law; the Judges will judge of the Verdict, according to the Special Matter. *Hob.* 53.

No Verdict will make that good, which is not so by Law, of which the Court is to judge; judgment is to be given on Verdicts, that stand with Law; and what both parties have agreed in the pleading, must be admitted so to be, though the Jury find it otherwise, it being a rule in Law. *Hob.* 112: 2 *Cro.* 678: 2 *Mod.* 4.

At Common Law, where any thing is omitted in the Declaration, though it be matter of substance, if it be such as, without proving it at the trial, the plaintiff could not have had a Verdict, and there be a Verdict for the plaintiff, such omission shall not arrest the judgment. This rule, however, is to be understood with some limitation; for, on looking into the cases, it appears to be, that where the plaintiff has stated his title, or ground of action, defectively, or inaccurately, (because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,) it is a fair presumption, after a Verdict, that they were proved; but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption. And hence it is a general rule, that a Verdict will aid a title defectively set out, but not a defective title. Thus, where the grant of a reversion is stated, which cannot take effect without attornment, that, being a necessary ceremony, may be presumed to have been proved. But where, in an action against the indorser of a bill of exchange, the plaintiff did not allege a demand on and refusal by the acceptor, when the bill became due, or that the defendant had notice of the acceptor's refusal, this omission was held to be error, and not cured by the Verdict; For in this case, it was not requisite for the plaintiff to prove either the demand on the acceptor, or the notice to the defendant, because they were neither laid in the declaration, nor were they circumstances necessary to any of the facts charged. *Doug.* 679. See *Tidd's Pract.*

Another rule at Common Law is, that surplusage will not vitiate after Verdict; *utile per inutile non vitiatur*. And therefore, in *Trover*, if the plaintiff declare that on the 3d of *March* he was possessed of goods, which came to the defendant's hands; and that afterwards, to wit, on the 1st of *March*, he converted them to his own use: This is cured after Verdict; for that he afterwards converted them is sufficient, and the *sc.* is void. *Cro. Jac.* 428: *Tidd's Pract.*

The Statute of Jeofails helps, in certain cases, after Verdict; as it supposes the matter left out was given in evidence, and that the Judge directed accordingly. 1 *Mod.* 292. See title *Amendment*.

Where a Verdict is found for the plaintiff, and he will not enter it, the defendant may compel him to do it, on motion; or the defendant may enter it himself. 2 *Lill.* After a Verdict is returned into Court, it cannot be altered, but if there be any misprision, it is to be suggested before: And a mistake of the Clerk of the Assises appearing to the Court, was ordered to be amended. *Cro. Eliz.* 112, 150. See title *Amendment*.

VERECUNDIUM, Is specially used for injury done to any one. *Somner of Gavelkind, pag.* 174.

VERGE, or VIRGE, *Virgata*.] The compass of the King's Court which bounds the jurisdiction of the Lord Steward of the Household; and that seems to have been twelve miles about. *Stat.* 13 *R.* 2. *cap.* 3: *Britton* 68: *F. N. B.* 24. See tit. *Palace*; *Marshalsea*. There is also a Verge of Land; which is an uncertain quantity directed by the custom of the country, from 15 to 30 acres. See title *Yard-Land*. 28 *Ed.* 1. The word Verge has also another signification, of a stick or rod, whereby one is admitted tenant to a copyhold estate. *Old Nat. Br.* 17. See title *Copyhold*.

VERGERS, *Virgatores*.] Are such as carry white wands before the Judges. *Fleta, lib.* 2. *cap.* 38. Otherwise called *Portatores Virgæ*.

VERONICA. It is a piece of ancient superstition, that as our Saviour was led towards the Cross, the likeness of his face was formed on his handkerchief in a miraculous manner: This handkerchief is pretended to be still preserved in St. *Peter's* Church at *Rome*, and called *Veronica*. *Mat. Paris, Anno* 1216, *pag.* 514: *Bromp.* 121.

VERT, Fr. *Verd.* i. e *Viridis*, otherwise called *Greenhue.*] In the Forest Laws signifies every thing that beareth a green leaf within a forest, that may cover a deer; but especially great and thick coverts. Of Vert there are divers kinds; some that bear fruit, which may serve for food, as chesnut-trees, service-trees, nut-trees, crab-trees; &c. And for the shelter of the Game, some are called *Haut-boys*, (high-wood,) serving both for food and browze; also for the defence of them, as oaks, beeches, &c. and for shelter and defence, such as ashes, poplars, maples, alder, &c. Of *Sub-boys*, (underwood,) some are for browze and for food of the Game; of bushes and other vegetables, some are for food and shelter, as the haw-thorn, black-thorn, &c. And some for hiding and shelter, such as brakes, gorse, heath, &c. But herbs and weeds, although they be green, our legal Vert extendeth not to them. 4 *Inst* 327.

Manwood divides Vert into Overt-vert and Nether-vert: The Overt-vert is that which the Law-books term *haut-boys*; and Nether vert, what they call *sub-boys*: And into Special-vert, which is all trees growing within the forest that bear fruit to feed deer: called special, because the destroying of it is more grievously punished than of any other Vert. *Manw. par.* 2. *pag.* 33. Vert is sometimes taken for that power which a man hath by the King's grant to cut green-wood in the forest. See title *Forest*.

VERVISE, A kind of cloth, mentioned in *stat.* 1 *R.* 3. *c.* 8.

VERY LORD AND VERY TENANT, *Verus Dominus & Verus Tenens.*] They that are *immediate* lord and tenant one to another. *Broke.* See *Old Nat. Br.*: and title *Tenures*.

VEST, *Vestire.*] To invest with, to make possessor of, to place in possession. *Plenam possessionem terræ vel prædii tradere, seisinam dare, infeodare. Spelman.*

VESTA, The Vest, Vesture, or Crop on the Ground. *Hist. Croyl. contin. p* 454.

VESTED, Estates; See titles *Estate*; *Remainder*; *Vested Legacies*. See *Legacy*.

VESTRY; see tit. *Churches* III. 1. A Place or Room adjoining to a church, where the Vestments of the Minister are kept; also a meeting at such place: Heretofore the Bishop and Priests sat together in Vestries, to consult of the affairs of the Church; in resemblance of which ancient custom, the Ministers, Churchwardens, and chief men of most parishes, do at this day make a Parish Vestry: And, in general, a person is chosen in every Parish to act as Vestry Clerk, whose duty is to attend at all Parish meetings, to draw up and copy all orders and other acts of Vestry, and to give out copies thereof when necessary; for which purpose he has the custody of all books and papers relating thereto.

The *Sunday* before a Vestry is to meet, public notice ought to be given either in the church after divine service is ended, or else at the church-door as the parishioners come out, both of the calling of the said meeting, and also of the time and place of the assembling of it; and it ought also to be declared for what business the said meeting is to be held, that no one may be surprised, but that all may have full time before to consider of the subject-matter of the meeting. It is also usual to toll one of the church bells for half-an-hour preceding the time when the Vestry is to assemble, in order to remind the parishioners of the appointed time. See 5 *Mod.* 66: *Lu.* 21: *Hetl.* 61: *Litt.* 263: *Popb.* 137: 1 *Mod.* 194: 2 *Vent.* 167: *Burn. Eccl. L.*

Every parishioner who is assessed to, and pays the church rates, or scot and lot, is, of common right, entitled to be admitted into a General Vestry, and to give his vote therein. Thus where *Phillibroun*, an inhabitant and parishioner, paying scot and lot in the parish of *St. Botolph, Bishopsgate*, in *London*, was excluded from the Vestry-room of that parish by *Ryland*, the churchwarden, he brought his action for this injury, and, on a demurrer to the declaration, it was insisted that Vestries are voluntary meetings only, and therefore the exclusion was neither an injury or damage to *Phillibroun*; but that, admitting the shutting of the door against him and keeping him out was a damage, yet it was no more than a public damage, for which no Action would lie. But on the other side, it was contended that every inhabitant has a right to be present at such meetings, and give his vote: And the Court made no difficulty but that such an action was maintainable; but they gave judgment for the defendant, because it was not stated in the declaration that the parishioners had a right to hold their Vestry in this room; for that in an action of this nature, the plaintiff must first shew a Right in the thing claimed, and then a Disturbance in the enjoyment of it. 2 *Ld. Raym.* 1388: 1 *Stra.* 624: 8 *Mod.* 52, 351.

The Rector, Vicar, or Curate also have a right to be admitted into the Vestry, and to vote upon the question therein propounded, although not assessed to the church rates.

So also, all Out-dwellers, occupying land in the parish, have a right to vote in the Vestry as well as the Inhabitants. *Burn. Eccl. L.*

When the parishioners, thus qualified, are assembled at the time and place appointed, those who are present include all those who are absent, and the votes of the major part of those present bind all the rest. *Vent.* 367.

The persons assembled at a Vestry being all upon an equal footing, the power of adjourning it does not reside singly in the minister, or in any other person as chairman, nor in the churchwardens, but in the whole assembly; for *inter pares non est potestas*; and therefore the adjournment, as well as every other act of the Vestry, must be decided by the majority of votes. 2 *Stra.* 1045.

To prevent disputes, it may be convenient that every Vestry Act be entered in the Parish Books of Accounts, and that every man's hand consenting, be set thereto. *Burn Eccl. L.*

SELECT VESTRIES—In large and populous parishes, especially in and about the Metropolis, a custom has obtained of yearly choosing a select number of the chief and most respectable parishioners to represent and manage the concerns of the parish for that year; and this has been held to be a good and reasonable custom. 2 *P. Wms.* 3: *Lutw.* 1027: *Burn Eccl L.*

It seems also to have been held a good and reasonable custom to choose a certain number of parishioners as a Select Vestry; and that as often as any one of the members die, the rest shall choose one other fit and able parishioner of the same parish to fill up the vacancy of him so

so deceased; but this can only be supported upon the basis of prescription, and constant immemorial usage.

The custom, however, differing in different parishes as to the election, government, and proceedings of Select Vestries, it is enacted by the *stat.* 10 *Ann c.* 11. *§20*, for building fifty new churches in or near *London* and *Westminster*, that the Commissioners shall appoint a convenient number of sufficient Inhabitants to be Vestry-men, and from time to time, upon the death, removal, or other voidance of any such Vestry-man, the rest, or majority of them, may choose another.

In several private Acts for building particular churches, the Legislature has described the persons of whom the Select Vestry shall respectively consist. Thus, in *Spittlefields*, by *stat.* 2 *Geo.* 2. *c.* 10, the Rector, Churchwardens, Overseers, and all other persons who have served or fined for those offices, shall, so long as they continue householders within the parish, and pay the Poor-rate, be Vestry-men of the said parish for the time being, and have the management of the affairs of the parish.—So also, in the parish of *Wapping, Stepney*, by *stat.* 2 *Geo.* 2. *c.* 30, the Rector, Churchwardens, Overseers, and all other persons who shall pay two shillings a month, or more, towards the relief of the Poor, and no other, shall be Vestry-men of the said parish.

A Vestry was called to consider about building a Workhouse, where it was agreed to, and to borrow money for that purpose: And that whoever should be bound for it should be indemnified by the parish. This order was confirmed by another, and both signed by the Vicar and several of the Inhabitants. 300*l.* being the sum agreed upon, was borrowed of *A.* to whom *B.* gave bond for it. An order of Vestry was made for raising the money, but, upon appeal to the Quarter Sessions by some new parishioners, was quashed. *B.* was sued on the bond, and paid the money, and then brought a bill for relief. And the Master of the Rolls decreed him his principal, interest, and costs at Law, and in Chancery; and that the defendants the Vicar, Churchwardens, and Overseers of the Poor, call a Vestry to make a rate for payment; and if the Inhabitants refuse payment, the plaintiff to be at liberty to apply to the Court: And said that he did not see why the Court might not as well compel those who are not parties to pay the rate, as order tenants, though not parties, to pay the rates; and because the defendants had put in a fair answer, their costs were decreed to be raised by the same rate; but said, that if those who had appealed to the Quarter Sessions had been before the Court, they should have paid all the costs. 2 *P. Wms.* 332. See 21 *Vin. Abr. p.* 448.

VESTURA, *Vesture*: A Crop of Grass or Corn; An allowance of some set portion of the products of the earth, as Corn, Grass, Wood, *&c.* for part of the salary or wages to some officer, servant, or labourer, for their livery or vest. So Foresters had a certain allowance of timber and underwood yearly out of the Forest for their own use. *Paroch. Antiq. p.* 620.

VESTURE, A Garment; metaphorically applied in Law to a possession or seisin. *Stat. Westm.* 2. *c.* 5. Vesture of an Acre of Land is the profit of it; "It shall be inquired how much the Vesture of an acre of ground is worth, and how much the land," *&c.* 4 *Ed.* 1; 14 *Ed.* 3. By grant of *Vestura terræ*, the soil will pass; and the Vesture being the profit of land, it is generally all one to have that, as the land itself. 1 *Vent.* 393: 2 *Roll. Abr.* 2.

VETITUM NAMIUM. See *Namium Vetitum*; *Replevin*; *Withernam*.

VIA MILITARIS, A Highway. *Bract. l.* 4. *c.* 16. *par.* 7: *Fleta, lib.* 4. *c.* 6. *par.* 3.

UFFINGI, The Kings of the *East Angles* were so termed; from King *Uffa*, who lived in the year 578. *Matt. West.*

VIA REGIA, The Highway or common road, called the King's Way, because authorised by him, and under his protection: It is also denominated *Via Militaris*. *Leg. Hen.* 1. *c.* 80; *Bract. lib.* 4. See tit. *Highway*.

VICAR, *Vicarius, quasi vice fungens Rectoris.*] The Priest of every parish is called Rector, unless the predial tithes are appropriated, and then he is styled Vicar; and when Rectories are appropriated, Vicars are to supply the Rectors' places. See title *Parson* I. Where the Vicar is endowed, and comes in by institution and induction, he hath *curam animarum actualiter*; and is not to be removed at the pleasure of the Rector, who in this case hath only *curam animarum habitualiter*; but where the Vicar is not endowed, nor comes in by institution and induction, the Rector hath *curam animarum actualiter*, and may remove the Vicar. 1 *Vent.* 15: 3 *Salk.* 378.

Upon endowment, the Vicar hath an equal, though not so great an interest in the church as a Rector; the freehold of the church, church-yard, and glebe is in him; and as he hath the freehold of the glebe, he may prescribe to have all the tithes in the parish, except those of Corn, *&c.* Many Vicars have a good part of the great tithes; and some Benefices, that were formerly severed by impropriation, have, by being united, had all the glebe and tithes given to the Vicars; But tithes can no other way belong to the Vicar than by gift, composition, or prescription; for all tithes *de jure* appertain to the Parson; and yet generally Vicars are endowed with glebe and tithes, especially small tithes, *&c.* If a Vicar be endowed of small tithes by prescription, and afterwards land, which had been arable time out of mind, is altered, and there are growing small tithes thereon, the Vicar shall have them; for his endowment goes to such tithes, in any place within the parish. *Cro. Eliz.* 467: *Hob.* 39. But where the Vicar is endowed out of the Parsonage, he shall not have tithes of the Parson's glebe, or of land that was part thereof at the time of the endowment, but now severed from it: Yet it seems to be otherwise, if the glebe lands are in the hands of the Parson's lessee. *Cro. Eliz.* 479: *Mallor. Q. Imped.* 4. See title *Tithes*.

VICARAGE, *Vicaria*,] Of places did originally belong to the Parsonage or Rectory, being derived out of it: The Rector of common right is patron of the Vicarage; but it may be settled otherwise; for if he makes a lease of his Parsonage, the patronage of the Vicarage passes as incident to it. 2 *Roll. Abr.* 59. And if a Vicarage become void, during the vacancy of the Parsonage, the Patron of the Parsonage shall present to such Vicarage. 19 *Edw.* 2. 41. If the profits of the Parsonage or Vicarage fall into decay, that either of them by itself is not sufficient to maintain a Parson and Vicar, they ought again to be reunited: Also, if the Vicarage be not sufficient to maintain a Vicar, the Bishop may compel the Rector to augment the Vicarage. 2 *Roll.* 337:

Pars.

Parf. Counfell. 195, 196: *Stat.* 29 *Car.* 2. *c.* 8. Upon the appropriation of a Church, and endowment of a Vicar out of the fame, the Parfonage and Vicarage are two diftinct ecclefiaftical benefices: and it hath been held, that where there is a Parfonage and Vicarage endowed, that the Bifhop in the vacation may diffolve the Vicarage; but if the Parfonage be impropriated, he cannot do it; for on a diffolution the cure muft revert, which it cannot into lay-hands. 2 *Cro.* 518: *Palm.* 219.

For the moft part, Vicarages were endowed upon appropriations; but fometimes Vicarages have been endowed without any appropriation of the Parfonage.

The Parfon, Patron, and Ordinary, may create a Vicarage, and endow it: And in time of vacancy of the church, the Patron and Ordinary may do it; but the Ordinary alone cannot create a Vicarage, without the Patron's affent. 17 *Edw.* 3. 51: *Cro. Jac.* 516. Where there is a Vicarage and Parfonage, and both are vacant, and in one perfon's Patronage; if he prefents his Clerk as Parfon, who is thereupon inducted, this fhall unite the Parfonage and Vicarage again. 11 *H.* 6. 32. Vicarage, or not, is to be tried in the Spiritual Court, becaufe it could not begin to be created but by the Ordinary. 3 *Salk.* 378. See further, titles *Appropriation*; *Parfon*; and 1 *Comm. c.* 11. *n.* 21.

VICARIAL TITHES. Privy or fmall Tithes. See title *Tithes*.

VICARIO *deliberando Occafione cujufdam Recognitionis*, &c. An ancient writ for a fpiritual perfon imprifoned, upon forfeiture of a recognizance, &c. mentioned in *Reg. Orig* 147.

VICE-ADMIRAL, An under Admiral at fea; or Admiral on the coafts, &c. See title *Admiral*.

VICE-ADMIRALTY COURTS; See title *Admiral*.

VICE-CHAMBERLAIN. A great Officer next under the Lord Chamberlain; who, in his abfence, hath the rule and controul of all Officers appertaining to that part of his Majefty's Houfehold, which is called the Chamber above Stairs. *Stat.* 13 *R.* 2.

VICE-CONSTABLE OF ENGLAND, An officer whofe office is fet forth in *Pat.* 22 *Edw.* 4. See title *Conftable*.

VICE-CONSUL, The fame as *Vicecomes*, or Sheriff. *Leg. Ed. Conf. c.* 12.

VICE-DOMINUS, The fame with *Vicecomes*. *Leg. Hen.* 1. *c.* 7: *Selden's Tit. Hon. par.* 2: *Ingulphus*.

VICE-DOMINUS EPISCOPI, The Vicar-general, or Commiffary of a Bifhop. *Blount*.

VICE-GERENT, A deputy or lieutenant. *Stat.* 31 *Hen.* 8. *c.* 10.

VICE-MARSHAL, Is mentioned with Vice-Conftable in *Pryn's Animad. on* 4 *Inft.* 71.

VICE-ROY, *Pro Rex*.] The King's Lord Lieutenant over a Kingdom, as *Ireland*.

VICE-TREASURER, An officer under the Lord Treafurer in the reign of *Henry* VII. See *Under-Treafurer of England*.

VICINAGE, Fr. *Voifinage, Vicinetum*.] Neighbourhood, or near dwelling. *Magn. Chart. c.* 14. See title *Venue*:—As to Common by reafon of Vicinage, fee title *Common*.

VICIS ET VENELLIS MUNDANDIS, An ancient writ againft a Mayor or Bailiff of a town, &c. for the clean keeping of their ftreets. *Reg. Orig.* 267.

VICOUNT, or VISCOUNT, *Vicecomes*.] Signifies as much as Sheriff. Between which two words, there feems to be no other difference, but that the one comes from the *Normans*, the other from our anceftors the *Saxons*; of which, fee *Sheriff*. Vifcount alfo fignifies a degree of Nobility next to an Earl, which *Camden* (*Britton, pag.* 170,) fays, is an old name of office, but a new one of dignity, never heard of amongft us, till *Henry* VI. who, in his eighteenth year in Parliament, created *John* Lord *Beaumont*, Vifcount *Beaumont*; but far more ancient in other countries. See *Selden's Tit. Hon.* 761; and this Dictionary, title *Peers of the Realm* I.

VICOUNTIEL, or VICONTIEL, An adjective, from Vifcount, and fignifieth any thing that belongeth to the Sheriff; as, Writs Vicontiel are fuch Writs as are triable in the County or Sheriff's Court; of which kind there are divers Writs of Nufance, &c. mentioned by *Fitzherbert*. *Old Nat. Brev.* 109: *F. N. B.* 184.

Vicontiels are certain farms, for which the Sheriff pays a rent to the King, and he makes what profit he can of them. Vicontiel Rents ufually come under the title of *firma comitatûs*; of thefe the Sheriff hath a particular roll given in to him, which he delivers back with his accounts. See *ftats* 34 & 35 *H.* 8. *c.* 16: 2 & 3. *Ed.* 6. *c.* 4: 22 *Car.* 2. *c.* 6.; this Dict. title *Sheriff*; and *Hale's Sheriff's Ac.* 40.

VICOUNTIEL JURISDICTION, That Jurifdiction which belongs to the Officers of a County; as to Sheriffs, Coroners, Efchreators, &c.

VICTUALS, *Victus*.] Suftenance, things neceffary to live by, as meat and provifions. Victuallers are thofe that fell Victuals; and we call now all common alehoufe-keepers by the name of Victuallers. Victuallers fhall fell their Victuals at reafonable prices, or forfeit double value: Victuallers, Fifhmongers, Poulterers, &c. coming with their Victuals to *London*, fhall be under the governance of the Lord Mayor and Aldermen; and fell their Victuals at prices appointed by Juftices, &c. See *ftats.* 23 *Edw.* 3. *c.* 6: 31 *Edw.* 3. *c.* 10: 7 *R.* 2. *c.* 11: 13 *R.* 2. *ft.* 1. *c.* 8. No perfon during the time that he is a Mayor, or in office in any town, fhall fell Victuals, on pain of forfeiture, &c. But if a Victualler be chofen Mayor, whereby he is to keep the Affife by Statute, two difcreet perfons of the fame place, who are not Victuallers, are to be fworn to affife Bread, Wine, and Victuals, during the time that he is in office; and then, after the price affeffed by fuch perfons, it fhall be lawful for the Mayor to fell Victuals, &c. *Stat.* 6 *R.* 2. *c.* 9: 3 *Hen.* 8. *c.* 8.—If any one offend againft thefe Statutes, the party grieved may fue a writ directed to the Juftices of Affife, commanding them to fend for the parties, and to do right; or an attachment may be had againft the Mayor, Officer, &c. to appear in *B. R.* In fome manors they choofe yearly two Surveyors of Victuals, to fee that no unwholefome Victuals be fold, and deftroy fuch as are corrupt. 1 *Mod.* 202. The rates of Victuals in all places, except Corporations, fhall be affeffed by the King's Juftices, &c. by proclamation. Victuals are not to be tranfported. *Stat.* 25 *H.* 8. *c.* 2. Thefe ancient acts feem now totally difregarded, though the provifions in fome of them are not unworthy attention. See further, titles *Foreftalling*; *Monopoly*; *Regrating*; *Navigation Acts*, &c.

VIDAME; See *Vavafors*; *Vice-Dominus*.

VIDELICET; See *Scilicet*.

VIDUITATIS PROFESSIO, The making a folemn profeffion to live a fole and chafte widow; which

was heretofore a custom in *England*. *Dugd. Warwicksh.* 313, 654.

VIDIMUS; See *Innotescimus*.

VI ET ARMIS, With force and arms. Words used in indictments, &c. to express the charge of a forcible and violent committing any crime or trespass Where the omission of *Vi et Armis*, &c. is helped in indictments, see *stat.* 4 & 5 *Ann. c.* 16; and this Dictionary, title *Indictment*.

VIEW, Fr. *Veue*, i. e, *Visus*.] Originally, where a real action was brought, and the tenant did not know certainly what was in demand, he might pray that the Jury might view it. *Britton, c.* 45: *F. N. B.* 178.

This View was for the Jury to see the land or thing claimed, and in controversy: Formerly, a View was not granted in personal actions: and see *stat.* 13 *E.* 1. *c.* 48, which restrains it in certain real actions. At present, in actions of Waste, Trespass *quare clausum fregit*, Ejectment, and other actions where a View appears to the Court to be proper and necessary, that the Jurors, whether common or special, who are to try the issues, may, for the better understanding of the evidence, have the View of messuages, lands, or place in question, the Court is authorised by *stat.* 4 & 5 *Ann. c.* 16. § 3, "to order special writs of *distringas* or *habeas corpora* to issue, by which the Sheriff, or other officer to whom they are directed, shall be commanded to have six out of the first twelve of the Jurors named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who then and there shall have the matters in question shewn to them, by two persons in the said writs named, to be appointed by the Court, and the said Sheriff or other officer, who is to execute the said writs, shall, by a special return upon the same, certify that the View hath been had, according to the command of the said writs." And, by *stat.* 3 *Geo.* 2. *c.* 25. § 14, "where a View shall be allowed in any cause, in such case six of the Jurors named in such Panel, or more, (who shall be mutually consented to by the parties, or their agents on both sides, or, if they cannot agree, shall be named by the proper officer of the respective Courts of King's Bench, &c. for the causes in their respective Courts, or, if need be, by a Judge of the respective Courts where the cause is depending, or by the Judge or Judges before whom the cause shall be brought on to trial respectively,) shall have the View, and shall be first sworn, or such of them as appear, upon the Jury to try the said cause, before any drawing as directed by the act; and so many only shall be drawn, to be added to the Viewers who appear, as shall, after all defaulters and challenges allowed, made up the number of twelve, to be sworn for the trial of such cause." See title *Jury*.

Before the *stat.* 4 & 5 *Ann. c.* 16, there could be no View, till after the cause had been brought on to trial; when, if the Court saw the question involved in any obscurity, which might be cleared up by a View, the cause was put off, that the Jurors might have a View before it came on again. Upon this statute, it had become the practice to grant a View of course, upon the motion of either party: and a notion having prevailed, that six of the first twelve, upon the Panel, must attend upon the View, and that if they did not appear at the trial, the cause must be put off, Lord *Mansfield*, and the rest of the Judges, thought it their duty to interfere, and to take care that their ordering a View should not obstruct the course of justice, and prevent the cause from being tried; for they were all clearly of opinion, that the act of Parliament meant that a View should not be granted, unless the Court were satisfied that it was proper and necessary; and they thought it better, that a cause should be tried upon a View had by any six, or by fewer than six, or even without any View at all, than that the trial should be delayed for a great length of time. Accordingly they resolved, not to order a View any more, without a full examination into the propriety and necessity of it, unless the party applying would come into such terms, as might prevent an unfair use being made of it. Agreeably to this resolution, they required a consent, which has ever since been made a part of the rule, that in case no View be had, or if a View be had by any of the Jurors, though not six of the first twelve, yet the trial shall proceed, and no objection be made on either side, on account thereof, or for want of a proper return to the writ. 1 *Burr.* 253, 7.

In actions of Waste, and Trespass *quare clausum fregit*, the necessity for a View appearing on the face of the pleadings, the motion for it is a motion of course, requiring only Counsel's signature; upon which a rule of Court is drawn up in the Term-time, or a Judge's order in Vacation. But, in other cases, a special application must be made for the rule or order, to the Court or a Judge, upon an affidavit of the circumstances; and it is always made a part of the rule or order, that the expences of taking the View shall be equally borne by both parties, and that no evidence shall be given on either side, at the time of taking thereof. Before the rule or order is drawn up, an application should be made to the opposite Attorney, for the name of his Shewer; and the names of both Shewers must be inserted in the rule or order, and also in the writ, with the time and place of meeting for proceeding on the View. The rule or order being drawn up, a copy of it must be served on the opposite Attorney, and the original left with the Sheriff, together with the names of the Jurors, if special, and he will summon them; if common, he will summon such as he thinks proper. *Tidd's Pract.*: *Impey's Pract.*

Where, in action of Waste, several places are assigned, and the Jury hath not the View of some of them, they may find no Waste done in that part which they did not view: In Waste for wasting of Wood, if the Jury view the Wood without entering into it, it is good; also Waste being assigned in every room of an house, the View of an house generally is sufficient, 1 *Leon.* 259, 267. If a rent or common is demanded, the land out of which is issues must be put in View. 1 *Leon.* 56. And if a View be denied, where it ought to be granted, or granted where it ought not to be, &c. it is error. 2 *Lev.* 217. So a View may be on indictment for a Nusance. See *Nusance*.

VIEW OF FRANK-PLEDGE; See title *Frank-Pledge*.

VIGIL, *Vigilia*.] The eve, or next day before any solemn feast; because then Christians were wont to watch, fast, and pray in their churches. *Stat.* 2 & 3 *Ed.* 6. *c.* 19.

VI LAICA REMOVENDA, A writ that lies where two Parsons contend for a church, and one of them enters into it with a great number of laymen, and holds out the other *vi et armis*; then he that is holden out shall have this writ directed to the Sheriff, that he remove the force: But the Sheriff ought not to remove the Incumbent out of the Church, whether he is there by right or wrong, but only the force. *F. N. B.* 54: 3 *Inst.*

161; and see *stat.* 15 *R.* 2. *c.* 3. The writ *Vi laica removenda* ought not to be granted, until the Bishop of the diocese where such church is, hath certified into the Chancery such resisting and force, *&c.* though it is said in the *New Natura Brevium,* it lieth upon a surmise made by the incumbent, or by him that is grieved, without any such certificate of the Bishop, *New Nat. Br.* 121. A restitution was awarded to one who was put out of possession by the Sheriff upon a *Vi laica removenda.* *Cro. Eliz.* 466: 5 *Mod.* 443.

VILL, or VILLAGE, *Villa.*] Is sometimes taken for a Manor, and sometimes for a Parish, or part of it: But a Vill is most commonly the out-part of a parish, consisting of a few houses, as it were separate from it. *Villa est ex pluribus mansionibus, vicinata, & collata ex pluribus vicinis.* 1 *Inst.* 115. *Fleta* mentions the difference between a Mansion, a Village, and a Manor, *viz.* a Mansion may be of one or more houses, but it must be but one dwelling-place, and none near it; for, if other houses are contiguous, it is a Village; and a Manor may consist of several Villages, or one alone. *Fleta, lib.* 6. *c.* 51. According to *Fortescue,* the boundaries of Villages are not by houses or streets; but by a circuit of ground, within which there may be hamlets, woods, and waste ground, *&c.* *Fortesc. de L. L. Ang. c.* 24. The word *Town,* or *Vill,* is now, by the alteration of times and language, become a general term; comprehending under it the several species of Cities, Boroughs, and common Towns. 1 *Comm. Introd.* § 4.

When a place is named generally, in legal proceedings, it is intended to be a Vill, because, as to civil purposes, the Kingdom was first divided into Vills; and it is never intended a Parish, that being an ecclesiastical division of the kingdom to spiritual purposes, though, in many cases, the Law takes notice of Parishes as to civil purposes. 1 *Mod.* 250. If no Vill, *&c.* is alleged, where a messuage and lands lie, no trial can be had concerning it: But some Counties in the north of *England,* and in *Wales,* have no Vills but Parishes. *Jenk. Cent.* 33, 328. A Vill and a Parish by intendment shall be all one; and in process of appeal, a Parish may be intended a Vill. *Cro. Jac.* 263: 3 *Salk.* 380. If a Venue be laid in *Gray's Inn,* which is no Parish or Vill, the defendant must plead there is no such Vill as *Gray's Inn,* or it shall be intended a Vill after verdict, *&c.* 3 *Salk* 381. Two houses in an extraparochial place are not enough to denominate a Vill. 2 *Stra.* 1004, 1071. See titles *Poor* I. 1; *City*; *Town.*

VILLA REGIA, A title given to those Country Villages where the Kings of *England* had a Royal Seat, and held the manor in their own demesne, having there commonly a free chapel, not subject to ecclesiastical jurisdiction. *Paroch. Antiq.* 53.

VILLAIN, VILLEIN, *Villanus,* Fr. *Vilain,* i. e. *Vilis.*] A man of base or servile condition, a Bondman, or Servant. Of these Bondmen or Villains there were two sorts in *England*; one termed a Villain in Gross, who was immediately bound to the person of the Lord, and his heirs: the other, a Villain Regardant to a Manor, being bound to his Lord as a member belonging and annexed to a manor, whereof the Lord was owner. And he was properly a pure Villain, of whom the Lord took redemption to marry his daughter, and to make him free; and whom the Lord might put out of his lands and tenements, goods and chattels, at his will, and chastise, but not maim him: For if he maimed his Villain, he might have appeal of Maihem against the Lord; as he could bring appeal of the death of an ancestor against his Lord, or appeal of Rape done to his wife. *Bract. lib.* 1. *c.* 6: *Old Nat. Br.* 8: *Terms de Ley.*

Some were Villains by title or prescription, that is to say, that all their blood had been Villains Regardant to the Manor of the Lord time out of mind: And some were made Villains by their confession in a Court of Record, *&c.* Though the Lord might make a manumission to his Villain, and thereby infranchise him: And if the Villain brought any action against his Lord, other than an appeal of Maihem, *&c.* and the Lord, without protestation, made answer to it; by this the Villain was made free. *Terms de Ley* 576.

Villain estate was contradistinguished to free estate, by the *stat.* 8 *Hen.* 6. *c.* 11. The Villains were such as dwelt in villages, and of that servile condition, that they were usually sold with the farm to which they respectively belonged; so that they were a kind of slaves, and used as such: Villenage, or Bondage, it is said, had beginning among the *Hebrews.* *Terms de Ley* 455.

VILLENAGE cometh of Villain, and was a base tenure of lands or tenements, whereby the tenant was bound to do all such services as the Lord commanded, or were fit for a Villain to perform: The division of Villenage, by *Bracton,* was into *purum* Villenagium *à quo præstatur servitium incertum & indeterminatum,* & Villenagium *socagium*; which was to carry the Lord's dung into his fields, to plough his ground at certain days, sow and reap his corn, *&c.*; and even to empty his jakes; as the inhabitants of some places were bound to do, though afterwards turned into a rent, and that villanous service excused. Every one that held in Villenage was not a Villain or Bondman; for tenure in Villenage could make no Freeman a Villain, unless it were continued time out of mind; nor could free land make a Villain free. *Bract. l.* 2. *c.* 8. See further, this Dictionary, title *Tenures* III. 1; 13; *Villenage*; and 2 *Comm. c.* 5.

The slavery of this custom hath been long ago taken off; for we have hardly heard of any case in Villenage since *Crouche*'s Case in *Dyer*'s *Rep.* There are not properly any Villains now; and the title and tenure of Villenage are abolished by the *stat.* 12 *Car.* 2. *c.* 24.

VILLANIS REGIS SUBTRACTIS REDUCENDIS, A writ that lay for the bringing back of the King's Bondmen, that had been carried away by others out of his manors, whereto they belonged. *Reg. Orig.* 87.

VILLANOUS JUDGMENT, *Villanum Judicium.*] Is that which casts the reproach of Villany and shame upon him against whom it is given, as a Conspirator, *&c.* And the judgment in such a case shall be like the ancient Judgment in Attaint, *viz.* That the offender shall not be of any credit afterwards; nor shall it be lawful for him to approach the King's Court; and his lands and goods shall be seised into the King's hands, his trees rooted up, and body imprisoned, *&c.* *Staundf. P. C.* 157: *Lamb. Eiren.* 63. The better opinion is, that the Villanous Judgment is now by disuse become obsolete, not having been pronounced for some ages; though the punishment at this day appointed for Perjury may partake of the name of Villanous Judgment, as it hath somewhat more in it than corporal or pecuniary pain,

i. e. the discrediting the testimony of the offender for ever. See 4 *Comm. c.* 10. *p.* 136.

VILLEIN FLEECES, Bad Fleeces of Wool, shorn from scabbed Sheep. *Stat.* 31 *Edw.* 3. *c.* 8.

VILLENAGE, *Villenagium*; from *Villain.*] A servile kind of tenure belonging to land or tenements, whereby the Tenant was bound to do all such services as the Lord commanded, or were fit for a Villain to do. *Ubi sciri non poterit vespere quale servitium fieri debet mane.* For every one that held in Villenage was not a Villain, or Bondman: *Villenagium vel servitium nihil detrahit libertati, habita tamen distinctione utrum tales sunt* Villani *&* villanis *in* Villano *socagio de dominico Domini Regis. Bract. l.* 1. *c.* 6. *num.* 1.

The division of Villenage was into Villenage by Blood, and Villenage by Tenure. Tenure in Villenage could make no Freeman Villain, unless it were continued time out of mind, nor even free land make a Villain free. *Bracton* (*l.* 2. *c.* 8. *num.* 3,) divides it into *purum* Villenagium *à quo præstatur servitium incertum & indeterminatum, ubi sciri non poterit vespere, quale servitium fieri debet mane,* viz. *ubi quis facere tenetur quicquid ei præceptum fuerit*: The other he calls *Villanum Socagium*, and was tied to the performance of certain services agreed upon between the Lord and Tenant; and was to carry the Lord's dung into his field, to plough his ground at certain days, to reap his corn, plash his hedges, *&c.*; as the inhabitants of *Bickton* were bound to do for those of *Clumcastle* in *Shropshire*, which was afterwards turned into a Rent, now called *Bickton Silver*, and the service excused. There were likewise *Villani Sockmanni*, which were those who held their land in Socage; and there were *Villani Adventitii*, who were those who held land by performing certain services expressed in their deeds. *Bract. l.* 2. *c.* 8. See title *Tenures* III. 1: 2 *Comm. c.* 5.

VINAGIUM, *Tributum à Vino.*] A payment of a certain quantity of Wine, instead of rent, to the chief Lord, for a Vineyard. *Mon. Ang.* ii. 980.

VINCULO MATRIMONII, Divorce à. See title *Divorce.*

VINEGAR AND VERJUICE, Are liable to certain duties of *Customs* and *Excise*, on the importation from abroad, or the manufactory at home; which are regulated by *stats.* 24 *G.* 3. *st.* 2. *c.* 41: 26 *G.* 3. *c.* 73: 10 & 11 *W.* 3. *c.* 21: 7 & 8 *W.* 3. *c.* 30: 27 *G.* 3. *c.* 13, *&c.*

VINEYARDS. The owners of Vineyards may make wine of *British* grapes only growing there, free from any duty. *Stat.* 10 *Geo.* 2. *c.* 17.

VINNET, or *Vignet*, Fr.]. A flower or border which Printers use to ornament printed leaves of books; mentioned in *stat.* 14 *Car.* 2. *c.* 33.

VIOLATING THE QUEEN, *&c.* See title *Treason* III. 6.

VIOLENCE, *Violentia.*] All Violence is unlawful. If a man assault another with an intention of beating him only, and he dieth, it is Felony. And where a person knocks another on the head who is breaking his hedges, *&c.* this will be Murder, because it is a violent act, beyond the provocation. *Kel. Rep.* 64, 131. See titles *Homicide*; *Riots.*

VIOLENT PRESUMPTION; See title *Evidence.*

VIRGA, A Rod, or White Staff, such as Sheriffs, Bailiffs, *&c.* carry as a badge or ensign of their office. *Cowell.*

VIRGATA TERRÆ, A Yard Land, *ex* 24 *acris constat, quatuor* Virgatæ *bidam faciunt, & quinque bidæ feodum militis.* Kennet's Gloss.

VIRGE, *Tenant by.* A species of Copyholders, *i. e.* such as are said to hold by the Virge, or Rod. In fact, Copyholders and Customary Tenants differ not so much in nature as in name, for though called by different names, yet they all agree in substance and kind of tenure: Their lands are holden in one general kind, that is, by custom and continuance of time. See *Calthorpe on Copyholds*, 51, 54: 2 *Comm. c.* 9. *p.* 148; and this Dict. titles *Copyhold*; *Verge.*

VIRIDARIO ELIGENDO, A writ for the choice of a Verderor in the Forest. *Reg. Orig.* 177.

VIRIDIS ROBA, A Coat of many colours; for, in the old books, *Viridis* is used for *varius. Bract. l.* 3.

VIRILIA, The Privy Members of a Man; to cut off which was Felony by the Common Law, though the party consented to it. *Bract. l.* 3. *p.* 144. See tit. *Maihem.*

VIS, *Lat.*] Any kind of force, violence, or disturbance, relating to a man's person, or his goods, right in lands, *&c.* See *Force*; *Assault*, &c.

VISCOUNT, *Vicecomes.*] A degree of Nobility next to an Earl. They are now made by patent, as an Earl; but their number is small in this kingdom, in comparison with the other degrees of Peerage. See title *Peers of the Realm.*

VISITATION, *Visitatio.*] That office which is performed by the Bishop of every diocese once every three years, or by the Archdeacon once a year, by visiting the Churches and their Rectors throughout the whole diocese. *Reform. Leg. Eccl.* 124. When a Visitation is made by the Archbishop, all acts of the Bishop are suspended by Inhibition, *&c.* A Commissary, at his Court of Visitation, cannot cite lay-parishioners, unless it be churchwardens and sidesmen; and to those he may give his articles, and inquire by them. *Noy* 123: 3 *Salk.* 370. Proxies and Procurations are paid by the Parsons whose Churches are visited, *&c.* See those titles.

VISITATION-BOOKS OF HERALDS, when admissible in evidence; see title *Court of Chivalry.*

VISITOR, An Inspector of the government of a Corporation, *&c.* The Ordinary is Visitor of Spiritual Corporations; but Corporations instituted for private charity, if they are lay, are visitable by the Founder, or whom he shall appoint; and from the sentence of such Visitor there lies no appeal. By implication of Law, the Founder and his Heirs are Visitors of lay-foundations, if no particular person is appointed by him to see that the charity is not perverted. 3 *Salk.* 381. See further, title *Corporation* IV.

VISITOR OF MANNERS, In ancient time, was wont to be the name of the Regarder's office in the forest. *Manwood, par.* 1. *p.* 195.

VISNE, *Visnetum.*] A neighbouring place, or place near at hand. See *Venue.*

VISUS, View, or inspection; as wood is to be taken *per* Visum *forestarii, &c. Hoved.* 784.

VIVARY, *Vivarium.*] A place, by land or water, where living creatures are kept. In Law, it is most commonly used for a park, warren, piscary, *&c.* 2 *Inst.* 100.

VIVA VOCE, Is where a Witness is examined personally in open Court. See title *Evidence.*

VIVO VADIO, Estate *in*. See titles *Vadium Vivum*; *Mortgage*.

ULCUS, A Hulk of a ship of burden. *Leg. Ethelred.*

ULLAGE, Is when there is want of measure in a cask, &c.

ULNAGE, The same with *Alnage*; which see.

ULNA FERREA, Is the standard Ell of Iron, kept in the Exchequer for the rule of Measure. *Mon. Angl.* ii. 383.

UMPIRE AND UMPIRAGE; See title *Award.*

UNANIMITY OF JURIES; See title *Jury.*

UNCEASESATH, An obsolete word, mentioned in *Leg. Inæ, cap.* 37; *viz.* he who kills a thief, may make oath that he killed him in flying for the fact, & *parentibus ipsius occisi juret* unceasesath; that is, that his kindred will not revenge his death: From the *Saxon*, *ceas, litis*, and *un*, which is a negative particle, and signifies *without*; and *ath*, which is *oath*; *i. e.* to swear that there shall be no contention about it. *Blount.*

UNCERTAINTY OF THE LAW. On this subject, see 3 *Comm.* 325; where the popular doctrine of the hardship and inconveniency of this supposed evil is very ably explained and refuted.

UNCIA TERRÆ; UNCIA AGRI. These phrases often occur in the Charters of the *British* Kings, and signify some Measure or Quantity of Land. It was the quantity of 12 *modii*, and each *modius* possibly 100 feet square. *Mon. Angl.* iii. 198.

UNCORE PRIST, The Plea of a defendant, in nature of a Plea in Bar; where being sued for a debt due on bond at a day past, to save the forfeiture of the bond, he says that he *tendered* the money at the day and place, and that there was none there to receive it; and that he is also *still ready* to pay the same. See title *Tender.*

UNCUTH, *Sax.* Unknown. See title *Third-Night-Awn-Hinde.*

UNDE NIHIL HABET; See *Dote unde nihil habet.*

UNDER-CHAMBERLAIN OF THE EXCHEQUER, An Officer there that cleaved the Tallies written by the Clerk of the Tallies, and read the same, that the Clerk of the Pell, and Comptrollers thereof, might see their entries were true. He also made searches for all records in the Treasury, and had the custody of *Domesday-book*. There were two Officers of this name. *Cowell.* This office is now abolished. See title *Exchequer.*

UNDER-ESCHEATOR, *Sub-Eschaetor.*] Mentioned in *stat.* 5 *E.* 3. *c.* 4. See *Escheator.*

UNDER-SHERIFF, *Sub-Vicecomes.*] See title *Sheriff.*

UNDERTAKERS, Such as the King's Purveyors employed as their Deputies. *Stat.* 12 *Car.* 2. *c.* 24. The name is given in several statutes to persons who undertake any great work, as draining of fens, &c. See *stats.* 2 & 3 *P. & M. c.* 6: 43 *Eliz. c.* 11.

UNDER-TREASURER OF ENGLAND, *Vice-Thesaurarius Angliæ.*] An Officer first created in the time of King *Henry* VII.; but some think he was of a more ancient original. His business was to chest up the King's Treasure at the end of every Term, to note the content of money in each chest, and see it carried into the King's Treasury, for the ease of the Lord Treasurer, as being a thing beneath him, but fit to be performed by a man of great trust and secrecy: And, in the vacancy of the Lord Treasurer's office, he did all things in the receipt, &c. This Officer is mentioned in several statutes; and named Treasurer of the Exchequer, till the reign of Queen *Elizabeth*, when he was termed Under-Treasurer of *England*. See *stat.* 39 *Eliz. c.* 7.

UNDERWOOD, STEALING OF, is punishable criminally, by whipping, small fines, imprisonment, &c. See *stats.* 43 *Eliz. c.* 7: 15 *Car.* 2. *c.* 2.; and this Dict. title *Larceny* I. 1.

UN DIEU, ET UN ROY, *One God, and One King.* The learned Judge *Littleton*'s Motto.

UNDRES, A word used for Minors, or persons under age, not capable to bear arms, &c. *Fleta, l.* 1. *c.* 9.

UNFRID, One that hath no quiet or peace. *Sax.*

UNGELD, A person out of the protection of the Law; so that, if he were murdered, no Geld or fine should be paid, or composition made, by him that killed him. *Leg. Ethelred.*

UNGILDA AKER. This is mentioned in *Brompton, Leg. Athelred, p.* 898; and it signifies almost the same as Ungeld, *viz.* where a man was killed attempting any felony, he was to lie in the field unburied, and no pecuniary compensation was to be paid for his death: From the *Sax. un*, without, *gilda*, *solutio*, and *acre*, *ager. Cowell.*

UNIFORMITY, *Uniformitas.*] One form of Public Prayers, and Administration of Sacraments, and other Rites and Ceremonies of the Church of *England*, is prescribed by *stats.* 1 *Eliz. c.* 2: 13 & 14 *Car.* 2. *c.* 4. See titles *Dissenters*; *Nonconformists.*

UNION, *Unio.*] A combining and consolidating of two Churches into one: Also, it is when one Church is made subject to another, and one man is Rector of both; and where a Conventual Church is made a Cathedral. *Lyndewode.* In the first signification, if two Churches were so mean that the Tithes would not afford a competent provision for each Incumbent, the Ordinary, Patron, and Incumbents, might unite them at Common Law, before any statute was made for that purpose; and in such case it was agreed which Patron should present first, &c.; for though, by the Union, the Incumbency of one Church was lost, yet the Patronage remained, and each Patron might have a *Quare impedit* upon a disturbance to present in his turn. 3 *Nels. Abr.* 480. The licence of the King is not necessary to an Union, as it is to the Appropriation of Advowsons; because an Appropriation is a Mortmain, and the Patronage of the Advowson is lost, and, by consequence, all Tenths and First Fruits. *Dyer* 259: *Moor* 409, 661. See title *Appropriation.*

By assent of the Ordinary, Patron, and Incumbent, two Churches, lying not above a mile distant one from the other, and whereof the value of the one is not above 6*l.* a year in the King's Books of First Fruits, may be united into one. *Stat.* 37 *H.* 8. *c.* 21. And, by another statute, in cities and corporation-towns, it shall be lawful for the Bishop, Patrons, and Mayors, or Chief Magistrates of the place, &c. to unite Churches therein; but where the income of the Churches united exceeds 100*l.* a year, the major part of the Parishioners are to consent to the same; and after the Union made, the Patrons of the Churches united shall present, by turns, to that Church only which shall be presentative, in such order as agreed; and, notwithstanding the Union, each of the

Pariſhes united ſhall continue diſtinct as to rates, charges, &c. though the Tithes are to be paid to the Incumbent of the united Church. *Stat.* 17 *Car.* 2. *c.* 3. A Union made of Churches of greater yearly value than mentioned in the *ſtat.* 37 *H.* 8, was held good at Common Law; and, by the Canon Law, the Ordinary, with conſent of the Patron, might make an Union of Churches, of what value ſoever; ſo, by ſtatute, with the aſſent of the King. *Dyer* 259: 2 *Roll. Abr* 778.

When two Parochial Churches were thus united, the reparations continued ſeveral as before; and therefore the inhabitants of the pariſh where any ſuch Church was demoliſhed, were not obliged to contribute to the repairs of the remaining Church to which it was united. *Hob.* 67. This occaſioned the *ſtat.* 4 & 5 *W.* & *M.* *c.* 12; by which it is ordained, that where any Churches have been united, by virtue of the *ſtat.* 17 *Car.* 2 *c.* 3, and one of them is demoliſhed; when the other Church ſhall be out of repair, the Pariſhioners of the pariſh whoſe Church is down, ſhall pay in proportion towards the charge of ſuch repairs, &c.

UNION OF ENGLAND AND SCOTLAND; See title *Scotland*.

UNITY OF POSSESSION, *Unitas Poſſeſſionis*] Is where a man hath a right to two eſtates, and holds them together jointly in his own hands; as if a man take a leaſe of lands from another at a certain rent, and after he buys the fee-ſimple, this is an Unity of Poſſeſſion, by which the leaſe is extinguiſhed, becauſe that he who had before the occupation only for his rent, is now become Lord and Owner of the land. *Terms de Ley.* A Leſſee for years of an advowſon, on the Church becoming void, was preſented by the Leſſor, and inſtituted and inducted; and it was held, that this was a ſurrender of his leaſe; for they cannot ſtand together in one perſon, and by the Unity of Poſſeſſion one of them is extinguiſhed. *Hut.* 105. No Unity will extinguiſh or ſuſpend Tithes, but, notwithſtanding any Unity, they remain, &c. 11 *Rep.* 14: 2 *Lill.* 658. Unity of Poſſeſſion extinguiſheth all privileges not expreſsly neceſſary; but not a way to a cloſe, or water to a mill, &c. becauſe they are thus neceſſary. A way of eaſe is deſtroyed by Unity of Poſſeſſion; and a rent, or eaſement, do not exiſt during the Unity, wherefore they are gone. *Latch* 153, 154: 1 *Vent.* 95. See further, title *Joint-tenants*.

UNIVERSITY,

UNIVERSITAS; the Civil Law term for a Corporation. 1 *Comm.* 469] A place where all kinds of Literature are *univerſally* taught.

The Univerſities, with us, are taken for thoſe two Bodies which are the nurſeries of learning and liberal ſcience in this kingdom, *viz.* *Oxford* and *Cambridge*; endowed with great privileges. By *ſtat.* 13 *El.* c 29, it was enacted, That each of the Univerſities ſhall be incorporated by a certain name, though they were ancient Corporations before; and that all Letters Patent and Charters granted to the Univerſities ſhall be good and effectual in Law: That the Chancellor, Maſters, and Scholars, of either of the ſaid Univerſities, ſhall enjoy all manors, lands, liberties, franchiſes, and privileges, and all other things which the ſaid Corporate Bodies have enjoyed, or of right ought to enjoy, according to the intent of the ſaid Letters Patent; and all Letters Patent, and Liberties, Franchiſes, &c. ſhall be eſtabliſhed and confirmed; any law, uſage, &c. to the contrary notwithſtanding.

The Univerſities have the keeping of the aſſiſe of bread and beer, and are to puniſh offences concerning it: Alſo they have the aſſiſe of wine and ale, &c. And the Chancellor, his Commiſſary, and Deputy, are Juſtices of Peace for the vill of *Oxon*, county of *Oxon*, and *Berks*, by virtue of their offices; ſee *ſtats* 51 *H.* 3: 31 *Ed.* 1: 7 *Ed.* 6: 2 & 3 *P.* & *M.*: and the *Chart.* 29 *Ed.* 3: 14 *H.* 8. &c. Perſons acting theatrical performances within the precincts of either Univerſity, or five miles thereof, ſhall be deemed Vagrants; and the Chancellor, &c. may commit them to the Houſe of Correction, or Common Gaol for one month *Stat* 10 *Geo* 2. *c.* 19.

Their Courts are called the Chancellor's Courts. The Chancellors are uſually Peers of the Realm, and are appointed over the whole Univerſity. But the Courts are kept by their Vice Chancellors, their Aſſiſtants, or Deputies; the cauſes are managed by Advocates or Proctors. See *Chart.* 14 *H.* 8.

As to the power of theſe Courts in *Civil Caſes*, ſee this Dictionary, title *Courts of the Univerſities*. The following particulars are alſo deſerving notice.

Theſe Courts have juriſdiction in all cauſes, Eccleſiaſtical and Civil, (except thoſe relating to Freehold,) where a Scholar, Servant, or Miniſter of the Univerſity, is one of the parties in ſuit. *Cro Car.* 73.

Their proceedings are in a ſummary way, according to the practice of the Civil Law; and in their ſentences they follow the juſtice and equity of the Civil Law, or the Laws, Statutes, Privileges, Liberties, and Cuſtoms of the Univerſities, or the Laws of the Land, at the diſcretion of the Chancellor. *Cro. Car.* 73: *Hetley* 25: *Hard.* 508.

If there is an erroneous ſentence in the Chancellor's Court of the Univerſity of *Oxford*, an appeal lies to the Congregation, thence to the Convocation, and thence to the King in Chancery, who nominates Judges Delegates to hear the appeal; the appeal is of the ſame nature in *Cambridge*. *Wood's Inſt.* 549: 2 *Lord Raym.* 13, 46.

As cognizance is granted to the Univerſity of all ſuits ariſing any where in Law or Equity againſt a Scholar, Servant, or Miniſter of the Univerſity, depending before the Juſtices of the King's Bench, Common Pleas, and others there mentioned, and before any other Judge, though the matter concern the King; therefore, if an *Indebitatus aſſumpſit* is brought by *Quo minus* in the Exchequer againſt a Scholar or other privileged perſon, the Univerſity ſhall have conuſance, for the Court of Exchequer is included in the general words. *Cro. Car.* 73: *Hard.* 505.

But if a Debtor and Accountant to the King ſues a Scholar by bill in Equity in the Exchequer, or if an Attorney ſues a Scholar by writ of Privilege, it is ſaid that the Univerſities ſhall not have conuſance, for a general grant ſhall not take away the ſpecial Privilege of any Court. *Hard.* 189: *Lit. Rep.* 304: 3 *Lev.* 149.

But in the caſes where Privilege is allowable, a Scholar, &c. cannot waive his Privilege, and have a prohibition in the Courts of *Weſtminſter*; for the Univerſity by right

right has the conusance of the plea, where one is a privileged person; and a stranger is forced to sue a privileged person in their Courts, by reason of that right vested in them. *Cro. Car.* 73: *Hetl.* 28.

But a Scholar ought to be resident in the University at the time of the suit commenced; and no other ought to be joined in the action with him, for in such case he shall not have privilege. *Hetl.* 28. Though it is said that Servants of the University are privileged, yet it has been held, that a Bailiff of a College was not capable of privilege. *Brownl.* 74. Neither is a Townsman entitled to privilege, to exempt him from an office in the town, if he keeps a shop and follows a trade, though he is matriculated as Servant to a Scholar. 2 *Vent.* 106.

It is to be observed, that though cases as to Freehold appear, as above, to be the only causes excepted in their Charter; yet it has been held that in actions for the recovery of the possession of a Term, without claiming title to the Freehold, the Universities shall have no privilege, because the Freehold may come in question. *Cro. Car.* 87, 88: *Litt. Rep.* 252.

It hath been disputed how far the words of the Grant entitled them to privilege, in matters of Equity. And the general principle of construction seems to be, that where chattels only are concerned, or where damages only are to be given, there their privilege is allowable; but where the suit is for the thing itself, there their privilege cannot be allowed. *Vide* 2 *Vent.* 362.

The jurisdiction of the Criminal Courts in the University of *Oxford*, is thus stated by *Blackstone*; and it is believed that of *Cambridge* is nearly similar. See 2 *Lord Raym.* 13, 46.

The Chancellor's Court of *Oxford* hath authority to determine all causes of property, wherein a privileged person is one of the parties, except only causes of Freehold; and also all criminal offences or misdemesnors under the degree of Treason, Felony, or Mayhem. The prohibition of meddling with Freehold still continues; but the Trial of Treason, Felony, and Mayhem, by a particular Charter, is committed to the University jurisdiction in another Court, namely the Court of the Lord High Steward of the University.

For by the Charter of 7 *June*, 2 *Hen.* 4. (confirmed, among the rest, by the *stat.* 13 *Eliz. c.* 29,) cognizance is granted to the University of *Oxford* of all Indictments of Treasons, Insurrections, Felony, and Mayhem, which shall be found in any of the King's Courts against a Scholar or privileged person; and they are to be tried before the High Steward of the University, or his deputy, who is to be nominated by the Chancellor of the University for the time being. But, when his office is called forth into action, such High Steward must be approved by the Lord High Chancellor of *England*; and a Special Commission under the Great Seal is given to him, and others, to try the indictment then depending, according to the Law of the Land and the Privileges of the said University. When, therefore, an indictment is found at the Assises, or elsewhere, against any Scholar of the University, or other privileged person, the Vice-Chancellor may claim the cognizance of it; and (when claimed in due time and manner) it ought to be allowed him by the Judges of Assise; and then it comes to be tried in the High Steward's Court. But the indictment must first be found by a Grand Jury, and then the cognizance claimed: For it seems that the High Steward cannot proceed originally *ad inquirendum*; but only, after inquest in the Common Law Courts, *ad audiendum et determinandum*. Much in the same manner as when a Peer is to be tried in the Court of the Lord High Steward of *Great Britain*, the indictment must first be found at the Assises, or in the Court of King's Bench, and then, (in consequence of a writ of *certiorari*,) transmitted to be finally heard and determined before his Grace the Lord High Steward and the Peers. See titles *Parliament*; *Peers*.

When the cognizance is so allowed, if the offence be *inter minora crimina*, or a misdemesnor only, it is tried in the Chancellor's Court by the ordinary Judge. But if it be for Treason, Felony, or Mayhem, it is then, and then only, to be determined before the High Steward, under the King's Special Commission to try the same. The process of the trial is this: The High Steward issues one precept to the Sheriff of the County, who thereupon returns a panel of eighteen Freeholders; and another precept to the Beadles of the University, who thereupon return a panel of eighteen matriculated Laymen, "*laicos privilegio Universitatis gaudentes*:" And by a Jury formed *de medietate*, half of Freeholders and half of matriculated persons, is the indictment to be tried; and that in the Guildhall of the city of *Oxford*. And if execution be necessary to be awarded, in consequence of finding the party guilty, the Sheriff of the County must execute the University Process; to which he is annually bound by an oath. 4 *Comm. c.* 19. *p.* 277, 8.

The Universities and Royal Colleges are excepted out of the statute of Charitable Uses, *stat.* 43 *Eliz. c.* 4. § 2. See title *Charitable Uses*. The presentation of benefices belonging to Papists given to the two Universities, *stats.* 1 *W. & M. st.* 1. *c.* 26: 12 *Ann. st.* 2. *c.* 14. Universities may file a Bill in Equity to discover Trusts, *stat.* 12 *Ann. st.* 2. *c.* 14. § 4. Pending *quare impedit*, a Rule may be made for examining Patron and Clerk, *stat.* 12 *Ann. st.* 2. *c.* 14. § 5. Grants made by Papists of Ecclesiastical Livings vested in the Universities, void, *stat.* 11 *Geo.* 2. *c.* 17. § 5. See title *Papists*.

Collegians refusing to take the oaths, the King may nominate persons to succeed. *Mandamus* lies to admit the King's nominee, *stat.* 1 *Geo.* 1. *st.* 2. *c.* 13. See title *Mandamus*.—Vice-Chancellor of *Cambridge* may act as Justice of the County without the landed qualification, *stat.* 7 *Geo.* 2. *c.* 10. See title *Justices of Peace*. The Universities and Royal Colleges excepted out of the Mortmain Act.—Colleges possessed of more advowsons than a moiety of the Fellows, not to purchase more, *stat.* 9 *Geo.* 2. *c.* 36. §§ 4, 5. See title *Mortmain*.

UNKNOWN PERSONS, Larceny from. An indictment will lie, for stealing the goods of a Person Unknown. 1 *Hal. P. C.* 512. See title *Larceny*.

UNLAGE, A *Saxon* word, denoting an unjust Law; in which sense it is used in *Leg. Hen.* 1. *c.* 34.

UNLAWFUL ASSEMBLY, *Illicita Congregatio.*] The meeting of three persons or more together, by force, to commit some unlawful act. *Lamb.* See title *Riot*.

UNQUES PRIST; See *Uncore-prist*; *Tender*.

VOCIFERATIO, An outcry, or hue and cry. *Leg. Hen.* 1. *c.* 12. See title *Hue and Cry*.

VOIDANCE, *Vacatio.*] The want of an Incumbent upon an Ecclesiastical Benefice. See *Avoidance.*

VOID AND VOIDABLE. In the Law, some things are absolutely void, and some are voidable. A thing is void which is done against Law at the very time of the doing of it, and it shall bind no person: But a thing which is only voidable, and not void, although it be what he that did it ought not to have done, yet, when it is done, the doer cannot avoid the same; though by some act in Law it may be made void by his heir, &c. 2 *Lil. Abr.* 653. But see *post.* Where a grant is void at the commencement, no act afterwards can make it good: If a lease is absolutely void, acceptance of rent will not affirm it; it is otherwise when a lease is only voidable, there it will make it good. A lease for life which is voidably only, must be made void by re-entry, &c. 3 *Rep.* 64. This position is very general and perhaps wrong—If an ejectment is brought, the want of entry is cured by the defendant's entering into the rule to confess lease, entry, and ouster, in all cases, except where a fine is to be avoided.—It is generally held that covenants made in a void lease or deed, are also void. *Yelv.* 18. See *Owen* 136.

A deed of exchange, entered into by an infant, or one *non sanæ memoriæ*, is not void; but may be avoided by the infant, when arrived at age, or by the heir of him who is *non sanæ memoriæ*. *Perk.* 281. But it hath been adjudged, that a bond of an infant, or of one *non compos*, is void, because the Law hath not appointed any thing to be done to avoid such bonds; for the party cannot plead *non est factum*, as the cause of nullity doth not appear upon the face of the deed. 2 *Salk.* 675. See titles *Idiots*; *Infants.* Where the condition of a bond is void, in part by statute, it may be void totally; though it is otherwise if void in part by the Common Law, for there it shall be good for the residue. *Moor* 856: 1 *Brownl.* 64. A deed being voidable, is to be avoided by special pleading; and where an Act of Parliament says, that a deed, &c. shall be void, it is intended that it shall be by pleading, so as it is voidable, but not actually vacated. 5 *Rep.* 119. A judgment given by persons who had no good commission to do it, is void, without writ of error, 2 *Hawk. P. C. c.* 50. § 3. But an erroneous attainder is not void, but voidable by writ of error, &c. 2 *Hawk. P. C. c.* 29. § 40. See titles *Judgment*; *Attainder.*

VOIRE, Old Fr. now *vrai*, Truth. *Law Fr. Dict.*

VOIRE DIRE, Fr. *Veritatem dicere.*] Is when it is prayed upon a Trial at Law, that a witness may be (previously to his giving evidence in a cause) sworn to *speak the Truth*, whether he shall get or lose by the matter in controversy; and if it appears that he is unconcerned, his testimony is allowed, otherwise not. *Blount.* On a *Voire Dire*, a witness may be examined by the Court, if he be not a party interested in the cause, as well as the person for whom he is a witness; and this has been often done, where a busy evidence, not otherwise to be excepted against, is suspected of partiality. *Terms de Ley* 581. So in case of Trial of Infancy by Inspection, the Court may examine the Infant himself upon the oath of *Voire Dire*, to make true answer to such questions as the Court shall demand of him. See 3 *Comm. c.* 22; and this Dict. title *Infant.*

VOLUMUS. The first word of a clause in the King's Writs of Protection and Letters Patent. See *Protection.*

VOLUNTARY, As applied to a Deed, is where any conveyance is made without a consideration, either of money, or marriage, &c. Thus Remainders limited in settlements, to a man's right heirs, &c. are deemed voluntary in Equity, and the persons claiming under them are called Voluntiers. *Abr. Cas. Eq.* 385: 3 *Salk.* 174. See title *Fraud.*—So an escape may be voluntary. See title *Escape.*—And as to Voluntary *Oaths* and Voluntary *Waste*, see those titles.

VOTUM, A vow or promise, used by *Fleta* for *nuptiæ*; so *dies votorum*, is the wedding-day. *Fleta, l.* 4.

VOUCHE, Fr. in Latin *Voco.*] To call one to warrant lands, &c. See title *Recovery.*

VOUCHEE. The person vouched in a Writ of Right. See title *Recovery.*

VOUCHER, A word of art, when the Tenant in a Writ of Right calls another into the Court, who is bound to him to warranty; and is either to defend the right against the demandant, or yield him other lands to the value, &c. And it extends to lands or tenements of freehold or inheritance, and not to any chattel real, personal, or mixed: He that voucheth is called the Voucher, and he that is vouched, is called the Vouchee; and the process whereby the Vouchee is called, is a *summoneas ad warrantizandum*; on which writ if the Sheriff return that the party hath nothing whereby he may be summoned, then goes out another writ called *sequatur sub suo periculo*, &c. *Co. Litt.* 101. See title *Recovery.*

There is also a Foreign Voucher, when the Tenant being impleaded within a particular jurisdiction, as in *London*, voucheth one to Warranty in some other county out of the jurisdiction of that Court, and prays that he may be summoned, &c. 2 *Rep.* 50. On a suit in *England*, a Voucher doth not lie in *Ireland*: But it lies in *Wales*, and the Tenant shall be summoned in the next county to it. A Vouchee by entering into Warranty, becomes Tenant in Law of the Lands; and when the demandant counts against him, he may plead a release, &c. *Jenk. Cent.* 41, 100. In a Writ of Entry in the degrees, none shall vouch out of the line: And in Writs of Right and Possession, it is a good counterplea, that neither the Vouchee nor his ancestors had ever seisin of the land. *Stat.* 3 *Ed.* 1. *c.* 40. The demandant may aver a Vouchee to be dead, and that there is no such person, where the tenant voucheth a person deceased, to Warranty. *Stat.* 14 *E.* 3. *st.* 1. *c.* 18. See further, titles *Recovery*; *Warranty.*

VOUCHER, Is also used for a Ledger Book, or Book of Accounts, wherein are entered the acquittances or warrants for the accountant's discharge. *Stat.* 19 *Car.* 2. *c.* 1. Voucher signifies also, any acquittance or receipt, discharging a person, or being evidence of payment.

VOX, *Vocem non habere.* A phrase made use of by *Bracton*, signifying an infamous person, one who is not to be admitted to be a witness. *Bract. lib.* 3.

UPHOLDERS, UPHOLSTERS, or UPHOLSTERERS. None shall put to sale any Beds, Bolsters, &c. except such as are stuffed with one sort of dry pulled feathers, or clean down; and not mixed with scalded feathers, fen-down, thistle-down, sand, &c. on pain to forfeit the same, or the value: And they are to stuff

quilts,

quilts, mattrasses, and cushions, with clean wool, and flocks; without using horse-hair, &c. therein, under the like forfeiture. *Stats.* 11 *H.* 7. *c.* 19: 5 & 6 *Ed.* 6, *c.* 23.

UPLAND, High ground, or *terra firma*, in contradistinction to marshy and low ground. *Ingulph.*

USA, The River *Isis*; which River was termed *Isis* from the Goddess of that name; for it was customary among the *Pagans* to dedicate hills, woods, and rivers, to favourite Goddesses, and to call them after their names. The *Britons* having the greatest reverence for *Ceres* and *Proserpina*, who was also called *Isis*, did for that reason name the River *Isis*: She being the Goddess of the *Night*, thence they computed days by nights; as Seven Night, &c. *Blount.*

USAGE, Differs from Custom and Prescription: No man may claim a Rent, Common, or other Inheritance by Usage; though he may by Prescription. 6 *Rep.* 65. See titles *Prescription*; *Custom.*

USANCE, A calendar month, as from *May* 20 to *June* 20, and Double Usance is two such months. See title *Bills of Exchange.*

U S E,

USUS.] Is, in application of Law, the Profit or Benefit of Lands and Tenements; or a Trust and Confidence reposed in a man for the holding of lands, that he to whose Use the Trust is made shall take the profits thereof. *West. Sym par.* 1: 1 *Inst.* 272.

The following extract from the Commentaries, (*lib.* 2. *c.* 20,) seems to afford the clearest and most perspicuous view of this very intricate part of our Law; and on which our modern Conveyances are in general founded. See further, as connected with the subject, this Dictionary, titles *Conveyance*; *Deed*; *Lease and Release*; *Fine of Lands*; *Recovery*; *Mortmain*; *Trust*, &c.

USES AND TRUSTS, are, in their original, of a nature very similar; or, rather, exactly the same: Answering more to the *fidei commissum*, than the *Usus-fructus*, of the Civil Law; which latter was the temporary right of using a thing, without having the ultimate property or full dominion of the substance: But in our Law, a Use was a Confidence reposed in another, who was Tenant of the Land, or *Terre-tenant*, that he should dispose of the land according to the intentions of *Cestui-que-Use*, or him to whose Use it was granted, and suffer him to take the profits. As, if a Feoffment was made to *A.* and his heirs, to the Use of (or in Trust for) *B.* and his heirs; here, at the Common Law, *A.* the *Terre-tenant*, had the legal property and possession of the land, but *B.*, the *Cestui-que-Use*, was in conscience and equity to have the profits and disposal of it. *Plowd.* 352.

This notion was transplanted into *England* from the Civil Law, about the close of the reign of *Edward* III. by means of the foreign Ecclesiastics; who introduced it to evade the statutes of Mortmain, by obtaining grants of lands, not to their Religious Houses directly, but to the Use of the Religious Houses; which the Clerical Chancellors of those times held to be *fidei-commissa*, and binding in conscience; and therefore assumed the jurisdiction of compelling the execution of such Trusts in the Court of Chancery. See *stats.* 50 *Edw.* 3. *c.* 6: 1 *Ric.* 2. *c.* 9: 1 *Rep.* 139; and this Dictionary, title *Mortmain.* And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by Law the lands themselves were not devisable, yet if a Testator had enfeoffed another to his own Use, and so was possessed of the Use only, such Use was devisable by will. But this evasion was crushed in its infancy, by *stat.* 15 *Ric.* 2. *c.* 5, with respect to Religious Houses. See *Mortmain.*

Yet, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes; particularly as it removed the restraint of alienations by will, and permitted the owner of lands, in his life-time, to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till at length, during our long Wars in *France*, and the subsequent Civil Commotions between the Houses of *York* and *Lancaster*, Uses grew almost universal: Through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore, about the reign of *Edward* IV. (before whose time, Lord *Bacon* remarks, there are not six cases to be found relating to the doctrine of Uses), the Courts of Equity began to reduce them to something of a regular system. See *Bacon on Uses*, 313.

Originally it was held that the Chancery could give no relief, but against the very person himself intrusted for *Cestui-que-Use*, and not against his heir or alienee. This was altered in the reign of *Henry* VI., with respect to the heir; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable Consideration, or with an express notice of the Use. *Keilw.* 42, 46: *Y. B.* 22 *Ed.* 4. *c.* 6: *Bac. Uses*, 312. But a purchaser, for a valuable Consideration, without notice, might hold the land discharged of any Trust or Confidence. And also it was held, that neither the King or Queen, on account of their Dignity Royal, nor any Corporation Aggregate, on account of its limited capacity, could be seised to any Use but their own; that is, they might hold the lands, but were not compellable to execute the Trust. *Bac. Uses*, 346, 347. And, if the Feoffee to Uses died without heir, or committed a forfeiture, or married, neither the Lord who entered for his escheat or forfeiture, nor the Husband who retained the possession as tenant by the curtesy, nor the Wife to whom dower was assigned, were liable to perform the Use; because they were not parties to the Trust, but came in by Act of Law; though doubtless their title in reason was no better than that of the Heir. 1 *Rep.* 122.

On the other hand, the Use itself, or Interest of *Cestui-que-Use*, was learnedly refined upon, with many elaborate distinctions. And, 1. It was held that nothing could be granted to a Use, whereof the Use is inseparable from the Possession; as Annuities, Ways, Commons, and Authorities, *quæ ipso Usu consumuntur*; or whereof the Seisin could not be instantly given. 1 *Jon.* 127: *Cro. Eliz.* 401.—2. A Use could not be raised without a sufficient Consideration. For where a man makes a Feoffment to another without any Consideration, Equity presumes that he meant it to the Use of himself; unless he expressly declares it to be to the Use of another, and then nothing shall be presumed contrary to his own expressions. 1 *And.* 37. But, if either a good or a valuable Consideration appears, Equity will immediately raise a Use

Use correspondent to such Consideration. *Moor* 684.—3. Uses were descendible according to the rules of the Common Law, in the case of Inheritances in Possession: for, in this and many other respects, *Æquitas sequitur legem*, and cannot establish a different rule of Property from that which the Law has established. 2 *Roll. Abr.* 780.—4. Uses might be assigned by secret deeds between the parties, or be devised by last will and testament: For, as the legal estate in the soil was not transferred by these transactions, no Livery of Seisin was necessary; and, as the intention of the parties was the leading principle in this species of Property, any Instrument, declaring that Intention, was allowed to be binding in Equity. *Bac. Uses*, 312, 318. But *Cestui-que-Use* could not, at Common Law, aliene the legal Interest of the lands, without the concurrence of his Feoffee; to whom he was accounted by Law to be only Tenant at Sufferance. See *stat.* 1 *R.* 3. *c.* 1.—5. Uses were not liable to any of the Feodal Burdens; and particularly did not escheat for Felony, or other defect of blood; for Escheats, &c. are the consequence of Tenure, and Uses are held of nobody: But the land itself was liable to Escheat, whenever the blood of the Feoffee to Uses was extinguished by crime or by defect: and the Lord (as was before observed) might hold it discharged of the Use. *Jenk.* 190.—6. No Wife could be endowed, or Husband have his Curtesy, of a Use: For no Trust was declared for their benefit, at the original grant of the estate. 4 *Rep.* 1: 2 *And* 75. And therefore it became customary, when most estates were put in Use, to settle, before marriage, some joint estate to the Use of the Husband and Wife for their lives; which was the original of modern Jointures. See title *Jointure*.—7. A Use could not be extended by writ of *Elegit*, or other legal Process, for the debts of *Cestui-que-Use*. For, being merely a Creature of Equity, the Common Law, which looked no farther than to the person actually seised of the land, could award no Process against it. *Bro. Abr.* title *Executions*, 90.

It is impracticable here to pursue the doctrine of Uses, through all the refinements and niceties, which the ingenuity of the times, (abounding in subtile disquisitions,) deduced from this child of the imagination; when once a departure was permitted from the plain simple rules of Property established by the Ancient Law. These principal outlines will be fully sufficient to shew the ground of Lord *Bacon*'s complaint, that this course of proceeding "was turned to deceive many of their just and reasonable Rights. A man, that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The Wife was defrauded of her Thirds; the Husband of his Curtesy; the Lord of Wardship, Relief, Heriot, and Escheat; the Creditor of his Extent for Debt; and the poor Tenant of his Lease." *Bac. Use of the Law* 153.—To remedy these inconveniences, abundance of statutes were provided, which made the lands liable to be extended by the Creditors of *Cestui-que-Use*; allowed Actions for the Freehold to be brought against him, if in the actual pernancy or enjoyment of the Profits; made him liable to Actions of Waste; established his Conveyances and Leases, made without the concurrence of his Feoffees; and gave the Lord the Wardship of his Heir, with certain other Feodal Perquisites. See *stats.* 50 *Edw.* 3. *c.* 6; 2 *Ric.* 2. *stat.* 2, 3: 19 *Hen.* 7. *c.* 15: 1 *Ric.* 2. *c.* 9: 4 *Hen.* 4. *c.* 7: 11 *Hen.* 6. *c.* 3: 1 *Hen.* 7. *c.* 1: 11 *Hen.* 6. *c.* 5: 1 *Rich.* 3. *c.* 1: 4 *Hen.* 7. *c.* 17: 19 *Hen.* 7. *c.* 15.

These provisions all tended to consider *Cestui-que-Use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 *Hen.* 8. *c.* 10. which is usually called THE STATUTE OF USES, or, in Conveyances and Pleadings, *The Statute for transferring Uses into Possession.* The hint seems to have been derived from what was done at the Accession of King *Richard* III.; who having, when Duke of *Gloucester*, been frequently made a Feoffee to Uses, would upon the assumption of the Crown, (as the Law was then understood,) have been entitled to hold the land discharged of the Use. But, to obviate so notorious an injustice, an Act of Parliament was immediately passed, which ordained, that, where he had been so enfeoffed jointly with other persons, the land should vest in the other Feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *Cestui-que-Use*, in like manner as he had the Use. *Stat.* 1 *Ric.* 3. *c.* 5. And so the statute of *Henry* VIII., after reciting the various inconveniences before-mentioned, and many others, enacts, that "when any person shall be seised of lands, &c. to the Use, Confidence, or Trust, of any other person or Body-Politic, the person or Corporation entitled to the Use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c. of and in the like estates as they have in the Use, Trust, or Confidence; and that the estate of the person so seised to Uses, shall be deemed to be in him or them that have the Use, in such quality, manner, form, and condition, as they had before in the Use." The statute thus executes the Use, as the Lawyers term it: that is, it conveys the Possession to the Use, and transfers the Use into Possession; thereby making *Cestui-que-Use* complete owner of the lands and tenements, as well at Law as in Equity. 2 *Comm. c.* 20.

The Statute having, thus, not abolished the Conveyance to Uses, but only annihilated the intervening estate of the Feoffee, and turned the interest of *Cestui-que-Use* into a legal, instead of an equitable, Ownership; the Courts of Common Law began to take cognizance of Uses, instead of sending the party to seek his relief in Chancery. And, considering them now as merely a mode of Conveyance, very many of the rules before established in Equity were adopted, with improvements, by the Judges of the Common Law. The same persons only were held capable of being seised to a Use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments, as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the Feoffee, nor be aliened to any purchaser discharged of the Use, nor be liable to Dower or Curtesy on account of the seisin of such Feoffee; because the legal estate never vests in him for a moment, but is instantaneously transferred to *Cestui-que-Use*, as soon as the Use is declared. And, as the Use and the land were now convertible terms, they became liable to Dower, Curtesy, and Escheat, in consequence of the seisin of *Cestui-que-Use*, who is now become the

Terre-tenant

Terre-tenant also; and they likewise were no longer devisable by will. 2 *Comm.* c. 20.

The various necessities of mankind induced also the Judges very soon to depart from the rigour and simplicity of the rules of the Common Law, and to allow a more minute and complex construction upon Conveyances to Uses than upon others. Hence it was adjudged, that the Use need not always be executed the instant the Conveyance is made: but, if it cannot take effect at that time, the operation of the statute may wait till the Use shall arise upon some future contingency, to happen within a reasonable period of time; and in the mean-while the ancient Use shall remain in the original grantor: As, when lands are conveyed to the use of *A.* and *B.*, after a marriage shall be had between them, or to the Use of *A.* and his heirs till *B.* shall pay a sum of money, and then to the Use of *B.* and his heirs. 2 *Roll. Abr.* 791: *Cro. Eliz.* 439: *Bro. Abr.* title *Feoffm. al. Uses*, 30. Which doctrine, when Devises by Will were again introduced, and considered as equivalent in point of construction to Declarations of Uses, was also adopted in favour of *Executory Devises*. See that title. But herein these, which are called *Contingent* or *Springing Uses*, differ from an Executory Devise; in that there must be a person seised to such Uses at the time when the Contingency happens, else they can never be executed by the statute; and therefore if the estate of the Feoffee to such Use be destroyed by alienation, or otherwise, before the Contingency arises, the Use is destroyed for ever: whereas by an Executory Devise the freehold itself is transferred to the future Devisee. 1 *Rep.* 134, 138: *Cro. Eliz.* 439. And, in both these cases, a fee may be limited to take effect after a fee; because, though that was forbidden by the Common Law in favour of the Lord's escheat, yet, when the legal estate was not extended beyond one fee simple, such subsequent Uses (after a Use in fee) were before the statute permitted to be limited in Equity; and then the statute executed the legal estate in the same manner as the Use before subsisted. *Pollexf.* 78: 10 *Mod.* 423. It was also held, that a Use, though executed, may change from one to another by circumstances *ex post facto*; as, if *A.* makes a feoffment to the Use of his intended wife and her eldest son for their lives, upon the marriage the wife takes the whole Use in severalty; and, upon the birth of a son, the Use is executed jointly in them both. *Bac. Us.* 351. This is sometimes called a *Secondary*, sometimes a *Shifting Use*. And, whenever the Use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration or during such impossibility, and is styled a *Resulting Use*. As, if a man makes a Feoffment to the Use of his intended wife for life, with remainder to the Use of her first-born son in tail: here, till he marries, the Use results back to himself: after marriage, it is executed in the wife for life; and, if she dies without issue, the whole results back to him in fee. *Bac. Us.* 350: 1 *Rep.* 120. It was likewise held, that the Uses originally declared may be revoked at any future time, and new Uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the Common Law would allow, was a deed of Defeasance coeval with the grant itself (and therefore esteemed a part of it) upon events specifically mentioned. And, in case of such a revocation, the old Uses were held instantly to cease, and the new ones to become executed in their stead. *Co. Litt.* 237. And this was permitted, partly to indulge the convenience, and partly the caprice of mankind; who (as Lord *Bacon* observes) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards. *Bac Us.* 316.

By this equitable train of decisions in the Courts of Law, the power of the Court of Chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the Judges found it hard to get over, restored it with ten-fold increase. They held, in the first place, that "no Use could be limited on a Use;" and that when a man bargains and sells his land for money, which raises a Use by implication to the bargainee, the limitation of a farther Use to another person is repugnant, and therefore void. *Dy.* 155: 1 *And.* 37, 136. And therefore, on a feoffment to *A.* and his heirs, to the Use of *B.* and his heirs, in trust for *C.* and his heirs, they held that the statute executed only the first Use, and that the second was a mere nullity; not adverting, that the instant the first Use was executed in *B.*, he became seised to the use of *C.*; which second Use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down, through a hundred Uses upon Uses, till finally executed in the last *Cestui-que-Use*. [It is now the practice to introduce only the names of the Trustee and *Cestui-que-Trust*; the estate being conveyed to *A.* and his heirs, to the Use of *A.* and his heirs in trust for *B.* and his heirs.] Again; as the statute mentions only such persons as were *seised* to the Use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not seised, but only possessed; and therefore, if a term of one thousand years be limited to *A.*, to the Use of (or in trust for) *B.*, the statute does not execute this Use, but leaves it at Common Law. *Bac. Us.* 335: *Jenk.* 244: *Poph.* 76: *Dyer* 369. And, lastly, (by more modern resolutions,) where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this Use is not executed by the statute; for the land must remain in the trustee to enable him to perform the trust. 2 *Comm.* c. 20, cites 1 *Eq. Ab.* 383, 384.

It seems, however, now to be decided, that, to prevent a trust from being executed by the statute in cases of this kind, it is necessary that the Trustees should have some control and discretion in the application of the profits of the estate, as to make repairs, or provide for the maintenance of the *Cestui-que-Trust*. Where there is no such special circumstance, it appears to be equivalent to a direction to Trustees to permit *Cestui-que Trust*, to take the profits of the estate; which is fully established, to be a Use executed. 1 *Comm.* c. 20, *in n.*, cites 1 *Bro. C. R.* 75: 2 *Term Rep.* 444: 1 *Eq. Ab.* 383.

Of the two more ancient distinctions the Courts of Equity quickly availed themselves. In the first case it was evident that *B.* was never intended by the parties to have any beneficial interest; and, in the second, the *Cestui-que-Use* of the term was expressly driven into the Court of Chancery to seek his remedy: and therefore that Court determined, that though these were not Uses, which the statute could execute, yet still they were

were *Trusts* in Equity, which in conscience ought to be performed. To this the reason of mankind assented, and the doctrine of Uses was revived, under the denomination of Trusts: And thus, by this strict construction of the Courts of Law, a Statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a Conveyance. *Vaugh.* 50: *Atk.* 591.

However, the Courts of Equity, in the exercise of this new jurisdiction, have wisely avoided, in a great degree, those mischiefs which made Uses intolerable. The Statute of Frauds, *stat.* 29 *Car.* 2. *c.* 3, having required that every Declaration, Assignment, or Grant of any Trust, in Lands and Hereditaments, (except such as arise from implication or construction of Law,) shall be made in writing signed by the party, or by his written will; the Courts now consider a Trust-estate (either when expressly declared or resulting by such implication) as equivalent to the legal Ownership, governed by the same rules of Property, and liable to every charge in Equity, which the other is subject to in Law: And, by a long series of uniform determinations, for now near a century past, with some assistance from the Legislature, they have raised a new System of rational jurisprudence, by which Trusts are made to answer in general all the beneficial ends of Uses, without their inconvenience or frauds. The Trustee is considered as merely the instrument of Conveyance, and can in no shape affect the estate, unless by Alienation for a valuable Consideration to a Purchaser without Notice; which, as *Cestui-que-Use* is generally in possession of the land, is a thing that can rarely happen. 2 *Freem.* 43. The Trust will descend, may be aliened, is liable to Debts, to Executions on Judgments, Statutes, and Recognizances, (by the express provision of the Statute of Frauds,) to Forfeiture, to Leases, and other Incumbrances, nay even to the Curtesy of the Husband, as if it was an Estate at Law. It has not yet indeed been subjected to Dower, more from a cautious adherence to some hasty precedents, than from any well-grounded principle. 1 *Chanc. Rep.* 254: 2 *P. Wms.* 640. It hath also been held not liable to escheat to the Lord, in consequence of Attainder or want of Heirs; because the Trust could never be intended for his benefit. *Hardw.* 494: *Burgess and Wheat*, 1 *Black. Rep.* 123. See further, title *Trusts.*

The only service, therefore, to which this celebrated *Statute of Uses* is now consigned, is in giving efficacy to certain new and secret species of Conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making Livery of Seisin, the only ancient Conveyance of Corporeal Freeholds; the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an Attorney in one's stead: But which has given way to a species of Conveyance called a *Covenant to stand seised to Uses*; by which a man, seised of lands, covenants, in consideration of Blood or Marriage, that he will stand seised of the same to the Use of his Child, Wife, or Kinsman; for Life, in Tail, or in Fee. Here the Statute executes at once the estate; for the party intended to be benefited, having thus acquired the Use, is thereby put at once into Corporal Possession of the land, without ever seeing it, by a kind of Parliamentary Magic. But this Conveyance can only operate, when made upon such weighty and interesting considerations as those of Blood or Marriage. 2 *Comm. c.* 20. See this Dictionary, titles *Conveyance*; *Covenant to stand seised*, &c.

When the legal and equitable Estates meet in the same persons, the Trust or equitable Estate is merged in the legal Estate: As if a Wife should have the legal Estate and the Husband the equitable; and if they have an only Child, to whom these Estates descend, and who dies intestate without issue, the two Estates, having united, the descent will follow the legal Estate, and the Estate will go to the Heir on the part of the Mother. *Doug.* 771: *Goodright d. Alston* v. *Wells.*

Superstitious Uses. A Devise of lands or goods to Superstitious Uses, is where it is to find or maintain a Chaplain or Priest to pray for the souls of the dead; or a lamp in a chapel, a stipendiary Priest, &c. These, and such like, are declared to be Superstitious Uses; and the lands and goods so devised are forfeited to the King by *stat.* 1 *Ed.* 6 *c.* 14: See also *stat.* 23 *H.* 8. *c.* 10. and this Dict. titles *Mortmain*; *Charitable Uses.* A man devised lands to Trustees and their heirs, to find a Priest, to pray for his soul, so long as the Laws of the land would permit; and if the Laws would not permit it, then to apply the profits to the Poor, with power to convert the profits to either of the said Uses; adjudged this was not a Devise to any Superstitious Use. 3 *Nels. Abr.* 259. Where certain profits arising out of lands are given to Superstitious Uses, the King shall have only so much of the yearly profits, which were to be applied to the Superstitious Uses; though when the land itself is given to the testator, declaring that the profits, without saying how much, shall be employed for such Uses, in this case the King shall have the land itself. *Moor* 129. If a sum certain is given to a Priest, and other goods which depend upon the Superstitious Use, all is forfeited to the King; yet if land, &c. is given to find an obit, or anniversary, and for another good Use, and there is no certainty how much shall be employed to the Superstitious Use, the gift to the good Use shall preserve the whole from forfeiture. 4 *Rep.* 104: 2 *Roll.* 205. Where a Superstitious Use is void, so that the King could not have it, it is not so far void, as to result to the heir at law; and therefore the King may apply it to charity. 1 *Salk.* 163. It seems now, that, independent of the statutes, Devises of this kind could not have effect: for either they would be void by the *Mortmain* statutes, or when not within the reach of any of them, would be deemed superstitious by the Courts of Equity; which would therefore direct the money to be applied to some Use really charitable, at the Court's discretion; or should the determined Uses not be thought strong enough to warrant the exercise of a discretion so large, would consider the Devisee as a Trustee, for such as would be entitled if there were no Devise. 1 *Inst.* 112, *b. n.* 2. See *Vin. Abr. Charitable Uses* (D).

USER DE ACTION, Is the pursuing or bringing an Action, in the proper county, &c. *Broke* 64.

USHER, Fr. *Huissier*, a door-keeper.] An officer in the King's house, as of the Privy Chamber, &c. There are also Ushers of the Courts of Chancery and Exchequer.

USUCAPTION, *Usucaptio.*] The enjoying by continuance of time; a long possession, or prescription. *Terms de Ley.*—Rather the taking the profit of a thing.

USUFRUC-

USUFRUCTUARY, *Usufructuarius.*] One that hath the Use and reaps the Profit of a thing.

USURIOUS CONTRACT, Any Bargain or Contract, whereby any man is obliged to pay more Interest for Money than the Law allows. See title *Usury*.

USURPATION, *Usurpatio.*] The using that which is another's; an interruption or disturbing a man in his right and possession, &c. Usurpations in the Civil and Canon Law are called Intrusions; and such Intruders, having not any right, shall submit, or be excommunicated and deprived, &c. by *Boniface's Const.* *Gibs. Codex.* 817. For Usurpations of *Advowsons*, see title *Advowson*. As to Usurpations of Franchises, see titles *Corporation*; *Quo Warranto.*

USURY.

USURA.] Money given for the Use of Money; it is particularly defined to be the gain of any thing by contract above the principal, or that which was lent, exacted in consideration of Loan thereof, whether it be of Money, or any other thing. 3 *Inst.* 151. Some make Usury to be the Profit exacted for a Loan made to a person in want and distress; but properly it consists in extorting an unreasonable rate for Money, beyondw hat is allowed by positive Law. The letting Money out at Interest, or upon Usury, was against the Common Law; and in former times, if any one after his death had been found to be an Usurer, all his goods and chattels were forfeited to the King, &c. And according to several ancient statutes, all Usury is unlawful; but at this time neither the Common or Statute Law absolutely prohibit Usury. 3 *Inst.* 151, 152. By this is meant Interest for Money lent, not exceeding the settled rate: *Interest* being the lawful gain: *Usury* the extortion of unlawful gain.

If judgment cannot be given on the statute against Usury, it hath been said that if it be found that a person took money for forbearance by corrupt agreement, judgment may be given against him at Common Law, of fine and imprisonment. 3 *Salk* 391.

Whatever were the prejudices of early times against the taking of Interest, they appear to have worn off in the reign of *Henry* VIII.; a rational commerce having taught the Nation, that an estate in money, as well as an estate in land, houses, and the like, might be let out to hire, without the breach of one moral or religious duty. And indeed, when the source of this prejudice is examined, it will be found to have originated in a political, and not a moral precept; for though the Jews were prohibited from taking Usury, that is, Interest, from their brethren, they were in express words permitted to take it from a stranger. 2 *Comm.* 455, 6.

What shall be a reasonable profit for the loan of money must necessarily depend on a variety of circumstances. In the reign of *Henry* VIII. 10 *l.* *per cent.* was allowed, as the legal rate of Interest, but by *stat.* 5 & 6 *Ed.* 6. *c.* 20, it was observed, that the *stat.* 37 *H.* 8. *c.* 9, allowing this rate of Interest, had been construed to give a licence and sanction to all *Usury* not exceeding 10 *l.* *per cent.*; and this construction was declared to be utterly *against Scripture*; and therefore all persons were forbid to lend or forbear by any device, for any *Usury, Increase, Lucre*, or *Gain* whatsoever, on pain of forfeiting the thing, and the Usury or Interest, and of being imprisoned and fined; and so the Law stood till the *stat.* 13 *Eliz.* *c.* 8, which revived the *stat.* 37 *H.* 8. *c.* 9, and ordained that all brokers should be guilty of a *præmunire* who transacted any contracts for more; and the securities themselves should be void. The statute 21 *Jac.* 1. *c.* 17, further reduced the rate of interest to 8 *l.* *per cent.*; and it having been lowered in 1650, during the Usurpation, to 6 *l.* *per cent.* the same reduction was re-enacted after the Restoration, by *stat.* 12 *Car.* 2. *c.* 13. And, lastly, this rate of Interest was reduced to 5 *l.* *per cent.* by *stat.* 12 *Ann.* *st.* 2. *c.* 16.

By this *stat.* 12 *Ann.* *c.* 16, no person shall take, directly or indirectly, for loan of any money, or any thing, above the value of 5 *l.* for the forbearance of 100 *l.* for a year, and so proportionably for a greater or less sum; and all bonds, contracts, and assurances made for payment of any principal sum to be lent on Usury, above the rate of 5 *l.* *per cent.* *shall be utterly void*: And whoever shall take, accept, or receive by way of corrupt bargain, loan, &c. a greater Interest, shall forfeit treble the money borrowed, one half of the penalty to the prosecutor, the other to the King: And if any Scrivenor or Broker takes more than 5 *s.* *per cent.* procuration-money, or more than 12*d.* for making a Bond, he shall forfeit 20 *l.* with costs, and suffer half-a-year's imprisonment. See also title *Annuities for Life.*

These restrictions, however, do not apply to contracts made in foreign countries, for on such contracts our Courts will direct the payment of Interest according to the Law of the country in which such contract was made. *Ekins* v. *East India Company*, 1 *P. Wms.* 396: 2 *Bro. P. C.* 72. Thus *Irish*, *American*, *Turkish*, and *Indian* Interest have been allowed in our Courts to the amount of even 12 *l.* *per cent.* For the moderation or exorbitance of Interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade. And by *stat.* 14 *Geo.* 3. *c.* 79, all mortgages and other securities upon estates and other property, in *Ireland*, or the Plantations, bearing Interest not exceeding 6 *l.* *per cent.* shall be legal, though executed in the kingdom of *Great Britain*, unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case, also, to prevent Usurious Contracts at home, under the colour of such foreign securities, the Borrower shall forfeit treble the sum so borrowed. 2 *Comm.* 463, 4. See title *Mortgage.*

The following determinations will further explain the general principles that govern the cases on this subject.

It is not necessary that Money should be actually advanced, to constitute the offence of Usury, but any contrivance or pretence whatever to gain more than legal Interest, where it is the intent of the parties to contract for a Loan, will be Usury: As where a person applies to a tradesman to lend him money, who, instead of cash, furnishes him with goods, to be paid for at a future day, but at such an exorbitant price as to secure himself more than legal Interest, upon the amount of their intrinsic value, this is an Usurious Contract. The question of Usury, or whether a Contract is a colour and pretence for an Usurious Loan, or is a fair and honest transaction, must, under all its circumstances, be determined by a Jury, subject to the correction of the Court by a New Trial. *Cowp.* 112, 770; *Doug.* 708; 3 *Term Rep.* 531.

It is remarkable, that one particular species of indirect Usury is guarded against by the *stat.* 37 *H.* 8. *c.* 9, and this part of the statute seems still in force.—By this it is enacted, that no person shall sell his merchandizes to any other, and, within three months after, buy the same, or any part thereof, upon *a lesser price*, knowing them to be the same, on pain to forfeit treble the value; half to the informer, and half to the King; and also to be punished by fine and imprisonment.

It is now clearly settled that Bankers, and others *discounting* bills, may not only take 5*l. per cent.* for Interest, but also a reasonable sum besides, for their trouble and risk, in remitting cash, and for other incidental expences. 5 *Term Rep.* 52.—But still whether such a charge is reasonable, or usurious, must be decided by a Jury, assisted by the direction of the Judge.—If a contract is entered into to pay more than legal Interest, though all securities are immediately void, yet the penalty is not incurred till more than legal Interest is actually paid. *Doug.* 223. The Borrower may be produced as a witness to prove the Usury in an action for the penalty, if *he swears* that he has repaid the sum borrowed. 4 *Burr.* 2251. See *Raym.* 191.—It was formerly held, that the Borrower could not be admitted to prove the repayment of the money, for till that was proved he was no witness at all. 1 *Stra.* 633.

If a Bill of Exchange, or note, is given in consequence of an Usurious Contract, it is absolutely void, even in the hands of an innocent person, who may have taken it in the fair and regular course of business, without any notice of the Usury: And evidence of Usury will be a good defence, in an action, brought upon such bill or note against the drawer, acceptor, or indorser. *Lowe* v. *Waller*, *Doug.* 708. So in cases of Gaming Debts. See title *Gaming*. The Borrower may be a witness though the money is not paid, if the Usury neither affects the debt, nor avoids the contract: And where the matter is doubtful, the objection shall only go to his credit, and not to his competency as a witness. 1 *Term Rep.* 153.

A contract for 6*l. per cent.* made before the statute, is not within the meaning of it; and therefore it is still lawful to receive such Interest, in respect of any such contract. The receipt of higher Interest than is allowed by the statute, by virtue of an agreement subsequent to the first contract, doth not avoid an assurance fairly made; and a bond made to secure a just debt, payable with lawful Interest, shall not be avoided by a corrupt Usurious Agreement between others, to which the obligee was no ways privy; Nor shall mistakes in drawing writings make void a fair agreement. 1 *Mod.* 69.

If the original contract be not usurious, nothing done afterwards can make it so; A counter-bond to save one harmless against a bond made upon a corrupt agreement, will not be void by the statutes. But if the original agreement be corrupt between all the parties, and so within the statute, no colour will exempt it from the danger of the statutes against Usury. 1 *Brownl.* 73: 2 *And.* 428: 4 *Shep. Abr.* 170.

A fine levied, or judgment suffered as a security for money, in pursuance of an Usurious Contract, may be avoided by an averment of the corrupt agreement, as well as any common specialty or parol contract; It is not material, whether the payment of the Principal and the Usurious Interest be secured by the same, or by different conveyances; for all writings whatsoever for the strengthening such a contract are void; also a contract reserving to the lender a greater advantage than allowed, is usurious, if the whole is reserved by way of Interest, or in part only under that name, and in part by way of rent for a house, let at a rate plainly exceeding the known value; so where part is taken before the end of the time, that the Borrower hath not the profit of the whole principal money, &c. 1 *Hawk. P. C. c.* 82, § 22.

By *Holt*, Chief Justice, if *A.* owes *B.* 100*l.* who demands his money, and *A.* acquaints him, that he hath not the money ready, but is desirous to pay it, if *B.* can procure it to be lent by any other person; and thereupon *B.* having present occasion for his money, contracts with *C.* that if he will lend *A.* 100*l.* he will give him 10*l.*, on which *C.* lends the money, and the debt is paid to *B.*; this is a good and lawful contract, and not usurious between *B.* and *C.* *Carth.* 252. It is not Usury, if there be not a corrupt agreement, for more than the statute Interest; and the defendant shall not be punished, unless he receive some part of the money in affirmance of the usurious agreement. 3 *Salk.* 390.

There can be no Usury, without a Loan; and the Court hath distinguished between a Bargain and a Loan. 1 *Lutw* 273: *Sid.* 27. If a man lend another 100*l.* for two years, to pay for the loan 30*l.* and if he pays the principal at the year's end, he shall pay nothing for Interest; this is not Usury, because the party may pay it at the year's end, and so discharge himself. *Cro. Jac.* 509: 5 *Rep.* 69. And it is the same where a person, by special agreement, is to pay double the sum borrowed, &c. by way of penalty, for non-payment of the principal debt; the penalty being in lieu of damages, and the Borrower might repay the principal at the time agreed, and avoid the penalty. 2 *Inst.* 89: 2 *Roll. Abr.* 801. But if these clauses be inserted merely to evade the statute, the contract is void, and the lender is liable to the penalties of Usury. 1 *Hawk. P. C. c.* 82. § 19.

A man surrenders a copyhold estate to another, upon condition that if he pays 80*l.* at a certain day, then the surrender to be void; and after it is agreed between them that the money shall not be paid, but that the surrenderor shall forfeit, &c. In consideration whereof, the surrenderee promises to pay to the surrenderor, on a certain day, 60*l.* or 6*l. per annum* from the said day *pro Usu & Interesse* of the said 60*l.* till that sum is paid: This 6*l.* shall be taken to be *interesse damnorum*, and not *lucri*; and but limited as a penalty for non-payment of the 60*l.* as a *nomine pœnæ*, &c. 2 *Roll. Rep.* 469: 1 *Danv. Abr.* 44. On a loan of 100*l.* or other sum of money for a year, the lender may agree to take his Interest half-yearly, or quarterly; or to receive the profits of a manor or lands, &c. and it will be no Usury, though such profits are rendered every day. *Cro. Jac.* 26.

If a grant of rent, or lease for 20*l.* a year of land which is worth 100*l. per annum*, be made for one hundred pounds, it is not usurious; if there be not an agreement, that this grant or lease shall be void, upon payment of the principal and arrears, &c. *Jenk. Cent.* 249. But if two men speak together, and one desires the other to lend him an hundred pounds, and, for the loan of it, he will give more than legal Interest; and, to evade the statute, he grants to him 20*l. per annum* out of his land for ten years, or makes a lease for one hundred years to him, and the lessee regrants it upon condition that he shall

shall pay 30*l.* yearly for the ten years: In this case it is Usury, though the lender never have his own hundred pounds again. 1 *Cro.* 27. See 1 *Leon.* 119.

A man granted a large rent for years, for a small sum of money: The Statute of Usury was pleaded; and it was adjudged, that if it had been laid to be upon a loan of money, it had been usurious; though it is otherwise if it be a contract for an annuity. 4 *Shep. Abr.* 170. If one hath a rent-charge of 30*l.* a year, and another asketh what he shall give for it, and they agree for 100*l.* this is a plain contract for the rent-charge, and no Usury. 3 *Nelf.* 510. The grant of an annuity for lives, not only exceeding the rate allowed for interest, but also the proportion for contracts of this kind, in consideration of a certain sum of money, is not within the statutes against Usury; and so of a grant of an annuity, on condition, &c. *Cro. Jac.* 253: 2 *Lev.* 7. See 1 *Sid.* 182; and this Dict. title *Annuities for Lives.*

Where interest exceeds 5*l. per cent. per annum* on a bond, if possibly the principal and interest are in hazard, upon a contingency or casualty, or if there is a hazard that one may have less than his principal, as when a bond is to pay money upon the return of a ship from sea, &c. these are not Usury. 2 *Cro.* 208, 508: 1 *Cro.* 27: *Show.* 8. Though where *B.* lends to *D.* three hundred pounds on bond, upon an adventure during the life of *E.* for such a time; if therefore *D.* pays to *B.* twenty pounds in three months, and, at the end of six months, the principal sum, with a farther *præmium*, at the rate of 6*d. per* pound a month; or if before the time mentioned *E.* dies, then the bond to be void: This, differing from the hazard in a bottomry bond, was adjudged an usurious contract. *Carthew* 67, 68: *Comberb.* 125. One hundred pounds is lent to have 120*l.* at the year's end, upon a casualty; if the casualty goes to the interest only, and not the principal, it is Usury. The difference is, that where the principal and interest are both in danger of being lost, there the contract for extraordinary interest is not usurious; but when the principal is well secured, it is otherwise. 3 *Salk.* 391. See title *Insurance* IV. as to *Bottomry Bonds.*

A lender accepting a voluntary gratuity from the borrower, on payment of the principal and interest; or receiving the interest before due, &c. without any corrupt agreement, shall not be within the statutes against Usury. 2 *Cro.* 677: 3 *Cro.* 501. Also if one gives an usurious bond, and tenders the whole money; yet if the party will take only legal interest, he shall not forfeit the treble value by statute, 4 *Leon.* 43. Judgment on an indictment for Usury was arrested, because it only laid a corrupt agreement, without any loan, or taking excessive interest in pursuance of it. 2 *Strange* 816.

In action for Usury, a corrupt agreement must be set forth: It is not sufficient to plead the statute, and say that for the lending of 20*l.* the defendant took more than 5*l. per cent.* without setting forth a corrupt agreement or contract. *Lutw.* 466: 2 *Lill.* 672. In case of Usury, &c. an obligor is admitted to aver against the condition of a bond, or against the bond itself, for necessity's sake. *Pasch.* 6 *W.* & *M. B. R.*

In all questions, in whatever respect repugnant to the statute, the nature and substance of the transaction, and the view of the parties, must be ascertained to satisfy the Court, that there is *A Loan and Borrowing*: And where the real truth is, a loan of money, the wit of man cannot find a shift to take it out of the statute: And though the statute mentions only loans of monies, wares, merchandizes, and other commodities, yet any other contrivance, if the substance of it be a loan, will come under the word, *indirectly*. *Cowp,* 115, 796: *Doug.* 712.

As to pleading the Statute of Usury, *Vide Com. Dig.* title *Pleader.* Also see farther on this subject, 5 *New Abr.* and 22 *Vin. Abr.* title *Usury.*

UTAS, *Octava*, The eighth day following any term or feast; as the *Utas* of St. *Michael*, &c. And any day between the Feast and the Octave is said to be within the *Utas*: The use of this is in the return of writs; as appears by the *stat.* 51 *H.* 3. *st.* 2. See titles *Terms*; *Days in Bank.*

UTENSIL, Any thing necessary for use and occupation; as household stuff, &c. *Cowell.*

UTERINUS FRATER. A brother by the mother's side. *Fortesc. de Laud. LL. Ang.* 5. See title *Descent.*

UTFANGTHEF; See *Outfangthef.*

UTLAGATO *capiendo, quando utlagatur in uno comitatu, et postea fugit in alium*; A writ, the nature whereof is sufficiently expressed by the name. See *Reg. Orig. fol.* 133; and this Dictionary, title *Outlawry.*

UTLEGH, *Utblagus, Utlagatus.*] An outlaw. *Fleta, lib.* 1. *c.* 47. See *Outlawry.*

UTLAWRY, *Utlagaria, vel Utlagatio.*] See title *Outlawry.*

UTLEPE, Sax.] An escape of a felon out of prison. *Fleta, lib.* 1. *c.* 47.

UTRUM, A writ now of little use. *Terms de Ley.* See *Assise de Utrum.*

UTTER BARRISTERS, *Juris consulti.*] Barristers at Law, newly called, who plead without the Bar, &c. See titles *Barrister*; *Serjeant.*

UTTERING FALSE MONEY; See titles *Coin*; *Treason.*

VULGARIS PURGATIO. The most ancient species of trial, was that by ordeal, which was peculiarly distinguished by the appellation of *Judicium Dei*; and sometimes *Vulgaris Purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. See title *Ordeal.*

VULTIVA, A wound in the face—*Vultivam* 50 *sol. componat. Leg. Sax.*

VULTUS DE LUCA, The image or portrait of our crucified Saviour kept at *Lucca* in the Church of the Holy Cross: *Will.* I, called the Conqueror, often swore *per sanctum vultum de Luca. Eadmer. lib.* 1: *Malmsb. lib.* 4.

W.

WAFTORS, *Waftores.*] Conductors of vessels at sea; King *Edw.* IV. constituted certain officers with naval power, whom he stiled *Custodes, Conductores,* and *Waftores,* to guard our fishing vessels on the coasts of *Norfolk* and *Suffolk. Pat.* 22 *Ed.* 4.

WAGE, *Vadiare,* from Fr. *Gage.*] The giving of security for performance of any thing; as to Wage or gage deliverance, to Wage law, &c. *Co. Litt.* 294. See *Wager of Law.*

WAGER OF BATTLE; See title *Battel.*

WAGER OF LAW, *Vadiatio Legis.*] So called, because the defendant puts in sureties, *vadios,* that at such a day he will *make his Law,* that is, take the benefit which the Law has allowed him. 3 *Comm. c.* 22: 1 *Inst.* 295.

This takes place where an *action of debt* is brought against a man upon a *simple contract* between the parties, without deed or record: and the defendant swears in Court in the presence of eleven compurgators, that he oweth the plaintiff nothing, in manner and form as he hath declared: The reason of this waging of Law is, because the defendant might have paid the plaintiff his debt in private, or before witnesses who may be all dead, and therefore the Law allows him to wage his Law in his discharge; and his oath shall rather be accepted to discharge himself, than the Law will suffer him to be charged upon the bare allegation of the plaintiff. 2 *Inst.* 45. Wager of Law is used in actions of debt without specialty; and also in action of detinue, for goods or chattels lent or left with the defendant, who may swear on a book, that he detaineth not the goods in manner as the plaintiff has declared, and his compurgators, (who must, in all cases, as it seems now, be eleven in number,) swear that they believe his oath to be true. 3 *Comm. c.* 22.

The manner of waging Law is thus: He that is to do it, must bring his compurgators with him into Court, and stand at the end of the bar towards the right hand of the Chief Justice; and the Secondary asks him, whether he will wage his Law? If he answers that he will, the Judge admonisheth him to be well advised, and tells him the danger of taking a false oath; and if he still persists, the Secondary says, and he that wages his Law repeats after him: "Hear this, ye Justices, That I *A. B.* do not owe to *C. D.* the sum of, &c. nor any penny thereof, in manner and form as the said *C. D.* hath declared against me: So help me God." Though, before he takes the oath, the plaintiff is called by the Crier thrice; and if he do not appear he becomes nonsuited, and then the defendant goes quit without taking his oath; and if he appear, and the defendant swears that he owes the plaintiff nothing, and the compurgators do give it upon oath that they believe he swears true, the plaintiff is barred for ever; for when a person has waged his Law, it is as much as if a verdict has passed against the plaintiff: If the plaintiff do not appear to hear the defendant perform his Law, so that he is nonsuit, he is not barred, but may bring a new action. 1 *Inst.* 155: 2 *Lil. Abr.* 674.

In an action of debt on a by-law, the defendant waged his Law; a day being given on the roll for him to come and make his Law, he was set at the right corner of the Bar, and the Secondary asked him, if he was ready to Wage his Law; who answering that he was, he laid his hand on the book, and then the plaintiff was called: Then the Judges admonished him and his compurgators not to swear rashly; and thereupon he made oath, that he did not owe the money *modo et forma* as the plaintiff had declared; and then his compurgators, who were standing behind him, were called, and each of them laying his right hand upon the book, made oath that they believed what the defendant had sworn was true. 2 *Vent.* 171: 2 *Salk.* 682. The defendant cannot wage his Law in any action, but personal actions, where the cause is secret; and Wager of Law has been denied on hearing the case, and the defendant been advised to plead to issue, &c. 2 *Lil.* 675, 676.

Executors and administrators, when charged for the debt of the deceased, shall not be admitted to wage their Law: For no man can, with a safe conscience, wage Law of another man's contract; that is, swear that he never entered into it, or at least that he privately discharged it. *Finch L.* 424. The King also has his prerogative; for, as all Wager of Law imports a reflection on the plaintiff for dishonesty, therefore there shall be no such Wager on actions brought by him. *Finch L.* 425. And this prerogative extends and is communicated to, debtor and accomptant; for, on a writ of *quo minus* in the Exchequer for a debt on simple contract, the defendant is not allowed to wage his Law. 1 *Inst.* 295.

In short, the Wager of Law was never permitted, but where the defendant bore a fair and irreproachable character; and it also was confined to such cases where a debt might be supposed to be discharged, or satisfaction made in private, without any witnesses to attest it: And many other prudential restrictions accompanied this indulgence. But at length it was considered, that (even under all its restrictions) it threw too great a temptation in the way of indigent or profligate men; and therefore by degrees new remedies were devised, and new forms of actions were introduced, wherein no defendant is at liberty to wage his Law. So that now no plaintiff need at all apprehend any danger from the hardiness of his

debtor's

debtor's conscience, unless he voluntarily chooses to rely on his adversary's veracity, by bringing an obsolete, instead of a modern, action. Therefore one shall hardly hear at present of an action of debt brought upon a simple contract; that being supplied by an action of trespass on the case for the breach of a promise, or *assumpsit*; wherein, though the specific debt cannot be recovered, yet damages may, equivalent to the specific debt: And this being an action of trespass, no Law can be waged therein. So, instead of an action of detinue to recover the very thing detained, an action of trespass on the case in trover and conversion is usually brought; wherein, though the horse or other specific chattel cannot be had, yet the defendant shall pay damages for the conversion, equal to the value of the chattel; and for this trespass also no Wager of Law is allowed. In the room of actions of account, a bill in equity is usually filed; wherein, though the defendant answers upon his oath, yet such oath is not conclusive to the plaintiff; but he may prove every article by other evidence, in contradiction to what the defendant has sworn. So that Wager of Law is quite out of use, being avoided by the mode of bringing the action: but still it is not out of force. And therefore, when a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, "in which no Wager of Law shall be allowed;" otherwise an hardy delinquent might escape any penalty of the Law, by swearing he had never incurred, or else had discharged it. See 3 *Comm. c.* 22; where many particulars as to this obsolete species of trial by the oath of a defendant, and his compurgators, are detailed.

WAGERING POLICIES; See title *Insurance*.

WAGERS. By *stat.* 7 *Ann. c.* 17, all Wagers laid upon a contingency relating to the then war with *France*, and all securities, &c. therefore were declared to be void; and persons concerned were to forfeit double the sums laid.

In general, a Wager may be considered as legal, if it be not an incitement to a breach of the peace, or to immorality; or if it do not affect the feelings or interest of a third person, or expose him to ridicule; or if it be not against sound policy. *Cowp.* 729: 2 *Term Rep.* 610: 3 *Term Rep.* 697: where the principal cases on this point are very fully considered. See *Gaming*.

WAGES, The reward agreed upon by a master to be paid to a servant, or any other person which he hires to do business for him. 2 *Lill. Abr.* 677. See titles *Labourers*; *Servants*.

WAGES OF MEMBERS OF PARLIAMENT; See *Parliament*.

WAGGONS AND WAGGONERS; see titles *Carts*; *Highways*; *Turnpikes*.

WAIFS, from the Sax. *Wafian*; Fr. *Chose guaive*; Lat. *Bona Waviata*.] Goods which are stolen and waived (*i. e.* abandoned) by the felon, on his being pursued, for fear of being apprehended; which are forfeited to the King; or Lord of the Manor, if he hath the franchise of Waif. *Kitch.* 81. If a felon in pursuit waives the goods; or, having them in his custody, and thinking that pursuit was made, for his own ease and more speedy flight, flies away and leaves the goods behind him; then the King's Officer, or the Bailiff of the Lord of the Manor within whose jurisdiction they are left, who hath the franchise of Waif, may seize the goods to the King's or Lord's use, and keep them; except the owner makes fresh pursuit after the felon, and sue an Appeal of Robbery within a year and a day, or give evidence against him whereby he is attainted, &c. In which case, the owner shall have restitution of his goods so stolen and waived. *Stat.* 21 *H.* 8. *c.* 11: 5 *Rep.* 109: *Finch L.* 212.

Waived goods also do not belong to the King, till seised by somebody for his use; for if the party robbed can seise them first, though at the distance of 20 years, the King shall never have them. *Finch L.* 212: 1 *Comm. c.* 8.

Goods waived by a felon, in his flight from those who pursue him, shall be forfeited. And though Waif is generally spoken of goods stolen, yet if a man be pursued with hue and cry as a felon, and he flies and leaves *his own* goods, these will be forfeited as goods stolen; but they are properly fugitive's goods, and not forfeited, till it be found before the Coroner, or otherwise of record, that he fled for the felony. 2 *Hawk. P. C. c.* 49. § 17. The Law makes a forfeiture of goods waived, as a punishment to the owner of the goods, for not bringing the felon to justice: But if the thief had not the goods in his possession when he fled, there is no forfeiture. If a felon steal goods and hide them, and afterwards flies, these goods are not forfeited: So where he leaves stolen goods any where, with an intent to fetch them at another time, they are not waived; and in these cases, the owner may take his goods where he finds them, without fresh suit, &c. *Cro. Eliz.* 694: 5 *Rep.* 109: *Moor* 785.

The goods of a foreign Merchant, though stolen and thrown away in flight, shall never be Waifs. *Fitz. Abr.* tit. *Estray* 1: 3 *Bulst.* 19. The reason assigned for this is, not only for the encouragement of trade, but also because there is no wilful default in the foreign Merchant's not pursuing the thief; he being generally a stranger to our laws, our usages, and our language. 1 *Comm. c.* 8. *p.* 297.

Waifs and 'Strays are said to be *nullius in bonis*; and therefore they belong to the Lord of the Franchise where found. *Briton, c.* 17. We read of *placita coronæ & Waif*, in the manor of *Upton*, &c. *in com. Salop.* See 22 *Vin. Abr.* 408—410; and this Dict. title *Estray*.

WAIN, *Plaustrum*.] A Cart, Waggon, or Plough to till land.

WAINABLE, *i. e.* That may be ploughed or manured; land tillable. *Chart. Antiq.*

WAINAGE; see *Gainage*.

To WAIVE, *Waiviare*.] In the general signification, is to forsake; but is specially applied to a woman, who for any crime for which a man may be outlawed, is termed waived. *Reg. Orig.* 132. See title *Outlawry*.

WAIVER, The passing by of a thing, or a declining or refusal to accept it. Sometimes it is applied to an estate or something conveyed to a man, and sometimes to a plea, &c. A Waiver or disagreement as to goods and chattels, in case of a gift, will be effectual. *Lit.* § 710. If a jointure of lands be made to a woman after marriage, she may waive this after her husband's death. 3 *Rep.* 27. An infant, or, if he die, his heirs, may by Waiver avoid an estate made to him during his minority. 1 *Inst.* 23, 348. But where a particular estate is given with a remainder over, there regularly he that hath it may not waive it, to the damage of him in remainder: Though it

it is otherwise where one hath a reversion, for that shall not be hurt by such Waiver. 4 *Shep. Abr.* 192. After special issue joined in any action, the parties cannot waive it without motion in Court. 1 *Keb.* 225. Assignment of error by Attorney on an Outlawry, ordered to be waived, and the party to assign in person, after demurrer for this cause. 2 *Keb.* 15. See title *Disclaimer.*

WAKE, The eve-feast of the Dedication of Churches; which, in many country places, is observed with feasting and rural diversions, &c. *Paroch. Antiq.* 609.

WAKEMAN, *quasi* Watchman.] The Chief Magistrate of the town of *Rippon* in *Yorkshire*, is so called. *Camd.*

WALES, *Wallia.*] Part of *Great Britain*, on the West side of *England*; formerly divided into three provinces, *North-Wales*, *South-Wales*, and *West-Wales*; and inhabited by the offspring of the ancient *Britons*, chased thither by the *Saxons*, called in to assist them against the *Picts* and *Scots*. *Lamb.*: *Stat. Walliæ*, 12 *Edw.* 1.—*England* and *Wales* were originally but one nation, and so they continued till the time of the *Roman* conquest: But when the *Romans* came, those *Britons* who would not submit to their yoke, betook themselves to the mountains of *Wales*; from whence they came again soon after the *Romans* were driven away by their dissensions here. After this came the *Saxons*, and gave them another disturbance; and then the kingdom was divided into an Heptarchy: and then also began the *Welsh* to be distinguished from the *English*. Yet it is observable, that though *Wales* had Princes of their own, the King of *England* had superiority over them, for to him they paid homage. *Camden*: 2 *Mod.* 11. See further, 1 *Comm. Introd.* § 4.

The *stat.* 28 *Ed.* 3. *st.* 1. *c.* 2, annexed the Marches of *Wales* perpetually to the Crown of *England*, so as not to be of the Principality of *Wales*. And by *stat.* 27 *Hen.* 8. *c.* 26, *Wales* was incorporated into, and united with, *England*: All persons born in *Wales* are to enjoy the like liberties as those born in *England*, and lands to descend there according to the *English* Laws: The Laws of *England* are to be executed in *Wales*; and the King to have a Chancery and Exchequer at *Brecknock* and *Denbigh*. Officers of Law and Ministers shall keep Courts in the *English* Tongue; and the *Welsh* Laws and Customs to be inquired into by Commission, and such of them as shall be thought fit continued; but the Laws and Customs of *North Wales* are saved.—By *stat.* 34 & 35 *Hen.* 8. *c.* 26, *Wales* was divided into 12 Counties; and a President and Council appointed to remain in *Wales* and the Marches thereof, with Officers, &c. Two Justices are to be assigned to hold a Session twice every year, and determine Pleas of the Crown and Assises, and all other Actions; and Justices of Peace shall be appointed as in *England*, &c. By *stat.* 18 *Eliz. cap.* 8, the King may appoint two Persons, learned in the Laws, to be Judges in each of the *Welsh* Circuits, which had but one Justice before; or grant Commissions of Association, &c.

An Office for Inrolments was erected, and the fees and proceedings regulated in passing Fines and Recoveries in *Wales*, by *stat.* 27 *Eliz. c.* 9.—Persons living in *Wales* may give and dispose of their goods and chattels, by will, in like manner as may be done within any part of the province of *Canterbury*, or elsewhere. *Stat.* 7 & 8 *W.* 3. *c.* 38. See title *Wills*. Jurors returned to try issues in *Wales*, are to have 6*l.* a year of Freehold or Copyhold, above reprises: And none shall be held to Bail in *Wales*, unless Affidavit be made that the cause of Action is 20 *l.* or upwards. *Stat.* 11 & 12 *W.* 3. *c.* 9. § 2. In Actions where the debt, &c. amounts not to 10*l.* in the Court of Great Sessions in *Wales*, the plaintiff shall sue out a Writ or Process, and serve the defendant with a copy eight days before holding of the said Court, &c.; who shall appear at the return, or before the third Court; or the plaintiff may enter an appearance, and proceed. *Stat.* 6 *Geo.* 2. *c.* 14.

By *stat.* 20 *Geo.* 2. *c.* 42. § 3, in all cases where *the Kingdom of England*, or *that part of Great Britain called England*, hath been or shall be mentioned in any Act of Parliament, the same has been and shall be taken to comprehend the Dominion of *Wales*, and town of *Berwick*. See that title.

Murders and Felonies in any part of *Wales* may be tried in the next *English* county. 1 *Str.* 553.—A *Certiorari* lies to *Wales*, on Indictments for Misdemeanors. 1 *Str.* 704.—A *Habeas Corpus* may be granted of course to remove a prisoner from *Wales* to an *English* county. 2 *Str.* 945.—A Prohibition granted to the Great Sessions to stay a suit on a *Subpœna* served out of the jurisdiction. 1 *Str.* 630. See further, titles *Courts of Wales*; *Prince of Wales*; and other apposite titles.

WALESHERIA; see *Valesheria.*

WALISCUS, i. e. *Servus.*] A Servant, or any Ministerial Officer, *Leg. Inæ*, *c.* 34.

WALKERS, Foresters, within a certain space of ground assigned to their care, in Forests, &c. *Cromp. Jurisd.* 145.

WALL, SEA-WALL, A Bank of Earth; see *Water-gage*; *Sea-banks.*

WALSINGHAM. The Demesne Lands in *Walsingham* may be let by Copy, and shall be Copyholds. *Stat. Antiq.* 35 *Hen.* 8. *c.* 13.

WALTHAM BLACKS; see title *Black-Act.*

WANDERING SOLDIERS AND MARINERS; see *stat.* 39 *Eliz. c.* 17, title *Vagrants.*

WANG, *Sax.*] The Cheek, or Jaw wherein the teeth are set. See *Seal.*

WANGA, An Iron Instrument with Teeth. *Consuetud. Dom. de Farend. MS.* 18.

WANLASS, or *Driving the Wanlass*, is to drive Deer to a stand, that the Lord may have a shoot. An ancient customary tenure of lands. *Blount's Ten.* 140.

WANT. As to Justification of Theft on account of extreme Want, see title *Larceny* I. 1.

WAPENTAKE, from the Sax. *Weapen*, i. e. *Armatura*, & *Tac*, *tactus*.] Is all one with what we call a Hundred; specially used in the North countries beyond the river *Trent*. *Bract. l.* 3: *Lamb.* The words seem to be of *Danish* original, and to be so called for this reason; when first this kingdom, or part thereof, was divided into Wapentakes, he who was the Chief of the Wapentake or Hundred, and whom we now call a High Constable, as soon as he entered upon his office, appeared in the field on a certain day, on horseback, with a pike in his hand; and all the chief men of the hundred met him there with their lances, and touched his pike; which was a sign that they were firmly united to each other, by the touching their weapons. *Hoveden*: *Fleta*, *lib.* 2.

lib. 2. But Sir *Thomas Smith* says, that anciently musters were made of the armour and weapons of the several inhabitants of every Wapentake; and from those that could not find sufficient pledges for their good abearing, their weapons were taken away, and given to others; from whence he derives this word. *Rep. Angl. l.* 2. *c.* 16: *Camd. Brit.* 159: 2 *Inst.* 99. See *stat. antiq.* 3 *Hen.* 5. *c.* 2: 9 *Hen.* 6. *c.* 10: 15 *Hen.* 6. *c.* 7; and this Dict. title *Hundred.*

WAPPING. An Act was made for the partition of *Wapping Marsh*; *stat.* 35 *Hen.* 8. *c.* 9. Persons sheltering themselves from debts, and obstructing the execution of writs, in *Wapping*, *Stepney*, &c. to be guilty of felony. *Stat.* 11 *Geo.* 1. *c.* 22. See titles *Arrest*; *Privilege* I.

WAR, *Bellum.*] A fighting between two Kings, Princes, or Parties, in vindication of their just rights; also the state of War, or all the time it lasts. By our Law, when the Courts of Justice are open, so that the King's Judges distribute justice to all, and protect men from wrong and violence, it is said to be a time of Peace: But when, by invasion, rebellion, &c. the peaceable course of justice is stopped, then it is adjudged to be a time of War: And this shall be tried by the Records and Judges, whether justice at such a time had her equal course of proceeding or not. For time of War gives privilege to them that are in War, and all others within the kingdom. 1 *Inst.* 249. In the Civil Wars of King *Charles* I. it was computed that there were not fewer than 200,000 foot and 50,000 horse in arms on both sides; which was an extraordinary host, considering it composed of *Britons*, sufficient to have shaken *Europe*, though it was otherwise fatally employed. In ancient times, when the Kings of *England* were to be served with soldiers in their Wars, a Knight or Squire that had revenues, farmers, and tenants, would covenant with the King, by indenture inrolled in the Exchequer, to furnish him with such a number of military men; and those men were to serve under him, whom they knew and honoured, and with whom they must live at their return. 1 *Inst.* 71. See titles *Soldiers*; *Militia*; *Tenures*; *King*, &c.

WARA, A certain quantity or measure of ground. *Mon. Ang.* i. 172.

WARD, *Custodia.*] Is variously used in our old books: A Ward in *London* is a district or division of the city, committed to the special charge of one of the Aldermen; of these there are 26, according to the number of the Mayor and Aldermen, of which every one has his ward for his proper guard and jurisdiction. *Stow's Surv.* See title *London.* A Forest is divided into Wards. *Manwood, par.* 1. *p.* 97. A Prison is also called a Ward. Lastly, the Heir of the King's Tenant, that held *in capite*, was termed a Ward during his nonage; and it is now usual to call all Infants, under the power of Guardians, Wards. See titles *Tenure* II. 3; *Guardian.*

WARDA, The custody of a Town or Castle, which the inhabitants were bound to keep at their own charge. *Mon. Ang.* i. 372.

WARDAGE, *Wardagium.*] Seems to be the same with *Wardpeny.*

WARDEN, *Guardianus*; Fr. *Gardien.*] He that hath the keeping or charge of any persons or things by office; as the Wardens of the Fellowships or Companies in *London.*—Wardens of the Marches of *Wales*, &c.—Wardens (now Justices) of the Peace. *Stat.* 2 *Edw.* 3. *c.* 3.—Wardens of the Tables of the King's Exchange.—Warden of the Armour in the Tower.—Warden of the Rolls of the Chancery.—Warden of the King's Writs and Records of his Court of Common Bench.—Warden of the Lands for repairing *Rochester* Bridge.—Warden of the Stannaries.—Warden and Minor Canons of St. *Paul's* Church.—Warden of the *Fleet* Prison, &c. particularised in various Statutes. See *Guardian.*

WARDMOTE, *Wardmotus.*] A Court kept in every Ward in *London*; ordinarily called the Wardmote Court. The Wardmote Inquest hath power every year to inquire into and present all defaults concerning the Watch and Constables doing their duty; that engines, &c. are provided against fire; that persons selling ale and beer be honest, and suffer no disorders, nor permit gaming, &c. that they sell in lawful measures; searches are to be made for vagrants, beggars, and idle persons, &c. who shall be punished. *Chart. K. Hen.* II.: *Lex Lond.* 185. See titles *London*; *Police.*

WARDPENY, Money paid and contributed to Watch and Ward. *Domesday.*

WARDWIT, The being quit of giving money for keeping of Wards. *Terms de Ley.*

WARDS, *Court of*: A Court first erected in the reign of King *Henry* VIII. and afterwards augmented by him with the office of Liveries; wherefore it was stiled the Court of Wards and Liveries; now discharged by *stat.* 12 *Car.* 2. *c.* 24. See title *Tenures.*

WARD-STAFF, The Constable or Watchman's Staff. The manor of *Langhourn* in *Essex* is held by the service of the Ward-staff, and watching the same in an extraordinary manner, when it is brought to the town of *Aibridge.* *Camden.*

WARECTARE, To plough up land designed for wheat in the spring, in order to let it lie fallow for better improvement; which in *Kent* is called Summer-Land: Hence *Warectabilis Campus*, a fallow field; *Campus ad Warectam*, *Terra Warectata*, &c.

WARGUS, A banished Rogue. *Leg. Hen.* 1. *c.* 83.

WARNISTURA, Garniture, Furniture, Provision, &c. *Pat.* 9 *Hen.* 3.

WARNOTH, There is an ancient custom, that if any Tenant, holding of the Castle of *Dover*, failed in paying his rent at the day, that he should forfeit double, and for the second failure treble: And the lands so held are called *Terræ Cultæ & Terræ de Warnoth.* *Mon. Angl* ii 589

WARRANT, A precept under hand and seal to some Officer, to take up any offender, to be dealt with according to due course of Law. See titles *Commitment*; *Constable*; *Justices of Peace.*

WARRANT OF ATTORNEY, An authority and power given by a Client to his Attorney, to appear and plead for him; or to suffer judgment to pass against him by confessing the action, by *nil dicit*, *non sum informatus*, &c. And although a Warrant of Attorney given by a man in custody to confess a judgment, no Attorney being present, is void as to the entry of a Judgment; yet it may be a good Warrant to appear and file Common Bail. 2 *Lil. Abr.* 682. A Warrant of Attorney which warrants the Action, is of course put in by the Attornies for the plaintiff and defendant; so that it differs from a Letter of Attorney, which passes ordinarily under the

hand

hand and seal of him that makes it, and is made before witnesses, &c. Though a Warrant of Attorney to suffer a Common Recovery by the Tenant, is acknowledged before such persons as a Commission for the doing thereof directs. *West's Symb. par.* 2. See titles *Attorney*; *Judgment acknowledged*; *Recovery*, &c.

WARRANTIA CHARTÆ, A Writ where a man is enfeoffed of lands with Warranty, and then he is sued or impleaded in Assise or other action, in which he cannot vouch or call to Warranty. By this Writ, he may compel the Feoffor or his Heirs to warrant the land unto him; and if the land be recovered from him, he shall recover as much lands in value against the Warrantor, &c. But the Writ ought to be brought by the Feoffee depending the first Writ against him, or he hath lost his advantage. *F. N. B.* 134: *Terms de Ley* 372, 588. See title *Pleadings* I. 1.

If a person doth enfeoff another of lands by deed with Warranty, and the Feoffee make a feoffment over, and taketh back an estate in fee, the Warranty is determined, and he shall not have the Writ *Warrantia Chartæ*, because he is in of another estate. Also where one makes a Feoffment in Fee with Warranty against him and his Heirs, the Feoffee shall not have a *Warrantia Chartæ* upon this Warranty against the Feoffor or his Heirs, if he be impleaded by them; but the nature of it is to rebut against the Feoffor and his Heirs. *Dalt.* 48: 2 *Lill. Abr.* 684.

This Writ may be sued forth before a man is impleaded in any Action, but the Writ doth suppose that he is impleaded; and if the defendant appear and say that he is not impleaded, by that plea he confesseth the Warranty, and the plaintiff shall have judgment, &c.; and the party shall recover in value of the lands against the vouchee, which he had at the time of the purchase of his *Warrantia Chartæ*; and therefore it may be good policy to bring it against him before he is sued, to bind the lands he had at that time; for if he have aliened his lands before the voucher, he shall render nothing in value. *New Nat. Br.* 298, 299. If a man recover his Warranty in *Warrantia Chartæ*, and after he is impleaded, he ought to give notice to him against whom he recovered, of the Action, and pray him to shew what plea he will plead, to defend the land, &c. Where one upon a Warranty doth vouch and recover in value, if he is then impleaded of the land recovered, he may not vouch again, for the Warranty was once executed. 23 *Edw.* 3. 12. In a Warranty to the Feoffee in land, made by the Feoffor; upon voucher, if special matter be shewn by the vouchee, when he entered into the Warranty, *viz.* that the land at the time of the feoffment was worth only 100*l.* and now at the time of the voucher it is worth 200*l.* by the industry of the Feoffee; the plaintiff in a *Warrantia Chartæ*, &c. shall recover only the value as it was at the time of the sale. *Jenk. Cent.* 35. If the vouchee can shew cause why he should not warrant, that must be tried, &c. See title *Recovery*.

WARRANTIA DIEI, An ancient Writ, where one having a day assigned personally to appear in Court to any Action, is in the mean time employed in the King's service, so that he cannot come at the day appointed: It was directed to the Justices to this end, that they neither take nor record him in default for that time. *Reg. Orig.* 18: *F. N. B.* 17. See titles *Essoin*; *Protection*.

WARRANTY,

WARRANTIA.] A Promise or Covenant by deed by the bargainor, for himself and his heirs, to warrant or secure the bargainee and his heirs, against all men, for the enjoying of the thing granted. *Bract. lib.* 2 & 5: *West's Symb. par.* 1.

As applied to Lands, it is defined to be a Covenant-real annexed to Lands or Tenements, whereby a man and his Heirs are bound to warrant the same; and either upon voucher, or by judgment in a Writ of *Warrantia Chartæ*, to yield other Lands and Tenements, to the value of those that shall be evicted by a former title; or else may be used by way of rebutter. 1 *Inst.* 365, *a.* See *Litt.* § 697; and Mr. *Butler's* Note there on the subject of Warranty. See also this Dictionary, titles *Deed*; *Tenures* I. 7; *Recovery*, &c.

The doctrine of Warranty, obsolete as it now is, and rather a matter of speculation than use, is considered by the learned Editor of *The First Institute*, as having still a powerful influence on our Landed Property: The following matter therefore, on this subject, is here introduced from 2 *Comm. c.* 20.

By the Clause of Warranty in a Deed, the Grantor doth, for himself and his Heirs, warrant and secure to the Grantee the estate so granted. By the Feodal Constitution, if the Vassal's title to enjoy the Feud was disputed, he might vouch, or call, the Lord or Donor, to warrant or insure his gift; which if he failed to do, and the Vassal was evicted, the Lord was bound to give him another Feud of equal value in recompence. And so, by our ancient Law, if, before the statute of *Quia emptores*, a man enfeoffed another in Fee, by the Feodal verb *dedi*, to hold of himself and his Heirs by certain services; the Law annexed a Warranty to this grant, which bound the Feoffor and his Heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered. *Co. Litt.* 384. Or if a man and his ancestors had immemorially holden land of another and his ancestors by the service of homage, (which was called *Homage Auncestrel*,) this also bound the Lord to Warranty, the homage being an evidence of such a Feodal grant. *Litt.* § 143. And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his Heirs be evicted of his share, the other and his Heirs are bound to Warranty, because they enjoy the equivalent. *Co. Litt.* 174. And so, even at this day, upon a Gift in Tail, or Lease for Life, rendering rent, the Donor or Lessor, and his Heirs, (to whom the rent is payable,) are bound to warrant the title. 1 *Inst.* 384. But in a Feoffment in Fee by the verb *dedi*, since the statute of *Quia emptores*, the Feoffor only is bound to the implied Warranty, and not his Heirs; because it is a mere personal contract on the part of the Feoffor, the tenure (and of course the ancient services) resulting back to the superior Lord of the Fee. 1 *Inst.* 384. And in other forms of alienation gradually introduced since that statute, no Warranty whatsoever is implied, they bearing no sort of analogy to the original Feodal donation. 1 *Inst.* 102. And therefore, in such cases, it became necessary to add an express clause of Warranty, to bind the Grantor and his Heirs; which is a kind of Covenant-real, and can only be created by the verb *warrantizo* or *warrant*. *Litt.* § 733.

These

These express Warranties were introduced, even prior to the statute of *Quia emptores*, in order to evade the strictness of the Feodal doctrine of Non-alienation without the consent of the Heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet, if a clause of Warranty was added to the ancestor's grant, this covenant descending upon the Heir, insured the Grantee, not so much by confirming his title, as by obliging such Heir to yield him a recompence in lands of equal value; the Law, in favour of alienations, supposing that no ancestor would wantonly disinherit his next of blood; and therefore presuming that he had received a valuable consideration, either in land, or in money which had purchased land, and that this equivalent descended to the Heir, together with the Ancestor's Warranty. *Co. Litt.* 373. So that when either an Ancestor, being the rightful Tenant of the Freehold, conveyed the land to a Stranger and his Heirs, or released the right in Fee-simple to one who was already in possession, and superadded a Warranty to his deed, it was held that such Warranty not only bound the Warrantor himself to protect and assure the title of the Warrantee, but it also bound his Heir; and this, whether that Warranty was *lineal* or *collateral* to the title of the land. *Lineal* Warranty was, where the Heir derived, or might by possibility have derived, his title to the land warranted, either from or through the Ancestor who made the Warranty; as where a Father, or an elder Son in the life of the Father, released to the Disseisor of either themselves or the Grandfather, with Warranty, this was *lineal* to the younger Son. *Litt.* §§ 703, 706, 707. *Collateral* Warranty was, where the Heir's title to the land neither was, nor could have been, derived from the warranting Ancestor; as where a younger Brother released to his Father's Disseisor, with Waraanty, this was *collateral* to the elder Brother. *Litt.* §§ 705, 707. But where the very Conveyance, to which the Warranty was annexed, immediately followed a Disseisin, or operated itself as such, (as, where a Father, tenant for Years, with remainder to his Son in Fee, aliened in Fee-simple with Warranty,) this being, in its original, manifestly founded on the *tort* or wrong of the Warrantor himself, was called a *Warranty commencing by Disseisin*; and, being too palpably injurious to be supported, was not binding upon any Heir of such tortious Warrantor. *Litt.* §§ 698, 702.

In both lineal and collateral Warranty, the obligation of the Heir (in case the Warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent from the warranting Ancestor. *Co. Litt.* 102. But though, without assets, he was not bound to insure the title of another, yet, in case of lineal Warranty, whether assets descended or not, the Heir was perpetually barred from claiming the land himself; for, if he could succeed in such claim, he would then gain assets by descent, (if he had them not before,) and must fulfil the Warranty of his Ancestor. And the same rule was, with less justice, adopted also in respect of collateral Warranties, which likewise (though no assets descended) barred the Heir of the Warrantor from claiming the land by any collateral title, upon the presumption of Law that he might hereafter have assets by descent either from or through the same Ancestor. *Litt.* § 711, 712. The inconvenience of this latter branch of the rule was felt very early, when Tenants by the Curtesy took upon them to alien their lands with Warranty; which collateral Warranty of the Father descending upon his son, (who was the Heir of both his Parents,) barred him from claiming his maternal inheritance. To remedy which, the statute of *Gloucester, stat.* 6 *Edw.* 1. *c.* 3, declared that such Warranty should be no bar to the Son, unless assets descended from the Father. It was afterwards attempted in 50 *Edw.* 3, to make the same provision universal, by enacting that no collateral Warranty should be a bar, unless where assets descended from the same Ancestor; but it then proceeded not to effect. *Co. Litt.* 373. However, by *stat.* 11 *H.* 7. *c.* 20, notwithstanding any alienation with Warranty by Tenant in Dower, the Heir of the Husband is not barred, though he be also Heir to the Wife. And by *stat.* 4 & 5 *Ann. c.* 16, all Warranties by any Tenant for Life shall be void against those in remainder or reversion; and all collateral Warranties by any Ancestor who has no estate of inheritance in possession, shall be void against his Heir. By the wording of which last statute it should seem, that the Legislature meant to allow, that the collateral Warranty of Tenant in Tail in possession, descending (though without assets) upon a Remainder-man or Reversioner, should still bar the remainder or reversion. For though the Judges, in expounding the statute *De donis*, held that, by analogy to the statute of *Gloucester*, a lineal Warranty by Tenant in Tail without assets should not bar the Issue in Tail, yet they held such Warranty with assets to be a sufficient bar. *Litt.* § 712: 2 *Inst.* 293. Which is therefore one of the ways whereby an Estate-tail may be destroyed; it being indeed nothing more in effect, than exchanging the lands entailed for others of equal value. See titles *Tail* and *Fee-tail*.—They also held, that collateral Warranty was not within the statute *De donis*; as that Act was principally intended to prevent the Tenant in Tail from disinheriting his own Issue; and therefore collateral Warranty (though without assets) was allowed to be, as at Common Law, a sufficient bar of the Estate-tail and all remainders and reversions expectant thereon. *Co. Lit.* 374: 2 *Inst.* 335. And so it still continues to be, notwithstanding the statute of Queen *Anne*, if made by Tenant in Tail in possession; who therefore may now, without the forms of a Fine or Recovery, in some cases, make a good conveyance in Fee-simple, by superadding a Warranty to his grant; which, if accompanied with assets, bars his own issue; and, without them, bars such of his Heirs as may be in remainder or reversion. 2 *Comm. c.* 20. *p.* 303.

As to Warranty of THINGS PERSONAL:—By the Civil Law, an implied Warranty was annexed to every sale, in respect to the title of the Vendor: And so too, in our Law, a Purchaser of Goods and Chattels may have a satisfaction from the Seller, if he sells them as his own, and the title proves deficient, without any express Warranty for that purpose. *Cro. Jac.* 474: 1 *Ro. Ab.* 90. But, with regard to the goodness of the wares so purchased, the Vendor is not bound to answer; unless he expressly warrants them to be sound and good; or unless he knew them to be otherwise, and hath used any art to disguise them; or unless they turn out to be different from what he represented to the buyer. *F. N. B.* 94: 2 *Roll. Rep.* 5: 2 *Comm. c.* 30. See title *Deceit*.

The following distinctions seem peculiarly referable to the sale of Horses: If the Purchaser gives what is called

called a *found* price, that is, such as, from the appearance and nature of the horse, would be a fair and full price for it, if it were in fact free from blemish and vice; and he afterwards discovers it to be unsound or vicious, and returns it in a reasonable time; he may recover back the price he has paid, in an action against the Seller for so much money had and received to his use, provided he can prove the Seller knew of the unsoundness or vice at the time of the sale: For the concealment of such a material circumstance is a fraud which vacates the contract. But if a Horse is sold with an express Warranty by the Seller, that it is sound and free from vice, the Buyer may maintain an Action upon this Warranty or Special Contract, without returning the Horse to the Seller, or without even giving him notice of the unsoundness or viciousness of the Horse: Yet it will raise a prejudice against the Buyer's evidence, if he does not give notice within a reasonable time, that he has cause to be dissatisfied with his bargain. 1 *H. Black. Rep.* 17. The Warranty cannot be tried in a general Action of *Assumpsit* to recover back the price of the Horse. *Cowp.* 819. In an Action on a Warranty, it is not necessary that the Seller knew of the Horse's imperfections at the time of the sale. 2 *Comm. c.* 30, *in n.*

WARREN, *Warrenna*, from Germ. *Wahren*, i. e. *Custodire*; or the Fr. *Garenne.*] A Franchise, or place privileged by prescription or grant from the King, for the keeping of beasts and fowls of the Warren; which seem to be only Hares and Conies, Partridges and Pheasants; though some add Quails, Woodcocks, and Water-fowl, *&c. Terms de Ley* 589: 1 *Inst.* 233: 2 *Comm. c.* 3, *in n.* A person may have a Warren in another's land, for one may alien the land, and reserve the Franchise: But none can make a Warren, and appropriate those creatures that are *Feræ Naturæ*, without licence from the King, or where a Warren is claimed by prescription. 8 *Rep.* 108: 11 *Rep.* 87. A Warren may lie open; and there is no necessity of inclosing it, as there is of a Park. 4 *Inst.* 318. If any person offend in a Free Warren, he is punishable by the Common Law. If any one enter wrongfully into any Warren, and chase, take, or kill any Conies, without the consent of the Owner, he shall forfeit Treble Damages, and suffer Three Months' Imprisonment, *&c. Stat.* 22 *&* 23 *Car.* 2. *c.* 25. See also title *Larceny*. When Conies are on the soil of the party, he hath a property in them by reason of the possession, and Action lies for killing them; but if they run out of the Warren, and eat up a neighbour's corn, the Owner of the land may kill them, and no Action will lie. 5 *Rep.* 104: 1 *Cro.* 548. In Waste, *&c.* against a Lessee of a Warren, the Waste assigned was for stopping Coney-boroughs; and it was held that this Action did not lie, because a man cannot have the inheritance of Conies; and Action may be brought against him who makes holes in the land, but not against him who stops them, by reason the land is made better by it. *Owen* 66.

Blackstone says, A man that has a Franchise of Warren is in reality no more than a Royal Game-keeper: And asserts, that no man, not even a Lord of a Manor, could by Common Law justify sporting on another's soil, *or even on his own*, unless he had the liberty of Free Warren. 2 *Comm. c.* 3. This latter position is very earnestly combated by Mr. *Christian*. See this Dict. title *Game-Laws*.

This Franchise is almost fallen into disregard, since the new statutes for preserving the Game; the name being now chiefly preserved in grounds set apart for breeding Hares and Rabbits.

WARSCOT, A Contribution usually made towards Armour, in the time of the *Saxons*. *Leg. Canut.*

WARTH, A customary payment for Castle-guard. *Blount's Ten.* 60.

WASH, A shallow part of a river, or arm of the Sea; as the Washes in *Lincolnshire*, &c. *Knight* 1346.

WASSAILE, *Sax.*] A festival song, heretofore sung from door to door about the time of the *Epiphany*. See *Wassel-bowl*.

WASTE,

VASTUM.] Hath divers significations: First, It is a spoil made either in houses, woods, lands, *&c.* by the tenant for life or years, to the prejudice of the heir, or of him in the reversion or remainder. *Kitchin, fol.* 168. Whereupon the writ of Waste is brought, for the recovery of the thing wasted, and treble damages. As to which, see at large *post*.

Waste of the Forest is most properly where a man cuts down his own woods within the Forest, without licence of the King, or Lord Chief Justice in Eyre. See *Manwood, part* 2. *cap.* 8. *numb.* 4 *&* 5.

Waste is also taken for those lands which are not in any man's occupation, but lie common; which seem to be so called because the Lord cannot make such profit of them as of his other lands, by reason of that use which others have of it in passing to and fro; upon this none may build, cut down trees, dig, *&c.* without the Lord's licence. See title *Common*.

Year, Day, and Waste, *annus, dies, & vastum*, is a punishment or forfeiture belonging to Petit Treason or Felony; whereof see *Staundf. Pl. Cor. lib.* 3. *c.* 30; and this Dict. title *Year, Day, and Waste*.

WASTE, in its most usual acceptation, is a Spoil or Destruction in houses, gardens, trees, or other corporeal hereditaments; to the disherison (disinheritance) of him that has the remainder or reversion in fee-simple or fee-tail. 1 *Inst.* 53.

I. *What shall be considered as Waste; generally, and in many particular specified Instances.*

II. 1. *Who may have a Remedy for Waste done:* 2. *Against whom such Remedy may be had.*

III. *Of the Punishment of Waste; and the Proceedings against Persons guilty thereof.*

IV. *Of Injunctions, and other Proceedings in Equity, to prevent, or relieve, against Waste.*

Waste is either *voluntary*, or *actual*, which is a crime of commission, as by pulling down a house; or it is *permissive* or *negligent*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Generally speaking, whatever does a lasting damage to the freehold or inheritance is Waste. *Hetl.* 35. Therefore removing wainscots, floors, or other things once fixed to the freehold of a house, comes under the general notion of Waste. 4 *Rep.* 64. If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no Waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee; though now by the *stat.* 6 *Ann. c.* 31, no action will lie against

against a tenant for an accident of this kind. See *post*. Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance. *Co. Lit.* 53. Timber also is part of the inheritance. 4 *Rep.* 62. Such are oak, ash, and elm in all places; and in some particular countries, by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is Waste. *Co. Lit.* 53. See title *Timber*:—But Underwood the tenant may cut down at any seasonable time that he pleases, and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions. 2 *Roll. Abr.* 817: *Co. Lit.* 41. The conversion of land from one species to another is Waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow or pasture; are all of them Waste. *Hob.* 296. For, as *Coke* observes, it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable, and *è converso*. 1 *Inst.* 53. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value. 1 *Lev.* 309. To open the land to search for mines of metal, coal, &c. is Waste; for that is a detriment to the inheritance: But if the pits or mines were open before, it is no Waste for the tenant to continue digging them for his own use; for it is now become the mere annual profit of the land. 5 *Rep.* 12: *Hob.* 295. These three are the general heads of Waste, *viz.* in Houses, in Timber, and in Land. Though, whatever else tends to the destruction, or depreciating the value of the inheritance, is considered by the Law as Waste. 2 *Comm. c.* 18. Which we therefore proceed to state more at large.

It has been laid down as a general principle, that the Law will not allow that to be Waste, which is not any way prejudicial to the inheritance. *Hetl.* 35. Nevertheless it has been held, that a Lessee or Tenant cannot change the nature of the thing demised; though, in some cases, the alteration may be for the greater profit of the Lessor. Thus if a Lessee converts a Corn-mill into a Fulling-mill, it is Waste; although the conversion be for the Lessor's advantage. *Cro. Jac.* 182. So the converting a Brewhouse of 120*l per ann.* into other Houses let for 200*l*. a year, is Waste; because of the alteration of the nature of the thing, and of the evidence. 1 *Lev.* 309.

WASTE IN LANDS.—It hath been already stated, that if a Tenant converts Arable into Wood, or *è converso*, it is Waste; for it not only changes the course of husbandry, but also the proof of evidence. *Hob.* 296. *pl.* 234. But if a Lessee suffers arable land to lie fresh, and not manured, so that the land grows full of thorns, &c. this is not Waste, but ill husbandry. 2 *Roll. Abr* 814. Likewise the conversion of Meadow into Arable is Waste. 1 *Inst.* 53, *b*. But if Meadow be sometimes Arable, and sometimes Meadow, and sometimes Pasture, there the plowing of it is not Waste. 2 *Roll. Abr.* 815. Neither is the division of a great Meadow into many parcels, by making of Ditches, Waste; for the Meadows may be better for it, and it is for the profit and ease of the occupiers of it. 2 *Le.* 174. *pl.* 210.

Likewise converting a Meadow into a Hop-garden, is not Waste; for it is employed to a greater profit, and it may be Meadow again; *per Windham* and *Rhodes*, J. But *Periam* said, though it be a greater profit, yet it is also with greater labour and charges. 2 *Le.* 174. *pl.* 210. But converting a Meadow into an Orchard, is Waste, though it be to the greater profit of the occupier. *Per Periam. Id. ibid.* If a Lessee ploughs the land stored with Conies, this is no Waste; unless it be a Warren by charter or prescription. 2 *Roll. Abr.* 815. So if a Lessee of land destroys the Coney-boroughs in the land, it not being a free Warren by charter or prescription, it seems is not Waste; for a man can have no property in them, but only a possession. *Id. ibid.*: *Ow.* 66.

It is Waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea the meadow or marsh is surrounded, whereby the same becomes unprofitable. But if it be surrounded suddenly by the rage and violence of the sea, occasioned by wind, tempest, or the like, without any default in the tenant, this is not Waste. Yet if the tenant repair not the banks or walls against rivers or other waters, whereby the meadows or marshes be surrounded and become rushy and unprofitable, this is Waste. 1 *Inst.* 53, *b*. So *à fortiori*, if arable land be surrounded by such default; for the surrounding washes away the marle and other manurance from the land. 2 *Roll. Abr.* 816.

WASTE *in* TREES *and* WOODS. Trees are parcel of the inheritance; and therefore, if a lessee assigneth his term, and excepts the Timber-trees, it is void; for he cannot except that which doth not belong to him by Law. 5 *Rep.* 12. The Lessor, after he has made a lease for life or years, may by deed grant the Trees, or reasonable estovers out of them, to another and his heirs; and the same shall take effect after the death of the Lessee. But such a gift to a stranger is void during the estate for life, because of the particular prejudice which might be done to the Lessee. 11 *Rep.* 48. The Lessee hath but a particular interest in the Trees, but the general interest of the Trees doth remain in the Lessor; for the Lessee shall have the Waste and Fruit of the Trees, and the shadow for his cattle, &c. But the interest of the body of Tree is in the Lessor, as parcel of his inheritance. Therefore if Trees are overthrown, by the Lessee or any other, or by wind or tempest, or by any other means disjoined from the inheritance, the Lessor shall have them in respect of his general ownership. 11 *Rep.* 81.

With respect to Timber-trees, such as Oak, Ash, Elm, (which are Timber-trees in all places,) Waste may be committed in them, either by cutting them down, or lopping of them, or doing any act whereby the Timber may decay. Also in countries where Timber is scarce, and Beeches or the like are converted to building for the habitation of man, they also are accounted Timber. 1 *Inst.* 53, *a*; 54, *b*. Thus, Waste may be committed in cutting of Beeches in *Buckinghamshire*, because there by the the custom of the country it is the best Timber. 2 *Roll. Abr.* 814.

So, Waste may be committed in cutting of Birches in *Berkshire*, because they are the principal Trees there for the most part. 2 *Roll. Abr.* 814. If the Tenant cut down Timber-trees, or such as are accounted Timber, as mentioned

tioned above, this is Waste; and if he suffers the young Germins to be destroyed, this is Destruction. So it is, if the Tenant cuts down Underwood (as he may by Law), yet if he suffer the young Germins to be destroyed, or if he stub up the same, this is Destruction. 1 *Inst.* 53, *a.* If Lessee, or his servants, suffer a Wood to be open, by which beasts enter and eat the Germins, though they grow again, yet it is Waste; for after such eating they never will be great Trees, but Shrubs. 2 *Roll. Abr.* 815. If a Termor cuts down Underwood of Hazel, Willows, Maple, or Oak, which is seasonable, it is not Waste. If Ashes are seasonable Wood to cut from ten years, it is not Waste to cut them down for house-boot. But if the Ashes are gross of the age of nine years, and able for great Timber, it is Waste to cut them down. 2 *Roll. Abr.* 817.

If Oaks are seasonable, and have been used to be cut always at the age of twenty years, it is not Waste to cut them at such age, or under; for in some countries, where there is a great plenty, Oaks of such age are but seasonable Wood. But, after the age of twenty-one years, Oaks cannot be said to be Wood seasonable, and therefore it shall be Waste to cut them down. 2 *Roll. Abr.* 817. Cutting down of Willows, Beech, Birch, Asp, Maple, or the like, standing in the defence and safeguard of the house, is Destruction. If there be a quickset fence of white thorn, if the tenant stub it up, or suffer it to be destroyed, this is also Destruction: And for all these and the like Destructions an Action of Waste lieth. 1 *Inst.* 53, *a.* The cutting of Horn-beams, Hazels, Willows, Sallows, though of forty years growth, is no Waste, because these Trees would never be Timber. *Godb.* 4. *pl.* 6.

If the Lessee covenant, that he will leave the Wood at the end of the term as he found it; if the Lessee cut down the Trees, the Lessor shall presently have an Action of Covenant: For it is not possible for him to leave the Trees at the end of the term. So that the impossibility of performing the covenant shall give a present action on a future covenant. But it is otherwise in the case of a house; for there, though the Lessee commit Waste, yet he may repair the Waste done, before the term expires. 5 *Rep.* 21.

The cutting down of Trees is justifiable for house-bote, hay-bote, plow-bote, and fire-bote. 1 *Inst.* 53, *b*: *Hob. Rep. c.* 296: *Bro. Waste*, 130. By the Common Law, Lessee shall have them, though the deed does not express it; but if he takes more than is necessary he shall be punished in Waste. *Bro. Waste, pl.* 30. The tenant may take sufficient Wood to repair the walls, pales, fences, hedges, and ditches, as he found them; but he cannot make new. Cutting of dead Wood is no Waste. But converting Trees into Fuel, when there is sufficient dead Wood, is Waste. 1 *Inst.* 53, *b.*

Cutting Wood to burn, where the tenant has sufficient Hedge-wood, is Waste. *F. N. B.* 59 (M). Where Lessee for years has power to take Hedge-bote by assignment, yet he may take it without assignment; for the affimative does not take away the power which the Law gives him. *Dy.* 19. *pl.* 115. If Lessor excepts his Trees in his lease, the Lessee shall not have Fire-bote, Hay-bote, &c. which he should have otherwise; and the property of the Trees is in the Lessor himself. 4 *Le.* 162. *pl.* 269. *Sir Richard Leuknor*'s case. But it has been said, that Lessee for years, the Trees being excepted, has liberty to take the shrouds and loppings for Fire-bote; but if he cuts any Tree, it shall be Waste, as well for the lopping as for the body of the Tree. *Noy* 29. If a Tenant that has Fire-bote to his house in another man's land, cuts Wood for that intent to make his Bote-wood, and the owner of the land takes it away, an Action of Trover and Conversion lies against him by the Tenant of the land who hath such Fire-bote. *Clayt.* 40. *pl.* 69. *Coram Berkley. Anon.* See *Dyer* 36. *pl.* 38; *Clayt.* 47. *pl.* 81: 1 *Lev.* 171.

If, during the estate of a mere tenant for life, Timber is severed either by accident or by wrong, it belongs to the first person who has a vested estate of inheritance: But where there are intermediate contingent estates of inheritance, and the Timber is cut down by a combination between the Tenant for Life, and the person who has the next vested estate of inheritance; or if the Tenant for Life has himself such estate, and fells Timber; in these cases the Chancellor will order it to be preserved for him who has the first contingent estate of inheritance under the settlement. 3 *Cox's P. Wms.* 267: 3 *Woodd.* 400. See further, *post.* II. IV.

Waste in digging for Gravel, Mines, &c.—If the Tenant digs for Gravel, Lime, Clay, Brick, Earth, or Stone, hid in the ground, or for Mines of Metal or Coal, or the like, not being open at the time of the lease, it is Waste. 1 *Inst.* 53, *b.* If a man hath land in which there is a Mine of Coals, or the like, and maketh a lease of the land (without mentioning any mines) for life or for years, the Lessee, as to such Mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any new Mine that was not open at the time of the lease made, for that would be adjudged Waste. Likewise, if there be open Mines in the land, and the Owner leases it to another, with the Mines in it, he may dig in the open Mines, but not in the close mines; but otherwise it would be if there was not any open Mine there: for then the Lessee might dig for Mines, otherwise the grant would take no effect. 1 *Inst.* 54, *b.* If Lessee dig Slate-stone out of the land, it is Waste: So digging for Stones, unless in a Quarry, is Waste, though the Lessee fill it up again. 2 *Roll. Abr.* 816: *Ow.* 66. Likewise, if he have a lease of land, in which there was a Coal Mine, but not open at the time of the lease; if the Lessee open it, and assigns his interest, it is still Waste in the Assignee: but where the lease is of lands, and all Mines in it, there he may dig in it. 5 *Rep.* 12, *a. b.*

But if Lessee of land, with Mines of Coals, Iron, and Stone, digs the Coals, Iron, and Stones, so much as is necessary for him to use without selling, it is not Waste. If a Lessee digs Earth, and carries it out of the land, Action of Waste lies. 2 *Roll. Abr.* 816. If a Lessee digs for Gravel or Clay, for reparation of the house, not being open at the time of the lease, it is not Waste, any more than the cutting of Trees for reparation. 1 *Inst.* 53, *b.*

If a man leases lands with general words of "all Mines of Coals," where there is not any Mine of Coals open at the time of the demise, and after the Lessee opens a Mine, he cannot justify the cutting of Timber-trees for making puncheons, corses, roll-scoops, and other utensils in and about the Mine, though without them he could not dig and get the Coals out of the Mine: and this is like a new house built after the demise, for the reparation of which he cannot take Timber

upon

upon the land; and it had been Waste to open it, if it had not been granted by express words; And it was said by *Hobart*, that the Law had been the same if the Mine was open at the time of the demise. *Hobart* 296: *Hut.* 19.

WASTE IN GARDENS, Orchards, Fish-ponds, Dove-houses, Parks, *&c.*—If the Tenant cut down or destroy any Fruit-trees growing in the Garden or Orchard, it is Waste: But if such Trees grow upon any of the ground, which the Tenant holdeth out of the Garden or Orchard, it is no Waste. 1 *Inst.* 53, *a.* Breaking a Hedge also is no Waste. 1 *Inst.* 53, *a.* Destruction of Saffron-heads in a Garden, is not Waste. *Bro. Waste, pl.* 143, cites 10 *H.* 7. *c.* 2. If the Tenant of a Dove-house, Warren, Park, Vivary, Estangues, or such like, takes so many that so much store is not left as he found at the time of the demise, it is Waste. 1 *Inst.* 53, *a*: *Hob Rep. c.* 296. Likewise, if the Lessee of a Pigeon-house stops the holes, that the Pigeons cannot build, it is Waste. So suffering the Pales of a Park to decay, whereby the Deer are dispersed, is Waste. 1 *Inst.* 53, *a.* Also, if the Lessee of a Hop ground plow it up and sow grain there, it is Waste. *Ow.* 66, *Moyle* v. *Moyle.*

The breaking a Weare is Waste, or the Banks of a Fish-pond, so that the water and fish run out. *Ow.* 66.

WASTE *with respect to* HOUSES. Waste may be done in Houses, by pulling them down or prostrating them, or by suffering the same to be uncovered, whereby the spars or rafters, planchers or other timber of the House are rotten. 1 *Inst.* 53, *a.*—Default of Coverture of an House is Waste, though the timber be standing. 2 *Roll. Abr.* 815. But if the House be uncovered, when the Tenant cometh in, it is no Waste in the Tenant to suffer the same to fall down. Though there be no Timber growing upon the ground, yet the Tenant, at his peril, must keep the Houses from wasting. 1 *Inst* 53, *a.* If a Lessee rases the House, and builds a new House, if it be not so long and wide as the other, it is Waste. 2 *Roll. Abr.* 815. So, if he rebuilds it more large than it was before, it is Waste; for it will be more charge for the Lessor to repair it. 1 *Inst.* 53, *a.*

But if a Lessee of land makes a new House upon the land where there was not any before, this is not Waste; for it is for the benefit of the Lessor. 2 *Roll. Abr.* 815. Though, according to *Coke*, if the Tenant build a new House, it is Waste; and if he suffer it to be wasted, it is a new Waste. Yet, if the House be prostrated by enemies or the like, without default of the Tenant, or was ruinous at his coming in, and fall down, the Tenant may build the same again with such materials as remain, and with the other timber, which he may take growing on the ground, for his habitation; but he must not make the House larger than it was. 2 *Roll. Abr.* 815: 1 *Inst.* 53, *a.* If the House be uncovered by tempest, the Tenant must in convenient time repair it. 1 *Inst.* 53, *a.* If a Lessee flings down a Wall between a Parlour and a Chamber, by which he makes a Parlour more large, it is Waste; it cannot be intended for the benefit of the Lessor, nor is it in the power of the Lessee to transpose the House. 2 *Roll. Abr.* 815. So, if he pulls down a Partition between Chamber and Chamber, it is Waste. *Bro. Waste*, 143. Or if a Lessee pulls down a Hall or Parlour, and makes a Stable of it, it is Waste. If a Lessee pulls down a Garret over head, and makes it all one and the same thing, it is Waste. If a Lessee permits a Chamber *fore in decasu pro defectu plaustrationis, per quod grossum maheremium devenit putridum, & camera illa turpissima & fœdissima devenit*, Action of Waste lies for it. So, if a Lessee permits the Wall to be in decay for default of daubing, *per quod maheremium devenit putridum*, Action of Waste lies. 2 *Roll. Abr.* 815. Breaking of a Pale or of a Wall uncovered, is not Waste. But breaking of a Wall covered with Thatch, and of a Pale of Timber covered, is Waste. *Bro. Waste, pl.* 94.

If the Tenant do, or suffer, Waste to be done in his Houses, yet if he repair them before any Action brought, there lieth no Action of Waste against him; but he cannot plead *quod non fecit vastum*, but the special matter. 1 *Inst.* 53, *a.*

It may be of use here to add something on the progress of the Law, as to the accidental burning of Houses, so far as regards Landlord and Tenant. At the Common Law, Lessees were not answerable to Landlords for accidental or negligent burning; for as to Fires by accident, it is so expressed in *Fleta, lib.* 1. *c.* 12; and Lady *Shrewsbury*'s case, 5 *Rep.* 13, *b.*, is a direct authority to prove that Tenants are equally excusable for Fires by negligence. Then came the Statute of *Gloucester*, (6 *E.* 1.) which by making Tenants for life and years liable to Waste without any exception, consequently rendered them answerable for Destruction by Fire. Thus stood the Law in Lord *Coke*'s time: But now, by *stat.* 6 *Ann. c.* 31, [the provisions of which are contained in the last Building-Act; see this Dictionary, title *Fire*;] the ancient Law is restored, and the distinction, introduced by the Statute of *Gloucester*, between Tenants at will and other Lessees, is taken away; for the Statute exempts all persons from Actions for *accidental* Fire in any House, except in the case of *special Agreements* between Landlord and Tenant. So much relates to Tenants coming in by Act or Agreement of Parties.—As to Tenants of particular estates coming in by Act of Law, as Tenant by the Curtesy, Tenant in Dower, and (before the Statute taking away Military Tenures) Guardian in Chivalry; these, or at least the two latter, being, at Common Law, punishable for Waste, were therefore responsible for losses by Fire; unless indeed they were answerable for Waste *voluntary* only, and not for Waste *permissive*; a distinction not found in the Books. If these Tenants in Curtesy or Dower were, at Common Law, responsible for accidental Fire, it may, some time or other, become necessary to determine whether they are within the Statute of *Anne.*—The Statute, in expression, is very general, and seems calculated to take away *all Actions* in cases of accidental Fire, as well from other persons as from Landlords.—*N. B.* It has been doubted on the Statute of *Anne*, whether a Covenant to *repair* generally, extends to the case of Fire, and so becomes an Agreement within the Statute; and therefore, where it is intended that the Tenant shall not be liable, it is most usual, in the Covenant for repairing, to except Accidents by Fire. 1 *Inst.* 57, *in n.*

But if a Lessee covenants to pay Rent, and to repair, with an express exception of Casualties by Fire, he may be obliged to pay rent during the whole term, though the premises are burned down by accident, and never rebuilt by the Lessor. 1 *Term Rep.* 310. See this Dict. titles *Covenant*; *Rent*; *Lease*.

WASTE *in Things annexed to the* FREEHOLD. The removing a Post in a house is Waste. 42 *Edw.* 3. 6. So, the removing of a Door. 1 *Inst.* 53. Or of a Window. 42 *Edw.* 3. 6. The digging up a Furnace annexed to the

the frank-tenement, and selling it, is Waste. *Bro. Waste, pl* 143. The removing of a Bench is Waste, though annexed by the Tenant himself. *Bro. Waste, pl.* 143: 1 *Inst.* 53, *a.* But these are such trifles that a Landlord would now scarcely obtain a Verdict in an Action of Waste, it being so very penal; unless very great injury was done by the act. As to the Furnace he might maintain Trover for the value.—If Wainscot, annexed to the house, be taken away, it is Waste. 1 *Inst.* 53, *a.* Of Tables dormant and fixed in the land, and not to the walls by the termor, and taken off within his term, Waste does not lie; for the house is not impaired by it. *Bro Waste, pl.* 104.

Beating down a wooden Wall, or suffering a brick Wall to fall, is no Waste, unless it be expressly alleged, that the Walls were coped or covered. If Waste be assigned in pulling up a Plank Floor, and Mangers of a Stable, the plaintiff must shew that the same were fixed. *Dy.* 108, *b. pl.* 31. If Lessee erects a Partition, he cannot break it down without being liable to an Action of Waste, for he has joined it to the frank-tenement. *Mo.* 178. Shelves are parcel of the house, and not to be taken away; and though it is not shewn that the Shelves were fixed, it ought to be intended that they were fixed. 2 *Bulst.* 113. Pavement is a structure, for they use lime to finish. *Id. ibid.* If the Tenant suffers the Groundsels to waste, in his default of defence or removing the water from off them, or through dirt or dung or other nusance which lies or hangs upon it, the Tenant shall be charged, for he is bound to keep it in as good case as he took it. *Ow.* 43.

The Law, upon this part of the subject, has been relaxed; for during the term the Tenant may take away Chimney-pieces or Wainscot, which he has put up; but not after the term, for he would then be a Trespasser. 1 *Atk.* 477. A Fire-engine, erected by Tenant for life, shall go to his Executor. 3 *Atk.* 13. But the rule is different between the Heir and Executor, with regard to Fixtures upon the inheritance, that descend to the Heir. 1 *H Black. Rep.* 258. See title *Heir* III. 3.

It may be observed in general, that WASTE, which ensues from the act of God, is EXCUSABLE; or rather, it is *no Waste.* Thus, if a House falls by Tempest, the Tenant shall be excused in Action of Waste; but if it be uncovered by Tempest, and stands, there, if the Tenant has sufficient timber to repair it, and does not, the Lessor, if the lease be made on condition of re-entry for Waste, may re-enter, but not immediately upon the Tempest, for it is no Waste until the Tenant suffers it to be so long unrepaired, that the timber be rotted, and then it is Waste. *Bro. Cond. pl.* 40.

Likewise, if a House be abated by Lightning, or thrown down by a great Wind, it is not Waste: 1 *Inst.* 53, *a.* So, if Apple-trees are torn up by a great Wind, if Lessee afterwards cuts them, it is not Waste. *Bro. Waste, pl.* 39. If the Banks are well repaired by the Lessee, and the Water, notwithstanding, subverts them, and surrounds his Meadow, by which it is become rushy, it is not Waste. 2 *Roll. Abr.* 280: *Contrà*, 20 *H.* 6. *c.* 1, *b.* The Lessor cannot give Trees during the Tenant's lease. But if he grants then to a stranger, and commands the Tenant to cut and deliver them, who does it, this shall excuse him in an Action of Waste. And yet the Tenant was not bound by Law to obey and execute this command. *Bro. Dow, &c.* 13.

If Tenant in Tail grants all his estate, his Grantee is dispunishable of Waste; so such Grantee's Grantee is also dispunishable; *per Clerk*, J. 3 *Le.* 121. *pl.* 173. *Anon.* If a man devises land to two in Tail, and after the one Devisee dies without issue, by which the Reversion in Fee of one moiety reverts to the Heir of the Donor; but the other Devisee is Tenant for Life of the whole, and after he commits Waste, Action of Waste lies against him by the Heir of the Donor for the one moiety. *New Abr.* 469. But Action of Waste does not lie against Tenant in Tail after possibility, for the greatness of the estate of inheritance which was once in him: and also, as some say, because the estate was not within the statute at the creation. 11 *Rep.* 80, *a Lewis* v. *Bowles*. See *post.* II. 2.

If lands are given to the Husband and Wife, and to the Heirs of the body of the Husband, the remainder to the Husband and Wife, and to the Heirs of their two bodies begotten, and the Husband dies without issue: The Wife shall not be Tenant in Tail after possibility; for the remainder in special Tail was utterly void, for that it could never take effect. For, so long as the Husband should have issue, it should inherit by force of the general Tail; and if the Husband die without issue, then the special Tail cannot take effect, inasmuch as the issue, which should inherit in special Tail, must be begotten by the Husband; and so the general, which is larger and greater, hath frustrated the special, which is lesser; and the Wife, in that case, shall be punished for Waste. 1 *Inst* 28, *b.*

It has been agreed, that Tenant for years may cut Wood; but it has been doubted, if Tenant at will may; but it seems, that as long as Tenant at will is not countermanded he may cut seasonable Wood, *&c. Bro Waste, pl.* 114. Where a man leases a Wood which consists only of great Trees, the Lessee cannot cut them. *Hobart's Rep. Cas.* 296. Nevertheless, if the Lessee cuts Trees for reparation, and sells them, and after buys them again, and employs them in reparation, yet it is Waste by the sale. So, if Lessee cuts Trees, and sells them for money, though with the money he repairs the House, yet it is Waste. 1 *Inst.* 53, *b.* As to the cutting of Timber trees for repairs by Lessee, there is no difference whether the Lessor or Lessee covenants to repair the Houses; for in either case it is not Waste, if Lessee cuts them. *Mo.* 23. *pl.* 80. *Anon.*

If a House be prostrated by Enemies of the King, or such like, without default of the Lessee, the Lessee may rebuild it again with the same materials that remain, and may cut other Timber upon the land to rebuild it, but he must not make the House larger than it was. 1 *Inst.* 53, *a.* So, if the House was ruinous at the time of the lease, and fell within the term, this is not Waste in the Tenant. 1 *Inst.* 53, *a*: *Bro. Waste, pl.* 130. But the Lessee shall not cut Trees to make a new House where there was not any at the time of the lease. *Hob.* 296. So, if a Lessee suffers a House to fall for default of covering, which is Waste, he cannot cut Trees to repair the House. *Bro. Waste, pl.* 39. And in general, if the Tenant suffer the House to be wasted, he cannot justify the felling of Timber to repair it. 1 *Inst* 53, *b.* If a House be ruinous at the time of the lease, though the Lessee is not bound to repair it, ye he may cut Trees to repair it. 1 *Inst.* 54, *b.* The Tenant may likewise dig for Gravel or Clay for the reparation of the House, though the soil was not open when the Tenant came in; and it is justifiable as well as

cutting

cutting of Trees. 1 *Inst.* 53, *b*. So, with regard to a Stable, if it fall without default of the Lessee, in time of the Lessor, the Lessee may take Trees of the Heir to make a new Stable, if it be of necessity. *Bro. Waste, pl.* 67. But if the Stable falls in default of the Lessee, in time of the Lessor, he cannot, in time of the Heir, cut Trees to make a new Stable. *Bro. Waste, pl.* 67.

II. 1. The Persons who be injured by Waste are such as have some interest in the estate wasted: for if a man be the absolute Tenant in fee-simple, without any incumbrance or charge on the premises, he may commit whatever Waste his own indiscretion may prompt him to, without being impeachable and accountable for it to any one. And, though his heir is sure to be the sufferer, yet *nemo est hæres viventis*: no man is certain of succeeding him, as well on account of the uncertainty which shall die first, as also because he has it in his own power to constitute what heir he pleases, according to the Civil Law notion of an *hæres natus* and an *hæres factus*: or, in the more accurate phraseology of our *English* Law, he may aliene or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his heir at law. Into whose hands soever therefore the estate wasted comes, after a Tenant in fee-simple, though the Waste is undoubtedly *damnum*, it is *damnum absque injuria*. 3 *Comm.* c. 14.

One species of Interest, which is injured by Waste, is that of a person who has a right of common in the place wasted; especially if it be common of *estovers*, or a right of cutting and carrying away Wood for House-bote, Plough-bote, &c. Here, if the owner of the Wood demolishes the whole Wood, and thereby destroys all possibility of taking estovers, this is an injury to the commoner, amounting to no less than a disseisin of his common of estovers, if he chooses so to consider it; for which he has his remedy to recover possession and damages by Assise, if entitled to a freehold in such common; but if he has only a chattel-interest, then he can only recover damages, by an action on the case for this Waste and Destruction of the Woods, out of which his estovers were to issue. *F. N. B.* 59: 9 *Rep.* 112.

But the most usual and important Interest, that is hurt by this commission of Waste, is that of him who hath the remainder or reversion of the inheritance after a particular estate for life or years, in being. Here, if the particular Tenant, (be it the Tenant in Dower or by Curtesy, who was answerable for Waste at the Common Law, 2 *Inst.* 299, or the Lessee for life or years, who was first made liable by the statutes of *Marlebridge*, 52 *H.* 3. c. 23; (*q.* 24?) and of *Gloucester*, 6 *Edw.* 1. c. 5;) if such particular tenant, commits or suffers any Waste, it is a manifest injury to him that has the inheritance; as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which Timber and Houses may justly be reckoned the principal. To him therefore in remainder or reversion, to whom the inheritance appertains in expectancy, the Law hath given an adequate remedy. *Co. Litt.* 63. For he, who hath the remainder for life only, is not entitled to sue for Waste; since his Interest may never perhaps come into possession, and then he hath suffered no injury. Yet a Parson, Vicar, Archdeacon, Prebendary, and the like, who are seised in right of their Churches of any remainder or reversion, may have an Action of Waste; for they, in many cases, have, for the benefit of the Church and of the successor, a fee-simple qualified: But, as they are not seised in their own right, the Writ of Waste shall not say, *ad exhæredationem ipsius*, as for other tenants in fee-simple; but *ad exhæredationem ecclesiæ*, in whose right the fee simple is holden. 1 *Inst.* 341: 3 *Comm.* c. 14.

By *stat* 13 *Ed.* 1. c. 22, the Action of Waste is given to one Tenant in Common against another. Where there are Tenants in Common for life, the one shall not have Trespass of Trees cut against the other, but shall have Waste *pro indiviso*, though they are only Tenants for term of Life, &c. *Bro. Waste, pl.* 79. If one Coparcener, before partition, makes Feoffment to another, and one of them does Waste in the Trees, Waste lies. 11 *Rep.* 49, *a*. *Lifford*'s Case. Likewise, if two Joint-tenants do Waste, and after the one enters into Religion, Waste lies against the other alone. 2 *Roll. Abr.* 828. See *post*. III.

By *stat.* 20 *Ed.* 1. *st.* 2, an Action of Waste is maintainable by the Heir, for Waste done in the time of his Ancestor, as well as for Waste done in his own time.

This Action must be brought by him that hath the immediate estate and inheritance in Fee-simple or Fee-tail; but sometimes another may join with him. 1 *Inst.* 53, *a*; 285, *a*. It is said, that the Reversion must continue in the same state that it was at the time of the Waste done, and not granted over; for though the Reversioner taketh the estate back again, the Action is gone, because the estate did not continue: But in some special cases an Action of Waste shall lie; though the Lessor had nothing in the Reversion at the time of the Waste done: As, if a Bishop makes a Lease for life or years, and dies, and the Lessee, the See being void, doth Waste, the Successor shall have an Action of Waste. This is allowed, though the *stat.* of 20 *Ed.* 1. speaks only of those that are Inheritors. 1 *Inst.* 53, *b*; 356, *a*: 2 *Roll. Abr.* 825.

If a Tenant doth Waste, and he in Reversion dieth, the Heir shall not have an Action of Waste for Waste done in the life of the Ancestor: For he cannot say that the Waste was done to his disinherison, &c. 1 *Inst.* 341, *a*; 53, *b*; 356, *a*. If a Lease is made to *A.* for life, the Remainder to *B.* for life, Remainder to *C.* in fee; no Action of Waste lieth against the first Lessee during the estate in the mean Remainder, for then his estate would be destroyed. Otherwise, if *B.* had a mean Remainder for years, for that would be no impediment, the recovery not destroying the term of years. 5 *Rep.* 76, 77: 1 *Inst.* 54, *a*.

No person is entitled to an Action of Waste against a Tenant for life, but he who has the *immediate* estate of Inheritance, in Remainder or Reversion, expectant upon the estate for life. If, therefore, between the estate of the Tenant for life, who commits Waste, and the subsequent estate of Inheritance, there is interposed an estate of Freehold to any person *in esse*, then, during the continuance of such interposed estate, the Action of Waste is suspended: And if the first Tenant for life dies during the continuance of such interposed estate, the Action is gone for ever. But, though, while there is an estate for life interposed between the estate of the person committing Waste, and that of the Reversioner or Remainder-man *in fee*, the Remainder-man cannot bring his Action of Waste; yet, if the Waste be done by cutting down

Trees,

Trees, &c. such Remainder-man in fee *may seise them*; and if they are taken away, or made use of, before he seizes them, he may bring an Action of *Trover*. For, in the eye of the Law, a Remainder-man *for life* has not the property of the thing wasted: And even a Tenant for life in possession has not the absolute property of it, but merely a right to the enjoyment or benefit of it, as long as it is annexed to the inheritance, of which it is considered a part, and therefore belongs to the Owner of the Fee. 1 *Inst.* 218, *b. in n.* refers to 1 *Inst.* 53: 5 *Rep.* 77, *Paget's Case*: *All.* 81: 3 *P. Wms.* 267: 22 *Vin. Abr.* 523: 2 *Eq. Abr.* 727: 3 *Atk.* 757.

If Lessee for years commit Waste, and the years do expire, yet the Lessor shall have an Action of Waste for Treble Damages, though he cannot recover the place wasted; but if the Lessor accepteth of a Surrender of a Lease after the Waste done, he shall not have his Action of Waste. It is said, that if a Tenant repairs before Action brought, he in Reversion cannot have an Action of Waste; but he cannot plead that he did no Waste, therefore he must plead the Special Matter. 1 *Inst.* 283, *a*; 285, *a*; 306: 5 *Rep.* 119: 2 *Cro.* 658. By *stat.* 11 *H* 6. *c.* 5, where Tenants for life, or for another's life, or for years, grant over their estates, and take their profits to their own use, and commit Waste, they in Reversion may have an Action of Waste against them. 2 *Inst.* 302. He in the Remainder, as well as the Reversioner, may bring this Action, and every Assignee of the first Lessee, mediate or immediate, is within this Act. 5 *Rep.* 77: 2 *Inst.* 302.

2. By the Feodal Law, Feuds being originally granted for life only, the rule was general for all Vassals or Feudataries; "*si vassallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*" *Wright* 44. See title *Tenures*. But in our ancient Common Law the rule was by no means so large; for not only he that was seised of an estate of inheritance might do as he pleased with it, but also Waste was not punishable in any Tenant, save only in three persons; Guardian in Chivalry, Tenant in Dower, and Tenant by the Curtesy; and not in Tenant for life or years. And it was even a doubt whether Waste *was* punishable, at the Common Law, in Tenant by the Curtesy. *Regist.* 72: *Bro. Abr.* title *Waste*: 2 *Inst.* 301. The reason of this diversity was, that the estate of the three former was created by the act of the Law itself, which therefore gave a remedy against them; but Tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of Waste by his Lessee; and if he did not, it was his own default. 2 *Inst.* 299. But, in favour of the owners of the inheritance, the statutes of *Marlebridge*, *stat.* 52 *Hen.* 3. *c.* 23, (*q.* 24?) and of *Gloucester*, 6 *Ed.* 1. *c.* 5, provided that the writ of Waste shall not only lie against Tenants by the Law of *England*, (or Curtesy,) and those in Dower, but against any Farmer or other that holds, in any manner, for life or years. So that, for above five hundred years past, all Tenants merely for life, or for any less estate, have been punishable, or liable to be impeached for, Waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without Impeachment of Waste, *absque impetitione vasti*; that is, with a provision or protection that no man shall *impetere*, or sue him, for Waste committed. But Tenant in tail, after possibility of issue extinct, is not impeachable for Waste; because his estate was at its creation an estate of inheritance, and so not within the statutes. *Co. Litt.* 27: 2 *Roll. Abr.* 826, 828. Neither does an Action of Waste lie for the Debtor against Tenant by Statute, Recognizance, or *Elegit*; because against them the Debtor may set off the damages in account. *Co. Litt.* 54. But it seems reasonable that it should lie for the Reversioner, expectant on the determination of the Debtor's own estate, or of these estates derived from the Debtor. *F. N. B.* 58: 2 *Comm. c.* 18.

The Statute of *Marlebridge*, 52 *H.* 3. *c.* 23. § 2, (or *c.* 24,) enacts, that "Farmers, during their terms, shall not make Waste, Sale, nor Exile, of Houses, Woods, and Men, nor of any thing belonging to the Tenements that they have to farm, without special licence had by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously."

This act provideth remedy for Waste done by Lessee for life, or Lessee for years, and it is the first statute that gave remedy in those cases. 2 *Inst.* 145. This statute is a Penal Law, and yet, because it is a remedial Law, it has been interpreted by Equity. 10 *Mod.* 281.

Farmers.] Here Farmers do comprehend all such as hold by lease for life or lives, or for years, by deed or without deed. 2 *Inst.* 145. It has been resolved, likewise, that it should extend to Strangers. 10 *Mod* 281. Although the *Register* says *sciand.* that *per statutum de Marlebridge, cap.* 23, *data fuit quædam prohibitio vasti versus tenementum annorum*, which is true: Yet the statute extends to Farmers for life also; but this act extended not to Tenant by the Curtesy, for he is not a Farmer; but if a lease be made for life or years, he is a Farmer, though no rent be reserved. 2 *Inst.* 145.

Shall not make Waste] By these words they are prohibited to suffer Waste, for it has been resolved that this act extends to Waste *omittendo*, though the word is *faciant*, which literally imports *active* Waste. 10 *Mod.* 281.

Nor of any thing] Houses, Woods, and Men were before particularly named; and these words do comprehend Lands and Meadows belonging to the Farm. 2 *Inst.* 146. Also these general words have a further signification; and therefore, if there had been a Farmer for life, or years, of a manor, and a Tenancy had escheated, this Tenancy so escheated did belong to the Tenement, that he held in farm, and therefore this extended to it; and the Lessor shall have a writ generally, and suppose a lease made of the lands escheated by the Lessor, and maintain it by the special matter. 2 *Inst.* 146.

Special Licence by Writing] This grant ought to be by deed, for all Waste tends to the disinheritance of the Lessor, and therefore no man can claim to be dispunishable of Waste without deed. 2 *Inst.* 146. Likewise, this Special Grant is intended to be *absque impetitione vasti*; without Impeachment of Waste. 2 *Inst.* 146.

Yield full Damage] And this must be understood such a prohibition of Waste upon this statute as lay against a Tenant in Dower at the Common Law; and single damages were given by this statute against Lessee for life, and Lessee for years. 2 *Inst.* 146.

It has been said, that there are five Writs of Waste: two at the Common Law, as for Waste done by Tenant in Dower, or by Guardian; three by statute, as against Tenant for Life, Tenant for Years, and Tenant by the

Curtesy. Tenant by the Curtesy, it is said, was punishable for Waste, by the Common Law, for that the Law created his estate as well as that of the Tenant in Dower, and therefore the Law gives like remedy against them. 1 *Inst*. 54, *a*: 2 *Inst*. 145, 299, 301, 305. But on this subject the authorities in the books are very contradictory, as the Reader will perceive by attending to the Note subjoined to the following clause of the Statute of *Gloucester*, 6 *Ed*. 1. *c*. 5, which enacts, that, "A man from henceforth shall have a Writ of Waste in the Chancery against him that holdeth by the Law of *England*, or otherwise for term of life, or for term of years, or a Woman in Dower."

No Action of Waste lay before the Statute of *Gloucester*, but against Tenant in Dower and Guardian; and by the statute, Action of Waste is given against the Tenant by the Curtesy, Tenant for term of Life, and Tenant for term of Years. *Bro. Waste, pl*. 88. Lord *Coke* says, a reason is required, (that seeing as well the estate of the Tenant by the Curtesy, as the Tenant in Dower are created by Act in Law,) wherefore the prohibition of Waste did not lie as well against Tenant by the Curtesy as the Tenant in Dower at the Common Law; and the reason he assigns is this, for that, by having issue, the estate of the Tenant by the Curtesy is originally created, and yet after that he shall do homage alone in the life of the Wife, which proves a larger estate; and seeing that at the creation of his estate he might do Waste, the prohibition of Waste lay not against him after his Wife's decease; but, in the case of Tenant in Dower, she is punishable of Waste at the first creation of her estate. 2 *Inst*. 145. But see 2 *Inst*. 299, and the reasons there, as quoted above.

Shall have a Writ of Waste] Neither this Act, nor the Statute of *Marlebridge*, doth create *new* kind of Wastes, but gives new remedies for old Wastes; and what is Waste, and what is not, must be determined by the Common Law. 2 *Inst*. 300, 301.

Against him] If two are joint-tenants for years or for life, and one of them does Waste, this is the Waste of them both as to the place wasted, notwithstanding the words of the act are, *him* that holds. 2 *Inst*. 302.

Holds by the Law of England] Here Tenant by the Curtesy is named for two causes: 1st, For that albeit the common opinion was, that an Action of Waste did lie against him, yet some doubted of the same in respect to this word (*tenet*) in the writ, for that the Tenant by the Curtesy did not hold of the Heir, but of the Lord Paramount; and after this act, the Writ of Waste grounded thereupon doth recite this statute: 2dly, For that greater penalties were inflicted by this act than were at the Common Law. 2 *Inst*. 301.

Or otherwise for Term of Life or for Term of Years] A Lessee for his own Life, or for another man's Life, is within the words and meaning of this Law, and in this point this act introduces that which was not at the Common Law. 2 *Inst*. 301. If Feme Lessee for Life takes Husband, the Husband does Waste, the Wife dies, the Husband shall not be punished by this Law; for the words of this act be (a man that holds, &c. for Life), and the Husband held not for Life; for he was seised but in right of his Wife, and the estate was in his Wife. 2 *Inst*. 301. He that hath an Estate for Life by Conveyance at Common Law, or by Limitation of Use, is a Tenant within the statute. 2 *Inst*. 302. Tenant for years of a moiety, 3d or 4th part *pro indiviso*, is within this act; and so it is of a Tenant by the Curtesy, or other Tenant for Life of a moiety, &c. 2 *Inst*. 302.

Or a Woman in Dower] This is to be understood of all the five kinds of Dower whereof *Littleton* speaks, *viz*. Dower at Common Law, Dower by the Custom, Dower *ad ostium ecclesiæ*, Dower *ex assensu patris*, and Dower *de la plus belle*; and against all these the Action of Waste did lie at the Common Law. 2 *Inst*. 303. If Tenant in Dower be of a Manor, and a Copyholder thereof commits Waste, an Action of Waste lies against Tenant in Dower. 2 *Inst*. 303. Action of Waste lies against an Occupant for life, because he has the estate of the Lessee for life, and holds for life, as the statute mentions. 6 *Rep*. 37, *b*. If a Lessee for life be attainted of Treason, by which the lease is forfeited to the King, who grants it over to *I. S.* and he afterwards does Waste, though he comes *en le post*, yet Action of Waste lies against him. 2 *Roll Abr*. 826. So, if a man disseises the Tenant for life, and does Waste, yet Action of Waste lies against the Tenant for term of life; for he may have his remedy over against the Disseisor. *Bro. Waste, pl*. 138. Likewise, if an estate be made to *A*. and his heirs, during the life of *B*., *A*. dies, the heir of *A*. shall be punished in an Action of Waste. 1 *Inst*. 54, *a*.

A Tenant for life, without Impeachment of Waste, has as full power of cutting down Timber, and of opening new Mines for his own use, as if he had an Estate of Inheritance; and is in the same manner entitled to the Timber, if severed by others. 1 *Term Rep*. 56: 1 *Inst*. 220, *n*. But although such Tenant for life may commit Waste for his own benefit, yet he may be restrained by an injunction out of the Court of Chancery, from making *Spoil* and *Destruction* on the Estate: This distinction was first introduced in the case of Lord *Barnard*, as to *Raby Castle*. See *post* IV.

Though it is said, that an Action of Waste does not lie against Tenant by Statute-Merchant, Elegit, or Staple, because it is not an estate for life or years, and the statute mentions those who hold in any manner for life or years; yet see, *contra*, *Fitzh. Nat*. 58 *H*. and there said, that in the Register is a writ against him. 6 *Rep*. 37. Some books give the reason of it to be, because the Conusor, if he commits Waste, may have a *venire facias ad computandum*, and the Waste shall be recovered in the debt. *Fitzh. N. B*. 58, *b*. See 1 *Inst*. 57, *b*. *in notis*. If a man makes a lease for years, and puts out the Lessee, and makes a lease for life, and the Lessee for years enters upon the Lessee for life, and does Waste; the Lessee for life shall not be punished for it. 2 *Inst*. 303. If Lessee for years makes a lease of one moiety to *A*. and of the other moiety to *B*., and *A*. does Waste; the Action shall be against both; for the Waste of the one is the Waste of the other. *Brownl*. 38.

An Action of Waste lies against a Devisee, and the writ may suppose it *ex legatione*, for it is within the equity of the statute. *Bro. Waste, pl*. 132. If an Estate of Land to be made to Baron and Feme, to hold to them during the coverture, &c. if they waste, the Feoffor shall have Writ of Waste against them. *Lit*. §. 381. If Feme Lessee for life marries, and the Husband does Waste, Action lies against both. And if, in the above case, the Husband dies, Action of Waste lies against the Feme for the Waste he committed. But if Tenant in Dower marries, and the Husband does Waste, and dies, the Feme shall not be punished for this. Likewise, if Baron and Feme are

are Lessees for life, and Baron does Waste, and dies, the Feme shall be punished in Waste, if she agrees to the estate. 2 *Roll. Abr.* 827: 1 *Inst.* 54: *Kel.* 113. But if she waives the estate, she shall not be charged. So, upon lease for years made to the Baron and Feme, Waste lies against both. And if Baron and Feme are joint Lessees for years, and Baron does Waste, and dies, Action of Waste lies for this against the Feme. Upon lease for life, to Baron and Feme, Waste lies against both. Likewise, if Feme commits Waste, and then marries, the Action shall be brought against both. 2 *Roll. Abr.* 827. And the writ may be *Quod fecerunt vastum*, or *Quod uxor, dum sola fuit, fecit vastum.* *Bro. Waste, pl.* 55.

If Baron seised for life of his Wife, in right of his Wife, does Waste, and after the Feme dies, no Action of Waste lies against the Baron in the *tenuit*, because he was seised only in right of his Wife, and the frank-tenement was in the Feme. 1 *Inst.* 54: 5 *Rep.* 75, *b.* But if the Baron, possessed for years in right of the Feme, does Waste, and after the Feme dies, Action of Waste lies against the Baron, because the Law gives the term to him. 1 *Inst.* 54. See *Godb.* 4, 5. *pl.* 6: *Ow.* 49.

Few cases, if any, can now happen of Waste or Injury done to Premises, but the Landlord, or person who has the inheritance, or even he who has a longer term in the Premises, or who is himself liable to answer over, may maintain an Action on the Case in nature of an Action of Waste, against the person committing the Injury, for Damages. See *post.* III. IV.

III. The Punishment for Waste committed, was, by Common Law and the Statute of *Marlebridge*, only single damages; except in the case of a Guardian, who also forfeited his Wardship by the provisions of the great Charter. 2 *Inst.* 146, 300: *Stat.* 9 *Hen.* 3. *c.* 4. But the Statute of *Gloucester* directs, that the other four species of Tenants (for Life, for Years, by Curtesy, or in Dower) shall lose and forfeit the place wherein the Waste is committed, and also treble damages, to him that hath the Inheritance. The expression of the statute is, "he shall forfeit the *thing* which he hath wasted;" and it hath been determined, that under these words the *place* is also included. 2 *Inst.* 303. And if Waste be done *sparsim*, or here and there, all over a Wood, the whole Wood shall be recovered; or if, in several Rooms of a House, the whole House shall be forfeited; because it is impracticable for the Reversioner to enjoy only the identical places wasted, when lying interspersed with the other. *Co. Lit.* 54. But if Waste be done only in one end of a Wood, (or perhaps in one Room of a House, if that can be conveniently separated from the rest,) that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the Reversioner. 2 *Inst.* 304: 2 *Comm. c.* 13.

The Redress for this injury of Waste is of two kinds; Preventive and Corrective: the former of which is by Writ of *Estrepement*, the latter by that of Waste.

Estrepement is an old *French* word, signifying the same as Waste, or Extirpation: and the Writ of *Estrepement* lay at the Common Law, *after* Judgment obtained in an Action real, and before the possession was delivered by the Sheriff; to stop any Waste which the vanquished party might be tempted to commit in Lands, which were determined to be no longer his. 2 *Inst.* 328. But as in some cases the Demandant may be justly apprehensive, that the Tenant may make Waste or *Estrepement* pending the suit, well knowing the weakness of his title, therefore the statute of *Gloucester*, 6 *Edw.* 1. *c.* 13, gave another writ of *Estrepement, pendente placito*, commanding the Sheriff firmly to inhibit the Tenant "*ne faciat vastum vel estrepamentum pendente placito* "*dicto indiscusso.*" *Regist.* 77. And, by virtue of either of these writs, the Sheriff may resist them that do, or offer to do, Waste; and, if otherwise he cannot prevent them, he may lawfully imprison the Wasters, or make a warrant to others to imprison them: Or, if necessity require, he may take the *posse comitatûs* to his assistance. So odious in the sight of the Law is Waste and Destruction. 2 *Inst.* 329: 3 *Comm. c.* 14. See further, this Dict. title *Estrepement*.

A Writ of Waste is also an Action, partly founded upon the Common Law, and partly upon the Statute of *Gloucester, c.* 5; and may be brought by him who hath the immediate estate of inheritance in reversion or remainder, against the Tenant for Life, Tenant in Dower, Tenant by the Curtesy, or Tenant for Years. This Action is also maintainable, in pursuance of statute *Westm.* 2, (13 *E.* 1. *c.* 22,) by one Tenant in Common of the Inheritance against another, who makes Waste in the estate holden in common. The equity of which statute extends to Joint-tenants, but not to Coparceners: Because, by the old Law, Coparceners might make partition, whenever either of them thought proper, and thereby prevent future Waste; but Tenants in Common and Joint-tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any farther Waste. 2 *Inst.* 403, 404. But these Tenants in Common and Joint-tenants are not liable to the penalties of the statute of *Gloucester*, which extends only to such as have Life-estates, and do waste to the prejudice of the Inheritance. The Waste however must be something considerable; for if it amount only to twelve pence, or some such petty sum, the plaintiff shall not recover in an Action of Waste: *nam de minimis non curat lex.* *Finch. L.* 29: 3 *Comm. c.* 14.

This Action of Waste is a mixed action; partly real, so far as it recovers Land, and partly personal, so far as it recovers Damages: For it is brought for both those purposes; and, if the Waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages, by the Statute of *Gloucester*. The Writ of Waste calls upon the Tenant to appear and shew cause, why he hath committed Waste and Destruction in the place named, *ad exhæredationem*, to the disinherison, of the plaintiff. *F. N. B.* 55. And if the defendant makes default, or does not appear at the day assigned him, then the Sheriff is to take with him a Jury of twelve men, and go in person to the place alleged to be wasted, and there inquire of the Waste done, and the Damages; and make a return or report of the same to the Court, upon which report the judgment is founded. *Poph.* 24. For the Law will not suffer so heavy a judgment, as the forfeiture and treble damages, to be passed upon a mere default, without full assurance that the fact is according as it is stated in the writ. But if the defendant appears to the writ, and afterwards suffers judgment to go against him by default, or upon a *nihil dicit*, (when he makes no answer, puts in no plea, in defence,) this amounts to a confession

confession of the Waste; since, having once appeared, he cannot now pretend ignorance of the charge. Now therefore the Sheriff shall not go to the place to inquire of the fact, whether any Waste has, or has not, been committed; for this is already ascertained by the silent confession of the defendant: but he shall only, as in defaults upon other actions, make inquiry of the *quantum* of damages. *Cro. Eliz.* 18, 290. The defendant, on the trial, may give in evidence any thing that proves there was no Waste committed, as that the destruction happened by lightning, tempest, the King's enemies, or other inevitable accident. *Co. Litt.* 53. But it is no defence to say, that a stranger did the Waste, for against him the plaintiff hath no remedy: though the defendant is entitled to sue such stranger in an Action of Trespass *vi et armis*, and shall recover the damages he has suffered in consequence of such unlawful act. *Bull. N. P.* 112.

When the Waste and Damages are thus ascertained, either by confession, verdict, or inquiry of the Sheriff, judgment is given, in pursuance of the *statute of Gloucester, c.* 5, that the plaintiff shall recover the place wasted; for which he has immediately a Writ of Seisin, provided the particular estate be still subsisting; (for, if it be expired, there can be no forfeiture of the land;) and also that the plaintiff shall recover treble the damages assessed by the Jury; which he must obtain in the same manner as all other damages, in actions personal and mixed, are obtained, whether the particular estate be expired, or still in being. 3 *Comm. c.* 14.

The Process incident to Action of Waste, is first a Writ of Summons made by the Cursitor of the county where the land lies, and on the return of this writ the defendant may essoin, and the plaintiff adjourn, &c. Then a *pone* is to be made out by the Filazer of the county, on the return of which a *distringas* issues for the defendant to appear, and upon his appearing the plaintiff declares, and the defendant pleads, &c. By *stat.* 8 & 9 *W.* 3. *c.* 11. § 3, a plaintiff shall have costs in all actions of Waste, where the damages found do not exceed twenty nobles; which he could not by the Common Law.

A common Writ of Waste is of this form:

GEORGE *the Third*, &c. *To the Sheriff of* S. *greeting: If* A. B. *shall secure you*, &c. *then summon by good summoners* C. D. *that he be before our Justices*, &c. *to shew wherefore, whereas by the Common Council of this Kingdom of* England, *it is provided, that it shall not be lawful for any man to commit Waste, Spoil, or Destruction in Lands, Houses, Woods, or Gardens to him demised for term of life or years; the said* C. *in a House, Lands, and Woods at* W. *which he holds for the term of his life, of the demise of the said* A. *hath made Waste, Spoil, and Destruction, to the disinheriting of him the said* A. *and against the form of the provision aforesaid*, &c.

IV. Besides the preventive redress at Common Law, the Courts of Equity, upon Bill exhibited therein, complaining of Waste and Destruction, will grant an Injunction, in order to stay Waste, until the defendant shall have put in his answer, and the Court shall thereupon make further order; which is now become the most usual way of preventing Waste. 3 *Comm. c.* 14.

If a Tenant for Life plant Wood on the land, which is of so poisonous a quality that it destroys the principles of vegetation, without an express power in his lease, where it is usual to have such powers, it may be considered as Waste, and the Court of Chancery may grant an Injunction. 5 *New Abr.* 493: *MSS. Rep. Marquis of Powis* v. *Dorall, Canc.*

If there be Lessee for Life, remainder for life, the reversion or remainder in fee, and the Lessee in Possession waste the lands, though he is not punishable for Waste by the Common Law, by reason of the mean remainder for life; yet he shall be restrained in Chancery, for this is a particular mischief. *Moor* 554: 1 *Vern.* 23. But if such Lessee has in his lease an express clause of *without Impeachment of Waste*, he shall not be enjoined in Equity. 1 *Vern.* 23.

If *A.* is Tenant for Life, remainder to *B.* for Life, remainder to first and other Sons of *B.* in Tail Male, remainder to *B.* in Tail, &c.; and *B* (before the birth of any son) brings a Bill against *A.* to stay Waste; and *A.* demurs to this Bill, because the Plaintiff had no right to the Trees, and no one that had the inheritance was party: Yet the Demurrer will be over-ruled, because Waste is to the damage of the Public, and *B.* is to take care of the inheritance for his Children, if he has any, and has a particular interest himself, in case he comes to the estate. 1 *Eq. Abr.* 400.

It seems to be a general principle, that Tenant in Tail after possibility, shall be restrained in Equity, in doing Waste, by Injunction, &c. because the Court will never see a man disinherited; *per* Chan. *Finch*. And he took a diversity, where a man is not punishable for Waste, and where he hath a right to do Waste; and cited *Uvedale*'s Case, (24 *Car.* 1.) ruled by Lord *Rolle*, to warrant that distinction. 2 *Show.* 69. *pl.* 53.

A. devised lands, on which Timber was growing, to his Wife for Life, remainder to *B.* in Fee, paying several legacies within a limited time; and in default of payment, the remainder to *C.*, he paying the legacies: And on a Bill brought by *B.*, the Court gave him leave to cut Timber for the payment of the legacies, though it was opposed by the Tenant for Life and the Devisee over, he making satisfaction to the Widow for breaking the ground by Carriage, Waste, &c. 2 *Vern.* 152; and see *ib.* 218.

A Lease without Impeachment of Waste, takes off all restraint from the Tenant of doing it; and he may, in such case, pull up or cut down Wood or Timber, or dig Mines, &c. at his pleasure, and not be liable to any Action. *Plowd.* 135. But though the Tenant may let the houses be out of repair, and cut down Trees and convert them to his own use; yet where a Tenant in Fee-simple made a Lease for Years without Impeachment of Waste, it was adjudged that the Lessor had still such property, that if he cut and carried away the Trees, the Lessee could only recover damages in Action for the Trespass, and not for the Trees: Also it hath been held, that Tenant for Life without Impeachment of Waste, if he cuts down Trees, is only exempt from an Action of Waste, &c. 11 *Rep.* 82: 1 *Inst.* 220: 2 *Inst.* 146: 6 *Rep.* 63: *Dyer* 184. And if the words are, "to hold without Impeachment of Waste, or any Writ or Action of Waste," the Lessor may seize the Trees if the Lessee cuts them down, or bring Trover for them. *Wood's Inst.* 574. See *ante* II.

In many cases, likewise, the Court of Chancery will restrain Waste, though the Lease, &c. be made without Impeach-

Impeachment of Waste: For the clause of "without Impeachment of Waste" never was extended to allow the destruction of the estate itself, but only to excuse for permissive Waste; and therefore such a clause would not give leave to fell or cut down Trees ornamental or sheltering of a House, much less to destroy or demolish a House itself. See 5 *New Abr.* 495: *MSS. Rep. in Chan.* 1744, *Packington* v. *Packington*; and 2 *Freem.* 53, *Abraham* v. *Bubb.* So where *A.*, on the marriage of his eldest Son, in consideration of 10,000 *l.* portion, settled (*inter alia*) *Raby* Castle on himself for life, without Impeachment of Waste, remainder on his Son for life, and to his first and other Sons in Tail Male: Afterwards, having taken some displeasure at his Son, he got 200 workmen together, and of a sudden stripped the Castle of the lead, iron, glass, doors, and boards, &c. to the value of 3000 *l.* The Court, on the Son's filing his Bill, granted an Injunction to stay committing Waste in pulling down the Castle; and, upon hearing the cause, not only the Injunction to continue, but that the Castle should be repaired, and put in the same condition it was in; and, for that purpose, a Commission was to issue to ascertain what ought to be repaired, and a Master to see it done at the charge and expence of the Father, and the Son to have his costs. 2 *Vern.* 738, 739: 1 *Salk.* 161, *Vane* v. *Lord Barnard.* Vide 1 *P. Wms.* 527.

A Bill was brought to restrain Tenant in Dower from getting Peat; Lord Chancellor dismissed it with costs, as it appeared to be vexatious; the Peat she sold not being above the value of 10 *d.* But herein it was said, that digging Peat is in many places the ordinary Bote, and perhaps the only fruit that can rise from the land. They do not carry away the Soil, for they dig off the Turf, then take away the Peat, and lay the Turf down again: And the Tenant for Life can no more dig Peat to sell, than cut down Timber to sell: And the Chancellor said, if he was to give any relief, he must direct an Issue; but that the cause was of too frivolous a nature to maintain the expence. 5 *New Abr.* 496: *MSS. Rep. Wilson* v. *Bragg*, 1742. Vide 2 *Vern.* 392.

A. Tenant for Life, remainder to Trustees to preserve, &c. remainder to *D.* the plaintiff in Tail, remainder over; with power to *A.* with consent of trustees, to sell Timber; and the money arising to be vested in lands, &c. to the same uses, &c. *A.* felled Timber to the value of 3000 *l.* without consent of Trustees, who never intermeddled; and *A.* had suffered some of the houses to go out of repair, *D.* by Bill prayed an Account and Injunction. The Master of the Rolls said, that the Timber might be considered under two denominations, to wit, such as was thriving and not fit to be felled; and such as was unthriving, and what a prudent man and good husband would fell, &c.; and ordered the Master to take an account, &c. And the value of the former, which was Waste, and therefore belonged to the plaintiff, the next in remainder of the inheritance, was to go to the plaintiff; and the value of the other was to be laid out according to the settlement, &c.; but as to repairs, the Court never interposes in case of permissive Waste, either to prohibit or give satisfaction, as it does in case of wilful Waste: And where the Court hath jurisdiction of the principal, viz. the prohibiting, it does in consequence give relief for Waste done, either by way of account, as for Timber felled, or by obliging the party to rebuild, &c. as in case of Houses, &c.; and mentioned Ld. *Barnard*'s Case above. But as to repairs, it was objected, that the plaintiff here had no remedy at Law, by reason of the demesne Estate for Life to the Trustees, between Plaintiff's remainder in Tail and the Defendant's estate for Life; and that therefore Equity ought to interpose, &c. and that it was a point of consequence. *Sed non allocatur.* 5 *New Abr.* 496: *MSS. Rep. Mich. Vac.* 1733, *Castlemain* v. *Lord Craven.*

A Lord of a Manor may bring a Bill for an account of Ore dug, or Timber cut, by the Defendant's Testator. Thus, a customary Tenant of Lands, in which was a Copper Mine that never had been opened, opened the same, and dug out and sold great quantities of Ore, and died; and his Heir continued digging and disposing of great quantities out of the same Mine. The Lord of the Manor brought a Bill in Equity against the Executor and Heir, praying an account of the said Ore; and alleged that these Customary Tenants were as Copyhold Tenants; and that the freehold was in the Plaintiff as Lord of the Manor and Owner of the soil; and that the manner of passing the premises was by surrender into the hands of the Lord, to the use of the Surrenderee. It was insisted for the Defendants, that it did not appear that the admittance in this case was to hold *ad voluntatem Domini secundum consuetudinem*, &c. without which words, it was insisted, that there could be no Copyhold, as had been adjudged in Lord Ch. Just. *Holt*'s time. And Lord Chan. *Cowper* said, it would be a reproach to Equity to say, that where a man has taken another's property, as Ore or Timber, and disposed of it in his lifetime, and dies, there should be no remedy. 1 *P. Wms.* 406. *pl.* 112, *Bishop of Winchester* v. *Knight.* Vide *Fin. Rep.* 135, *Wild* v. *Sir Edw. Stradling.* 2 *Vern.* 263, *pl.* 247.

Where Tenants of a Manor, claiming a right of Estovers, cut down a great quantity of growing Timber of great value, their title being doubtful, the Court of Chancery entertained a Bill, at the suit of the Lord of the Manor, to restrain this assertion of it. *Stoner* v. *Strange*; *and* v. *Whiting, Can. Mich.* 1767, *Hil.* 1768: *Mitf. Treat.* 123, 124.

One seised in Fee of Lands in which there were Mines, all of them unopened, by a deed conveyed those lands, and all Mines, Waters, Trees, &c. to Trustees and their Heirs, to the use of the Grantor for Life, (who soon after died,) remainder to the use of *A.* for Life, remainder to his first, &c. Son in Tail Male successively, remainder to *B.* for Life, remainder to his first, &c. Son in Tail Male successively, remainder to his two Sisters *C.* and *D.* and the Heirs of their Bodies, remainder to the Grantor in Fee. *A.* and *B.* had no Sons; and *C.*, one of the Sisters, died without issue; by which the Heir of the Grantor, as to one moiety of the premises, had the first estate of inheritance. *A.* having cut down Timber and sold it, and threatened to open the Mines, the Heir of the Grantor, being seised of one moiety, *ut supra*, by the death of one of the Sisters without issue, brought his Bill for an account of the moiety of the Timber, and to stay *A.*'s opening of any Mine. And it was adjudged, the right of this Timber belongs to those who, at the time of its being severed from the freehold, were seised of the first estate of inheritance, and the property becomes vested in them. 2 *P. Wms.* 240.

A Bill

A Bill was brought against the Executors of a Jointress, to have a satisfaction out of assets for permissive Waste upon the Jointure of the Testatrix, *&c.* But by *Cowper*, the Bill must be dismissed, for here is no covenant that the Jointress shall keep the jointure in good repair; and in the common case, without some particular circumstances, there is no remedy in Law or Equity for permissive Waste, after the death of the particular tenant. *Vin. Abr.* tit. *Waste, p.* 523. cites *MSS. Rep.* 1 *Geo.* 1. *in Canc. Turner* v. *Buck.*

It has been said in Equity, that Remainder-man for Life shall, in Waste, recover damages in proportion to the wrong done to the inheritance, and not in proportion only to his own estate for life. 1 *Vern.* 158.

A. being Tenant for ninety-nine years, if he should so long live, with Trustees to preserve remainder to his first and other Sons in Tail, remainder to *B.* in Tail; *A.* and *B.*, before issue born of *A.*, fell Timber. The eldest Son of *A.* afterwards brings his Bill, for an account and satisfaction of the Timber against *B.*—*Per* Lord Chan.: The plaintiff has no remedy at Law, either in his own name, or in the name of his trustees. *A.* if he had not consented to it, should have brought Trespass; for Tenant for years is considered as a fiduciary for Remainder-man, or his Lessor. If *A.* had an estate for life, and no limitation to Trustees, the plaintiff could have had no remedy; because Tenant for Life might have barred, or surrendered the whole estate to the Remainder-man: But here the freehold was in the Trustees; and the possession of Lessee for Years is in Law the possession of the Owner of the freehold. The Trustees however could not here have maintained Waste, because the Common Law gave no Action of Waste but to the Owner of the inheritance; and the statute of *Gloucester* gives the Writ to the same person; but the Trustees are in no other condition than Remainder-man for Life. Trustees may bring a Bill in Equity to stay Waste, before the contingent remainder comes *in esse*. If the Trustees had brought such a Bill, the Court, as to Trees actually cut, would have obliged them to have made satisfaction in money, to have been secured to attend the contingent uses. Where there is Tenant for life or years, subject to Waste, and Timber is blown down, the Owner of the first Remainder in Tail vested, shall have it; for the Common Law considers an estate in contingence as no estate; and when the Tree is severed, the property vests in somebody. If there be Tenant for Life, remainder for Life, remainder in Fee, Remainder-man can have no Action for Waste, because the plaintiff must recover the place wasted, which would be injustice to the remainder over; but such a Remainder-man of the inheritance after the intervening estate, may have Trover for the Trees; and if Remainder-man for Life dies in the Life of Remainder-man in Fee, he may bring Waste.—Though an Injunction is a proper remedy, yet it has never been determined that a Bill for an Account cannot be maintained afterwards: And though a Recovery was suffered after Waste done, it was to the use of plaintiff and his Heirs, which is no new use, and ought not to bar Waste in Equity. It is true, Action of Waste dies with the person; but though Waste will not lie at Law, as the person committing it is dead, yet *he may have relief in this Court*. It has been held in all cases of Fraud, the remedy never dies with the person, but relief may be had against the executor out of assets; and this Court will follow the assets of the party liable to the demand: and Collusion in this Court is the same as Fraud. Decreed, a satisfaction to be made to the plaintiff for the value of the Timber, as he is now Tenant in Fee of the estate; but without interest, as that would be carrying it too far. 5 *New Abr.* 499: *Garth* v. *Cotton*.

WASTEL-BOWL, from the Sax. *Was-heal*, i. e. Health be to you.] A large Silver Cup or Bowl, wherein the *Saxons*, at their entertainments, drank a Health to [illegible] another, in the phrase of Wass-heal. This Wastel [illegible]afs-heal Bowl, was set at the upper end of the table [illegible]igious houses for the use of the Abbot, who began the Health or *poculum charitatis* to strangers, or to his fraternity. Hence cakes and fine white bread, which were usually sopped in the Wastel-bowl, were called Wastel-Bread *Mat Paris* 141.

WASTORS, Thieves so called; mentioned among robbers, draw latches, *&c.* in *stat. antiq.* 4 *H.* 4. *c.* 27.

WATCH; To Watch is to stand sentry, or attend as a guard, *&c.* Watching is properly for the apprehending of rogues in the night, as Warding is for the day; and for default of Watch and Ward the Township may be punished. Our ancient statutes direct, that in all Towns, *&c.* between the day of *Ascension* and *Michaelmas-day*, Night-Watches are to be be kept, in every City, with six men at every gate; and six or four in Towns; and every borough shall have twelve men to watch, or according to the number of the inhabitants of the place, from sun-setting to sun-rising; who are to arrest strangers suspected, and may make hue and cry after them, and justify the detaining them until the morning; and Watches shall be kept on the Sea-coasts, as they have been wont to be. *Stats.* 13 *Ed.* 1. *st.* 2. *c.* 4: 5 *Hen.* 4. *c.* 3.

Every Justice of the Peace may cause these Night-Watches to be duly kept; which is to be composed of men of able bodies, and sufficiently weaponed: And none but inhabitants in the same town are compellable to watch, who are bound to keep it in turn; or to find other sufficient persons for them; or, on refusal, are indictable, *&c. Co. Litt.* 70: *Cro. Eliz.* 204. See further, title *Police*.

WATCHES, Made by artificers, are to have the makers' names, *&c.* under the penalty of 20*l.* *Stat.* 9 & 10 *W.* 3. *c.* 28.

WATER-BAILIFF, An officer in Port Towns, for the searching of Ships. In the city of *London*, there is a Water-Bailiff, who hath the supervising and search of Fish brought thither; and the gathering of the Toll arising from the *Thames*: He attends on the Lord Mayor, having the principal care of marshalling the guests at his table; and arrests men for debt, or other personal or criminal matters, upon the River of *Thames*. See *stat.* 28 *H.* 6. *c.* 5.

WATER COURSE. A Water-course does not begin by prescription, nor yet by assent, but begins *ex jure naturæ*, having taken this Course naturally, and cannot be diverted. 3 *Bulst.* 340.

Action on the Case lies for diverting a Water-course to my prejudice. See *Action on the Case*; and *Het.* 32: *Skin.* 316, 389: 5 *Mod.* 206: 22 *Vin. Abr.* 525, 528.

WATER-GAGE, A sea wall or bank, to restrain the current and overflowing of the Water. It signifies

also

also an instrument to gauge or measure the quantity or deepness of any Waters.

WATER GANG, *Watergangium.*] A *Saxon* word for a trench or course to carry a stream of Water; such as are commonly made to drain Water out of marshes. *Ordin. Marisc. de Romn. Chart. H.* 3.

WATER GAVEL, A rent paid for fishing in, or other benefit received from, some river. *Chart.* 15 *H.* 3.

WATER-MEASURE, Is greater than *Winchester* Measure, and used for selling of Coals in the Pool, &c. mentioned in the *stat.* 22 *Car.* 2. *c.* 11.

WATERMEN. The Lord Mayor and Court of Aldermen, in *London*, have a great power in the Government of the Company of Watermen, and appointing the fares for plying on the *Thames*; and the Justices of Peace for *Middlesex*, and other adjoining counties, have likewise authority to hear and determine offences, &c. Watermen's names are to be registered; and their boats be twelve feet and a half long, and four feet and a half broad, or be liable to forfeiture. Also none shall ply on the River, but such as have been apprentices to Watermen for seven years, &c. *Stat* 2 & 3 *P.* & *M. c.* 16. The Lightermen on the *Thames*, and Watermen, are made a Company: The Lord Mayor and Aldermen are yearly to elect eight of the best Watermen, and three of the best Lightermen, to be Overseers and Rulers; and the Watermen to choose Assistants at the principal Stairs, for preserving good government; and the Rulers and Assistants may make rules to be observed under penalties, &c. The Rulers, on their Court-days, shall appoint forty Watermen to ply on *Sundays*, for carrying passengers cross the River; and pay them for their labour, and apply the overplus of the money to the poor decayed Watermen: Where persons travel on a *Sunday* with boats, they are to be licensed and allowed by a Justice, on pain of forfeiting 5*s.* *Stat.* 11 & 12 *W.* 3. *c.* 21. No person working any wherry-boats, or barges, on the River *Thames*, shall take an apprentice or servant, but such Watermen as are housekeepers, &c. on pain of 10*l.* And no apprentice shall take upon him the care of any boat, till he is sixteen years of age, if a Waterman's son; and seventeen, if a Landsman's; unless he hath worked with some able Waterman for two years, under the penalty of 10*s.* If any person, not having served seven years to a Waterman, &c. row any boat on the same river for hire, he shall forfeit 10*l.* But Gardeners' boats, Dung-boats, Wood-lighters, Fishermen, Western-barges, &c. are excepted. The penalties to be levied by distress, for want of which the Lord Mayor, or a Justice of Peace may commit the offenders to the House of Correction for any time not exceeding a month, nor less than fourteen days, &c. *Stat.* 2 *Geo.* 2. *c.* 26.—Watermen using boats, &c. upon the *Thames*, are not to take any apprentice under 14 years old, who shall be bound for seven years, and inrolled in the book of the Watermen's Company, on pain of 10*l.* No more than two apprentices to be taken at one time; when the first hath served four years, under the like penalty. No Tilt-boat, Row-barge, &c. shall take in above thirty-seven passengers, and three more by the way: nor any other Boat above eight passengers, and two by the way, on forfeiture of 5*l.* for the first offence, and 10*l.* for the second, &c. And in case any person be drowned, where a greater number is taken in, the Watermen to be guilty of Felony, and transported: Also Tilt-boats, used between *London-Bridge* and *Gravesend*, shall be 15 tons, and not under, and the other Boats 3 tons. Rulers of the Company of Watermen are to appoint two Officers, one at *Billingsgate* at high water, and another at *Gravesend*, to ring a bell for the Tilt boats, &c. to put off; and they not immediately proceeding in their voyage, with two sufficient men, shall forfeit 5*l.* leviable on their boats, tackle, &c. See, as to *stat.* 34 *Geo.* 3. *c.* 65, for further regulating Watermen, this Dictionary, title *Police.*

WATER-ORDEAL; See *Ordeal.*

WATERSCAPE, from the Sax. *Waeter, Aqua,* & *Schap, ductus.*] An Aqueduct, or passage for Water.

WATLING-STREET, Is one of those four ways which the *Romans* are said to have made in this kingdom, and called them *Consulares, Prætorios, Militares,* & *Publicas.* This Street is otherwise called *Werlam-Street.* See *R. Hov. f.* 248, *a. n.* 10. This Street leads from *Dover* to *London, St. Albans, Dunstable, Towcester, Atherston*, and the *Severn*, near the *Wrekin*, in *Shropshire*, extending itself to *Anglesey* in *Wales. Anno* 39 *El. c.* 2.

The Second is called *Ikenild-Street*, so called *ab Icenis*, stretching from *Southampton* over the River *Isis*, at *Newbridge*; thence by *Camden* and *Litchfield*; then it passeth the River *Derwent* by *Derby*, so to *Bolsover* Castle, and ends at *Tinmouth.*

The Third was called *The Fosse*, because in some places it was never perfected, but lies as a large Ditch; or, as *Cowel* says, from having a Ditch on one side of it: This way led from *Cornwall* through *Devonshire*, by *Tetbury*, near *Stow in the Wolds*, and besides *Coventry* to *Leicester, Newark*, and so to *Lincoln.*

The Fourth was called *Ermine* or *Erminage Street*, beginning at *St. David's* in *West Wales*, and going to *Southampton.* See the Laws of *Edward the Confessor*, whereby these four public ways had the privilege of *Pax Regis.* See *Hollingshed's Chron. vol.* 1. *cap.* 19; and *Henry* of *Huntingdon, lib.* 1. *in principio.* And in *Leg Will.* 1. *c.* 30, there are three ways mentioned; but *Ikenild-Street* is omitted: See also an old Description of these ways, made by *Robert* of *Gloucester. Doug. Antiq. of Warw. p.* 6: *Cowell.*

WAVESON, Such Goods as after Shipwreck do appear swimming upon the Waves. *Chart.* 18 *Hen.* 8. See titles *Flotsam*; *Wreck.*

WAX-CHANDLERS; See title *Candles.*

WAXSCOT, *Ceragium.*] A Duty anciently paid, twice a year, towards the charge of Wax Candles in Churches. *Spelman.*

WAY, *Via.*] A Passage, Street, or Road. *Litt.* A *Way*, or the Right of going over another man's Ground, is classed by *Blackstone* among Incorporeal Hereditaments. In such private Ways, a particular Man may have an Interest and a Right, though another be the Owner of the Soil. 2 *Comm. c.* 3.

This may be grounded on a special Permission; as when the Owner of the Land grants to another a Liberty of passing over his grounds, to go to Church, to Market, or the like; in which case the Gift or Grant is particular, and confined to the Grantee alone; it dies with the person; and if the Grantee leaves the country, he cannot assign over his Right to any other; nor can he justify taking another person in his company. *Finch. L.* 31. A Way may be also by Prescription; as if all the inhabitants

of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground, for such a particular purpose; for this immemorial usage supposes an original grant, whereby a Right of Way thus appurtenant to land or houses may clearly be created. A Right of Way may also arise by act and operation of Law: for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a Way to come at it; and I may cross his land for that purpose without trespass. *Finch L.* 63. For when the Law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same. 1 *Inst.* 56.

Where a man has a Way to his Close, he cannot go further without a Prescription; but it is held if he go to a Mill or Bridge, it may be otherwise. 1 *Ld. Raym.* 75.

If a man has a Right of Way over another's land, and the Way becomes impassable by the overflowing of a river, he cannot justify going over the adjoining land, unless the Owner of the land is bound, by Prescription, or in his own Grant, to repair the Way: But if public Highways are foundrous, passengers are justified, from principles of convenience and necessity, in turning out upon the land next the road. *Taylor* v. *Whitehead. Doug.* 716.

Disturbance of Ways is very similar in its nature to Disturbance of Common. See title *Common.* It principally happening when a person, who hath a Right to a Way over another's grounds, by Grant or Prescription, is obstructed by inclosures, or other obstacles, or by ploughing across it; by which means he cannot enjoy his Right of Way, or at least not in so commodious a manner as he might have done. If this be a Way annexed to his estate, and the obstruction is made by the tenant of the land, this brings it to another species of injury; for it is then a Nusance, for which an Assise will lie. See title *Nusance.* But if the Right of Way, thus obstructed by the tenant, be only in gross, (that is, annexed to a man's person, and unconnected with any lands and tenements,) or if the obstruction of a Way belonging to an house or land is made by a stranger, it is then in either case merely a Disturbance: for the obstruction of a Way in gross is no detriment to any lands or tenements, and therefore does not fall under the legal notion of a Nusance, which must be laid *ad nocumentum liberi tenementi*; and the obstruction of it by a stranger can never tend to put the Right of Way in dispute: the remedy therefore for these Disturbances is not by Assise or any real action, but by the universal remedy, of Action on the Case to recover damages. 3 *Comm. c.* 16: *Hale on F. N. B.* 183: *Lutw.* 111, 119.

Ways and Means, Committee of; See title *Taxes.*

WEALD, or WALD, In the beginning of names of places, signifies a situation near a Wood, from the Sax. *Weald,* i. e. a Wood. The woody parts of the counties of *Kent* and *Sussex,* are called the *Wealds*; though misprinted *Wildes* in the statute 13 & 14 *Car.* 2. *c.* 6.

WEALREAF, from the Sax. *Weal, Strages,* & Reaf, *Spoliatio.*] The robbing of a dead man in his grave. *Leg. Ethelred. cap.* 21.

WEAR, A great dam made across a river, accommodated for the taking of fish, or to convey a stream to a mill. All Wears, for the taking of fish, are to be put down, except on the sea coasts, by *Magna Carta, c.* 23, and *stat.* 25 *Ed.* 3. *st.* 4. *c.* 4. Commissions shall be granted to Justices, to keep the Waters, survey Wears and Mills, and to inquire of and correct abuses; and where it is found by them that any new Wears are made, or others altered, to the nusance of the Public, the Sheriff, by *scire facias,* is to give the person making them notice of it; and if he do not amend the same in three months, he shall forfeit 100 marks, &c. *Stats.* 1 *H.* 4. *c.* 12: 4 *H.* 4. *c.* 11: 12 *Ed.* 4. *c.* 7.

WEAVERS, Persons using the trade of a Weaver, shall not keep a tucking or fulling-mill, or use dying, &c. Or have above two looms in a house, in any Corporation or Market-town, on pain of forfeiting 20*s.* a week: And shall serve an apprenticeship of seven years to a Weaver or Clothier, or shall forfeit 20*l.* &c. *Stat.* 2 & 3 *P.* & *M. c.* 11. By *stat.* 13 *Geo.* 3. *c.* 68, the wages of Journeymen Weavers in *London* are to be settled by the Lord Mayor, Recorder, and Aldermen. Masters giving more wages than so appointed, to forfeit 50*l.*; and Journeymen demanding, or combining to demand more, to forfeit 40*s.* or be imprisoned for three months.

WED, *Sax.*] A covenant or agreement; whence to wed, a wedded husband, wedded bond-slave. *Cowell.*

WEDBEDRIP, The customary service which inferior tenants paid to their Lord in cutting down their corn, or doing other harvest duties. From the Sax. *Wed,* (*ante,*) and *Biddan* to pray or desire, and *Rippan* to reap or mow. As a Covenant of the Tenant to reap for the Lord at the time of his bidding or commanding. *Paroch. Antiq.* 401: *Cowell.*

WEEK, *Septimana.*] Seven Days of Time; four of which Weeks make a Lunar Month, &c. The Week was said to be originally divided into seven Days, according to the number of the seven Planets. *Skene.*

WEIGH, *Waga.*] A Weigh of Cheese or Wool, containing two hundred and fifty-six pounds; in *Essex,* the Weigh of Cheese is three hundred pounds. A Weigh of Barley or Malt is six quarters, or forty-eight bushels. There is also a Weigh of Salt. See *stat.* 9 *H.* 6. *c.* 8.

WEIGHTS, *Ponaera.*] And Measures; are used between buyers and sellers of goods and merchandize, for reducing the quantity and price to a certainty, that there may be the less room for deceit and imposition. There are two sorts of Weights in use with us, *viz. Troy-Weight* and *Avoirdupois*: *Troy-Weight* contains twelve ounces to the pound, and no more; by which are weighed gold, silver, pearl, jewels, medicines, silk, wheat-bread, &c. *Avoirdupois* contains sixteen ounces in the pound, by which grocery wares, copper, iron, lead, flesh, cheese, butter, tallow, hemp, wool, &c. are weighed. In this Weight twelve pounds over are allowed to every hundred, so as one hundred and twelve pounds make the Hundred Weight. *Dalt.* 248.

In the composition of *Troy-Weight,* twenty pennyweights make an ounce, twenty-four grains a pennyweight, twenty mites a grain, twenty-four droits a mite, twenty perits a droit, and twenty-four blanks a perit. The *Troy-Weight* is said to be 20*s.* sterling in the pound; and the *Avoirdupois-Weight* 25*s.* sterling. 4 *Shep. Abr.* 194.

Fleta mentions a Weight, called a *Trone-Weight,* being the same with that we now call *Troy-Weight*; and, according to the same author, all our Weights have their composition from the Penny sterling, which ought to weigh

weigh thirty-two wheat-corns of the middle sort; twenty of which Pence make an ounce, and twelve such ounces a pound; but fifteen ounces make the Merchants' pound. *Fleta, lib. 2. c. 12.*

By *Magna Charta,* 9 H. 3. c. 25: *stats.* 14 *Ed.* 3. *st.* 1. c. 12: 25 *Ed.* 3. *st.* 5. c. 10; 27 *Ed.* 3. *st.* 2. c. 10, &c. there is to be but one Weight, &c. throughout the kingdom; but this is to be understood of the same species of goods; otherwise the *Troy* and *Avoirdupois* Weights would not be permitted. Every City, Borough, and Town shall have a common Balance, with common Weights sealed; on pain of 10*l* in the City, 5*l.* in the Borough, and 40*s.* the Town. *Stat.* 8 *H.* 6. c. 5. But only Cities and Market-towns are injoined to have common Balances, Weights, and Measures, by *stat.* 11 *H.* 7. c. 4. By this latter statute, Weights are to be marked by the chief officers of places, and sealed, &c. Refusing or delaying to do it, is liable to a penalty of 40*s.* Allowing Weights not agreeable to the standard, incurs a forfeiture of 5*l.* &c. The Mayors and such officers are once a year to view all Weights and Measures, and burn and destroy those which are defective; also fine the offenders, &c. And two Justices of Peace have power to hear and determine the defaults of Mayors.

By *stat.* 35 *Geo.* 3. c. 102, the Justices in Quarter Sessions in every county are required to appoint persons to examine the Weights and Balances within their respective jurisdictions. These Inspectors may seize and examine Weights in shops, &c. and seize false Weights and Balances; and the offender being convicted before one Justice, shall be fined, from 20*s.* to 5*s.* Persons obstructing the Inspectors to forfeit, from 40*s.* to 5*s.* Inspectors to be recompensed out of the County-rate. Standard Weights to be purchased by the Sessions out of the County-rate, and produced to all persons paying for the production thereof; Informations to be within one month. The Act not to infringe on the authority of Corporations, Court-Leets, &c. But persons punished by this Act not to suffer under any other Statute or Law.

By *stat.* 36 *Geo.* 3. c. 85, a Balance and Weights are to be kept in every *Corn Mill,* which may be examined by Inspectors appointed under the preceding Act: the provisions of which are extended to Corn Mills. See also *stat.* 36 *Geo.* 3. c. 86, to prevent abuses and frauds in the Packing, Weight, and Sale of Butter: And *stat.* 10 *G.* 3. c. 23, for regulating Weights, Balances, and Measures in *Marybone*; by means of Inspectors appointed by the Commissioners of Paving, &c.

It has been determined, that although there had been a custom in a town to sell butter by 18 ounces to the pound; yet the Jury of the Court-Leet were not justified in seizing the butter of a person who sold pounds less than that, but more than 16 ounces each; the Statute Weight. 3 *T. Rep.* 271. See further, title *Measures.*

WEIGHTS OF AUNCEL, Mentioned in *stat.* 14 *E.* 3. *st.* 1. c. 12. See *Auncel-Weight.*

WEND, *Wendus,* i. e. *Perambulatio,* from the Sax. *Wendan*] A certain quantity or circuit of ground. *Rental. Regal. Maner. de Wye, pag.* 31.

WERE; See *Wergild.*

WERELADA, from the Sax. *Were,* i. e. *Pretium capitis hominis occisi,* & Ladian *purgare.*] Where a man was slain, and the price at which he was valued not paid to his relations, but the party denied the fact, then he was to purge himself by the oaths of several persons, according to his degree and quality: and this was called *Werelada. Leg. H.* 1. c 12. See next title.

WERGILD, WEREGILD, *Weregildus.*] The price of Homicide, or other enormous offences; paid partly to the King for the loss of a Subject, partly to the Lord whose vassal he was, and partly to the party injured, or the next of kin of the person slain. *LL. H.* 1. See 4 *Comm.* 188.

In our *Saxon* Laws, particularly those of King *Athelstan,* the several Weregilds for Homicide were established in progressive order, from the death of the Ceorl or peasant, up to that of the King himself. And in the Laws of King *Henry* I. we have an account of what other offences were then redeemable by Weregild, and what were not so. The Weregild of a Ceorl was 266 *thrysmas,* that of the King 30,000; each thrysma being equal to about 1*s.* of our present money. The Weregild of a Subject was paid entirely to the Relations of the party slain; but that of the King was divided, one half being paid to the Public, the other to the Royal Family. 4 *Comm.* c. 23, & *n.* See further, this Dict. titles *Appeal of Death*; *Homicide.*

WEST-SAXONLAGE, The Law of the *West-Saxons.* See *Merchenlage.*

WESTMINSTER, *Westmonasterium,* Sax. *West-mynster,* i. e. *Occidentale Monasterium.*] The ancient seat of our Kings; and is now the well-known place where the High Court of Parliament, and Courts of Judicature sit. It had great privileges granted by *Pope Nicholas*; among others, *Ut amplius in perpetuum Regiae constitutionis locus sit atque repositorium regalium insignium.* 4 *Inst.* 255. See further, titles *London*; *Police*; *Bishop*; *Fish,* &c.

WHALES, And Sturgeon; See *Regal Fishes.*

WHALE-FISHING; See title *Fish*; *Fishery*; and *Fishing.*

WHARF, *Wharfa*] A broad plain place, near some creek or haven, to lay goods and wares on, that are brought to or from the water. *Stat.* 12 *Car.* 2. c. 4. See title *Harbours and Havens.*

WHARFAGE, *Wharfagium.*] Money paid for landing of goods at a Wharf, or for shipping and taking goods into a Boat or Barge from thence. See *stat.* 22 *Car.* 2. c. 11.

WHARFINGER, He that owns or keeps a Wharf. See title *Carrier.*

WHEELAGE, *Rotagium.*] *Tributum quod rotarum nomine penditur; hoc est, pro plaustris & carris transeuntibus. Spelm.*

WHERLICOTES, The ancient *British* chariots, that were used by persons of quality before the invention of coaches. *Stowe's Surv. Lond. p.* 70.

WHINIARD, A sword, from the Sax. *Winn.* i. e. to get, and *Are* honour; because honour is gained by the sword. A cant word used by *Butler* in *Hudibras.*

WHIPPING, A punishment inflicted for many of the smaller offences. See title JUDGMENT, *Criminal,*

WHITEHART-SILVER, A mulct on certain lands in or near the Forest of *Whitehart,* paid yearly into the *Exchequer,* imposed by King *Hen.* III. upon *Thomas de la Linde,* for killing a beautiful white Hart which that King before had spared in hunting. *Camd. Brit.* 150.

WHITE-MEATS, Milk, butter, cheese, eggs, and any composition of them; which before the Reformation were

were forbid in *Lent* as well as flesh, till King *Hen.* VIII. published a proclamation allowing the eating of White-meats in *Lent. Anno* 1543.

WHITE-RENT, A Duty or Rent payable by the Tinners in *Devonshire* to the Duke of *Cornwall.* See *Quit-Rent.*

WHITE-RENTS. Payments or Chief Rents reserved in Silver or White Money, called White-Rents or Blanch-Farms, *reditus albi*; in contradiction to Rents reserved in work, grain, &c. See *Alba Firma.*

WHITE-SPURS, A kind of Esquires called by this name.

WHITSUNTIDE, The Feast of *Pentecost*, being the fiftieth day after *Easter*: It is so called, saith *Blount*, because those who were newly baptized came to the church, between *Easter* and *Pentecost*, in white garments. *Blount's Dict.*

WHITSUN-FARTHINGS, Mentioned in Letters Patent of King *Hen.* VIII. to the Dean of *Worcester.* See *Pentecostals.*

WHITE-STRAITS, A kind of coarse cloth in *Devonshire*, about a yard and half-a-quarter broad, raw; mentioned in *stat.* 5 *H.* 8. *c* 2.

WHOLE-BLOOD; See title *Descent.*

WIC, A place on the sea-shore, on the bank of a river. 1 *Inst.* 4. It more properly signifies a town, village, or dwelling-place; and is often in the *Saxon* language made a termination to the name of the town, which had a complete name without it, as *Lunden-Wic*, i. e. *London Town*; so *Ipswich* is written in some old Charters *Villo de Gippo Wico*, which is the same thing, for *Gipps* is the name, and *Gipps Wic* is *Gipps Town.*

WICA, A Country-house or Farm. There are many such houses, now called the Wick and the Wike. *Cartular Abbat. Glaston.* 29.

WICHENCRIF, Sax. *Witchcraft.*] The word occurs in the Laws of K. *Canute*, *c.* 27.

WIDOW, *Vidua, Relicta.*] A married Woman bereft of her Husband, left all alone. *Litt.* The Widow of a Freeman of *London* may use her Husband's trade, so long as she continues a Widow. *Chart. K. Cha.* I. See title *Baron and Feme.*

WIDOW'S CHAMBER. In *London*, the Widow of a Freeman is, by the custom of the City, entitled to her Apparel, and the Furniture of her Bed-chamber, called the Widow's Chamber. See title *Executor* V. 9.

WIDOW OF THE KING, *Vidua Regis.*] Was she that after her Husband's death, being the King's Tenant *in Capite*, could not, during the continuance of the Feodal Law of Tenures, marry again without the King's consent. *Staundf. Prærog. c.* 4. See title *Tenures.*

WIFE, *Uxor.*] A Woman married. See *Baron and Feme.*

WIGREVE, From the Sax. *Wig.* i. e. *Sylva*, and *Greve, Præpositus.*] The Overseer of a Wood. *Spelm.*

WIGHT ISLAND, Was anciently called *Guith* by the *Britons*; whence it had many other names, as *Icta*, *Wotha*, &c. *Law Lat. Dict.*

WILD FOWL, Are not to be destroyed by nets or otherwise, nor their eggs taken, under divers penalties. *Stat.* 25 *Hen* 8. *c.* 11. See title *Game-Laws.*

WILL, *Defect of.* See title *Idiots and Lunatics.*

WILL, ESTATES AT; A species of Estates not Freehold. An Estate at Will is where lands and tenements are let by one man to another, to have and to hold at the Will of the Lessor, and the Tenant by force of this Lease obtains possession. *Litt.* § 68.

Such Tenant hath no certain indefeasible Estate, nothing that can be assigned by him to any other; because the Lessor may determine his Will, and put him out whenever he pleases. But every *Estate at Will* is at the Will of both parties, Landlord and Tenant; so that either of them may determine his Will, and quit his connexions with the other, at his pleasure. 1 *Inst.* 55. Yet this must be understood with some restriction; for if the Tenant at Will sows his land, and the Landlord, before the Corn is ripe, or before it is reaped, puts him out, yet the Tenant shall have the Emblements, and free ingress, egress, and regress, to cut and carry away the Profits. 1 *Inst.* 56. And this for the same reason upon which all the cases of Emblements turn, *viz.* the Point of Uncertainty; since the Tenant could not possibly know when his Landlord would determine his Will, and therefore could make no provision against it: and having sown the land, which is for the good of the Public, upon a reasonable presumption, the Law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the Tenant himself determines the Will; for in this case the Landlord shall have the Profits of the land. 1 *Inst.* 55. See title *Emblements.*

What act does, or does not, amount to a determination of the Will on either side, has formerly been matter of great debate in our Courts. But it now seems settled, that, (besides the express determination of the Lessor's Will, by declaring that the Lessee shall hold no longer; which must either be made upon the land, or notice must be given to the Lessee,) the exertion of any act of Ownership by the Lessor, as entering upon the premises and cutting timber, taking a distress for rent and impounding it thereon, or making a feoffment, or lease for years of the land, to commence immediately; any act of Desertion by the Lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure; or, which is *instar omnium*, the death or outlawry of either Lessor or Lessee; puts an end to or determines the Estate at Will. 2 *Comm. c.* 9.

The Law is however careful, that no sudden determination of the Will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of Emblements before mentioned; and, by a parity of reason, the Lessee, after the determination of the Lessor's Will, shall have reasonable ingress and egress to fetch away his goods and utensils. *Litt.* § 69. And, if rent be payable quarterly or half-yearly, and the Lessee determines the Will, the rent shall be paid to the end of the current quarter or half-year. *Salk.* 414: 1 *Sid.* 339. And, upon the same principle, Courts of Law have of late years leaned as much as possible against construing Demises, where no certain term is mentioned, to be Tenancies at Will; but have rather held them to be Tenancies from Year to Year so long as both parties please, especially where an annual rent is reserved; in which case they will not suffer either party to determine the Tenancy even at the end of the year, without reasonable notice to the other, which is generally understood to be half a year. 2 *Comm. c.* 9, & *n.*; and see this Dict. titles *Sufferance*; *Lease.*

The

The Notice must be to quit at the end of the year; and the time specified in the Notice will be supposed to be the end of the year, unless the contrary is shewn. 1 *Term Rep.* 159. If the Notice is not good for one year, it is not good for the next, it being supposed that the Landlord has waived it. 2 *Bro. C. R.* 161.

If the Landlord gives notice to quit, and afterwards receives Rent for the time subsequent to the end of the year, it is a question for the Jury to determine, whether it was accepted with intent to waive the Notice. *Cowp.* 243. But a Distress for such Rent is an unequivocal Waiver of the Notice. 1 *H. Bl. Rep.* 311.

WILLS; OR, LAST WILLS *and* TESTAMENTS.

I. *Of the Form and Manner of making Wills and Codicils.*
- 1. *The Nature, and different Sorts of Wills.*
- 2. *Nuncupative Wills.*
- 3. *Codicils.*
- 4. *Of various and contradictory Wills, Codicils, and Legacies. And see this Dictionary, title* Legacy.
- 5. *How Wills shall be executed by a Testator, and attested by Witnesses.*

II. *Who are capable or incapable of making Wills.*
- 1. *Generally; Aliens.*
- 2. *Infants; Idiots; Lunatics: Others disabled by Temporal Incapacity; Deaf, Dumb, and Blind Persons.*
- 3. *Femes Covert.*
- 4. *Persons under Duress.*
- 5. *Criminals; Traitors; Felons; Outlaws; Excommunicates; Papists.*

III. *What may be disposed of by Will.*
- 1. *Of the Statutes enabling Perso s to devise.*
- 2. *What Estates and Things are devisable.*
- 3. *Of Devises of Estates in Joint-tenancy; by Curtesy; in Dower, &c. and of Property peculiarly circumstanced.*

IV. 1. *Of the Republication of Wills.*
- 2. *Of the Revocation of Wills.*

V. *General Rules as to the Construction of Wills.*

For further matter, connected with this subject, see this Dictionary, titles *Descent*; *Estate*; *Executor*; *Executory Devise*; *Legacy*; *Remainder*; *Tail, or Fee-Tail,* &c.

I. 1. A WILL or Testament is, "the legal Declaration of a man's Intentions of what he *wills* to be performed *after* his death;" a Will or Testament being of no force till after the death of the Testator, or person making it. 2 *Inst.* 111.

A Will and a Testament, strictly speaking, are not words of the same meaning: A Will is properly limited to Land, and a Testament only to Personal Estate; and the latter requires Executors. Wills, by which Lands are disposed of, are regulated by several statutes made for that purpose, and are a Conveyance unknown to the old Common Law, which permitted a man only to dispose of his goods or personal property. So the word *Devise* seems most properly applicable to the disposition of Lands by Will; and *Bequest* or *Legacy* to that of Personal Estate. But in a course of time the words have come to be applied indifferently to a disposition of Lands or Goods, which are frequently and continually distributed and devised, at the same time, by the same Will. *Burn. Eccl. L.* title *Wills.*

Upon the notion that a Devise of Land by Will is merely a species of Conveyance, is founded the following distinction between such Devises, and Dispositions of Personal Estate; that a Devise of a man's goods and personal property will operate upon all such personal estate as the maker of the Will dies possessed of, at whatever distance of time he may die after making the Will: But a Devise of Real Estate, will only operate on such estates as were his at the time of executing and publishing his Will; so that freehold lands, purchased after making the Will, cannot pass under any Devise in that Will, unless the Will shall have been legally and formally republished subsequent to the purchase or contract. See *post.* IV. 1.

These Wills and Testaments are divided into two sorts; first, Written; and, secondly, Verbal, or Nuncupative.

The Law also takes notice of a particular Gift, in the nature of a Will, made by any one in contemplation of immediate death, which is called *Donatio causâ mortis*; a Gift in prospect of death. This is, where a man, being ill, and expecting to die, gives and delivers something to another, to be his in case the giver dies; but if he lives, he is to have it again. In every such Gift, there must be a delivery made by the giver himself, or some person by his order, in his last sickness, while he is yet alive; for the Gift will not be good if the delivery is made after his death. This delivery, however, may be made either to the person himself, for whom the Gift is intended, or to some other for his use, which will be equally effectual, so as it is made in the life-time of the party giving. See titles *Legacy*; *Donatio causâ mortis.*

No Stamp-Duty whatever is imposed on Wills, till after the death of the Testator; when the Probate or Letters of Administration are charged with certain Duties, in proportion to the value of the deceased's property. A Will may therefore be written and executed, by the Testator, on unstamped parchment or paper.

2. A NUNCUPATIVE WILL extends only to the personal property of the Testator, and is his Intention, declared in his last hours, before a sufficient number of Witnesses, and afterwards reduced to writing.

As these Verbal Wills (which were formerly more in use than at present, when the art of writing is become almost universal) are liable to great impositions, and may occasion many perjuries, the Statute of Frauds, *stat.* 29 *C.* 2. *c.* 3, (amongst other things) enacts,

First, That no Written Will shall be revoked or altered by a subsequent Nuncupative one; except the same (the Nuncupative Will) be in the life-time of the Testator put in writing, and read over to him and approved; and unless the same be proved to have been so done, by the oaths of three Witnesses at the least; who, by *stat.* 4 & 5 *Ann. c.* 16, must be such as are admissible upon Trials at Common Law. See title *Evidence* II. 1.

But

But where a man by Will, in writing, devised the residue of his personal estate to his Wife, and she dying, he afterwards, by a Nuncupative Codicil, bequeathed to another all that he had given to his Wife; this was resolved to be good: For, by the death of the Wife, the Devise of the residue was totally void, and the Codicil was no alteration of the former Will, but a New Will for the residue. 1 *Eq. Ab.* 408: *T. Raym.* 334.

Secondly, That no Nuncupative Will shall be good, (where the estate thereby bequeathed shall exceed the value of 30*l.*) which is not proved by the oaths of three Witnesses at the least, who were present at the making of it: nor unless it be proved that the Testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his Will, or to that effect; nor unless such Nuncupative Will were made in the time of the last sickness of the deceased, and in the house of his habitation or dwelling, or where he hath been resident for the space of ten days or more, before the making of such Will; except where such person was surprised, or taken sick, being from his own house, and died before he returned.

Thirdly, That after six months passed after the speaking of the pretended testamentary words, no Testimony shall be received to prove any Nuncupative Will, except the said Testimony, or the substance thereof, were committed to writing within six days after the making the said Will.

Fourthly, That no Letters Testamentary, or Probate of any Nuncupative Will, shall pass the Seal of any Court till fourteen days at least after the death of the Testator; nor shall any Nuncupative Will be at any time received to be proved, unless Process have first issued to call in the Widow and next of kindred to the deceased, that they may contest the same if they please. Soldiers and Sailors, in actual service, may dispose of their moveables, wages, and personal estate, as they might before this Act. *See the Statute.*

The Legislature has, by the above restrictions, provided against frauds in setting up Nuncupative Wills, by so numerous a train of requisites, that the thing itself is fallen into disuse, and is hardly ever heard of; but in the only instance where favour ought to be shewn to it, when a person is surprised by sudden and violent sickness.

The words by which the Devise is made, must be spoken with an intent to bequeath, not any loose, idle discourse in his illness; for the sick man must require the by-standers to bear witness of such his intention: The Will must be made at home, among his family or friends, unless by unavoidable accident, to prevent impositions from strangers; it must be in his last sickness; for if he recovers, he may alter his disposition, and has time to make a Written Will. It must not be proved at too long a distance from the Testator's death, lest the words should escape the memory of the Witnesses; (but which is permitted to be remedied by their writing down, within six days, what they heard the Testator say;) nor yet too hastily, and without notice, lest the family of the Testator should be put to inconvenience, or surprised. 2 *Comm. c.* 30.

3. A CODICIL is a Supplement to a Will, or an Addition made by the person making the Will, annexed to, and to be taken as part of the Will itself, being for its explanation or alteration; to add something to, or to take something from, the former dispositions; or to make some alteration in the quantity of the Legacies, or the regulations contained in the Will. This Codicil may also be either written or verbal, under the same restrictions as regard Wills. 2 *Comm. c.* 32.

Whenever a Codicil is added to a Will or Testament, and the Testator declares that the Will shall be in force, in such case, if the Will happens to be void, for want of the forms required by Law in the execution, or otherwise, yet it shall be good as a Codicil, and shall be observed by the Administrator. And, though Executors cannot regularly be appointed in a Codicil, yet they may be substituted in the room of others named in the Will, and the Codicil is still good. If Codicils are regularly executed and witnessed, they may be proved as Wills; and so if they are found written by the Testator himself, they ought to be taken as part of the Will, as to the personal estate, and proved in common form by Witnesses, to be the Hand-writing of the person making the Codicil, and by giving an account when, where, and how the same was found. *Burn. Eccl. Law.*

4. If two Wills are found, and it does not appear which was the former or latter, both are void; but if two Codicils are found, and it cannot be known which was first or last, and one and the same thing is given to one person in one Codicil, and to another person in another Codicil, the Codicils are not void, but the persons therein named ought to divide the thing betwixt them. But if the Dates appear to the Wills or Codicils, the latter Will is always to prevail, and revoke the former; as also the latter Codicil, as far only as it is contradictory to the former; but as far as the Codicils are not contradictory, they are allowed to be both in force. For, though I make a Last Will and Testament irrevocable, or unalterable, in the strongest words, yet I am at liberty to revoke or alter it; because my own act or words cannot alter the disposition of Law, so as to make that irrevocable which in its own nature is revocable. If, in the same Will, there are two Clauses or Devises totally repugnant and contradictory to each other, it has been held, that the latter Clause or Devise shall take effect, on the same principle as respects prior and subsequent Wills. But it seems now, that where the same estate is given by a Testator to two persons in different parts of his Will, they shall be construed to take the estate as Joint-tenants, or Tenants in Common, according to the limitation of the Estates and Interests devised. 3 *Atk.* 493: 1 *Inst.* 112, *b. n.*

Where two Legacies are given to the same person by the same Will, or by Will and Codicil, the rule seems clear, that by the Devise of the same sum to a person by a second Clause in a Will as had before been given him by a former Clause in the same Will, he shall only take one of the Legacies, and not both. But where a Legacy is given to a person by a Codicil as well as by a Will, whether the Legacy given by the Codicil be more or less than, or equal to, the Legacy given by the Will, the Legatee shall take both: and if the Executor contests the payment, it is incumbent on him to shew evidence of the Testator's intention to the contrary. See title *Legacy.*

5. Several regulations have been made by the Law, in order to guard against any Frauds in the Disposition of real estate by Will. As to such Wills as dispose of goods and personal property only, if the Will is written in

in the Testator's own hand, though it has neither his Name or Seal to it, and though there are no Witnesses to it, it is good, if sufficient proof can be obtained of the Hand writing. And even if it is in another person's Hand-writing, though not signed by the Testator, it will be good, if proof can be produced that it was made according to his instructions, and approved of by him. But as many mistakes and errors, not to say misfortunes, must often arise from so irregular a method of proceeding, it is the safer and more prudent way, and leaves less in the breast of the Ecclesiastical Judge, if it be signed and sealed by the Testator, and published in the presence of Witnesses. 2 *Comm.* c. 32.

It is expresly provided by *Stat.* 29 *Car.* 2. c. 3, that all Devises of *Lands and Tenements* shall not only be in Writing, but shall also be signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be witnessed and subscribed in the presence of the person devising, by three or four credible Witnesses; or else the Devise will be entirely void, and the land will descend to the Heir at Law.

In the construction of this statute, it has been adjudged, that the Name of the person making the Will, written with his own hand, at the beginning of his Will, as, "I *John Mills* do make this my Last Will and Testament," is a sufficient Signing, without any Name at the bottom. But this seems doubtful, unless the whole Will be written by the Testator himself: And the safe and proper way is to sign the Name, not only at the bottom or end of the Will, but, as is usual and regular, at the bottom of each page or sheet of paper, if the Will contain more than one: and the Witnesses to the Will, seeing the Testator sign all the sheets, and put his Seal, (though this latter is not absolutely necessary in Law,) as well as his Name, to the last sheet, must write their Names under the Attestation in the last sheet only.

It has also been determined, that though the Witnesses must all see the Testator sign the Will, or at least acknowledge the Signing, yet they may do it at different times. *Jones* v. *Dale*, 5 *Bac. Abr.* But they must all subscribe their Names as Witnesses, in his presence, lest by any possibility they should make a mistake; and that a Will is good, though none of the Witnesses saw the Testator actually sign it, if he owns it before them to be his Hand-writing. It is remarkable, that the *stat.* 29 *Car.* 2. c. 3, does not say the Testator shall sign his Will in the presence of the three Witnesses, but requires these three things:—First, that the Will should be in Writing; Secondly, that it should be signed by the person making the same; And, thirdly, that it should be subscribed by three Witnesses, in his presence. 3 *P. Wms.* 254. But it is not at all necessary that the Witnesses should be acquainted with the Contents of the Will; provided they are able, when called on, to identify the Writing; *i. e.* to say that the Paper, then shewed them, is the same they saw the Testator sign.

Though the Statute has required that the Witnesses to the Will shall witness it in the Testator's presence, (in order to prevent obtruding another Will in the place of the true one,) yet it is enough that the Testator *might* see the Witnesses; it is not necessary that he should see them signing; for otherwise, if a man should but turn his back, or look off, it might make the Will void. And in a case where the Testator desired the Witnesses to go into another room, seven yards distant, to witness the Will; in which room there was a window broken, through which the Testator *might* see them; it was, by the Court, adjudged to be a Witnessing in his presence. So where the Testator's carriage was drawn opposite the windows of an Attorney's office, in which the Witnesses attested the Will; this was clearly determined to be in the Testator's presence. 1 *Bro. C. R.* 99. But if a Will is executed at one time, and at another time, afterwards, the Witnesses put their Names to it, the Testator being then insensible, this will not be a good Will, as it cannot be said to be witnessed in his presence, if he is unconscious of what is passing. *Doug.* 241, *Right d. Cater* v. *Price.*

A Will made beyond Sea, of lands in *England*, must be attested by three Witnesses. 2 *P. W'ms.* 293.

A Will devising Copyhold land, witnessed by one or two Witnesses, or even without any Witness at all, is sufficient to declare the uses of a Surrender of such Copyhold lands made to the use of a Will; because the party to whom the land is given becomes entitled to it by means of the Surrender, and not by the Will. 2 *Atk.* 37: 2 *Bro C. R.* 58.

The Witnesses to a Will ought to be disinterested. In a case formerly determined by the Court of King's Bench, the Judges were extremely strict in regard to the credibility, or rather the competency, of the Witnesses: For they would not allow any Legatee, nor by consequence a Creditor, where the Legacies and Debts were charged on the real estate, to be a competent Witness to the Devise, as being too deeply concerned in interest not to wish the establishment of the Will; for if it were established, he gained a Security for his Legacy or Debt from the real estate, whereas, otherwise he had no claim but on the personal assets. 2 *Stra.* 1253. This determination, however, alarmed many Purchasers and Creditors, and threatened to shake most of the Titles in the kingdom, that depended on Devises by Will. For, if the Will was attested by a Servant to whom wages were due, by the Apothecary or Attorney whose very attendance made them Creditors, or by the Minister of the Parish who had any demand for Tithes or Ecclesiastical Dues, (and these are the persons most likely to be present in the Testator's last illness,) and if in such case the Testator had charged his real estate with the payment of his Debts, the whole Will, and every Disposition therein, so far as related to real property, were held to be utterly void. This occasioned the *stat.* 25 *Geo.* 2. c. 6, which restored both the competency and the credit of such Legatees, by declaring void all Legacies (and, in this are included, Devises of Lands and other Interests) given to Witnesses; and thereby removing all possibility of their Interest affecting their Testimony. The same Statute likewise established the competency of Creditors, by directing the Testimony of all such Creditors to be admitted, but leaving their Credit (like that of all other Witnesses) to be considered, on a view of all the circumstances, by the Court and Jury before whom such Will should be contested. And the Testimony of three Witnesses, who were Creditors, has been since held to be sufficiently credible, though the land be charged with the payment of debts. 2 *Comm.* c. 23.

II. 1. Regu-

II. 1. Regularly every person has full power and liberty to make a Will and Testament, who is not under some special prohibition by our Law, or by Custom; which prohibitions are principally upon three accounts:—1st, For want of sufficient discretion in the person making the Will.—2dly, For want of sufficient liberty and free-will.—And, 3dly, On account of their criminal conduct. 2 *Comm. c.* 32.

It may not be amiss, perhaps, first to mention a case which does not strictly come under either of these heads, unless on some occasions it might be supposed proper to be referred to the third: An *Alien*, while living under the *English* Government, may obtain money, goods, and personal property; and may make a Will, and dispose of such property as he pleases; contrary to the ancient custom in *France*, where the King, at the death of an Alien, was entitled to all he was worth in that kingdom; a custom repealed under the reign of the late unfortunate *Louis* XVI. A distinction is made in some of the Law-books, between Alien Friends and Alien Enemies: But in the case of an Alien, the Subject of a State at war with *England*, if he lives here and trades, and is not guilty of any unfriendly act, he is permitted to dispose of his goods and money as freely as any Subject; and this under the idea that he has the King's licence for staying in the kingdom, and is therefore in some degree entitled to the protection and privilege of a Subject. But an Alien (Friend or Enemy), not being capable of acquiring any right in land for his own benefit, can never, therefore, have any real estate to dispose of. Yet it seems undisputed, that an Alien may be a *Devisee*, even of Lands, whatever the further effect of his taking such lands may be. *Powell on Devises.*

Some doubts have arisen, but it is believed have never yet been brought before the Courts here, of the power of an Alien, during a *temporary* residence here, to devise his property in the Funds. It seems that such a Devise is certainly good, unless the Alien be positively restrained therefrom by the established Laws of his own country, or by his own Precontract. See further, title *Alien.*

2. It is particularly provided by the *stat.* 34 & 35 *Hen.* 8. *c.* 5. § 14, that no person under the age of 21 years shall make a Will or Testament of any manors, lands, tenements, or other hereditaments. See *post.* III.

It appears settled, however, that a Male Infant of the age of 14 years and upwards, and a Female of 12 years or upwards, are capable of making a Will respecting only Personal Estate; but as the Ecclesiastical Court is the judge of every Testator's capacity, and decides on disputes respecting the validity of Wills relating to Personal Estates, the discretion of the person making the Will may be disputed there, and his capacity of devising, let him be of what age he will. But no custom can be good to enable any persons to make a Will, *under* the respective ages of 14 and 12 above-mentioned. *Burn. Eccl. L.* Though, by custom, in particular places, Infants may devise lands after that age, and before 21. *Burn. Eccl. L.* See further, title *Infant.*

An Idiot, or Natural Fool, notwithstanding he may be of lawful age to make a Will, cannot at any time make a Will or Testament, nor dispose either of his lands or goods: And, on the same principle, persons who are grown childish, either through old age or any infirmity or distemper, are, during the continuance of such incapacity, disabled from making a Will. 2 *Comm. c.* 32.

Lunatics, during the time of their madness, cannot make a Will or Testament, nor dispose of any thing thereby, and that for the most forcible of all reasons, their utter incapacity of knowing what they are doing: and it is a principle of Law, that in making of Wills, integrity, soundness, and perfectness of mind are absolutely requisite; the health of the body merely not being regarded. Yet if such mad persons have lucid intervals of reason, then during the time of such intervals, if they are fully possessed of a sound and disposing memory and understanding, they may make their Wills. *Burn. Eccl. L.* See this Dict. title *Idiots and Lunatics.*

Every person, however, is presumed to be of perfect mind and memory, unless the contrary is proved: And therefore, if any one attempts to call in question or overthrow the Will, on account of any supposed madness, or want of memory, in the Testator, he must prove such impediment to have existed previous to the date of the Will: but people of mean understanding and capacities, neither of the wise sort nor of the foolish, but indifferent betwixt both, even though they rather incline to the foolish sort, are not hindered from making their Wills. The Law will not scrutinize into the depth of a man's capacity, particularly after his death, if he was able to conduct himself reasonably in the common course of life; as it might be opening a wide door to support pretensions of fraud or imposition on the Testator. *Burn. Eccl. L.* And if a person of a sound mind make his Will, this shall not be revoked or affected by his subsequent infirmity. 4 *Co.* 61.

One overcome with drink is equally incapable of using his reason, during his drunkenness, as a madman: and therefore, if he makes his Will at that time, it is void. 2 *Comm. c.* 32.

Persons born *Blind, Deaf,* and *Dumb,* are incapable of making a Will, as they want the common inlets of understanding, and are incapable of having any desire of bequeathing or obtaining any knowledge with respect to property, or the disposal of it, and are in as helpless and ignorant a situation as idiots themselves; and even those who are only deaf and dumb by nature, cannot make any Will, unless it very manifestly appears, by strong and convincing proofs, that such persons understand what a Will means, and they have a desire to make a Will; for if they are possessed of such understanding, and desire, then they may, by signs and tokens, declare their intentions. *Burn. Eccl. L.*

A *Blind Person* may make a Nuncupative Will, by declaring his intentions before a sufficient number of Witnesses; and he may also make a Will in Writing, provided the Will be read to him before Witnesses, and in their presence acknowledged by him for his last Will; but if a Writing should be delivered to a blind man, and he, not hearing the same read, acknowledged the same for his Will, this would not be sufficient; for it might happen, that if he had heard the same read, he would not have acknowledged it for his Will. The best way, therefore, in such a case, is, that the Will be read over to the Testator, and approved by him, in the presence of all the subscribing Witnesses: and although the Law of *England* does not expressly require this regulation, in respect to the Will of Blind Persons, yet a Court of

Justice will demand satisfactory proof of some kind that the identical Will was read over to him, though it was not in the presence of the Witnesses: it is therefore good policy to let all the subscribing Witnesses be present at the reading over such a Will; as in case of any dispute, which may be more likely in such extraordinary circumstances, they will be most capable of affording complete satisfaction to the minds of a Judge and Jury. *Burn. Eccl. L.*

The above precautions seem in like degree requisite in the case of a person who cannot read; for though the Law, in other cases, may presume that the person who executes a Will knows and approves the contents of it, yet that presumption will cease where, through defect of education, he cannot read, or is by sickness incapacitated to read the Will at that time. *Burn. Eccl. L.*

3. *A Married Woman* is restrained and prevented from devising any land or real estate whatsoever; being particularly excepted out of the *stat.* 34 & 35 *H.* 8. *c.* 5, enabling other persons to dispose of their lands and tenements by Will; and it is a general rule, that she cannot make any Will, even of goods or personal estate, without the licence or consent of her Husband; because by the Law, as soon as a man and woman are married, all the goods and personal estate, of what nature soever, which the Wife had at the time of the marriage, or may acquire after, belong to the Husband, by force of the marriage; which empowers him to make such part of them his own as are not absolutely vested in him immediately by the marriage; and therefore it would be an inconsistency in the Law to give her a power of defeating that rule, by bequeathing those goods and chattels to another. 2 *Comm. c.* 32. See title *Baron and Feme*.

If a Woman makes a Will, and afterwards marries, and dies during the life of her Husband, yet being at the time of her death incapable by Law of devising, because her Husband is then living, the Will is void; for it is necessary, in order to make her Will of force in Law, that she had ability to make a Will; not only at the time of making thereof, when the Will received its being, but also at the time of her death, at which time only any Will can receive its strength and confirmation. 4 *Rep.* 60: 2 *P. Wms.* 624. If a Wife survives her Husband, a Will made during the marriage is not good; because she is, during such time, by Law restrained from making any Will: but if a Will is made during the marriage, and she survives her Husband, and approves and confirms the Will after his death, in this case it will be good, by reason of her new consent or new declaration of her Will; for then it is, as it were, a new Will. See *post.* IV. 1.

If a Woman makes her Will, and afterwards marries and survives her Husband, and dies a Widow, leaving such Will made before her marriage; it has been held, that the Will was revived, and in force. *Plowd. Comm.* 343.—But later determinations seem to have settled, that though she was able in Law to make a Will, both at the time of the execution of it and at her death, yet such Will shall not be good or valid in Law, without a republication; it having been once absolutely revoked and entirely made void by the marriage. See 2 *T. Rep.* 695.

Although a married Woman is, generally speaking, so entirely under the power of her Husband, that she cannot make what in propriety of speech is called a Will, yet she may, with the consent of her Husband, make what is termed an Appointment, and which, like a Will, does not take effect till her death, and may be altered or revoked during her life, and the usual way in such cases is for the intended Husband to enter into marriage articles, or a bond, before marriage, in a sufficient penalty conditioned, to permit his Wife to make a Will, and to dispose of money or legacies to a certain value, and to pay what she shall appoint, not exceeding such value; and in that case, if after the marriage, and during it, she makes any Writing, purporting to be her Will, and disposes of Legacies to the value agreed on, though in strictness of Law she cannot make a Will, without her Husband's positive assent to the specific Will, but only something like a Will, yet this shall be good as an Appointment, and the Husband is bound by his bond, agreement, or covenant, to allow the execution of it. 2 *Comm. c.* 32. And this Will, or Appointment, ought to be proved in the Spiritual Court. 1 *Burr.* 431: *Stone* v. *Forsyth, Doug.* 707.

To the above general rules there are also some few other exceptions.

The Queen-Consort is exempted from these restrictions, and she may dispose of her goods and personal estate by Will, without the consent of her Lord. See title *Queen*.

If a married Woman is Executrix to some other person, and in that right has goods and chattels, these do not become the property of the Husband by marriage, because she has them not for her own use, but as representing the person of another; and therefore, in this case, she may, for the continuation of the executorship only, and for no other purpose, make an Executor, and consequently a Will, without the consent of her Husband; but she cannot, either in her life-time, or by her Will, dispose of the goods which she is thus possessed of in right of another, any otherwise than as by Law she is required to do as Executrix. See title *Baron and Feme* VI.

If a married Woman has any pin-money, or separate maintenance, she may dispose of any savings made by her out of the same by Will, without the control of her Husband. *Pre. Ch.* 44.

Another remarkable exception is in favour of a married Woman, whose Husband is banished for his life by Act of Parliament; for she may make a Will, and act in every thing as if she was unmarried, or as if the Husband was dead. 2 *Vern.* 104. See title *Baron and Feme* VI.

Where personal property is given to a married Woman for her sole and separate use, she may dispose of it by Will without the assent of her Husband. 3 *Bro. C. R.* 8.

Where lands are conveyed to Trustees, a married Woman may have the power of appointing the disposition of them after her death, which Appointment must be executed like the Will of a Feme Sole, and will be subject to the same rules of construction. 2 *Ves.* 610: 1 *Bro. C. R.* 99.—And (though the contrary has been held) it has been determined by the House of Lords, that the Appointment of a married Woman is effectual against the Heir at Law; though it depends only upon an agreement of her Husband before Marriage, without any conveyance of the estate to Trustees. *Bro. P. C.* vi. 156.

4. A Will will be set aside which is made by a person in consequence of any threats made use of to him, whereby he is induced, through fear of any injury, to make

make such a Will as he would not otherwise have wished to do; and as to this, no certain rule can be laid down, but it is left to the discretion of the Court to determine upon the particular circumstances of the case, whether or no such persons could be supposed to have a free Will in the disposing of their estates; and the Judge will, on such an occasion, not only consider the quality of the threats, but also the persons as well threatening as threatened; in the person threatening, his power and disposition; and in the person threatened, the sex, age, courage, pusillanimity, and the like. But if after making the Will, when there is no cause of fear, the maker of it ratifies and confirms it, it will be good in Law. *Burn. Eccl. L.*

If a Man makes a Will in his sickness, at the over-importunity of his Wife, contrary to his own wishes and desires, and merely that he may be quiet, this is a Will made by restraint, and shall not be good. *Sty.* 427.

The Ecclesiastical Court has jurisdiction of fraud or deception relating to a Will of personal estate, and can examine the parties by allegation concerning such fraud and deceit; and if the Will was falsely read to the Testator, then it is not his Will; but in the case of a real estate, a Will cannot be set aside even by a Court of Equity, for fraud or imposition, but must be tried at Law, on the question, whether the Testator did or did not in fact devise; the fraud or imposition in this case being a matter proper for a Jury to inquire into. *Bransby* v. *Kerridge, Bro. P. C.* See this Dict. title *Fraud.*

5. A Traitor lawfully convicted of High Treason, by verdict, confession, outlawry, or otherwise; besides the loss of his life, shall forfeit to the King all his goods and chattels, and all such lands and freehold property as he shall have at the time of his committing such treason, or at any time after; and so consequently is unable to dispose of any thing by Will: and Traitors are not only deprived of the privilege of making any kind of Last Will, from the time of their being convicted and found guilty, but any Will made before, does, by reason of such conviction, become void, in respect both of goods and lands. But if any person convicted of Treason obtain the King's Pardon, he is thereby restored to his former estate, and may make his Will, as if he had not been convicted; or if he had made any before his conviction and condemnation, such Will, by reason of the Pardon, recovers its former force and effect. See titles *Treason*; *Forfeiture*; *Attainder*.

A Felon, lawfully convicted, cannot make any Will, or other disposition of any goods or lands, because the Law has disposed thereof already; all his goods being forfeited to the King, who is to hold his freehold estate for a year and a day after his death, when it is forfeited to the chief Lord of the fee; so that it cannot be in the power of the Felon to devise it. But in this case also, a Pardon restores him to his former estate and capacity of making a Will. See titles *Forfeiture*; *Attainder*.

The Will of a *Felo de se* is void, both as to the Appointment of an Executor, and also with respect to any Legacy or Bequest of goods, for they are forfeited by the very act and manner of his death; but any Devise of Land made by him is good, as that is not subjected to any Forfeiture. See titles *Homicide*; *Forfeiture*.

An Outlaw is not only out of the King's protection and out of the aid of the Law, but also all his goods and chattels are forfeited to the King, by means of the Outlawry, although it should only be for Debt, and even though the action in which he is outlawed is not just, nevertheless his goods and chattels are forfeited, by reason of his contempt in not appearing; and therefore he that is outlawed cannot make his Will of his goods so forfeited. But a man outlawed for Debt, or in any other personal action, may, in some cases, make Executors; for he may have Debts upon Contract, which are not forfeited to the King, and those Executors may have a Writ of Error to reverse his Outlawry. *Burn. Eccl. L.* See title *Outlawry.*

It is the better opinion, that an Excommunicated Person may make a Will; though some disputes have heretofore arisen as to the effect of what is called the greater and lesser Excommunication; but these niceties are nearly put an end to, by the unusualness of the case ever happening at this time. *Burn. Eccl. L.*

With respect, however, to the Wills of Traitors, Felons, Outlaws, &c. though they are void as far as concerns the King, or the Lord who is entitled to the forfeiture of their lands or goods, yet the Will is of force against the Testator and his representatives, and all other persons whatsoever; so that if the King or the Lord pardons the Forfeiture, the Will is suffered to take effect.

Formerly Papists were under several disabilities, both as to the purchasing Lands and taking them by Descent or Devise; but those are now done away, and Papists rendered capable of purchasing and devising Lands, and having them by Descent, Purchase, and Devise, on taking the oath prescribed to them by the Act of the 18th *Geo.* 3. c. 60. See title *Papists.*

III. 1. ANCIENTLY there were in different parts of the kingdom, and particularly in *Wales*, and in the province of *York*, and in *London*, several Customs, the remains of the old Common Law, which prevented persons from disposing of more than the one-third part of their Goods and *Personal Property*: And this restraint continued till very modern times, when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three Acts of Parliament have been provided; (one, *stat.* 4 & 5 *W.* & *M. c.* 2, explained by *stat.* 2 & 3 *Anne, c.* 5, for the province of *York*: another, *stat.* 7 & 8 *Will.* 3. *c.* 38, for *Wales*; and a third, *stat.* 11 *Geo.* 1. *c.* 18. § 17, for *London*;) whereby all persons within those Districts, and liable to those Customs, are enabled to dispose of all their money and other personal estate by Will, and the claims of the Widows, Children, and other relations, to the contrary, under pretence of the Custom, are totally barred. Thus is the old Common Law, restraining Devises, and the Customs in those places, which were the relics of it, entirely abolished throughout all the kingdom of *England*; and a man may give the whole of his chattels by Will, as freely as he formerly could his third part; in disposing of which, he was bound, by the custom of many places, to remember his Lord and the Church, by leaving them his two best chattels; and afterwards he was left at his own liberty to bequeath the remainder as he pleased. 2 *Comm. c.* 32. These Customs, however, as far as they respect the distribution of an Intestate's estate, still remain in force. See title *Executor* V. 9.

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It seems sufficiently clear, that, before the Conquest, *Lands* were devisable by Will. *Wright of Tenures* 172. But, upon the introduction of the Military Tenures, the restraint of devising Lands naturally took place, as a branch of the Feodal Doctrine of Non-alienation without the consent of the Lord. See title *Tenures*. And some have questioned, whether this restraint was not founded upon truer principles of Policy, than the power of wantonly disinheriting the Heir by Will, and transferring the estate, through the dotage or caprice of the Ancestor, from those of his Blood to utter Strangers. See 1 *Comm. c* 23.

However this be, we find that, by the Common Law of *England* since the Conquest, no estate, greater than for term of years, could be disposed of by Testament; except only in *Kent*, and in some ancient Burghs, and a few particular Manors, where their *Saxon* immunities by special indulgence subsisted. 2 *Inst.* 7: *Litt.* § 167: 1 *Inst.* 111. And though the feodal restraint on Alienations by Deed vanished very early, yet this on Wills continued for some centuries after; from an apprehension of infirmity and imposition on the Testator *in extremis*, which made such Devises suspicious. Besides, in Devises there was wanting that general notoriety, and public designation of the Successor, which in Descents is apparent to the neighbourhood; and which the simplicity of the Common Law always required in every transfer and new acquisition of property. 2 *Comm. c.* 23.

But when Ecclesiastical Ingenuity had invented the Doctrine of Uses, as a thing distinct from the Land, Uses began to be devised very frequently, and the Devisee of the Use could in Chancery compel its execution. For it has been observed, that, as the *Popish* Clergy then generally sate in the Court of Chancery, they considered that men are most liberal when they can enjoy their possessions no longer: and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But, when the Statute of Uses had annexed the Possession to the Use, these Uses, being now the very Land itself, became no longer devisable. See title *Uses*. This might have occasioned a great revolution in the Law of Devises, had not the Statute of Wills been made, about five years after, *viz. stat.* 32 *H.* 8. *c.* 1, explained by *stat.* 34 & 35 *Hen.* 8. *c.* 5; which enacted, that all persons being seised in Fee-simple (except Feme-coverts, Infants, Idiots, and persons of nonsane memory) might by Will and Testament in Writing devise to any other person, except to Bodies Corporate, two-thirds of their Lands, Tenements, and Hereditaments, held in Chivalry, and the whole of those held in Socage; which now, through the alteration of Tenures by the Statute of *Charles* the Second, amounts to the whole of their Landed Property, except their Copyhold Tenements; and these latter pass, as we have seen, rather by Surrender than by Will: and in the latter case, rather as Personal than Real Property. 2 *Comm. c.* 23.

Corporations were excepted in these statutes, to prevent the extension of Gifts in Mortmain; but now, by construction of the *stat.* 43 *Eliz. c.* 4, it is held, that a Devise to a Corporation for a Charitable Use is valid, as operating in the nature of an Appointment, rather than of a Bequest. See titles *Mortmain*; *Charitable Uses*.

With regard to Devises in general, experience soon shewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the Rules of the Common Law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and prejuries were quickly introduced by this parliamentary method of inheritance: For so loose was the construction made upon this Act by the Courts of Law, that bare Notes in the Hand-writing of another person were allowed to be good Wills within the statute. To remedy which the Statute of Frauds and Perjuries, 29 *Car.* 2. *c.* 3, already so fully stated, was passed: And to remedy the further inconveniences, as to Witnesses, the *stat.* 25 *Geo.* 2. *c.* 6, (see *ante* I. 5,) was found necessary.

One inconvenience more was at length found to attend this method of Conveyance by Devise; in that Creditors by Bond and other Specialties, which affected the *Heir*, provided he had Assets by Descent, were now defrauded of their Securities, not having the same remedy against the Devisee of their Debtor. To obviate which, the *stat.* 3 & 4 *W.* & *M. c.* 14, provided, that all Wills and Testaments, Limitations, Dispositions, and Appointments, of real Estates by Tenants in Fee-simple, or having power to dispose by Will, shall (as against such Creditors only) be deemed to be fraudulent and void: And that such Creditors may maintain their actions jointly, against both the Heir and Devisee. A Devise to raise a portion for younger Children, according to an agreement before marriage, and a Devise for payment of Debts, are exceptions in the statute, § 4. But it has been held, that the payment of the Debt must be provided for effectually, in order to bring it within the exception. 1 *Bro. C.R.* 311: 2 *Bro. C. R.* 614.

2. *More immediately as to what Things are devisable.*—In general it may be stated, that every thing in which a man has the absolute property may now be devised by his Will; disputes at present arising mostly on the words of the Will, and not on the capacity to bequeath. Thus, Rents, Tithes, Manors, Franchises, and Annuities, may be devised; by virtue of the words Lands, Tenements, and Hereditaments, in the Statutes of Wills. So may Reversions, and vested Remainders expectant after an Estate-Tail; and Trust-Estates by the *Cestui que-Trust*. See *Powell on Devises*.

Estates *pur autre vie* are devisable, by *stat.* 29 *Car.* 2. *c.* 3. § 12, by a Will attested by three Witnesses. See titles *Occupant*; *Life Estate*.

If any one has money owing to him on Mortgage, he may devise this money to be paid when it becomes due. *Burn. Eccl. L.* See 1 *Inst.* 209; and this Dict. title *Mortgage*.

The right of presenting to the next Avoidance, or the Inheritance of an Advowson, of a Benefice, may be devised; so also a Donative may be devised. *Powell on Devises.* And a Devise of the next *Turn*, or Presentation, carries the next Turn of presenting absolutely to the Devisee, and not merely the right of getting himself presented. 2 *Black. Rep.* 1840. And such Devise may be made by an Incumbent or Parson of any Church, to whom the Inheritance of the Advowson of that Church belongs, though he is the Incumbent or Parson of the Church when he dies; for though the Will has no effect

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But by the death of the Testator, yet it has a beginning in his life-time; and the disposition and bequest will be good also, if he appoints by his Will who shall be presented to the Church by his Executors, or that one Executor shall present the other, or that his Executors shall grant the Advowson to any particular person. This case being distinguished and excepted from the general rule as to Advowsons, which are by Law forbidden to be disposed of while there is no Incumbent, and the Church is empty, in order to restrain the practice of Simony. 3 *Bulst.* 36, 43: 1 *Roll. Rep.* 210: *Cro. Jac.* 371: 1 *Atk.* 619. See *Dy.* 456; and this Dict. title *Simony*.

If a man has agreed to purchase an estate, and the Buyer and Seller enter into articles for the purchase, and the Buyer dies, having by his Will devised the land so agreed to be purchased, before any deed to convey the same is made to him; the land will, in Equity, pass to the Devisee; the Seller only standing as Trustee for him, and whom he should appoint, till a regular conveyance be executed. 1 *C. C.* 39: 2 *Vern.* 679: 1 *Atk.* 573.

A Lease for any number of years, determinable upon a Life or Lives, or a Lease for 500 or 1000 years, or any other term absolute, may be given and disposed of by Will, as Personal Estate. *Burn. Eccl. L.*

Some of our old Writers on the Law of Wills have very carefully stated, that if a person devises to another a Horse or a yoke of Oxen, the Legacy is good, though the Testator may have no Horse or Ox of his own, either at the time of his death or making his Will; and that in these kind of Legacies the rule is, that if the words of the Devise are directed to the person to whom the Legacy is given, as, "I will that *A. B.* shall have a Horse;" the choice of the Horse belongs to the Legatee; but if the words are directed to the Executor, as, "I will that my Executor give to *A. B.* a Horse;" the choice belongs to the Executor: And they add, that both parties should be reasonable in their choice, that the Legatee may not choose a Horse of too great value, or the Executor one of too little. *Swinb.*: *Burn. Eccl. L.*

3. If one of two Joint-tenants, during his life-time, devise his share in the land, and die, this Devise will not be good; and the person to whom the Joint-tenant has devised his share, takes nothing, because the Devise does not take effect till after the death of the Joint-tenant, and then the survivor takes the whole land by a prior title, that is to say, the Deed of Purchase. *Burn. Eccl. L.* And although the Joint-tenancy is severed before the Testator's death, yet if the Will be made before the severance, it will have no effect; unless there is a Republication of the Will after the partition. 3 *Burr.* 1497.

By *stat.* 20 *H.* 3. *c.* 2, Widows may bequeath the Crop of their Ground, as well of their Dowers as of their other Lands and Tenements: And by *stat.* 28 *H.* 8. *c.* 11, if the Incumbent of a Living, before his death, has caused any of his Glebe Lands to be manured and sown at his own expence, with any Corn or Grain, he may by his Will devise such Corn, and all the profit of it, growing on the Glebe Land so manured and sown.—So if a man is possessed of Land for the term of his life only, and the Land after his death descends to his Heir, yet he may devise the Corn growing on the land at the time of his death, away from the Heir, to some other person; although he has it not in his power to devise the Land whereon it grows. *Burn. Eccl. L.*—So where a man has Lands in right of his Wife, or is Tenant by the Curtesy of Lands, and sows them with Corn, he may devise the Corn growing on the lands at his death: And if the Husband, or Tenant by the Curtesy, lets the lands to another, who sows the ground, and afterwards the Wife, or the Tenant by Curtesy, dies, the Corn not being ripe; yet, in this case, the person to whom the lands were let is entitled to the Corn, and may devise it, notwithstanding his estate and interest in the land is determined. See title *Emblements*.

But Trees, and other things fixed to the Freehold, or *Heir-looms*, which by custom go to the Heir with the House, are not devisable but by him who has the Fee-simple. 4 *Co.* 64: 1 *Inst.* 185. See title *Heir*.

An Executor or Administrator cannot devise those goods which he has as Executor or Administrator, and which belong to the person to whom he is Executor or Administrator; but the same must be applied in payment of that person's debts, and distributed in a due course of Law: the Executor or Administrator having these goods only for such particular purposes, and not to their own absolute use. Nor can a Husband devise any effects which his Wife has as Executrix, for the like reason. *Burn. Eccl. L.* See titles *Executor*; *Baron and Feme*.

Although the Personal Estate of the Wife becomes the property of the Husband immediately on marriage, as he is thereby enabled to make all debts due to her, and bonds for money given her before marriage, his own; yet unless he recovers such debts during the marriage, and renews the bonds, and takes them in his own name, he has not such an absolute interest in them as to be able to devise them by his Will; but they will, after his death, again become the property of the Wife. 1 *Inst.* 351. But if a Woman's fortune, or any part of it, consisted in Bonds given her before marriage, and the Husband on the marriage makes a settlement on her in consideration of such fortune, notwithstanding the Bonds are not renewed during the marriage, yet the Husband will be entitled to them, being in this case considered as a purchaser for a valuable consideration; and he may devise them, or they shall go to his Executor, even though the Wife should survive him. *Talb.* 108. See title *Baron and Feme*.

It has been already noticed, that one cannot devise lands which he shall acquire after making his Will; the Will only operating on such lands as he is possessed of at the time of publishing it. And though a man does, by express words in his Will, give to another all the lands which he shall have at the time of his death, yet this Devise will be good only as to such lands as he had at the time of making the Will; and any lands purchased afterwards will not pass by it, but go the Heir at Law, unless the Will is republished. See *post*. IV. 1.

But where a man is entitled to an Estate in Reversion, expectant on the determination of another person's life, who holds the lands for his Life or in Tail, he may by his Will dispose of this; and if the Tenant in Tail or for Life dies during the life-time of the Testator, such lands, which will then come to his possession, will pass without any Republication of his Will; the Reversion at the time of making the Devise being a certain present interest, though it was to take place in future. 10 *Rep.* 78 (*a*). See *post*. IV. 1.

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IV. 1. THE REPUBLICATION OF WILLS has already been alluded to. A Will as to the disposition of Land, and in some other circumstances, takes effect, or is hindered from doing so, according to its date; it is therefore necessary, on certain occasions, to renew it, as it were; or in fact to make a new Will. And if the Testator is exactly of the same mind, as to the method of the disposal of his property, and circumstances only require that the Will should bear date at any particular time, it will be sufficient for him to call in three proper Witnesses, and before them declare the signature to be his Hand-writing, and use the same forms as in the original execution. And the three Witnesses must sign their names to such new Will or Republication, mentioning the date thereof.

A new Publication of a Will is in truth, as has been already said, making it a new Will; so that after such Publication it has the force and operation of a Will just made at the time of such Publication. Therefore, if a man by his Will devises "all his Lands," and after making the Will purchases other lands, and then new publishes his Will, this new Publication has made it a new Will, and consequently by the Devise of all his Lands the newly-purchased lands shall pass; for there is no necessity to make any alteration in this case in the Will, the words being sufficient, upon the new Publication, to convey all the lands he had at the time of such Publication. So if a man by his Will devises all his Lands to certain uses, and afterwards purchases Copyhold Lands, and surrenders them to the uses *declared, or to be declared,* (or to the uses *declared* only,) by his last Will; this has the effect of a Republication of his Will, as to such after-purchased Copyhold Lands, and they shall pass thereby. *Cowp.* 130.—Or if the Testator, after making such a Devise, purchases Freehold Lands, and then makes a *Codicil*, duly executed to pass real estate, though no notice is taken of the after-purchased lands; yet if the Codicil is annexed to or confirms the Will, or (as it seems) has a reference to it, this amounts to a Republication of the Will, and the after-purchased lands will pass under the general Devise. *Cowp.* 158: *Com.* 383: *Acherly* v. *Vernon*, 3 *Bro. P. C.* See *Powell on Devises*; and *Brady* v. *Cubitt*, *Doug.* 40; where it seems that such Republication may be effected by *any instrument* (sufficiently executed) referring to the Will.

This rule, as to the new Publication of a Will, should be understood with the following restriction, *viz.* that the words of the Will at the time of the new Publication are such as are proper to convey the lands, and also sufficiently to denote the person to whom they are devised; for if there is any change with respect to the person who is to take the lands by the Will between the time of the first making the Will and the new Publication of it, in such case the new Publication will not alter the intention of the Will as originally made, nor change the import of the words made use of; so as to make the persons named in the Will take in a different manner than was intended at the time of such original making the same. If therefore I devise land to *A.* and his Heirs, and *A.* dies in my life-time, yet a new Publication after the death of *A.* will not make his Heir take by the Will; for though the original Devise was to *A.* and his Heirs, and from thence it appears to be my intention that his Heirs should have the land; yet because the Heirs were named in the Will to take by Descent, as Heirs only, and not as the persons designed to take the land immediately, the Devise to them was rendered void by the death of *A.* in my life-time, and the new Publication of the Will could not make it good; the Publication making no alteration in the words of the Will, and having no other effect than this, that if the words in the Will are proper to convey and describe the person to take, and the land or thing to be taken, it makes that Will, though of never so long a date, to be as perfectly new as if but then made. *Powell on Devises.*

Such Republication being duly made will supply a defect for want of capacity in the Testator to make a Will, as well as any inability for want of a subject-matter whereon the Will may attach. And therefore if one having, under age, made a Will of Land, duly executed according to the statute, which is void by reason of his infancy, re-execute it after he come of age, with the circumstances required by the statute, this will render such Will valid. 1 *Sid.* 162: 1 *Keb.* 589.

New Publication of a Will is always favoured in Equity; and with respect to Personal Estate, very slender evidence will serve; though it is not safe to trust to it. As if a man says, "My Will in the hands of *Robert* shall stand;" this will amount to a good Republication. But we have seen that in the case of real estate, the Republication must be as formal as the original execution.

2. REVOCATION OF A WILL may arise from various causes both in Fact and Law; and is either express or implied. Express, as if the Testator absolutely cancels the Will, by tearing off the seal and the signature; or if he destroys or burns the whole Will, or expressly declares his mind that his Will should be revoked. Revocations are implied where the state or condition of the person devising, or of the estate or thing devised, is altered, after making the Will. The consequences of a Revocation of a Will, which may frequently take place without the knowledge, or even against the consent, of an uninformed Testator, it is necessary to state the principles of the Law on this subject something at length.

By the Statute of Frauds, *stat.* 29 *Car.* 2. *c.* 3, no Devise of Land in Writing shall be revocable, otherwise than by another Will, or some other Writing, to be executed in the presence of three Witnesses; or by burning, tearing, or cancelling the Will containing such Devise, *by the person making the same*, or in his presence, or by his consent.

But it has been determined (since, as well as before, this statute) that, without an express Revocation, if a man who has made his Will afterwards marries, and has a child or children, whether such child is born before or after his death, this is a presumptive or implied Revocation of his former Will which he made in his state of celibacy, as well as to his Real as his Personal Estate; and the statute does not extend to this case, but he shall be said to die intestate; the Law supposing that he must mean to provide in the first place for his family, and distributing his estate for their benefit accordingly. See 5 *Term Rep.* 49.—This however being only a presumptive Revocation, if it appears, by any expression or other means, to be the intent of the Testator that his Will should continue in force, the marriage will be no Revocation of it. As in the case, where a man devised an estate to a woman, whom he afterwards married, and when

when he died she was with child of a son, yet the Will was determined to be good, and not revoked by the marriage. And such implied Revocation may, in all cases, be rebutted by parol evidence. *Brady* v. *Cubitt*, *Doug*. 40.

If a man by his Will devises his land, and then sells the same land, and afterwards repurchases it, yet the Will stands revoked (as to the land) by the sale, and the repurchase is no declaration of the Testator's mind to set it on foot again, without a Republication. *Powell on Devises*.

If a woman before marriage makes her Will, and thereby devises her land to *A.*, and afterwards marries him or any other, and then dies, yet neither *A.* nor the Husband take any thing by his Will, the marriage being, in Law, a Revocation of it; and a Married Woman not being capable of making a Will of Lands. See *ante* II. 3.

Where a man, possessed of Stock or Money in the Funds, devises the exact quantity he is possessed of to any one or more persons by his Will, this is a specific Legacy; and if the Testator afterwards, before his death, sells any part of the Stock so devised, such Sale shall operate as a Revocation (or, as the Law terms it, an Ademption or taking away) of so much of the Legacy as shall be sold: and the Legatee or Legatees shall be only entitled to so much Stock as actually remains at the time of the Testator's death; and if there is no Stock at all remaining, the whole Legacy is gone, and the Legatees cannot come on the other part of the estate for a satisfaction. If the Testator however, after sale of part of the Stock, purchases other Stock, this shall restore the Legatees to the amount of such purchase. See title *Legacy* I.

In the case of Lands, where the Law does not imply a Revocation, it must be *in writing*, operating as a Will, and signed by the person making the Will; or by some writing, by which the Testator declares his intention to revoke the first Will, and signed by three Witnesses, pursuant to the Statute of Frauds.

A subsequent Devise to another person, though he may be incapable of taking, is a Revocation of a precedent Devise to a person who was capable of taking; as it serves to shew the intent of the Testator to revoke the first Devise, though the second cannot take effect. See *Spragge* v. *Stowe*, cited *Doug* 35.—But one Will cannot be revoked by another Will, though it should contain a clause declaring all former Wills to be revoked, unless the second is valid and effectual as a Will. 2 *P. Wms*. 343. Yet a Will may be revoked by an instrument written merely for the purpose of Revocation, if it is attested by three Witnesses: and the Testator must sign it *in their presence*, which, as already noticed, is not necessary in the execution of a Will. 3 *Comm. c.* 23, *in n.*

If there is a Duplicate of a Will made, and deposited in the hands of an Executor, or other person; in such case, a cancelling of that part of the Will which is in the possession of the Testator is a sufficient Revocation of both the parts, as well that in his own hands as the Duplicate, in the hands of the Executor; they being both in fact but one Will. *Doug*. 40. So, if a Testator makes a second Will, and duly executes the same, it shall, without any thing further, revoke and make void the former Will and Duplicate.

Where a latter Will is the instrument by which a former is revoked, the Revocation effected thereby is ambulatory until the death of the Testator; for although, by making a second Will, the Testator intends to revoke the former, yet he may change his intention at any time before his death; (until which neither of his Wills can have operation;) and then the latter, being a revocable instrument itself, and only affecting the former as far as it is itself efficient, being revoked, is as no Will; the consequence of which is, that the first Will *never having been cancelled, but remaining entire*, stands in like manner as if no other had been made. 4 *Burr*. 2512. But if a prior Will be made, and then a subsequent one *expressly revoking the former*, in such case, although the first Will be left entire, and the second Will be afterwards cancelled, yet the better opinion seems to be, that the former is not thereby set up again. See *Cowp*. 53. So, if a Testator, having made a new Will, *actually cancel* the former Will by tearing off the name and seal, *&c.*, and afterwards cancel the latter Will, the former Will is not revived thereby, although a Counterpart thereof be found in his possession uncancelled and undefaced; because the Revocation is here an express, independent, substantive Act; by which the former Will becomes, to all intents and purposes void, and incapable of taking effect, unless as a new Will by force of a Republication. *Powell on Devises*.

Revocations of a Will may also take place by an actual or intended alteration in the estate of the Testator. And here it is necessary to observe, that the principle which governs cases of such actual alteration, is clearly distinguishable from that which governs cases of an intended alteration only: In the former cases, the Revocation is a consequence of Law, uninfluenced by and independent of any intent in the Testator to revoke or not; but, in the latter cases, the Revocation is an inference from the fact, as furnishing a ground to conclude that such was the intent of the party. *Powell on Devises*.

The following general principles will explain the nature of such Revocations, and the decisions of the Courts thereon; and the instances quoted, though few, may suffice in a Work of this nature:

There is no feature in our Law more prominent than that of an uniform solicitude, on every occasion, to favour the Heir, and prevent his disinherison: This anxious attention to the interest of the lawful Representative has introduced into the Law respecting Devises this fixed principle; namely, that as at the inception of his Will a man must be seised of the estate he devises, so the Law requires that such estate should remain in the same plight and unaltered, to the time of its consummation by his death; and that his original intention in respect thereto should continue, unremittingly, the same until the object of it takes effect, when the Will is consummated thereby; and therefore not only any alteration or new modelling which makes it a different estate, but also any intent of the owner to alter or new-model the estate, will, in construction of Law, render a disposition of it by Will invalid. See *Powell on Devises*, title *Revocations*, and the cases there cited.

Any alteration whatever in a Freehold Estate will operate as a Revocation; even although the act done be necessary to give effect to the disposition made by such

Devise. 3 *P. Wms.* 163, 170. And the rule of Law will be the same, although the act be expresly declared to be done with a view to give effect to the Will, if, in its operation, the Devisor be in as of a new purchase; for the rule being introduced with a view to preserving the inheritance in the Heir at Law, and not with a view to carry into execution the intent of the Devisor, the question is not, whether the Devisor intended to revoke; but whether he intended to do that, the effect of which in Law will be to alter the estate or interest which was in him, by passing it away, and taking it back through a new channel; for if that be his intention, whether he meant to revoke or not is immaterial; the alteration operating as a Revocation in Law, and not as a Revocation by the party; and therefore taking effect without reference to the intent of the party, as to the stability or non-stability of the Will. *Powell on Devises.* See 2 *Atk.* 579.

Since Courts of Equity have considered Articles for the Sale of Estates, or respecting the Settlement of them, as of the nature of actual Conveyances, from the time at which they are agreed to be carried into execution; even Covenants, when the Covenantee has a right to a specific performance, have been allowed in Equity to operate as Revocations of Wills previously made. See 2 *P. Wms.* 329, 624.

But, upon the principle that no *actual* alteration is made in the thing devised, the changing of Trustees, where the estate originally devised is only *the Trust*, will not amount to a Revocation. 1 *C. R.* 23: 2 *C. R.* 109. Nor though the estate is absolutely conveyed to different parties from those who had it at the time of the Devise; as in the case of an intended Purchase being completed, or a Mortgage paid off by the Testator. *Fullarton* v. *Watts*, *Doug.* 561: *Doe d. Gibbons* v. *Pott*, *Doug.* 710: 3 *P. Wms.* 170: 1 *Wilf.* 311.

Under the head of *intended Alterations* of his Estate by the Devisor may be arranged those cases, where the Devisor, after making his Will, attempts a disposition of his Estate, and intends a complete Conveyance, but fails therein, either for want of due formalities in the Instrument that he uses, or from an incapacity to take, in the person to whom he means to convey: In these cases of intended Alteration, it may be shewn that the Devisor had no intent to alter the disposition he has made; and if that be made out in proof, no Revocation will ensue from the circumstance of there having been such imperfect Conveyance. *Powell on Devises.*

In all cases, where a person having lands in Fee devises them, and then parts with or conveys them away, though he afterwards, nay immediately, takes a new Estate in Fee, this will be a Revocation of his Will. 1 *Ro. Ab.* 616. *pl.* 15: 2 *Atk.* 325: *Darley* v. *Darley*, *Bro. P.C.*: 1 *Eq. Ab.* 412. *c.* 12; and see *Powell on Devises.* As where a person having made his Will, and thereby devised his Real Estate, afterwards, in contemplation of an intended marriage, conveys that estate to Trustees for the use of himself and his Heirs till the marriage should take effect, and after the marriage for other particular uses; but happens to die before any marriage had; this has been determined to be a Revocation of his Will as to the disposal of such Estate. *Show. P. C.* 154: 4 *Burr.* 1961; See *Powell on Devises.* But in the case of Coparceners, as also in the case of Tenants in Common, having devised their several parts by Will, any partition between them, or even the levying a fine, in consequence of and to strengthen the same, shall not revoke their Will; if the Conveyance is merely for the purpose of partition. *T. Raym.* 140: 3 *P. Wms.* 170: 1 *Wilf.* 309.

If a man seised of lands in Fee, devises the same by his Will, and afterwards mortgages them in Fee, to secure a sum of money, though in Law the legal estate is conveyed to the Mortgagee, and such Mortgage is therefore held to be a Revocation of the Devise in the Will; yet, in Equity, it is now settled that these Mortgages shall only operate as a Revocation *pro tanto*; (*for so much* as the land is mortgaged for;) by which means the Devisee shall take the land under the Will, subject to the Mortgage. 1 *Vern.* 239: 2 *C. R.* 154: 1 *Salk.* 158; and see *Powell on Devises.*—A Conveyance by way of Mortgage for years, amounts, both in Law and Equity, only to a conditional Revocation, *pro tanto*, of a Devise in Fee: But still the Construction is different in Law and in Equity; for, in Law, the Mortgage is an absolute Revocation *quoad* the Term, though the Reversion passes by the Will notwithstanding; but, in Equity, it is a Revocation *pro tanto* only; as well with respect to the Term as to the Reversion, and the Reversion there draws to it the Equity of redemption. *Powell on Devises.* But if one devise lands to *A.* in Fee, and afterwards mortgage the same lands to *A* this has been decreed to be an entire Revocation, it being inconsistent with the Devise. *Pre. Ch.* 514.

If a man possessed of a Leasehold Estate in Land for a term of years, or for life or lives, by his Will bequeaths the same to *A.*, and after making his Will takes a new lease of the same land for another term of years, or for other life or lives, so that the former lease is surrendered in Fact or in Law, this is a Revocation of his Will, or at least makes the same void as to this Devise; for this is another lease, and not that which he had at the time of the making of the Will. 1 *P. Wms.* 575: 2 *P. Wms.* 168: 3 *P. Wms.* 163.

But these Revocations turn merely on the penning the Will, *viz.* whether the words are sufficient to pass the subsequent renewed Interest; and not on any inability in point of Law, to give by Will an after-taken lease: and therefore if such lease be disposed of by Will, by a proper form of words, it will pass, notwithstanding any subsequent renewal. As if one give "all his Estate, Right and Interest, he shall have to come in such lease at the time of his death."—So, such right of renewal will pass by a general Devise of the residue; or by a Devise of the lease, together with the right of renewal: And the Devise of the lease carries the right of renewal as well as the lease itself. *Salk.* 237: 1 *P. Wms.* 575: 1 *Atk.* 599: 3 *Atk.* 177, 199; and see *Powell on Devises.*

In all the above cases, where a Will is determined to be revoked, and no other Will is made, a person is said to die Intestate; at least as far as concerns the Devises thus revoked. In all cases also of *void Devises*, an Intestacy shall take place as to those, unless there is a particular Devise contained in the Will of the residue of the Testator's estate to some person; in which case the Legacies sink into and become part of such residue, and go to the Residuary Legatee.

V. The

V. THE MOST GENERAL and comprehensive Rule, as to the *Construction of Wills*, is; That a Devise be most favourably expounded, to pursue, if possible, the Will of the Devisor, who, for want of advice or learning, may have omitted the legal or proper phrases: And, therefore, many times, the Law dispenses with the want of words in Devises, that are absolutely requisite in all other instruments. Thus a Fee may be conveyed without words of Inheritance; and an Estate-tail without words of Procreation. By a Will also an Estate may pass by mere Implication, without any express words to direct its course. As where a man devises lands to his Heir at Law, after the death of his Wife: Here, though no Estate is given to the Wife in express terms, yet she shall have an Estate for life by Implication; for the intent of the Testator is clearly to postpone the Heir till after her death; and, if she does not take it, nobody else can. 1 *Vent.* 376. But it seems, that if it is given to a *Stranger*, after the Wife's death, the Devise raises no Implication in favour of the Wife, for it may descend to the Heir during the life of the Wife. *Cro. Jac.* 75. So also, where a Devise is of *Black acre*, to *A.* and of *White-acre* to *B.* in Tail, and if they both die without issue, then to *C.* in Fee; here *A.* and *B.* have Cross Remainders by Implication, and on the failure of either's issue, the other or his issue shall take the whole; and *C.*'s Remainder over shall be postponed till the issue of both shall fail. But where Cross-Remainders are to be raised between more than two, the presumption is against them. See title *Remainder*. And, in general, where any Implications are allowed, they must be such as are necessary, (or at least highly probable,) and not merely possible Implications. And herein there is no distinction between the rules of Law and of Equity; for the Will, being considered in both Courts in the light of a Limitation of Uses, is construed in each with equal favour and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive Law. 2 *Comm. c.* 23.

The intention of the Testator is said, by *Coke*, to be the pole star to guide the Judges in the exposition of Wills; but though it is allowed to be thus considered, in order to explain the words of the Will, yet such intention must be collected from the Will itself, and not from any reports or evidence concerning it; the Courts having been at all times careful of admitting verbal testimony in respect to a Will: And little credit being due to any thing that may have fallen from a man himself, either before or after making his Will; it often appearing that insinuations may be thrown out purposely to mislead those who were interested in the disposal of his property. Though a Parol Averment shall not be admitted to explain a Will, so as to expound it contrary to the import of the words, yet, when the words will bear it, a Parol Averment may be admitted. As, for instance, to ascertain a person; but in no case to alter the estate. 1 *Freem.* 292, *Sleede* v. *Berrier*: 5 *Rep.* 68, Lord *Cheyney*'s Case.

Other Rules of Construction are the following; all consistent with, and dependent upon, that, which lays down the intent of the Testator as the general guide for the exposition of doubtful circumstances:—Where the words of a Will have a plain sense, and no doubt is in any matter within or without the words, touching the matter of the Devise, there the words of the Will shall always be taken to be the intent of the Devisor, and his intent to be what the words say. 2 *And.* 17. All the words of a Will are to be carried to answer the intent of the Devisor; but this is to be understood in cases where the intent of the party may be known by the words that are in the Will. 2 *And.* 10, 11, 134. If there are inconsistent and contradictory words in a Will, some words must be rejected to make it sense. Thus, where a Testator gave the interest of a sum of 6000*l.* to *Mary Comfortle*, his Daughter, for her life, and after her decease gave the money between *Charles Comfortle*, her Husband, and their Children: And in another part of the Will he said, "and in case there be no such Child or Children, I give it to *Charles Comfortle* and such Children."—Lord Chancellor rejected these latter words, as they were absurd and contradictory. 5 *New Abr.* 325: *MS. Rep.*

A Will must have a favourable interpretation, and as near to the mind and intent of the Testator as may be, and yet so withal as his intent may stand with the rules of Law, and not be repugnant thereunto; it being a rule or maxim of Law, *Quod ultima voluntas testatoris perimplenda est, secundum veram intentionem;—sed legum servanda fides, suprema voluntas quod mandat fierique jubet parere necesse est.* In Deeds the rule of Construction is, that the intention must be directed by the words; but in Wills, the words must follow the intent of the Devisor; and such a Construction is to be made of them, as to make use of all the words, and not of part, and so as they may stand together, and have no contrariety in them. *Shep. Abr.* part 10. voc. *Testament*: *Bridg.* 105. See tit. *Words.*

Such a sense shall be made of a Devise, that it may be for the profit of the Devisee, and not to his prejudice.—General and doubtful words in a Will shall not alter an express Devise before, nor carry any thing contrary to the apparent intent.—The clauses and sentences of a Will shall be severally transposed to serve the meaning of it: And Construction shall be made of the words to satisfy the intent, and they shall be put in such order as the intent may be fulfilled.—No sense may be framed upon the words of a Will, wherein the Testator's meaning cannot be found. *Shep. Abr.* voc. *Testament.*

One part of a Will shall be expounded by another: As where a man leaves an estate to another and his Heirs, and afterwards mentions to have given him an estate-tail, Heirs shall be taken to mean Heirs of the body, and the Devisee shall take only an estate-tail. 2 *Freem.* 267, *Bramfield* v. *Popham*. See further on this subject, *Burr.* 912—924; 1110—1113: 1 *Vesey* 142.

Notwithstanding that Wills are thus generally favoured, yet where a person endeavours to make a settlement of his estate against the reason and policy of the Common Law, the Judges are bound to reject it. And where a man, by his Will, makes no other disposition of his land than the Law itself would have done, had he not made any Will, there such a Will is useless, and will be invalid. As if one give land to his Son and his Heirs, or to *A.* and his Heirs, and his Son or *A.* is his Heir at Law, this is *a void Devise*, and the person to whom the land is given shall not take the land under the Will, but by Descent, being the better title, as if no Will had been made; for a Descent strengthens a title, taking away the entry of such as may possibly have right to the estate: But he who has an estate by Devise, is said by Law to be in by Purchase; a worse title than Descent. But if one by Will create an estate in his Heir, different from what he

he would have taken by Law, there the Devise shall be good, the quality of the estate being altered, and it being indeed not the same estate as would have descended to him. *Burn. Eccl. Law.*

Those Devises *are also void* and rejected where the words of the Will are so general and uncertain that no meaning can be collected from them. And, therefore, where a man by Will gives "all to his Mother," these general words will not not pass lands to his Mother; for since the Heir at Law has a plain and uncontroverted title, it would be severe and unreasonable to set him aside, unless the intention of the Testator is evident from the Will; for that would be to set up and prefer a dark, and at best but a doubtful title, to a clear and certain one. *Burn. Eccl. Law.*

So, a Devise of real estate to the Heir of an Alien is void; because an Alien, according to the policy of the *English* Law, can have no Heir, either to inherit or to take by Purchase. See *ante* II. 1. and title *Aliens.*

If a man devises land to another *for ever*, or *in Fee-simple*, or *to him and his Assigns for ever*, or *to him and his*; in all these cases the Fee-simple passes by the Will: For it is evident, by the Testator's intention, that the Gift should continue beyond the life of the Devisee. So, if one devises lands to another, *to give, sell, or do what he pleases with them*, these words, by the intent of the giver, convey the Fee-simple; as does also a Devise to one *and his Blood*; because the Blood runs through every branch of a family. A Devise also to a man and *his Successors*, carries a Fee; for by the word Successors is intended Heirs, the Heir succeeding to the Father. *Burn. Eccl. Law.* See *Cowp.* 352.

A Devise of all his *estate* (or *estates*) whatsoever, or all his *effects* real and personal, comprehends all that a man has, land, money, goods, or other property whatever: Provided, in all cases, that the Will is duly executed, and attested by three Witnesses, so as to pass land. And where there is a Surrender to the use of his Will, a Copyhold Estate will fall under the same Construction. See *Cowp.* 299.

If lands are devised to Trustees for any particular purposes, without using the word Heirs, yet, by Implication of Law, the Trustees must have an Estate of Inheritance sufficient to support such Trust; for there is no difference between a Devise to a man for ever, and to a man upon Trusts which may last for ever. 1 *Eq. Abr.* 176.

Where one devises land to another, on condition that the Devisee shall pay several sums of money in gross, and not saying out of the profits of the land; or shall release a debt due from the Testator; the Devisee, in this case, shall have a Fee-simple in the land, though all the sums of money together, which he is to pay, do not amount to a year's rent of the land; for the Devise shall be intended for his benefit: And if he was to have the land for his life only, he might die before he could receive the amount of the Legacies out of the land, and consequently be a loser: And where there is a sum thus to be paid all at once and immediately, there the person to whom the land is devised shall have the whole of it, though the sum is not the value of the land, or near it; the quantity of the sum thus to be paid in gross, not being material. But if a Devise were to *A.*, paying so much, or such sums of money, *out of the profits of the lands*, there *A.* would take but an estate for his life; for though he takes the land charged with payment of the money, yet he is to pay no faster than he receives, and so he can be no loser. 1 *Eq. Ab.* 166, 7.

It would be endless to multiply individual cases, as to the Construction of Wills, where the words have been held to give an Estate in Fee, in Tail, or for Life. A Devise of Land to *A. B.*, without any further words, gives him only an Estate for Life.—The reason why the word *Estate* has been held to pass a Fee, is, that this word (and which has been extended to the plural, *Estates,*) comprehends not only the land or property that a man has, but also the *Interest* he has in it. The General Rule of Construction, that governs all uncertain cases, of which innumerable instances occur in the Books, seems to be, that "if there be no words of Limitation added, nor words of Perpetuity annexed to the Devise, so as to show the intention of the Testator, to convey the Inheritance to the Devisee, he can only take an Estate for Life." *Cowp.* 299.—But "wherever there are words and expressions, either general or particular, or clauses in a Will, which the Court can lay hold of, to enlarge the estate of a Devisee, they will do so, *to effectuate the intention of the Testator*: But if the intention of the Testator is doubtful, the Rule of Law must take place." *Cowp.* 352.

WIN, *Sax.*] In the beginning or ending of the names of places, signifies that some battle was fought, and victory gained there.

WINCHES, A kind of Engines to draw Barges against the stream of a river. *Stat.* 21 *Jac.* 1. *c.* 32.

WINCHESTER MEASURE, The standard Measure originally kept at *Winchester*. See *Measures*; *Weights.*

WINDAS, or WINDLASS, Corruptly Wanlass. A term for hunting of Deer in Forests to a Stand, &c. See *Wanlass.*

WIND-MILL, A man may not erect a Wind-Mill within any Forest, because it frights Deer, and draws company to the disquiet of the Game. *W. Jones's Rep.* 293. See title *Forest.*

WINDOW-TAX; See title *Taxes.*

WINE, *Vinum.*] Is to be tried twice a year, *viz.* at *Easter* and *Michaelmas*; and none shall sell Wine but at a reasonable price, *stat. antiq.* 4 *Ed.* 3. *cap.* 22. The Lord Chancellor hath authority to set the prices of Wines by the Butt, Barrel, &c. Persons selling at greater prices shall forfeit 40*l.*, and no persons may sell Wine by retail, but such as are licensed by Justices of Peace, &c. *Stats.* 28 *H.* 8. *cap.* 14: 7 *Ed.* 6. *cap.* 5. *Canary* Wine, *Alicant*, and other *Spanish* or sweet Wines were not to be sold for above 1 *s.* 6*d.* a quart, and *Gascoign* and *French* Wine not above 8*d.* the quart, &c. unless appointed at a higher price: And when the Lord Chancellor, Treasurer, &c. set the prices of all Wines, they were to cause them to be written, and Proclamation made thereof in the *Chancery* in Term-time, or in the Cities, Towns, &c. where it was to be sold at those prices. Also the number of Retailers of Wines, in every City and Market Town, was particularly limited. *Stats.* 7 *E.* 6. *c.* 5: 12 & 13 *C.* 2. *c.* 25.—The King was enabled to grant commissions to Commissioners to license persons to retail Wine; and they might, under their seal of office, grant Licences, for any term not exceeding 21 years, under certain rents, &c. the revenue whereof to be paid into the Exchequer; but the privileges of the Universities, and of the Company of Vintners in *London*, &c. were

were saved by this statute, 12 *Car.* 2. *c.* 25. By this statute also (§ 11,) any Brewing or Adulteration of Wine is punished with the forfeiture of 100*l.* if done by the Wholesale Merchant, and 40*l* if done by the Vintner or Retail Trader One single act is a selling by Retail. 2 *Strange* 718. But selling a dozen quart bottles of Wine is not selling by retail measure within the statutes, so as to require a Licence. *Ibid.* 1124. Merchants, &c. selling Wines, who shall adulterate the same, or utter any adulterated Wine, are liable to a penalty of 300*l.*; *stat* 12 C. 2. *c.* 25.

WINE-LICENCES, or the Rents payable to the Crown, by such persons as are licensed to sell Wine by Retail throughout *England*, heretofore, formed part of the Royal Revenue. These were first settled in the Crown by *stat.* 12 *Car.* 2. *c* 25; and, together with the hereditary Excise, made up the equivalent in value for the loss sustained by the Crown in the abolition of the Military Tenures, and the right of Pre-emption and Purveyance: but this revenue was abolished by *stat* 30 *Geo.* 2. *c.* 19, and an annual sum of upwards of 7000*l.* *per ann* issuing out of the new Stamp-duties imposed on Wine Licences, was settled on the Crown in its stead. See further, titles *King* V. 4.; *Taxes.*

See also titles *Alehouses*; *Customs*; *Navigation-Acts*, &c.

WINTER HEYNING, The season between the 11th day of *November* and the 23d day of *April*; which is excepted from the liberty of commoning in the Forest of *Dean*, &c. *Stat.* 23 *Car.* 2. *c.* 3. See title *Forest.*

WIRE, of Iron or Gold or Silver, is one of the articles, the importation of and duties on which are regulated by the Navigation-Acts, and other statutes; and is also liable to an Excise-duty on the Manufacture. *Stat* 27 *Geo* 3. *c.* 13.

WIRE-DRAWERS. By *stat.* 9 & 10 *W.* 3. *c.* 39. Silver-Wire drawn, for making Gold and Silver Thread, shall contain certain quantities to the pound weight, on pain of 5*s.* *per* ounce wanting. By *stat.* 15 *Geo.* 2. *c.* 20, the Silver Wire to be drawn for Silver Thread, is to hold eleven ounces and fifteen penny-weights; and all Silver to be gilt, and used in the Wire-Drawers' trade, shall hold eleven ounces and eight penny-weights of fine Silver on the pound weight *Troy*; and four penny-weights and four grains of Gold, to be laid upon each pound of Silver, on forfeiture of 5*s.* for every ounce made otherwise. And see *stat.* 28 *Geo.* 3. *c.* 7; by which Copper, Brass, and Metals, inferior to Silver, are directed to be spun on *Thread*, not on *Silk*; which Act also regulates making Copper-Wire, Lace, Spangles, &c. —Wire-Drawers are to take out annual Licences, paying 2*l.* for the same. *Stat.* 24 *Geo.* 3. *c.* 41.

WISTA, A measure of Land among the *Saxons*; being the quantity of Half a Hide; the Hide being 120 Acres. *Mon. Ang.* i. 133.

WITAM, *Secundum* Witam *jurare*, Was for a person to purge himself by the oaths of so many Witnesses, as the offence required. *Leg. Inæ, cap.* 63.

WITCHCRAFT; See *Conjuration.*

WITE, A *Saxon* word used for Punishment; a Pain, Penalty, Mulct, &c. So *Witefree* is a term of privilege or immunity from fines and amercements. *Sax Dict.* Hence come the words *Bloodwite*, *Lecherwite*, &c.

WITENA-GEMOT, or WITTENA-GEMOT, Sax. *Conventus Sapientum.*] A Convention or Assembly of great men, to advise and assist the King, answerable to our Parliament, in the time of the *Saxons*; or, rather an Assembly of the whole Nation. See title *Diets*: *Squire's Anglo-Saxon Government* 165, &c.; and this Dictionary, title *Parliament.*

WITENS, The Chief of the *Saxon* Lords or *Thanes*, their Nobles and wise men. *Sax. Dict.*

WITERDEN, A taxation of the *West Saxons*, imposed by the public Council of the kingdom. *Chart. Ethelwolf. Reg. Anno* 855.

WITHERNAM, From the Sax. *Wither*, i. e. *altera*, or, as some say, *contrà*, & Nam, *captio.*] Where a Distress is driven out of the County, and the Sheriff upon a Replevin cannot make deliverance to the party distrained; in this case the Writ of Withernam is directed to the Sheriff, for the taking as many of *his* beasts or goods, who did thus unlawfully distrain, into his keeping, till the party make deliverance of the first Distress, &c. It is therefore a *taking* or Reprisal of *other* cattle or goods, in lieu of those that were formerly unjustly taken and essoined, or otherwise withholden. *F. N. B.* 68, 69: 2 *Inst.* 140: *Stat. Westm.* 2. 13 *Ed.* 1. *c.* 2. See title *Replevin* I.; V.

This Writ is granted on the return of the Sheriff upon the *Alias* and *Pluries* in Replevin, that the Cattle, &c. are essoined, by reason whereof he cannot replevy them; and it appears by our books, that the Sheriff may award Withernam on Replevin sued by plaint, if it be found by inquest in the county, that the Cattle were essoined according to the Bailiff's return, &c. Though upon the Withernam awarded in the County Court, if the Bailiff doth return that the other party hath not any thing, there shall be an *Alias* and *Pluries*, and so infinite, and no other remedy there: But on a Withernam returned in the King's Bench, or Common Pleas, if the Sheriff return that the party hath not any thing, &c. a *Capias* shall issue against him, and Exigent and Outlawry. *New Nat. Br.* 166. In Replevin, &c. the Sheriff returns *averia elongata sunt* by the defendant; thereupon a Writ of Withernam is awarded; and if he return *nihil*, the plaintiff proceeds to Outlawry by *Alias* and *Pluries Capias in Withernam*, and so to Exigent: There is some difference where the defendant appeareth upon the return of the *Pluries Capias*, and when he stays longer, and appears on the return of the Exigent and not before; for in the first case his Cattle shall not be taken in Withernam: but he must find pledges to make deliverance, or be committed; and, in the last case, he shall not only find pledges for making deliverance, but shall be fined, and his Cattle may be taken in Withernam: In both cases, the plaintiff may declare for the unjust taking, and yet detaining of his Cattle, and so go to trial upon the right; and if it is found for him, then he shall recover the value of the Cattle, with costs and damages, or may have the Cattle again by a *retorno habendo* directed to the Sheriff; but if it be found for the defendant, he shall keep the Cattle, and have costs and damages for the unjust prosecution. 1 *Brownl.* 180.

A defendant in Replevin may have a Writ of Withernam against the plaintiff; as if the defendant hath a Return awarded for him, and he sueth a writ *de retorno habendo*, and the Sheriff return upon the *Pluries*, *quod averia elongata sunt*, he shall have a *sci. fac.* against the pledges which the plaintiff put in to prosecute, &c.; and if they have nothing, then he shall have a *Capias ad Withernam.*

Withernam against the plaintiff. The Cattle taken in Withernam are to be *ad valentiam*, *i e*. to the value of the Cattle that were first taken and detained; for it is to be understood not only of the number of the Cattle, but according to the worth and value; otherwise he that brings the Replevin and Withernam will be deprived of his satisfaction. Where Cattle have been taken in Withernam, they have been, by a Rule of Court, delivered back and restored to the owner, on his payment to the plaintiff of all his damages, costs, and expences. 3 *Lill. Abr.* 690. Cattle taken in Withernam may be milked, or worked reasonably; because they are delivered to the party as his own Cattle, *&c. Contrà* of Cattle distrained. 1 *Leon* 302.

This word Withernam also signifies Reprisals taken at Sea by Letters of Mart. See *Letters of Marque*.

WITHERSAKE, An Apostate, or perfidious Renegado. *Leg Canut. cap.* 27.

WITHOUT DAY: See *Sine Die*.

WITNESS, *Testis.*] One who gives Evidence in a cause; an indifferent person to each party, sworn to speak the truth, the whole truth, and nothing but the truth. 2 *Lill. Abr.* 700. See title *Evidence*.

WITTENA-GEMOT; See *Witena-Gemot*.

WOAD, A profitable herb much used for the dying of Blue Colours. See title *Tithes*.

WOLD, *Sax.*] A Down, or open Champaign Ground, void of Wood; as *Stow-in the Wolds*, *Cotswold*, in *Gloucestershire*, &c.

WOLFESHEAD, or WOLFERHEFOD, Sax. *Caput Lupinum.*] Was the condition of such as were Outlawed in the time of the *Saxons*; who, if they could not be taken alive to be brought to justice, might be slain, and their heads brought to the King; for they were no more accounted of than a Wolf's Head, a beast so hurtful to man. *Leg. Edw. Conf.*: *Bract. lib.* 3. See title *Outlaw*.

WONG, *Saxon.*] A Field. *Spelm.*

WOOD. If any person purposely burned any pile of Wood, or barked any trees, *&c.* the owner might recover treble damages for it in trespass. *Stat. an iq.* 37 *Hen.* 6. *c.* 6. None may destroy any Woods, by turning them into Tillage or Pasture, *&c.* if two Acres or more in quantity, on pain of 40*s*. an Acre: And no person shall suffer his swine to go in a Wood unringed, under penalties. Where there is Wood or Coppice in Common, the Lord may inclose a fourth part, *&c. Stats.* 35 *H.* 8. *c.* 17; 13 *Eliz. c.* 25. If Coppice Wood is felled at or under twenty-four years' growth, there must be left twelve standils of Oaks in every Acre, or the like number of Ash, Elm, *&c.* on pain of forfeiting 3*s* 6*d*. for every standil wanting; and they are not to be cut down till ten inches square within three foot of the ground, or until so many years after they are left, under the penalty of 6*s*. 8*d*. *&c. Stat.* 35 *Hen.* 8. *c.* 17. All Woods or Coppices felled at fourteen years' growth, shall be preserved from destruction for eight years; and no Cattle be put into the ground from the time of felling till five years afterwards. *Stat. ibid.*; and *stat.* 13 *Eliz c.* 25.—See further, titles *Arson*; *Larceny*; MISCHIEF, *Malicious*; *Trees*, &c. If *A.* plant a Tree upon his own ground, and in growing its roots extend into the Land of *B.* adjoining, they are Tenants in Common of this Tree; But if all the root grows in the ground of *A.* though the boughs overshadow *B.*'s Land, yet the branches follow the root, and the property of the whole is in *A.* 1 *Ld. Raym.* 737.

WOOD-CORN, A certain quantity of Grain paid by the Tenant of some Manors to the Lord, for the liberty to pick up dead or broken Wood. *Cartular. Burgi S. Petri MS.* 142.

WOOD-GELD, The cutting of Wood within the Forest, or rather money paid for the same to the Foresters; or it signifies to be free from payment of money, for taking Wood in any Forest. *Cromp. Jurisf.* 157: *Co. Lit.* 233.

WOODMEN, Seem to be those in Forests, that have their charge particularly to look to the King's Woods there. *Cromp. Jurisf.* 146. See title *Forest*.

WOODMOTE, The old name of that Court of the Forest which is now called the Court of Attachments; which was wont to be held at the will of the chief Officers of the Forest, without any certain time, till since the Statute of *Charta de Foresta*. *Manwood*, *c.* 22. *p.* 207. See title *Forest*.

WOOD-PLEA-COURT, A Court held twice in the year in the Forest of *Clun* in *Shropshire*, for determining all matters of Wood and Agistments there.

WOODSTOCK. Wool and Yarn may be sold in *Woodstock* on market and fair days. *Stat.* 18 *Eliz. c.* 21.

WOODWARD, An Officer of the Forest whose office consists in looking after the Woods, and Vert and Venison, and presenting offences relating to the same, *&c.* Woodwards may not walk with bow and shafts, but with Forest bills. *Cromp. Jurisf.* 201: *Manwood*, *par.* 1. 189. See title *Forest*.

WOOL, Being a Staple Commodity of the greatest value in this kingdom; the employment of our Poor at home, and our most beneficial trade abroad, depending in a great measure upon it; divers good Laws have from time to time been made to preserve the same entirely to ourselves, and to prevent its being transported to other nations. An old *stat.* of 27 *Ed.* 3, declared it Felony to transport Wool: But the Felony was repealed by *stat.* 38 *Ed.* 3. *c.* 6; and see *stat.* 11 *Ed.* 3. *c.* 1. The *stat.* 8 *Eliz. c.* 3, prohibited the transportation of Live Sheep on severe penalties. By *stat.* 12 *Car.* 2. *c.* 30, any person exporting any Wool, Yarn, Sheep, or Fullers' Earth, was to forfeit the same; and for every pound weight of goods, 3*s*. And the owners of the ship in which it was transported, being privy to the offence, were to forfeit all their interest of the said ship; also the master and mariners assisting, all their goods; and any persons might seize such Wool, and should be entitled to one moiety, and the King to the other moiety of forfeitures, *&c.* The *stat.* 13 *&* 14 *Car.* 2. *c.* 18, made the transportation of Wool Felony again; though this being thought too severe, *stat.* 7 *&* 8 *W.* 3. *c.* 28, a second time repealed the Felony, and ordained that exporting Wool beyond Sea should incur a forfeiture of the vessel, and treble value; and persons aiding and assisting, to suffer three years' imprisonment.

By *stat.* 9 *&* 10 *W.* 3. *c.* 40, the former laws were explained, and a further provision made against transporting Wool; by obliging entries to be made of Wool shorn; and Wool not to be carried near the Sea-coasts, but between sun-rising and sun-setting, *&c.*—Unlawful exporters of Wool, where judgment was obtained against

against them, were to pay the sum recovered within three months; or be liable to transportation for seven years as Felons. *Stat.* 4 *Geo.* 1. *cap.* 11.—The Admiralty were directed to appoint three sixth-rate ships, and eight sloops, to cruise on the coasts, and search and seize vessels having Manufactures of Wool of the kingdom of *Ireland*, to be exported to foreign parts; which, with the ships, shall be forfeited, &c. *Stat.* 5 *Geo.* 2. *c.* 21. All Woollen Manufactures are to be shipped from *Dublin*, and certain other ports in *Ireland*, and imported here into *Biddeford*, and ports named, and none others; and be brought from thence hither in ships built in *Great Britain* or *Ireland*, and duly registered on oath. *Stat.* 12 *Geo.* 2. *c.* 21.

By *stat.* 28 *Geo.* 3. *c.* 38, all the former statutes respecting the Exportation of Wool and Sheep are repealed: and an infinite variety of regulations and restrictions upon the subject is consolidated into that statute, which it behoves the dealers in and carriers of Wool to pay particular attention to. It is given almost at length in 4 *Burn. J.* title *Woollen Manufacture*; but as it contains nearly 100 long clauses, it is impossible to give any adequate representation of it in an abridgment. The principal prohibitions are, that if any person shall send or receive any Sheep on board a ship or vessel, to be carried out of the kingdom, the Sheep and Vessel are both forfeited, and the person so offending shall forfeit 3 *l.* for every Sheep, and suffer solitary imprisonment for three months. But Wether Sheep, by a licence from the Collector of the Customs, may be taken on board for the use of the ship's company. And every person who shall export out of the kingdom any Wool or Woollen Articles, slightly made up, so as easily to be reduced to Wool again; or any Fullers' Earth, or Tobacco-pipe Clay; and every currier, ship-owner, commander, mariner, or other person, who shall knowingly assist in exporting, or in attempting to export, these articles, shall forfeit 3 *s* for every pound weight, or the sum of 50 *l.* in the whole, at the election of the prosecutor, and shall also suffer solitary imprisonment for three months. But Wool may be carried Coastwise upon being duly entered, and security being given, according to the directions of the statute, to the officer of the port from whence the same shall be conveyed. And the Owners of Sheep, which are shorn within five miles of the Sea, and ten miles in *Kent* and *Sussex*, cannot remove the Wool, without giving notice to the officer of the nearest port, as directed by the statute. See further, this Dict. title *Manufactures*.

WOOL-DRIVERS, Such as buy Wool in the country of the Sheep-owners, and carry it on horseback to the clothiers, or to market towns, to sell again. *Stat.* 2 & 3 *P.* & *M. c.* 13.

WOOLFERHEFOD; See *Wolfeshead*.

WOOL-KEY, Its Ground, Wharf, and Key, in the parish of *All-Saints, Barking*, in *London*, vested in trustees for his Majesty, his heirs and successors, &c. *Stat.* 8 *Geo.* 1. *c.* 31.

WOOLLEN MANUFACTURES, Combination of Weavers, Wool-combers, &c. prohibited, *stats.* 12 *G.* 1. *c.* 34; 29 *G.* 2. *c.* 33. Extended to Combers of *Jersey* Wool; Frame-work-knitters and Stocking-makers, *stat.* 12 *G.* 1. *c.* 34. § 8; and to other Manufacturers, *stat.* 22 *G.* 2. *c.* 27. § 2. See title *Conspiracy*. Regulations for the payment of Wages, *stat.* 30 *G.* 2. *c.* 12. Punishment of End-gatherers, 13 *G.* 1. *c.* 23. § 8 Having in custody Cloth stolen from the rack, or Wool left to dry, first offence treble value, third transportation, *stat* 15 *G.* 2. *c.* 27. See further, for some later and more efficient acts, this Dictionary, title *Manufactures*.

WOOL-STAPLE, Mentioned in *stat.* 51 *H.* 3. *stat.* 5, is, The city or town where Wool was sold. See *Staple*.

WOOLWINDERS, Those that wind up every Fleece of Wool, intended to be packed and sold by weight, into a kind of bundle, after it is cleansed, as required by statute, to avoid deceits by thrusting in locks of refuse Wool, and Thrumbs, to gain weight: They must be sworn to perform this office truly, between the Owner and the Wool-buyer or Merchant. Persons winding and selling deceitful Wool, shall forfeit for every fleece 6*d.* And if Wool-packers do not make good and due packing, without putting any locks, Pelt Wool, sand, earth, dirt, &c. in fleeces, Action of Trespass and Deceit lies against them, &c. *Stats.* 8 *H.* 6. *c.* 22; 23 *H.* 8. *c.* 17.

WORCESTERS, and Worsted Cloths, Are mentioned in many of our old statutes, as *stats.* 17 *R.* 2: 7 *E.* 4; 14 & 15 *Hen.* 8. *c.* 3, &c.

WORDS, Which may be taken or interpreted by Law in a general or common sense, ought not to receive a strained or unusual construction: Ambiguous Words are to be construed so as to make them stand with Law and Equity; and not to be wrested to do wrong. A *Latin* Word in pleading, which signified divers things, was well used to express that thing intended to be expressed by it: Uncertain Words in a Declaration, are made good and certain by a Plea in Bar, where notice is taken of the meaning of them; and Words which are in themselves uncertain, may be made certain by subsequent or following Words. The different placing of the same Words may cause them to have a different sense and construction: A Word which is written short, or abbreviated, is not good without a dash to distinguish it: Senseless Words are void and idle; though they shall not hurt where the sense is good without them. Nor shall Words in Deeds that are needless, impeach a clause certain and perfect without such Words. 2 *Lill. Abr.* 711, 712, 713, 714: *Hob.* 313.

The following general rules and maxims are stated by *Blackstone*, as having been laid down by the Courts of Justice, for the construction and exposition of the several species of Common Assurances or Conveyances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. 2 *Comm.* *c.* 23.

1. That the construction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of Law will admit. For the maxims of Law are, that *verba intentioni debent inservire*; and *benigne interpretamur chartas propter simplicitatem laicorum.* And therefore the construction must also be reasonable, and agreeable to common understanding. *And.* 60: 1 *Bulst.* 175: *Hob.* 304.

2. That *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*: but that, where the intention is clear, too minute a stress be not laid on the

the strict and precise signification of Words; *nam qui hæret in litera, hæret in cortice* 2 *Saund.* 157. Therefore, by a grant of a remainder a reversion may well pass, and *è converso*. *Hob* 27. And another maxim of Law is, that *mala grammatica non vitiat chartam*; neither false *English* nor bad *Latin* will destroy a Deed. Which perhaps (says *Blackstone*) a classical critic may think to be no unnecessary caution. See 10 *Rep* 133: 1 *Inst*. 225: 2 *Show* 334.

3. That the construction be made upon the entire deed, and not merely upon disjointed parts of it. *Nam ex antecedentibus et consequentibus fit optima interpretatio* 1 *Bulst*. 101. And therefore that every part of it be (if possible) made to take effect; and no Word but what may operate in some shape or other. 1 *P Wms*. 457 *Nam verba debent intelligi cum effectu, ut res magis valeat quem pereat*. *Plowd*. 156.

4. That the Deed be taken most strongly against him that is the Agent or Contractor, and in favour of the other party; *Verba fortiùs accipiuntur contra proferentem* As, if Tenant in Fee simple grants to any one an estate for life; generally, it shall be construed an estate for the life of the Grantee. 1 *Inst* 42. For the principle of self-preservation will make men sufficiently careful, not to prejudice their own interest by the too extensive meaning of their Words; and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an Indenture and a Deed-poll: for the Words of an Indenture, executed by both parties, are to be considered as the Words of them both; for, though delivered as the Words of one party, yet they are not his Words only, because the other party hath given his consent to every one of them. But in a Deed-poll, executed only by the Grantor, they are the Words of the Grantor only, and shall be taken most strongly against him. 1 *Inst*. 134. And, in general, this rule, being a rule of some strictness and rigour, is the last to be resorted to; and is never to be relied upon, but where all other rules of exposition fail. *Bac. Elem. c.* 3.

5. That, if the Words will bear two senses, one agreeable to, and another against, Law; that sense be preferred, which is most agreeable thereto. As if Tenant in Tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the Law; and not for the life of the Lessee, which is beyond his power to grant, 1 *Inst*. 42.

6. That in a Deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received, and the latter rejected; contrary to the general rule as to the exposition of Wills: yet in both cases we should rather attempt to reconcile them. *Hardr*. 94: *Cro Eliz*. 420: 1 *Vern*. 30.

See further, titles *Conveyance*; *Deeds*; *Statutes*; *Wills*, &c.

As to Words Defamatory that are actionable, see title *Action*.—And criminal, making *Libels* and *High Treason*, see titles *Libel*; *Treason*.

WORKHOUSES: See this Dict. titles *Police*; *Poor*; *Transportation*.

WORMTAK *Item est ibidem. apud, &c. de Wormtak, vi sol. viii. den solvend. annuatim ad Festum S. Martini. Inquisit. hæres*. 22 *Rub* 2

WORT, or WORTH, From Sax *Weorth*.] A Curtilage, or country farm. *Mat West*. 870

WORTHIEST OF BLOOD. An expression of the Lawyers, signifying the preference given in Descents, to sons before daughters. See title *Descent*,

WORTHINE OF LAND, A certain quantity of ground, so called in the manor of *Kingsland* in the county of *Hereford*: And in some places the tenants are called Worthies. *Consuetud. Manor. de Hedenham in Com. Bucks* 18 *Edw* 3.

WRECK, Lat. *Wreccum Maris*, Fr *Wreck de Mer*, sometimes writ *Wreche Wrec*, & *Seup werpe*. quasi *Seaup-werp*, i e *Ejectus Maris*.] Such goods as, after a Ship-wreck, are cast upon the land by the Sea, and left there, within some county: for they are not Wrecks so long as they remain at Sea, in the jurisdiction of the Admiralty. 2 *Inst*. 167. Where a Ship perisheth on the Sea, and no man escapes alive out of it, this is called Wreck. And the goods in the Ship being brought to land by the waves, belong to the King by his prerogative, or to the Lord of the manor. 5 *Rep*. 106. By the Common Law all Wrecks belonged to the Crown; and therefore they are not chargeable with any customs, and for that goods coming into the kingdom by Wreck, are not imported by any body, but cast ashore by the wind and Sea. But it was usual to seize Wrecks to the King's use, only when no Owner could be found; and in that case the property being in no man, it of consequence belongs to the King, as Lord of the Narrow Seas, &c. *Bract. lib*. 2. *c*. 5.

The profits arising from Shipwrecks are classed, by *Blackstone*, among the articles of the King's ancient ordinary revenue. These are declared to be the King's property by the prerogative statute, 17 *Ed*. 2. *st*. 1. *c*. 11, and were so, long before, at the Common Law.

It is worthy observation, how greatly the Law of Wrecks has been altered, and the rigour of it gradually softened in favour of the distressed proprietors. Wreck, by the ancient Common Law, was where any Ship was lost at Sea, and the goods or cargo were thrown upon the land; in which case these goods, so wrecked, were adjudged to belong to the King: for it was held, that, by the loss of the Ship, all property was gone out of the original Owner. *Doct & Stud. D*. 2. *c*. 51. But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was first ordained by King *Henry* I., that if any person escaped alive out of the Ship, it should be no Wreck; and afterwards King *Henry* II., by his charter, declared, that if on the coasts of either *England*, *Poictou*, *Oleron*, or *Gascony*, any Ship should be distressed, and either man or beast should escape or be found therein alive, the goods should remain to the Owners, if they claimed them within three months; but otherwise should be esteemed a Wreck, and should belong to the King, or other Lord of the franchise. This was again confirmed with improvements by King *Richard* I.; who, in the second year of his reign, not only established these concessions, by ordaining that the Owner, if he was shipwrecked and escaped, *omnes res suas liberas et quietas haberet*, but also, that, if he perished, his children, or, in default of them, his

his brethren and sisters, should retain the property; and, in default of brother or sister, then the goods should remain to the King. And the Law, as laid down by *Bratton* in the reign of *Henry* III., seems still to have improved in its equity. For then, if not only a dog (for instance) escaped, by which the owner might be discovered, but if any certain mark were set on the goods, by which they might be known again, it was held to be no Wreck. *Bract. l.* 3. *c.* 3. And this is certainly most agreeable to reason; the rational claim of the King being only founded upon this, that the true owner cannot be ascertained. Afterwards, in the *stat. Westm.* 1; 3 *Ed.* 1. *c.* 4, the time of limitation of claims, given by the charter of *Henry* II., is extended to a year and a day, according to the usage of *Normandy*: and it enacts, that if a man, a dog, or a cat, escape alive, the vessel shall not be adjudged a Wreck. These animals are only put for examples; for it is now held, that not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as Wreck. The statute further ordains, that the Sheriff of the county shall be bound to keep the goods a year and a day, that if any man can prove a property in them, either in his own right or by right of representation, they shall be restored to him without delay; but, if no such property be proved within that time, they then shall be the King's. 2 *Inst.* 168. If the goods are of a perishable nature, the Sheriff may sell them, and the money shall be liable in their stead. *Plowd.* 166. This revenue of Wrecks is frequently granted out to Lords of manors, as a royal franchise; but if any one be thus entitled to Wrecks in his own land, and the King's goods are wrecked thereon, the King may claim them at any time, even after the year and day. 2 *Inst.* 168.

In order to constitute a legal Wreck, the goods must come to land. If they continue at Sea, the Law distinguishes them by the barbarous and uncouth appellations of *jetsam*, *flotsam*, and *ligan*. *Jetsam* is, where goods are cast into the Sea, and there sink and remain under water: *Flotsam* is, where they continue floating or swimming on the surface of the waves: *Ligan*, or *Lagan*, is, where they are sunk in the Sea, but tied to a cork or buoy, in order to be found again. 5 *Rep.* 106. These are also the King's, if no owner appears to claim them; but, if any Owner appears, he is entitled to recover the possession. For even if they be cast overboard, without any mark or buoy, in order to lighten the Ship, the Owner is not by this act of necessity construed to have renounced his property: much less can things *ligan* be supposed to be abandoned, since the Owner has done all in his power to assert and retain his property. These three are therefore accounted so far a distinct thing from the former, that by the King's grant to a man of Wrecks, things *jetsam*, *flotsam*, and *ligan* will not pass. 5 *Rep.* 108. See title *Jetsam*, &c.

Wrecks, in their legal acceptation, are at present not very frequent: for, if any goods come to land, it rarely happens, since the improvement of Commerce, Navigation, and Correspondence, that the Owner is not able to assert his property within the year and day limited by Law. And in order to preserve this property entire for him, and if possible to prevent Wrecks at all, our Laws have made many very humane regulations. By *stat.* 27 *Edw.* 3. *c.* 13, if any Ship be lost on the shore, and the goods come to land, (which cannot, says the Statute, be called Wreck,) they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is called Salvage. See title *Insurance* II. 6.—Also, by the Common Law, if any persons (other than the Sheriff) take any goods so cast on shore, which are not legal Wreck, the Owners might have a commission to inquire and find them out, and compel them to make restitution. *F. N. B.* 112. And by *stat.* 12 *Ann st.* 2. *c.* 18, confirmed by *stat.* 4 *Geo.* 1. *c.* 12, in order to assist the distressed, and prevent the scandalous illegal practices on some of our Sea-coasts, it is enacted, that all head officers and others of towns near the Sea shall, upon application made to them, summon as many hands as are necessary, and send them to the relief of any Ship in distress, on forfeiture of 100*l.*; and in case of assistance given, Salvage shall be paid by the Owners, to be assessed by three neighbouring Justices. All persons that secrete any goods shall forfeit their treble value: and if they wilfully do any act whereby the Ship is lost or destroyed, by making holes in her, stealing her pumps, or otherwise, they are guilty of Felony, without benefit of clergy. Lastly, by *stat.* 26 *Geo.* 2. *c.* 19, plundering any Vessel either in distress, or wrecked, and whether any living creature be on board, or not, (for, whether Wreck or otherwise, it is clearly not the property of the populace,) or preventing the escape of any person that endeavours to save his life, or wounding him with intent to destroy him, or putting out false lights in order to bring any Vessel into danger; are all declared to be capital Felonies; in like manner as the destroying of trees, steeples, or other stated sea-marks, is punished by *stat.* 8 *Eliz.* *c.* 13, with a forfeiture of 100*l.* or Outlawry. Moreover, by the said statute of 26 *Geo.* 2, pilfering any goods cast ashore is declared to be Petty Larceny; and many other salutary regulations are made, for the more effectually preserving Ships, of any nation, in distress. 1 *Comm. c.* 8.

The year and day, in the *stat. Westm.* 1, shall be accounted from the seizure; and if the Owner of the goods die within the year, his executors or administrators may make proof. 2 *Inst.* 167; 5 *Rep.* 106. If a man have a grant of Wreck, and goods are wrecked upon his lands, and another taketh them away before seizure, he may bring Action of Trespass, &c. For, before they are seized, there is no property gained to make it Felony. 1 *Hawk. P. C. c.* 33. § 24.

If goods wrecked are seized by persons having no authority, the Owner may have his action against them; or if the wrong-doers are unknown, he may have a commission to inquire, &c. 2 *Inst.* 166. Goods lost by Tempest, or Piracy, &c. and not by Wreck, if they afterwards come to land, shall be restored to the Owner. *Stat.* 27 *Ed.* 3. *st.* 2. *c.* 13. Where a Ship is ready to sink, and all the men therein, for the preservation of their lives, quit the Ship, and afterwards she perishes; if any of the men are saved and come to land, the goods are not lost. A Ship on the Sea was chased by an enemy; the men therein, for the security of their lives, forsook the Ship, which was taken by the enemy, and spoiled of her goods and tackle, and then turned to sea; after this by stress of weather she was cast on land, where it

happened her men safely arrived; and it was resolved, that this was no Wreck. 2 *Inst.* 167. See further, titles *Navy*; *Pilots*, &c.

WRECKFREE, Is to be exempt from the forfeiture of shipwrecked goods and vessels; which King *Edw.* I. by charter granted to the Barons of the Cinque Ports. *Placit. temp. Edw.* I.

WRIT.

Breve, from Sax. *Writan*, i. e. *Scribere*.] In general is the King's Precept, in writing under seal, issuing out of some Court, to the Sheriff, or other person, and commanding something to be done touching a suit or action, or giving commission to have it done. *Terms de Ley*: 1 *Inst.* 73. Also a Writ is said to be a formal letter of the King's, in parchment sealed with a seal, directed to some Judge, Officer, or Minister, &c. at the suit or plaint of a Subject, requiring to have a thing done, for the cause *briefly* expressed, which is to be discussed in the proper Court, according to Law. *Old Nat. Br.* 4: *Shep. Abr.* 245. Of Writs there are divers kinds, in many respects; some Writs are grounded on Rights of Action, and some in nature of Commissions; some *mandatory* and *extrajudicial*, and others *remedial*; some are *patent* or open; some *close* or sealed up; some Writs issue at the suit of parties; some are of *office*; some *ordinary*; and others of *privilege*; some Writs are directed to the Sheriffs, and in special cases to the party, &c. 1 *Inst.* 289: 2 *Inst.* 39: 7 *Rep.* 20.

The Writs in Civil Actions are either *original* or *judicial*: Original Writs are issued out in the Court of Chancery, for the summoning a defendant to appear, and are granted before the suit is begun, to begin the same; and Judicial Writs issue out of the Court where the Original is returned, after the suit is begun: The Originals bear date in the name of the King; but Judicial Writs bear *teste* in the name of the Chief Justice. See titles *Original*; *Process*; *Latitat*; *Capias*, &c.—A Writ without a *teste* is not good, for the time may be material when it was taken out, and it is proved by the *teste*; and if it be out of the Common Law Courts, it must bear date some day in Term (not being *Sunday*); but in Chancery, Writs may be issued in Vacation as well as Term-time, as that Court is always open. *F. N. B.* 51, 147: 2 *Inst.* 40: *Lutw.* 337: See *Stat.* 13 *Car.* 2. *c.* 2.

Writs in Actions are likewise *real*; concerning the possession of lands, called Writs of Entry, or of Right, touching the property, &c.; *personal*, relating to goods, chattels, and personal injuries; and *mixed*, for the recovery of the thing, and damages. 2 *Inst.* 39. Writs may be *possessory*, of a man's own possession; or *ancestrel*, of the seisin and possession of his Ancestor: There are also certain Writs of Prevention or Anticipation; and of Restitution, &c. But the most common Writs in daily use, are in Debt, Detinue, Trespass, Action upon the Case, Accompt, and Covenant, &c. which with others must be rightly directed, or they will be naught. *F. N. B.*: *Style* 42, 237. In all Writs care is to be taken, that they be laid and formed according to the cause or ground of them, and so pursued in the process thereof: Though the Writ in some cases may be general; and the Count or Declaration special. *Hob.* 18, 84, 251.

Writ of Assistance, A Writ issuing out of the Exchequer to authorise any person to take a Constable, or other public officer, to seize goods or merchandize prohibited and uncustomed, &c. There is also a Writ of this name issued out of the Chancery, to give possession of land. *Stat.* 14 *Car.* 2. *c.* 1.

Writ of Delivery, In what cases grantable, *Stat.* 13 & 14 *Car.* 2. *c.* 11. § 30.

Writ of Entry; See title *Entry*.

Writ of Inquiry of Damages, A judicial Writ, that issues out to the Sheriff upon a Judgment by Default, in Action, of the Case, Covenant, Trespass, Trover, &c. commanding him to summon a Jury to inquire what Damages the plaintiff hath sustained *occasione præmissorum*. See title *Judgment* I.: *Tidd* 314.

The Writ of Inquiry should be returnable on a general return, or day certain, according to the nature of the proceedings: if by Original, on a general return; if by Bill, on a day certain. But where, in an Action by Bill against an Attorney, the Writ of Inquiry was returnable on a general return, it was holden not to be error: but only a miscontinuance, and cured by the Statutes of Jeofails. 2 *Stra.* 947: *Say. Rep.* 245.

A Writ of Inquiry of Damages is a mere Inquest of Office, to inform the conscience of the Court; who, if they please, may themselves assess the Damages. And it is accordingly the practice, in Actions upon Promissory Notes and Bills of Exchange, instead of executing a Writ of Inquiry, to apply to the Court for a rule to shew cause, why it should not be referred to the Master to see what is due for principal and interest, and why final judgment should not be signed for that sum, without executing a Writ of Inquiry; which rule is made absolute, on an affidavit of service, unless good cause be shewn to the contrary. *Tidd's Pract. K. B.*—This practice, however, is confined to Actions upon Promissory Notes and Bills of Exchange, where the *quantum* of Damages depends on figures, which may be as well ascertained by the Master as before a Jury; and therefore where the defendant had suffered judgment by default, in an Action of *Assumpsit*, on a foreign Judgment, the Court refused to make the rule absolute, for a reference to the Master; saying, this was an attempt to carry the rule further than had yet been done, and as there was no instance of the kind, they would not make a precedent for it. 4 *Term Rep.* 493. The Court has also refused to make the rule absolute, in an Action upon a Bill of Exchange, for foreign money; the value of which is uncertain, and can only be ascertained by a Jury. 5 *Term Rep.* 87. See *Cro. Eliz.* 536: *Cro. Jac.* 617.

Where the Jury, upon the trial of an Issue, omit to assess the Damages, the omission may, in some cases, be supplied by a Writ of Inquiry. As to which it seems, that where the matter, omitted to be inquired by the principal Jury, is such as goes to the very point of the Issue, and upon which, if it be found by the Jury, an Attaint will lie against them, by the party, if they have given a false verdict; there, such matter cannot be supplied by a Writ of Inquiry, because thereby the plaintiff may lose his Action of Attaint, which will not lie upon an Inquest of Office. *Tidd's Pract.*

Thus where, in Detinue, the Jury omitted to assess the value of the goods, the Court refused to supply the omission by a Writ of Inquiry. And so where the Jury, who try the issue in *Replevin*, (see that title,) omit to inquire of the rent in arrear, and value of the cattle, pursuant

pursuant to the statute 17 *C.* 2. *c.* 7, no Writ of Inquiry can be afterwards awarded, to supply the omission; for, by the words of the statute, these matters are to be inquired of, by the same Jury who try the issue. *Tidd's Pract.* and the authorities there cited.

But where the matter, omitted to be inquired by the principal Jury, doth not go to the point in issue, or necessary consequence thereof, but is merely collateral, as the four usual Inquiries on a *quare impedit*; there, such matter may be supplied by a Writ of Inquiry, without any damage to the party; because, if the same had been inquired of by the principal Jury, it would have been, as to those particulars, no more than an Inquest of Office, upon which an Attaint will not lie. *Carth.* 362.

Thus, where the parties being at issue in *assumpsit*, a demurrer was joined upon the evidence, and the Jury discharged, without assessing the Damages; and afterwards judgment was given for the plaintiff, and a Writ of Inquiry of Damages awarded; the Court held, that though the same Jury might have assessed the Damages conditionally, yet it may be as well done by a Writ of Inquiry of Damages, when the demurrer is determined; and the most usual course is, when there is a demurrer upon evidence, to discharge the Jury, without further Inquiry. *Cro. Car.* 143.

So, in Trespass or Replevin, against Overseers of the Poor, acting *virtute officii*, if the plaintiff be nonsuit, or have a verdict against him, and the Jury are discharged, without inquiring of the Treble Damages, pursuant to the *stat.* 43 *Eliz. c.* 2. § 19, the defect may be supplied by a Writ of Inquiry; because such Inquiry is no more than an Inquest of Office. In such case, as a ground for awarding a Writ of Inquiry, it is necessary to enter a suggestion upon the roll, that the defendants were Overseers of the Poor; and that the action was brought against them, for something done by virtue of their office. *Tidd's Pract.*

The Writ of Inquiry may be executed, on due notice, before the Sheriff or his Deputy; or, by leave of the Court, under special circumstances, before the Chief Justice, or a Judge of Assize, as an Assistant to the Sheriff. And where the Writ of Inquiry is executed before the Chief Justice, or a Judge of Assize, it is usual to move the Court, for the Sheriff to return a good Jury. But unless some matter of Law is likely to arise in the course of the Inquiry, the Court will not give leave to have it executed before a Judge, merely on account of the importance of the facts. *Tidd's Pract.*

The Notice of Inquiry should be in Writing; and if the defendant have appeared, and his Attorney be known, it should be delivered to such Attorney: But if the defendant have not appeared, or his Attorney be unknown, the Notice should be delivered to the defendant himself, or left at his last place of abode. If the Venue be laid in *London* or *Middlesex*, and the defendant live within forty computed miles from *London*, there must be eight days' Notice of Inquiry, exclusive of the day it is given; which Notice is also sufficient in Country Causes: for the *stat.* 14 *Geo.* 2. *c.* 17. § 4, which requires ten days' Notice of Trial at the Assizes, does not extend to Notices of Inquiry. But where the Venue is laid in *London* or *Middlesex*, and the defendant lives above forty computed miles from *London*, there must be fourteen days' Notice of Inquiry. And *Sunday* is to be accounted a day in these Notices, unless it be the day on which the Notice is given. Short Notice of Inquiry is the same as short Notice of Trial: and where a Term's Notice of Trial is required, there must, at the same distance of time, be the like Notice of Inquiry. *Tidd's Pract.* See title *Trial.*

Where the Inquiry is to be executed before the Chief Justice, or a Judge of Assize, the Notice should be given for the Sittings, or Assizes, generally: but otherwise the Notice should express the particular time and place of executing it. A Writ of Inquiry may be executed, in point of time, on the day it is returnable, but not on a *Sunday*; and where the Notice was to execute it by ten o'clock, the Court set it aside for uncertainty. The usual way is to give notice that the Inquiry will be executed, between two certain hours; as between ten and twelve o'clock in the forenoon, or between four and six in the afternoon, of a particular day, on or before the return of the Writ. On a Notice of Inquiry so given, the party is not tied down to the precise time fixed by the Notice; for the Sheriff may have prior business, which may last beyond it. *Tidd's Pract.*

With regard to the place of executing an Inquiry, it must be executed within the county where the action is laid, and the Notice should be given accordingly. Notice of Inquiry may be continued or countermanded, in like manner as Notice of Trial. *Tidd's Pract.*

In *London* or *Middlesex*, the Writ must be left at the Sheriff's Office the day before the time appointed for its execution. And if either party propose to attend by Counsel, he should give Notice thereof to his adversary, or he will not be allowed for it in costs. The execution of the Writ may be adjourned by the Sheriff, after it is entered upon. And if the plaintiff do not proceed to execute the Inquiry according to Notice, or countermand in time, the defendant, on an affidavit of attendance and necessary expences, shall have his costs, to be taxed by the Master. *Tidd's Pract.*

Letting judgment go by default is an admission of the cause of action: and therefore, where the action is founded on a Contract, the defendant cannot give in evidence on a Writ of Inquiry, that it was fraudulent. So, in an Action on a Promissory Note or Bill of Exchange, the Note or Bill need not be proved, though it must be produced before the Jury, in order to see whether any money appears to have been paid upon it. And where an Action was brought on a Policy of Assurance, on a foreign ship, wherein there was a stipulation, that the policy should be deemed sufficient proof of interest; the plaintiff, on the Writ of Inquiry, was only bound to prove the defendant's subscription to the policy without giving any evidence of interest. *Tidd's Pract.*

On the return of the Inquiry, the plaintiff should give a rule for judgment, with the Clerk of the Rules, which expires in four days. And, in the mean time, the defendant may move to set aside the Inquisition, for want of due Notice; or on account of an objection to the Jury, or mode of returning them, as that some of the Jury were debtors, taken out of prison for the purpose of attending, or that they were returned by the plaintiff's Attorney; or for excessive Damages. The plaintiff, in like manner, may move to set aside the Inquisition, when it is obvious the Damages are too small; except in vindictive, hard, or trifling actions. On the expiration of the rule for judgment, the Sheriff, being called upon

 for

for his Return, will deliver it, with the Inquisition, to the plaintiff's Attorney; who gets the Inquisition stamped, and taxes his costs thereon with the Master. *Tidd's Pract.*

The want of a Writ of Inquiry is aided by the Statute of Jeofails. And where a Writ of Inquiry had been many years executed, and costs taxed upon it, but no final judgment entered up; there being occasion to prove the debt in Chancery, and the Writ of Inquiry being lost, a rule was made for a new Writ of Inquiry and Inquisition, according to the Sheriff's notes, and that the Master should indorse the costs, which by the commitment-book appeared to have been taxed. *Tidd's Pract.* and the authorities there cited.

WRIT OF REBELLION, A Writ out of Chancery, or Exchequer, against a person in contempt, for not appearing in those Courts, &c. See title *Commission of Rebellion.*

WRIT OF RIGHT,

BREVE DE RECTO.] The great and final Remedy for him that is injured by *Ouster*, or Privation of his Freehold. See *Recto*; *Right.*

By the several possessory remedies given by our Law, (see titles *Entry, Assize,*) the Right of Possession may be restored to him that is unjustly deprived thereof. But the Right of *Possession* (though it carries with it a strong presumption) is not always conclusive evidence of the Right of Property, which may still subsist in another man: For as one man may have the Possession, and another the Right of Possession, which is recovered by *Possessory Actions*; so one man may have the Right of Possession, and thus not be liable to eviction by any Possessory Action, and another may have the Right of Property, which cannot be otherwise asserted than by the great and final Remedy of a Writ of Right, or such correspondent Writs as are in the nature of a Writ of Right. 3 *Comm. c.* 10. See *Title.*

This happens principally in four cases: 1. Upon Discontinuance by the Alienation of Tenant in Tail: whereby he, who had the Right of Possession, hath transferred it to the Alienee; and therefore his issue, or those in remainder or reversion, shall not be allowed to recover by virtue of that Possession, which the Tenant hath so voluntarily transferred. 2, 3. In case of judgment given against either party, whether by his own default, or upon trial of the merits, in any Possessory Action: for such judgment, if obtained by him who hath not the true ownership, is held to be a species of Deforcement; which however binds the Right of Possession, and suffers it not to be ever again disputed, unless the Right of Property be also proved. 4. In case the Demandant, who claims the Right, is barred from these Possessory Actions by length of time and the Statute of Limitations. See title *Limitation of Actions.* In these four cases the Law applies the remedial instrument of either the Writ of Right itself, or such other Writs as are said to be of the same nature.

1. And first, upon an Alienation by Tenant in Tail, whereby the estate-tail is discontinued, and the remainder or reversion is, by failure of the particular estate, displaced, and turned into a mere Right, the remedy is by Action of *Formedon, (secundum formam doni,)* which is in the nature of a Writ of Right, and is the highest action that Tenant in Tail can have. See this Dictionary, title *Formedon.*

2. In the second case; if the Owners of a particular estate, as for Life, in Dower, by the Curtesy, or in Fee-tail, are barred of the Right of Possession by a Recovery had against them, through their default or non-appearance in a Possessory Action, they were absolutely without any remedy at the Common Law, as a Writ of Right does not lie for any but such as claim to be Tenants of the Fee-simple. Therefore the *stat. Westm.* 2; 13 *Edw.* 1. *c.* 4, gives a new Writ for such persons, after their lands have been so recovered against them by default, called a *Quod ei deforceat*; which, though not strictly a Writ of Right, so far partakes of the nature of one, as that it will restore the Right to him who has been thus unwarily deforced by his own default. *F. N. B.* 155.—But in case the Recovery were not had by his own default, but upon defence in the inferior Possessory Action, this still remains final with regard to these particular estates, as at the Common Law: And hence it is, that a Common Recovery (on a Writ of Entry in the *post*) had, not by default of the Tenant himself, but (after his defence made and voucher of a third person to warranty) by default of such Vouchee, is now the usual bar to cut off an estate-tail. See this Dictionary, title *Recovery.*

3, 4. Thirdly, in case the Right of Possession be barred by a Recovery upon the merits in a Possessory Action, or lastly, by the Statute of Limitations, a claimant in fee-simple may have a *mere Writ of Rights*; which is in its nature the highest Writ in the Law, and lieth only of an estate in Fee-simple, and not for him who hath a less estate. *F. N. B.* 1. This Writ lies concurrently with all other real actions, in which an estate of fee-simple may be recovered; and it also lies after them, being as it were an appeal to the mere Right, when judgment hath been had as to the Possession in an inferior Possessory Action. *F. N. B.* 155. But though a Writ of Right may be brought, where the Demandant is entitled to the Possession, yet it rarely is advisable to be brought in such cases; as a more expeditious and easy remedy is had, without meddling with the property, by proving the Demandant's own, or his Ancestor's, Possession, and their illegal Ouster, in one of the Possessory Actions. But, in case the Right of Possession be lost by length of time, or by judgment against the true Owner in one of these inferior suits, there is no other choice; this is then the only remedy that can be had; and it is of so forcible a nature, that it overcomes all obstacles, and clears all objections that may have arisen to cloud and obscure the title. And, after issue once joined in a Writ of Right, the judgment is absolutely final; so that a Recovery had in this action may be pleaded in bar of any other claim or demand. *F. N. B.* 6: 1 *Inst.* 158.

The pure, proper, or mere Writ of Right lies only, we have seen, to recover Lands in Fee-simple, unjustly withheld from the true Proprietor. But there are also some other Writs which are said to be in the nature of a Writ of Right, because their process and proceedings do mostly (though not entirely) agree with the Writ of Right; but in some of them the Fee-simple is not demanded; and in others not Land, but some Incorporeal Hereditament. Nor is the mere Writ of Right alone, or always, applicable to every case of a claim of Lands in Fee-simple: for if the Lord's Tenant in Fee-simple dies without heir, whereby an Escheat accrues, the Lord shall have a Writ of Escheat, which is in the nature of a Writ

a Writ of Right. *Booth* 135: *F. N. B.* 9. And if one of two or more Coparceners deforces the other, by usurping the sole Possession, the party aggrieved shall have a Writ of Right, *de rationabili parte*: which may be grounded on the Seisin of the Ancestor at any time during his life; whereas, in a *nuper obiit*, (which is a possessory remedy,) he must be seised at the time of his death. *F. N. B.* 9.

The General Writ of Right ought to be first brought in the Court-Baron of the Lord of whom the lands are holden; and then it is open, or patent: But if he holds no Court, or hath waived his Right, *remisit Curiam suam*, it may be brought in the King's Courts by Writ of *Præcipe* originally; and then it is a Writ of Right Close, being directed to the Sheriff, and not to the Lord. *F. N. B.* 2: *Finch. L.* 313: *Booth* 91: Also, when one of the King's immediate Tenants *in capite* is deforced, his Writ of Right is called a Writ of *Præcipe in capite*; (the improper use of which, as well as of the former *Præcipe quia Dominus remisit Curiam*, so as to oust the Lord of his jurisdiction, is restrained by *Magna Carta, c.* 24;) and, being directed to the Sheriff and originally returnable in the King's Court, is also a Writ of Right Close. *F. N. B.* 5. There is likewise a little Writ of Right Close, *secundum consuetudinem manerii*, which lies for the King's Tenants in ancient demesne, and others of a similar nature, to try the Right of their lands and tenements in the Court of the Lord exclusively. But the Writ of Right Patent itself may also at any time be removed into the County-Court by Writ of *Tolt*, and from thence into the King's Courts by Writ of *Pone* or *Recordari facias*, at the suggestion of either party that there is a delay or defect of justice. 3 *Comm. c.* 10.

In the progress of this action, the Demandant must allege some seisin of the lands and tenements in himself, or else in some person under whom he claims, and then derive the Right from the person so seised to himself; to which the Tenant may answer by denying the Demandant's Right, and averring that he has more Right to hold the lands than the Demandant has to demand them: and, this Right of the Tenant being shewn, it then puts the Demandant upon the proof of his title: in which, if he fails, or if the Tenant hath shewn a better, the Demandant and his Heirs are perpetually barred of their claim; but if he can make it appear that his Right is superior to the Tenant's, he shall recover the land against the Tenant and his Heirs for ever. But even this Writ of Right, however superior to any other, cannot be sued out at any distance of time. For by the ancient Law no Seisin could be alleged by the Demandant, but from the time of *Hen.* I.—By the statute of *Merton*, 20 *Hen.* 3. *c* 8, from the time of *Hen.* II.; by the statute of *Westm.* 1, 3 *Edw.* 1. *c.* 39, from the time of *Rich.* I.; and now, by statute 32 *Hen.* 8. *c.* 2, Seisin in a Writ of Right shall be within 60 years. So that the Possession of Lands in Fee-simple uninterruptedly, for threescore years, is at present a sufficient Title against all the world; and cannot be impeached by any dormant claim whatsoever. 3 *Comm. c.* 10. See titles *Limitations of Actions* II. 1.; *Possession*; *Title*.

Writ of Right of Advowson; See this Dict. titles *Advowson* III.; *Quare Impedit*.

Writ of Right of Dower; See title *Dower*.

Writ of Right of Ward, See title *Guardian*.

Writ of Right sur Disclaimer; See titles *Cessavit*; *Disclaimer*.

WRITER OF TALLIES, *Scriptor Talliarum*.] An Officer in the Exchequer, being Clerk to the Auditor of the Receipt, who wrote upon the *Tallies* the whole letters of the *Tellers'* bills. *Cowell.* See title *Exchequer*.

WRITING, *Scriptum*.] A simple Writing or Declaration, not in the manner of a Deed, made to a certain person, &c. shall be good in Law. *Hob.* 312. See title *Agreement*.

WRONG, *Injuria*.] Any Damage or Injury; contrary to Right. *Co. Litt.* See *Tort*.

WRONGLANDS, Seem to be ill-grown Trees that will never prove Timber; such as wrong the ground they grow in. *Kitch.* 169.

WUDEHETH, From the Sax. *Wude*, i. e. *Sylva*.] A felling of Wood. *Leg. Hen.* 1. *c.* 37.

WYDRAUGHT, A water-passage, gutter, or watering-place; often mentioned in old leases of houses, in the covenants for repairs, &c.

WYKE, WYKA,——*Et totam* Wykam *cum hominibus*, &c. *Mon. Ang.* ii. See *Wic* and *Wica*.

WYTE, *Pœna*, *Mulcta*.——Saxones *duo mulctarum genera statuere*, *i. e.* Weram & Wytam. See *Wite*.

X.

XANTUS, Is used for *Sanctus*. See *Spelm*.

XENIA, *Dicuntur muscula, quæ à provincialibus rectoribus provinciarum offerebantur: Vox est in privilegiorum chartis non insueta; ubi quietus esse a* Xeniis *immunes notat ab hujusmodi muneribus aliisque donis, regi vel reginæ præstandis, quando ipsi per prædia privilegiatorum transierint.* Chart. Dom. Sempligham.—*Concedo ut omnia monasteria & ecclesia regni mei à publicis vectigalibus, operibus & oneribus absolvantur.——Nec munuscula præbeant regi vel principibus, nisi voluntaria.* Spelm. Gloss. *Nulla autem persona, parva vel magna, ab hominibus & terræ Radingensis monasterii exigat, non equitationem sive expeditionem, non summagia, non vectigalia, non navigia, non opera, non tributa, non* Zenia, &c. *Mem. Scacc. Anno* 20 *Edw.* 3.

XENODOCHIUM, Is interpreted an Inn, allowed by public licence for the entertainment of strangers and other guests: Also an Hospital. *Vocab. utriusque Juris.*

XEROPHAGIA, A kind of *Christian* Fast; the eating of dry meat. *Litt. Dict.*

Y.

YA AND NAY,—*Quod homines de* Rippon *sint credendi per suum* Ya, *& per suum* Nay *in omnibus querelis*, &c. *Charta Athelstan. Reg. Mon. Angl.* i. 173.

YARD, A Measure, three feet in length; by which cloth, linen, *&c.* are measured: It was said to be ordained by King *Henry* I., from the length of his own arm. *Baker's Chron.* See title *Measures*.

YARDLAND, *Virgata Terræ*] A quantity of Land, different according to the place or country; as at *Wimbleton* in *Surrey*, it is but fifteen acres, in other counties it is twenty, in some twenty-four, and in others thirty and forty acres. *Bract. lib.* 2. *c.* 10.

YARMOUTH. There is an Act for regulating the time of bringing in and selling Herrings at the Fair of *Great Yarmouth*, fixing the prices and quantity by the Last, *&c. Stat.* 31 *Edw.* 3. *st.* 2. *c.* 2. See title *Fish*.

YARN. No person shall buy Yarn or Wool, but he that makes cloth of it: And none may transport Yarn beyond the Sea, *stat.* 33 *H.* 8. *c.* 16. See title *Wool*.

YAUGH, A Yatcht, or little bark; also a fly-boat, pinnace, *&c.* In *Lat.* called *Celox, à celeritudine*, from its swiftness. *Litt. Dict.*

YEONOMOUS, *Oeconomus*; An Advocate, Patron, or Defender. *Vit. Abbat. S. Albani.*

YEAR, *Annus.*] The time wherein the Sun goes round his compass through the twelve Signs, *viz.* three hundred and sixty-five days, and about six hours. A Year is twelve months, as divided by *Julius Cæsar*: The Church has always begun the Year on the first day of *January*, called *New-year's-day*; but the civil account formerly, not till *March* the 25th. It appears by ancient grants and charters, that our Ancestors began the Year at *Christmas*, which was observed here till the time of *William* I. commonly called the *Conqueror*; but afterwards, for some time the Year of our Lord was seldom mentioned in Grants, only the Year of the Reign of the King. *Mon. Ang.* i. 62.

There being a difference in the computation of time in these Kingdoms, and on some parts of the Continent, of eleven days; and frequent uncertainties having arisen from the different times of commencing the Year abovementioned, (which introduced the mode of dating 174$\frac{8}{9}$, for days between the first of *January* and twenty-fifth of *March*,) all these inconveniences were remedied by *stat.* 24 *Geo.* 2. *c.* 23; which enacts, That the first day of *January* next following the last day of *December* 1751, shall be the first day of the Year 1752. And that the first day of *January* next after the first day of *January* 1752, shall be the first day of the Year 1753. And so on, the first day of *January* in every Year, shall be the first day of the Year. And that after the first day of *January* 1752, the several days of each month shall go on in the same order; and the Feast of *Easter*, and other Moveable Feasts thereon depending, shall be ascertained according to the same method they then were, until the second day of *September* 1752; and that the natural day next following the said second day of *September*, shall be reckoned the fourteenth day of *September*, omitting, for that time only, the eleven intermediate days. And that the several natural days which shall succeed the said fourteenth day of *September*, shall be reckoned in numerical order according to the order and succession of days now used in the present Calendar. All writings, *&c.* after the first of *January* 1752, to be dated according to the New Style. After 2 *September* 1752, *Hilary* and *Michaelmas* Terms, and all Courts to be held on the same nominal days and times they then were. The several Years 1800, 1900, 2100, 2200, 2300, and any other hundredth Year, (except every four hundredth Year, of which the Year 2000 shall be the first,) shall not be deemed *Bissextile* or *Leap Year*, but common Years to consist only of 365 days. The Years 2000, 2400, 2800, and every other four hundredth Year, from the Year 2000 inclusive, and all other Years, which are now esteemed *Bissextile* or *Leap Years*, shall for the future be esteemed *Bissextile* or *Leap Years*, consisting of 366 days.

A Calendar, and certain Tables and Rules for the fixing the true time of the celebration of the Feast of *Easter*, and the finding of the times of the Full Moons on which the same depends, are annexed to this Act, which are to be prefixed to all future editions of the Common Prayer Book. Courts of Session and Exchequer in *Scotland*, and Markets, Fairs, and Marts to be held upon the same natural days they should have been holden on, if this Act had not been made. The natural days and times for the opening and inclosing of Commons of Pasture, not altered by this Act. The natural days and times of payment of Rents, Annuities, Sums of Money or Interest, or of the Delivery of Goods, Commencement or Expiration of Leases, *&c.* or of attaining the age of twenty-one years, *&c.* not altered by this act. See 25 *Geo.* 2. *c.* 30: 26 *Geo.* 2. *cc.* 9, 34.

The mode of computation, introduced into *England* by the above Act, is called the *New Style*, to distinguish it from the former, called the *Old Style*, which still continues to prevail in many places; and the *New Style* had been used by other Nations, long previous to its adoption by the *English*.

The OLD STYLE now prevails in *Muscovy*, *Denmark*, *Holstein*, *Hamburg*, *Utrecht*, *Gueldres*, *East Friesland*, *Geneva*, and in all the Protestant Principalities in *Germany*, and the Cantons of *Switzerland*.

NEW STYLE, is used in all the Dominions subject to *Great Britain*; in *America*, in *Amsterdam*, *Rotterdam*, *Leiden*, *Haerlem*, *Middleburg*, *Ghent*, *Brussels*, *Brabant*, and in all the *Netherlands*, except the places before-mentioned: —Also in *France*, (before the last introduction of the unintelligible *Revolutionary* Style,) *Spain*, *Portugal*, *Italy*, *Hungary*, *Poland*, and in all the Popish Principalities of *Germany* and Cantons of *Switzerland*.

YEAR AND DAY. *Annus & Dies.*] A time that determines a Right, or works a Prescription in many cases by Law; as in case of an Estray, if the Owner challenge it not within that time, it belongs to the Lord; so of a Wreck, *&c.* See title *Estray*. A Year and a Day is given to prosecute Appeals, and for Actions in a Writ of Right, *&c.* after entry or claim, to avoid a fine. A person wounded must die within a Year and Day, in order to make the offender guilty of Murder, *&c.* 3 *Inst.* 53: 6 *Rep.* 107. See titles *Appeal of Death*; *Claim*; *Entry*; *Fine*; *Homicide*; *Wreck*; and other titles.

YEAR, DAY, AND WASTE, *Annus, Dies, & Vastum.*] A part of the King's Prerogative, whereby he hath the profits of lands and tenements for a Year and a Day of those that are attainted of Petit Treason or Felony, whosoever is Lord of the Manor whereto the lands or tenements do belong; and [*or*] the King may cause Waste to be made on the tenements, by destroying the houses, ploughing up the meadows and pastures, rooting up the woods, *&c.* except the Lord of the Fee agree with him for the redemption of such Waste; afterwards restoring it to the Lord of the Fee. *Staundf. Prarog.* 44. See further titles *Attainder*; *Escheat*; *Forfeiture* II. 1.; *Tenures*.

"We will not hold the lands of them that be convict of Felony but one Year and one Day, and then those lands shall be delivered to the Lords of the Fee." *Mag. Charta*, 9 *Hen.* 3. *c* 22.

This appears by *Glanvill* to be due to the King by his ancient Prerogative, 2 *Inst.* 36, cites *Glanvill* 7. *cap.* 17. *fol.* 59.

This chapter of *Magna Charta* doth express that which doth belong to the King, *viz.* the Year and the Day, and omits the Waste, as not belonging to him; and this is explained by our ancient books with an uniform consent. 2 *Inst.* 36, cites *Bracton, lib.* 3. *fol.* 129, & 137; and *Britton, c.* 5. *fol.* 14; and *Fleta, l.* 1. *c.* 28; and *Mirror, c.* 5 § 2. The *Mirror*, speaking of this chapter, saith, *Le point des terres aux felons tener per un an, est de fasie, car per la ou le roy ne aust aver que le gast de droit, ou l'an in nosme de fine pur salver le fief de l'estripment preignont les ministers le roy ambideux.* Upon all which it appears, that the King originally was to have no benefit in this case upon the attainder of Felony, where the free land was holden of a Subject, but only in detestation of the crime; *ut pœna ad paucos, metus ad omnes perveniat*; to prostrate the houses, to extirpate the gardens, to eradicate his wood, and to plough up the meadows of the Felon: For saving whereof, and *pro bono publico*, the Lords, of whom the lands where holden, were contented to yield the lands to the King for a Year and a Day; and therefore not only the Waste was justly omitted out of this chapter of *Magna Charta*, but thereby it is enacted, that after the Year and Day the Land shall be rendered to the Lord of the Fee, after which no Waste can be done. 2 *Inst.* 37. Serjeant *Hawkins* says, it seems agreed, that by the Common Law, upon an attainder of Felony, the King had a right utterly to waste the lands holden of any but himself, whereof the person attainted was seised of an estate of inheritance, either in his own or in his Wife's right. And it is said by some, that the King hath both this right, and also a right to hold such lands for a Year and a Day. But it is holden by others, that the right to hold over the lands for a Year and a Day was given to the King *in lieu of the Waste*, and it seems implied in *Magna Charta, cap.* 22, which saying, that the King shall not hold over the lands of those convicted of Felony but for one Year and a Day, and making no mention of the Waste, it seems plainly to intimate, that at the time of the making that statute, the King was thought to have no other right but only to the Year and Day. 2 *Hawk. P. C. c.* 49 § 8. See *Forfeiture* II. 1.

And where the treatise of *Prærogativa Regis*, made in 17 *Edw.* 2, says, *Et postquam Dominus Rex habuerit annum, diem, et vastum, tunc reddatur tenementum illud capitali domino feodi illius, nisi prius faciat finem pro anno, die, & vasto*; this is so to be expounded, that forasmuch as it appears in the said old Books, that the Officers and Ministers did demand both for the Waste *and* for Year and Day, that came in lieu thereof, therefore this treatise named both, not that both were due, but that a reasonable fine might be paid for all that which the King might lawfully claim. But if this act of 17 *Ed.* 2, be against this branch of *Magna Charta*, then it is repealed by the act of 42 *Ed.* 2. *c.* 1. 2 *Inst.* 37: 2 *Hawk. P. C. cap.* 49. § 8.

Hereby (says *Coke*) it appears how necessary the reading ancient Authors is for understanding of ancient Statutes. And out of these old Books you may observe, that when any thing is given to the King in lieu or satisfaction of any ancient right of his Crown, when once he is in possession of the new recompence, and the same in charge, his Officers and Ministers will, many times, demand the old also, which may turn to great prejudice, if it be not duly and discreetly prevented. 2 *Inst.* 37.

If there be Lord, Mesne, and Tenant, and the Mesne is attainted of Felony, the Lord Paramount shall have the Mesnalty, presently; for this prerogative belonging to the King, extends only to the land, which might be wasted, in lieu whereof the Year and Day was granted. 2 *Inst.* 37. And this is to be understood when a Tenant in Fee-simple is attainted; for when Tenant in Tail, or Tenant for Life is attainted, there the King shall have the profits of the lands during the life of Tenant in Tail, or of the Tenant for Life. 2 *Inst.* 37.

That be convict] Here *convict*, in a large sense is taken for *attincti*: For the nature and true sense of both these words, see the first part of the *Institutes*; and likewise for this word Felony there. 2 *Inst.* 37; and see this Dict. title *Attainder*.

Of Felony] Must be understood of all manner of Felonies punished by death, and not of Petit Larceny, which notwithstanding is Felony. 2 *Inst.* 38. If Lord and Tenant are, and the Tenant is attainted of Felony, and the King has *Annum, Diem, & Vastum*, yet if the Lord enters without due process, and the writ sued to the Eschcator, the land shall be re-seised, and he shall answer for the mesne issues and profits. *Br. Re-Seisir, pl.* 36, cites *Ed.* 2. and *Fitz. Traverse*, 48.

The statute *de Prærogativa Regis, cap.* 15, wills, that if a Felon has land, *tunc Rex statim illam habeat, & habeat*

unde

inde annum & vastum & terra destruetur, &c. & tunc reddatur capitali domino, &c. Quære, if this word (*statim*) shall be otherwise intended but after office found? *Br. Corone, pl.* 209.

Tenant by copy of Court-roll, by the verge in ancient demesne committed Felony, and was attainted of it, and *Annum, Diem, & Vastum* was awarded for the King; and the reason seems to be, inasmuch as Frank-tenants in ancient demesne have no other evidence but copies of Court-rolls; for otherwise it seems to be of a mere Copyholder out of ancient demesne for other Frank-tenement. *Br. Tenant per Copie*, &c. cites 3 *Ed.* 3. See titles *Copyhold*; *Forfeiture*.

A man was outlawed of Felony, and aliened his land to *J. N.*, on which *Scire facias* issued against him, who came and would have traversed the Felony; and the Court doubted if he might traverse it, by reason that he is a stranger to the record; but *per Pigot*, by 7 *Ed.* 4. *c.* 2, he cannot traverse it in case of Felony being a stranger to the record; *contrà* in case of Trespass; on which it was prayed for the King, that Year, Day, and Waste be adjudged for the King immediately, and so it was immediately from that Day till a Year and a Day next after: *quod nota. Quære*, If the King may take the Year and the Day at what time he pleases? It seems he cannot. *Br Corone, pl.* 205, cites 49 *Ass.* 2. See title *Inquest of Office*.

The King shall have the first Year and Day and [*or*] Waste of the Land of him who is attainted of Felony, which comes after the attainder, and whosoever takes the profits this Year shall answer the profits to the King; *per Fitzherbert*. But it seems that this is to be understood after office found, or that the Inquest which attaints him finds also what lands he had at the time of the Felony committed, or after. And in the case above of 49 *Ass.* 2, the Outlawry of Felony was 18 *Ed.* 3. and writ issued to the Coroners to inquire of his goods, lands, and tenements, 48 *Ed.* 3; which returned that he had land, and aliened to *J. N.* after the Outlawry; and upon this *Scire facias* issued against *J. N.*, who came and would have traversed the Felony; and the Year and Day was awarded to the King with the Waste. And so it seems that the King cannot take it, unless after office, which was thirty years after, as there. But *Quære*, if, upon the office found, he who receives the profits the first Year after the Felony shall not be charged? It seems he shall, *per Fitzh.* above. *Quære* the experience thereof in *B. R.*? *Br. Corone, pl.* 207, cites *F. N. B. fol.* 144. See title *Inquest of Office*.

YEAR-BOOKS. Reports, in a regular series, from the reign of King *Edw.* II., inclusive, to the time of *Hen.* VIII. which were taken by the Prothonotaries, or Chief Scribes of the Court, at the expence of the Crown, and published annually; whence they are known under the denomination of the Year-Books. See title *Law-Books*.

YEARS, *Estates for*; See title *Lease*.

YEMAN, or YEOMAN, or YOMAN, A derivative of the *Saxon, Geman*, i. e. *Communis*. These *Camden* in his *Britannia* placeth next in order to Gentlemen, calling them *Ingenuos*; whose opinion the statute affirms, *anno* 6 *Ric.* 2. *c.* 4. and 20 *Ric.* 2. *c.* 2. Sir *Thomas Smith*, in his *Republ. Anglorum*, *l.* 1. *c.* 23, calls him a Yeoman, whom our Law calls *legalem hominem*, which (says he) is in the *English* a free-born man, that may dispend of his own free-land in yearly revenues to the sum of forty shillings *sterling*. *Verstegan*, in his *Restitution of decayed Intelligence*, *c.* 10, writes, That *Gemen* among the ancient *Teutonics*, and *Gemein* among the modern, signifies as much as *Common*, and the letter *g* being turned into *y*, is written *Yemen*, which also signifies a *Commoner*. See title *Precedence*.

Yeoman also signifies an Officer in the Kings house, in the middle place between the Serjeant and the Groom; as Yeoman of the Chandry, Yeoman of the Scullery, *Stat. antiq.* 33 *H.* 8. *c.* 13. Yeoman of the Crown, *Stat. antiq.* 3 *E.* 4, 5. The word Youngmen is used for Yeomen, in the *stat.* 33 *Hen.* 8. *c.* 10. *Cowell.*

YEME, An ancient corruption of *Hieme*, winter. *Cowell.*

YEVEN, or YEOVEN, Given: Dated. *Cowell.*

YEW, Said to be derived from the Greek ἰάω, to hurt, *probably* because, before the invention of guns, our Ancestors made bows with this wood, with which they annoyed their enemies; and therefore they took care to plant the trees in the church-yards, where they might be often seen and preserved by the people. *Minshen.*

YIELDING AND PAYING, *Reddendo & Solvendo.*] Comes from the Sax. *Geldan & Gildan*; and in *Domesday*, *Gildare* is frequently used for *Solvere, Reddere*, the *Saxon* G. being often turned into Y. See title *Deed*.

YINGMAN, Mentioned in the Laws of King *Hen.* 1. *c.* 15. *Spelman* thinks this may be a mistake for *Inglishman*, or, as we now say, *Englishman*: But perhaps the Yingmen were rather Youngmen, printed for Yeoman and Yemen, in *stat.* 33 *H.* 8. *c.* 10.

YOKELET, Sax. *Jocelet.*] A little Farm, &c. in some parts of *Kent*, so called from its requiring but a Yoke of Oxen to till it. *Sax. Dict.*

YORK, *Custom of* See title *Executor* V. 9.

YORK-BUILDINGS COMPANY, A Corporation or Company erected by statute for raising *Thames* Water in *York-Buildings*: This Company having bought the forfeited estates in *Scotland* on the Rebellion, *anno* 1 *Geo.* 1. to enable them to make good their engagements to the Government, they were empowered by statute to dispose of rent-charges, to grant annuities, &c.

YPSIVREMETA, In Latin *Altitonans*, signifies God, the Thunderer.

YVERNAGIUM; See *Hybernagium*.

YULE. In the North of *England*, the country people call the Feast of the Nativity of our Lord by the name of Yule, which is the proper *Scotch* word for *Christmas*; and the sports used at *Christmas*, here called *Christmas Gambols*, in *Scotland* they term *Yule Games*. The statute 1 *Geo.* 1. *c.* 8, was made for the repeal of a repealing act, passed in the Parliament of *Scotland*, intitled "An Act for discharging the *Yule-Vacance*." See *Gule*.

Z.

ZABOLUS, i. e. *Diabolus*, as used in many old Writers, *viz. Edgar. in Leg. Monach. Hydens. c.* 4: *Orderic. Vitalis* 460, &c.

ZABULUM, Latin, *Sabulum*.] Grofs fand or gravel. *Cowell.*

ZALA, i. e. *Incendium*; from whence we derive the *English* word Zeal.

ZANT-KILLOW, A meafure containing fix *English* bufhels.

ZATOVIN, Sattin, or fine Silk. *Mon. Ang.* iii. 177.

ZEALOT, *Zelotes*.] Is for the moft part taken in *pejorem fenfum*, fo that we term one that is a Separatift or *Schifmatic* from the Church of *England*, a Zealot or *Fanatic*.

ZENIA; See *Xenia*.

ZETA, A room kept warm like a ftove; a withdrawing chamber with pipes conveyed along in the walls, to receive from below either the cool air in the Summer, or the heat of fire, *&c.* in Winter: It is called by our *English* Hiftorians a Dining-room, or Parlour. *Ofborn vita S. Elphegi apud* Wharton: *Mon.* ii. 127.

ZODIACK, *Zodiacus*.] An imaginary circle in the Heavens, containing the twelve Signs through which the Sun paffes every year. *Litt.*

ZUCHE, *Zucheus, Stirps ficcus & aridus*.] A withered or dry ftock of a tree.—See *Placit. Foreft. in Com. Nott. de Anno* 8 *H.* 3, where it feems a writ of *Ad quod damnum* iffued, on granting of Zuches or dead wood in a Foreft, *&c. Spelm.*

ZYGOSTATES, *Libripens*.] The Clerk of the Markets, to fee to Weights. *Spelm.*

ZYTHUM, A drink made of corn, ufed by the old *Gauls*; fo called from the feething or boiling it, whence Cyder had its name. *Spelm.*

ADDENDA ET CORRIGENDA

IN THIS VOLUME.

IMPEACHMENT. Column 2. line 5. add—But see *contrà*, 4 *Comm.* c. 19, *n.*
At the end of the title add—See *Raym.* 120: 1 *Leon.* 384; and this Dictionary, title *Parliament* VIII.

INFORMATION. Div. I. parag. 2. line 4. after "Attorney-General," add—(or, during a Vacancy of that Office, by the Solicitor-General; *Wilkes's Ca. Bro. P. C.*)

INSURANCE. Div. III. 6. At the end of this Division, add—
Since the above was written, the cases of *Brandon* v. *Nesbitt*, and *Bristow* v. *Towers*, were determined. See 6 *Term Rep.* 23; 35. In the first of these, the Court of *B. R.* declared, that no Action could be maintained *either by, or in favour of*, an Alien Enemy: And, as a consequence of that determination, in the latter case, after a long argument, it was decided, by the positive opinion of the Court, in a very few words, that the Insurance of an Enemy's Property is illegal; and no Action can be sustained thereon. See also *Parke's Law of Insurance*, 3*d Edition.*

JOINTENANCY; IN THINGS PERSONAL. Line 14. after *Litt.* § 321; Read thus—
So also, if 100*l.* be given by Will to two or more, equally to be divided between them, and the Survivors and Survivor of them; this has been held to make them Tenants in Common; as the same words would have done in regard to Real Estates: The word *Survivors*, &c. being to be understood of such of them as shall be living at the Testator's death. 1 *Eq Ab.* 292. c. 11.—But in a case of a Devise of a Debt to two or more, "share and share alike, equally to be divided between them, and if either of them die, to the Survivors or Survivor of them," it was determined in *Dom. Proc.* that they were Joint-tenants; and the decree of *Cowper, Ld. C.* declaring them Tenants in Common was reversed. See *Cox's P. Wms.* i. 96, and the note there;—Residuary Legatees, &c.

JUS PATRONATUS. Line 3. after "learning" add—Who are to summon a Jury of six Clergymen and six Laymen, to inquire, &c.

NATIONAL DEBT. Column 2. instead of the five last lines, Read:
By the Commissioners' Account, published on the first of *August* 1796, it appears that they have laid out £14,969,312 : 18 : 6 Sterling in the purchase of £20,117,450 Stock in the 3 and 4 *per Cents.*
Line 31 of that Column, for "between 250 and 300," read "nearly 400."

PARLIAMENT. In the arrangement of the Divisions at the beginning of the Title, transpose the lines V. 1: VI. (A): 2. thus—

V. 1. *As Members*, &c.
2. *In their judicial Capacity.*
VI. (A) *As relates to Taxes.*

Div. VI. (B) 3; col. 3. of that Div; line 27, after 3 *Lud.* 455. Add, But a contrary determination was made by the *Southwark Committee*, in the first Session of the Parliament called in 1796; who declared a Candidate disqualified, on the ground of having treated at the former Election.

ADDENDA ET CORRIGENDA.

PAWNBROKERS. Col. 2. line 9, after the word "exceeding" add—(42 *s. eight-pence*, and thence not exceeding 10*l.*) *&c.*—This alteration was made by *stat.* 36 *Geo.* 3. *c.* 87; which see.

PEERS OF THE REALM. Div. II. col. 4. line. 7. after 87. add—

It seems now to be settled, that a Peerage cannot be transferred, (unless we consider the summoning of the eldest Son of a Peer by Writ as a Transfer of one of his Father's Baronies,) without the concurrence of Parliament, at least in those cases where the noble Personage has no other Barony to remain in himself: As otherwise, on such transfer, he would himself be deprived of his Peerage, and be made ignoble by his own act. The Earldom of *Arundel* (see *ante*) is now settled, by Act of Parliament, in the *Norfolk* Family: And even if it were not, it might be questioned, whether, under the supposition of no remaining Barony, such an one could now be otherwise conveyed; it being held that the whole Nation is interested in each individual Peer: And that a Peer cannot be deprived of his Peerage but by Act of Parliament. See *Watkins's Notes on Gilbert's Tenures*, Note XI. in *p.* 11; and *p.* 361.

POLICE. - - Col. 3. parag. 3. line 2. for *stat.* 25 *Geo.* 2. read 28 *Geo.* 2.
Col. 4. line 5. for *Geo.* 1. read *Geo.* 2. in both instances.

WILLS. - - In the arrangement of the Divisions II. 2. line 2. for *temporal* read *temporary*.

THE END.